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THE SUPREME COURT OF CANADA'S APPRAISAL OF THE 1980 BAN ON ADVERTISING TO CHILDREN IN QUÉBEC: IMPLICATIONS FOR "MISLEADING" ADVERTISING ELSEWHERE

*Bill Jeffery**

I. INTRODUCTION

As recent rates of obesity among children (and adults) in Canada and world-wide have sky-rocketed,¹ there has been mounting evidence that advertisements promoting nutrient-poor foods and sedentary leisure activities have deleterious effects on children's (and adults') diets, physical activity levels, and, ultimately, their health.²

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1. See, e.g., CANADIAN INST. FOR HEALTH INFO., *IMPROVING THE HEALTH OF CANADIANS* 111–12 (2004), available at http://secure.cihi.ca/cihiweb/dispPage.jsp?cw_page=PG_39_E&cw_topic=39&cw_rel=AR_322_E; Margot Sheilds, *Overweight Canadian Children and Adolescents*, in *NUTRITION: FINDINGS FROM THE CANADIAN HEALTH SURVEY* 23, 28; Michael Tjepkema, *Adult Obesity in Canada: Measured Height and Weight*, in *NUTRITION: FINDINGS FROM THE CANADIAN HEALTH SURVEY* *supra*, at 19, 26.

2. See, e.g., GERALD HASTINGS ET AL., *CTR. FOR SOCIAL MKTG. UNIV. OF STRATHCLYDE & FOOD STANDARDS AGENCY, REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN* (2003), available at <http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>; INST. OF MED., *ADVERTISING, MARKETING AND THE MEDIA: IMPROVING MESSAGES* (2004), available at <http://www.iom.edu/Object.File/Master/22/609/0.pdf>; JOINT WORLD HEALTH ORG. [WHO] / FOOD AGRIC. ORG. [FAO] *EXPERT CONSULTATION, WHO, DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES* (2003)

This has sparked a renewed public concern about marketing efforts targeted at children. In essence, a compelling body of evidence suggests that advertisers of toys, sedentary entertainment products,³ and, especially, unhealthful foods, may be manufacturing premature death and disability due to heart disease, stroke, certain forms of cancer, diabetes, osteoporosis, obesity and other diseases by inducing life-long patterns of poor diet and physical inactivity.⁴ According to the World Health Organization (WHO), a substantial portion—and in some parts of the world, most—of the preventable loss of disability-free life-years can be averted by adopting a healthful diet and engaging in physical activity.⁵

This Article examines the unique legislative ban on advertising to children under age thirteen in the Canadian province of Québec. Relying in part on the Supreme Court of Canada's endorsement of the child developmental evidence underpinning the Québec law,⁶ a

[hereinafter JOINT WHO/FAO EXPERT CONSULTATION], available at http://www.who.int/hpr/NPH/docs/who_fao_expert_report.pdf; HENRY J. KAISER FAMILY FOUND., ISSUE BRIEF: THE ROLE OF MEDIA IN CHILD OBESITY 1, 10 (2004), available at <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf>.

3. Entertainment products include, notably, ads for television, movies, etc., the consumption of which logically requires being sedentary for *at least* another thirty minutes during the course of which the viewer is invariably subjected to more ads promoting nutrient-poor foods and sedentary pastimes. Carol Byrd-Bredbenner & Darlene Grasso, *Prime Time Health: An Analysis of Health Content in Television Commercials Broadcast During Programs Viewed Heavily by Children*, 2 INT'L ELECTRONIC J. HEALTH EDUC. 159, 162 (1999), <http://www.aahperd.org/iejhe/archive/byrd1999.pdf> (indicating that 32% of television commercials broadcasted in 1998 during a sample of programming aimed at American children were promotions for upcoming television programs, and of the 66% promoting products and services, 27% promoted entertainment and electronics).

4. See discussion *infra* Part V.D.

5. See WHO, World Health Report 2002: Reducing Risks, Promoting Healthy Life (2002), available at http://www.who.int/whr/2002/en/wrh02_en.pdf; see also *id.* at 198–201 tbl. 4, available at http://www.who.int/whr/2002/en/whr2002_annex4.pdf (showing the loss in *healthy* life expectancy due to all risk factors at birth); *id.* at 225 tbl.10, available at http://www.who.int/whr/2002/en/whr2002_annex4_10.pdf (indicating that all risk-attributable Disability-Adjusted Life Years (DALYs) were lost due to “childhood and maternal undernutrition” plus “other diet-related risks and physical inactivity”).

6. Att’y Gen. of Québec v. Irwin Toy, Ltd., [1989] 1 S.C.R. 927 (Can.), available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/19>

proliferation of further corroborating evidence since that decision was rendered,⁷ and other statutory and common law acknowledgements of the unique vulnerability of children,⁸ a credible case can be made that existing statutory prohibitions on misleading advertising must be interpreted in a manner that includes a statutory prohibition on advertising directed at children.

II. THE QUÉBEC BAN ON ADVERTISING DIRECTED AT CHILDREN UNDER AGE THIRTEEN

The Québec ban on advertising to children warrants special attention because it was the first such law in the twentieth century.⁹ As such, a constitutional challenge to the law ultimately afforded an opportunity to gauge the opinion of the Supreme Court of Canada on the adequacy of the evidence underpinning the law and the authority of both levels of government to legislate in this area.¹⁰

More than twenty-five years ago, long before the rising rates of obesity became a *cause célèbre*, the Canadian Province of Québec became the first jurisdiction in the world to institute a ban on nearly all commercial advertising (for food, toys, etc.) directed at children.¹¹ Concern about the over consumption of heavily-promoted sugary foods and the accompanying risks of tooth decay were part of the rationale for the law at the time.¹² But without question, the primary justification for the ban was related to the unique vulnerability of

89scr1_0927.html; see also *infra* notes 117–36 and accompanying text.

7. See *infra* notes 130–46 and accompanying text.

8. See *infra* notes 147–61 and accompanying text.

9. CORRINA HAWKES, WHO, MARKETING FOOD TO CHILDREN: THE GLOBAL REGULATORY ENVIRONMENT 20 (2004), available at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf>.

10. See *infra* notes 117–36 and accompanying text.

11. HAWKES, *supra* note 9, at 20. Sweden, Norway, and other European countries have also established various types of limits on advertising directed at children. See *id.* Most studies indicate the considerable rise in obesity rates in Canada occurred during the 1980s and 1990s. *E.g.*, CANADIAN INST. FOR HEALTH INFO., *supra* note 1, at 110.

12. *E.g.*, FED.-PROVINCIAL COMM. ON ADVER. INTENDED FOR CHILDREN, QUÉBEC DEP'T OF COMM'C'N, THE EFFECTS OF QUÉBEC'S LEGISLATION PROHIBITING ADVERTISING INTENDED FOR CHILDREN 35 (1985) (citing the possible long-term implications of advertising to children for health and dental costs); John P. Murray, *Québec Law Leads the Way Out of 'Kidvid' Wasteland*, TORONTO STAR, June 19, 1989, at A15, available at <http://www.thestar.com> (available for purchase in archives).

children to deception.¹³ In addition, it is worth noting that since the ban, Québec's obesity rates and soft drink consumption have been among the lowest in Canada,¹⁴ with fruit and vegetable consumption rates being among the highest.¹⁵ It is difficult to assess whether the restrictions on advertising played a causal role in changing Québec's consumption patterns partly because Canadian governments do not yet conduct regular dietary intake surveys.

In 1978, the legislative assembly of the province of Québec—a Canadian province with approximately seven million, primarily French speaking, residents—amended the Québec Consumer Protection Act.¹⁶ The revised Act, which became effective April 30, 1980, states, in part:

§248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.¹⁷

§249. To determine whether or not an advertisement is di-

13. *See* Att'y Gen. of Québec v. Irwin Toy, Ltd., [1989] 1 S.C.R. 927 (Can.). The Supreme Court accepted the following explanation of the objective of the legislation: "The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Québec, [TRANSLATION] 'Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct.'" *Id.* at 987.

14. Sarah Carr, *Overweight in Canadian Children: Mapping the Geographic Variation* 40 (Sept. 3, 2004) (unpublished M.S. thesis, London School of Hygiene and Tropical Medicine, on file with author) (showing that in 1981, Québec residents began consuming fewer soft drinks than other Canadians, a new pattern that has remained consistent since the provincial advertising ban was enacted).

15. *See* Dietary practices, by sex, household population aged 12 and over, Canada, provinces, territories, health regions and peer groups, 2003, http://www.statcan.ca/english/freepub/82-221-XIE/00604/tables/html/2188_03.htm (data compiled from Statistics Canada, Canadian Community Health Survey, cycle 2.1 (2003), available at <http://www.statcan.ca/bsolc/english/bsolc?catno=82C0025> (order form)) (showing that Québec residents are more likely than residents of any other province to report consuming at least five servings of fruits and vegetables daily).

16. Consumer Protection Act, R.S.Q., ch. P-40.1 (2004).

17. *Id.* § 248.

See also id. §§ 87–91 (permitting magazines to carry certain advertisements provided they satisfy sixteen criteria designed to limit the exploitation of vulnerable children).

rected at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of

- (a) the nature and intended purpose of the goods advertised;
- (b) the manner of presenting such advertisement;
- (c) the time and place it is shown.¹⁸

The Office of Consumer Protection (OCP) developed and applies a set of guidelines to help companies understand the criteria set out in section 249 of the Act as they relate to advertisements broadcast on television. The guidelines are shown in the chart below:

18. *Id.* § 249. Section 249 also states:
The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over . . . or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age. *Id.*

SUMMARY OF COMMERCIAL ADVERTISING REGULATION¹⁹

	PRODUCTS AND SERVICES EXCLUSIVELY INTENDED FOR CHILDREN	PRODUCTS AND SERVICES WITH A MARKED APPEAL FOR CHILDREN	PRODUCTS AND SERVICES WITH NO APPEAL FOR CHILDREN
DEFINITION	Includes: toys, some sweets and food products	Includes: "family" products and products for teenagers: some cereals, desserts and games	Includes: products for adults, families, teenagers and children
CHILDREN'S PROGRAMS	NEVER unless treatment not likely to interest children	NEVER unless treatment not likely to interest children	Always, but treated for adults
ALL PROGRAMS OTHER THAN CHILDREN'S PROGRAMS	Advertisements not designed to appeal particularly to the instinctual needs of children so as to arouse their interest	Advertisements not designed to appeal particularly to the instinctual needs of children so as to arouse their interest	Always, but treated for adults
PROGRAMS WHERE TWO TO ELEVEN YEAR-OLDS ²⁰ MAKE UP LESS THAN 15% OF AUDIENCE	Advertisements partly directed at children	Advertisements partly directed at children	Always, but treated for adults

19. This table summarizes Office de la protection du consommateur, Regulation Respecting the Application of the Consumer Protection Act (2004) (Can.) (on file with the Loyola of Los Angeles Law Review), which is an English version of a guide that discusses sections 248–49 of the Consumer Protection Act.

20. The two- to eleven-year range is the category used by the Bureau of Broadcast Measurement (BBM) that most closely corresponds to the statutory requirement. *Id.* at 4. Consequently, BBM uses this range as a proxy for estimating compliance with the Act. *Id.*

The OCP also identified periods during the week when the viewership of children two to eleven years old is persistently above fifteen percent according to Bureau of Broadcast Measurement (BBM) data:

	MONDAY TO FRIDAY	SATURDAY	SUNDAY
MORNING	7:00 a.m. to 8:30 a.m. 9:00 a.m. to 10:30 a.m. 11:00 a.m. to 12:30 p.m.	7:00 a.m. to 1:00 p.m.	7:00 a.m. to 10:00 a.m.
AFTERNOON	4:00 p.m. to 6:00 p.m.	2:00 p.m. to 4:30 p.m.	
EVENING		5:00 p.m. to 6:00 p.m.	5:00 p.m. to 5:30 p.m. 6:30 p.m. to 7:00 p.m.

III. RECENT CALLS FOR RESTRICTIONS ON ADVERTISING

Outside of Québec, numerous governmental and nongovernmental organizations with public health mandates are calling for legislative or regulatory restrictions on advertising directed at children (especially ads for nutrient-poor foods). For example, in Canada, reports published by such groups as the Canadian Institutes for Health Information, the Chief Medical Officer of Health for Ontario, the Heart and Stroke Foundation of Canada, and the Centre for Science in the Public Interest of Canada have urged serious consideration of advertising restrictions.²¹ In the United States,

21. See, e.g., SHEELA BASRUR, ONTARIO MINISTRY OF HEALTH & LONG-TERM CARE, 2004 CHIEF MEDICAL OFFICER OF HEALTH REPORT: HEALTHY WEIGHTS, HEALTHY LIVES (2004), available at <http://www.health.gov.on.ca/english/public/pub>; CTR. FOR SCI. IN THE PUB. INTEREST, PROPOSAL FOR AN EFFECTIVE INTEGRATED PAN-CANADIAN HEALTHY LIVING STRATEGY 1, http://cspinet.org/canada/pdf/PanCdn_EffectiveStrat.pdf (last visited Apr. 1, 2006); KIM D. RAINE, UNIV. OF ALBERTA, OVERWEIGHT AND OBESITY IN CANADA: A POPULATION HEALTH PERSPECTIVE (2004), available at http://secure.cihi.ca/cihiweb/dispPage.jsp?cw_page=GR_1130_E (free online registration required); Press Release, Heart and Stroke Found. of Can., Heart and

Commercial Alert, the Center for Science in the Public Interest (U.S.), the American Psychological Association, and the National Academies Institute of Medicine,²² and in the United Kingdom the Food Commission and Sustain have been especially active.²³ Internationally, the World Health Organization (and Assembly), the European Commissioner of Health and Consumer Affairs, Trans-Atlantic Consumer Dialogue, and the International Association of Consumer Food Organizations have been actively pressing the issue.²⁴

Stroke Foundation Warns Fat is the New Tobacco, <http://ww1.heartandstroke.ca/Page.asp?PageID=33&ArticleID=2913&Src=news> (last visited Nov. 20, 2005).

22. See CTR. FOR SCI. IN THE PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN 47–49 (2003), *available at* http://cspinet.org/new/pdf/pestering_parents_final_part_2.pdf; INST. OF MED. OF THE NAT'L ACADS. OF SCI., COMM. ON PREVENTION OF OBESITY IN CHILDREN AND YOUTH, PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 175 (Jeffrey P. Koplon et al. eds., 2005) [hereinafter PREVENTING CHILDHOOD OBESITY]; INST. OF MED. OF THE NAT'L ACADS. OF SCI., FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY (J. Michael McGinnis et al. eds., 2006) [in press], *available at* http://www.nap.edu/execsumm_pdf/11514.pdf (providing the executive summary); BRIAN WILCOX ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 5 (2004), *available at* <http://www.apa.org/pi/cyf/advertisingandchildren.pdf>; Marion Nestle & Michael Jacobson, Halting the Obesity Epidemic: A Public Health Policy Approach, 115 PUB. HEALTH REPORTS 12 (2000); News Release, Commercial Alert, Nader Starts Group to Oppose the Excesses of Marketing, Advertising and Commercialism (Sept. 8, 1998), *available at* <http://www.commercialalert.org/PDFs/CommercialAlertLaunch.pdf>.

23. KARLA FITZHUGH & TIM LOBSTEIN, FOOD COMM'N (UK), CHILDREN'S FOODS EXAMINED: AN ANALYSIS OF 358 PRODUCTS TARGETED AT CHILDREN 4 (2000), *available at* http://www.foodcomm.org.uk/PDF%20files/Childrens_Food_Examined.pdf; SUSTAIN, THE CHILDREN'S FOOD BILL: WHY WE NEED A LAW, NOT MORE VOLUNTARY APPROACHES (2005), *available at* http://www.sustainweb.org/pdf/CFB_MpReport.pdf.

24. FIFTY-SEVENTH WORLD HEALTH ASSEMBLY [WHA], DOC. WHA57.17, GLOBAL STRATEGY ON DIET, PHYSICAL ACTIVITY AND HEALTH 13, 19 (2004), *available at* http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R17-en.pdf; INT'L ASS'N OF CONSUMER FOOD ORG. (IACFO), COMMENTS OF THE IACFO CONCERNING THE DISCUSSION PAPER ON ADVERTISING PREPARED BY THE GOVERNMENT OF CANADA (May 9–13, 2005), *available at* <http://www.cspinet.org/reports/codex/adcomments.html>; TRANS ATL. CONSUMER DIALOGUE (TACD), DOC. FOOD-23-04, RESOLUTION ON FOOD ADVERTISING AND MARKETING TO CHILDREN (2004), *available at* http://www.tacd.org/db_files/files/files-288-filetag.doc.

These organizations can find support within existing legal limitations on misleading advertising, which establish the legal basis for regulations on advertising to children. The legal basis for misleading advertising regulations is buttressed by both the preponderance of developmental psychology literature²⁵ and the accepted legal doctrine of the limited capacity of children.²⁶ Together, these help demonstrate that children are so incapable of adequately interpreting commercial advertising that such advertising is inherently misleading.

IV. EXISTING RESTRICTIONS ON MISLEADING ADVERTISING IN CANADA OUTSIDE QUÉBEC

A. Canadian Voluntary Industry Codes Governing Advertising to Children

Three general self-regulatory codes govern advertising in Canada. The Canadian Code of Advertising Standards²⁷ (ASC Code) and the Broadcast Code for Advertising to Children²⁸ (Children's Code) are both administered by Advertising Standards Canada (ASC), a trade association with nearly 200 member companies.²⁹ The third self-regulating advertising code is the Code of Ethics and Standards of Practice,³⁰ which is administered by the Canadian Marketing Association. All three codes mention the special vulnerability of children to advertising, but none take serious account of the fundamental incapacity of children to interpret commercial advertisements. Furthermore, one should be doubly circumspect about accepting the purported controls on advertising in codes written by

25. See WILCOX ET AL., *supra* note 22; see also *infra* notes 130–35 and accompanying text (summarizing post-1989 evidence from developmental psychology literature).

26. See *infra* notes 147–61 and accompanying text.

27. CANADIAN CODE OF ADVER. STANDARDS (Adver. Standards Can. 2004), available at <http://www.adstandards.com/en/Standards/canCodeOfAdStandards.asp>.

28. BROAD. CODE FOR ADVER. TO CHILDREN (Adver. Standards Can. 2004), available at <http://www.adstandards.com/en/clearance/clearanceAreas/broadcastCodeForAdvertisingToChildren.asp>.

29. ASC Membership, <http://www.adstandards.com/en/Member/memberShipList.asp> (last visited Feb. 18, 2006).

30. CODE OF ETHICS & STANDARDS OF PRACTICE (Can. Mktg. Ass'n 2004), available at <http://www.the-cma.org/regulatory/codeofethics.cfm>.

and for parties that are engaged in the enterprise of commercial advertising. These authors have both a vested financial interest in weak standards and a professionally honed skill for “selling” such weak standards as tough regulatory oversight.

Although section two of the ASC Code prohibits the use of commercials presented in a format or style that disguises their commercial intent,³¹ no such provision is articulated in the Children’s Code,³² even though the preponderance of developmental psychology evidence (canvassed below) indicates that *all* ads directed at young children, by their very nature, disguise such intent.³³ Similarly, section twelve of the ASC Code stipulates that advertising directed at children should not “exploit their credulity, lack of experience or their sense of loyalty, and must not present information or illustrations that *might* result in their physical, emotional or moral harm.”³⁴ However, it is virtually impossible to know how these provisions of the ASC Code are routinely applied to complaints because ASC only publishes decisions in which it finds a violation of the Code.³⁵ In addition, it dismisses challenges against the vast majority of ads that are impugned by complaints,³⁶ and it claims to receive “virtually no” complaints about advertising directed at children.³⁷ But in light of the large volume of unchallenged adver-

31. CANADIAN CODE OF ADVER. STANDARDS § 2 (Adver. Standards Can. 2004), *available at supra* note 27.

32. *See* BROAD. CODE FOR ADVER. TO CHILDREN (Adver. Standards Can. 2004), *available at supra* note 28.

33. *See infra* notes 130–35 and accompanying text.

34. CANADIAN CODE OF ADVER. STANDARDS ¶ 12 (Adver. Standards Can. 2004) (emphasis added), *supra* note 27.

35. *Id.* The *Consumer Complaint Procedure*, Advertising Complaints Report.

36. *See* ADVER. STANDARDS CAN., 2004 AD COMPLAINTS REPORT 2 (2005) *available at* <http://www.adstandards.com/en/standards/adcomplaintsreports2004.pdf> (indicating that nearly 94% of challenged ads were absolved in 2004. Of all 860 ads challenged that year, complaints were upheld against only 55 ads.).

37. Cathy Loblaw, *A Homegrown Solution*, MARKETING MAG., Jan. 9, 2006, *available at* <http://www.marketingmag.ca>. ASC reported only ten complaints alleging violations of Article twelve (“Advertising to Children”) of the ASC Code during the period 1997 until the first quarter of 2004. Adver. Standards Can., Previous Complaints Reports, <http://www.adstandards.com/en/consumerSite/previousReports.asp> (last visited Apr. 9, 2006) (including links to the ten complaints alleging violations of Article twelve). All ten complaints were dismissed by ASC. *See* ADVER. STANDARDS CAN., PREVIOUS

tisements to which children are exposed (many of which are pre-cleared by ASC),³⁸ it is obvious that ASC applies a very narrow interpretation of section twelve.

The substantive provisions of the Children's Code are wholly inadequate for safeguarding children's interests. A close examination reveals that the Code only employs a superficial treatment of the mischief it purports to control. First, the Children's Code only warns against the most reprehensible forms of advertisements, misleading or otherwise. For example, section II(10)(a) prohibits the use of flames, fire, or subliminal messages in ads directed at children.³⁹ Second, the Code prohibits practices that would otherwise be prohibited by law even if aimed at adults. For example, section II(11)(b) limits exaggerated claims (which ought to be covered by statutory proscription of misleading advertising), and the interpretation guideline for this section needlessly incorporates by reference some existing federal statutes.⁴⁰ Third, the Code exaggerates the significance of comparatively minor distinctions between types of unconscionable conduct, thus yielding standards that are both arbitrary and wholly inadequate to protect children from unfair commercial practices. For instance, section II(7) sets generously permeable limits on the use of cartoon characters.⁴¹ Fourth, the Code overstates the value of certain types of restraint. For instance, section II(6)(b) limits commercials to four minutes per half-hour of programming,⁴² and section II(5)(c) restricts promotions for contests to fifty percent of commercial viewing time.⁴³

Lastly, the "Background" of the Children's Code endorses the use of fantasy in commercial advertisements by claiming that it is "appropriate to communicate with this audience in their [sic] own

AD COMPLAINT REPORTS (1997–2004), available at <http://www.adstandards.com/en/standards/previousReports.asp>.

38. For example, ASC pre-clearance does not apply to print ads or commercials broadcast in purely local markets. See BROAD. CODE FOR ADVER. TO CHILDREN § II(7) (Adver. Standards Can. 2004), available at *supra* note 28.

39. *Id.* § II(10)(a).

40. *Id.* § II(11)(b).

41. *Id.* § II(7).

42. *Id.* § II(6)(b).

43. *Id.* § II(5)(c).

terms.”⁴⁴ This statement illustrates the unprincipled, industry-friendly standards the Children’s Code applies to the commercial advertising industry. And generally, some provisions of the Code are too vague to set clear standards for enforcement, if an enforcement mechanism were actually available. In this vein, the APA Task Force noted that many guidelines of the akin Children’s Advertising Review Unit of the U.S. National Council of Better Business Bureaus are “too vague and general to be subject to empirical assessment.”⁴⁵ In the end, the Children’s Code fails to reconcile its permissive approach to overseeing commercial advertising aimed at children, with the demonstrated incapacity of children under the age of thirteen, and especially under the age of eight,⁴⁶ to independently and adequately interpret commercial advertisements.⁴⁷

Moreover, the unfavourable health implications of the products routinely promoted to these children, most of which worsen their diets and discourage physical activity,⁴⁸ renders the exploitative nature of commercial advertising aimed at children even more blameworthy.

The standards embodied by these voluntary, self-regulatory industry codes do not have any binding effect on recalcitrant advertisers. For example, publishing decisions is the only enforcement tool at ASC’s disposal under the ASC Code.⁴⁹ This power does not

44. *Id.* § I.

45. WILCOX ET AL., *supra* note 22, at 38.

46. *See* Adver. Standards Can., *All You Need to Know to Broadcast Children’s Commercials in Canada*, CHILDREN’S BROADCAST ADVERTISING CLEARANCE BULL., Jan. 2002, available at <http://www.adstandards.com/en/clearance/clearanceAreas/ASCBulletin.pdf>. Interestingly, in purporting to limit advertising directed at “pre-schoolers” (e.g., under age five) during weekdays from 9 a.m. to noon, ASC even fails to recognize the more recent evidence showing that children are clearly unable to appreciate commercials’ persuasive intent until age seven or eight. WILCOX ET AL., *supra* note 22, at 26–27. This age range is even older than the age of six range that was widely accepted in the 1980s. *See* Attorney General of Québec v. Irwin Toy, Ltd., [1989] S.C.R. 927, 988.

47. *E.g.*, *infra* Part V.E.

48. *See* HASTINGS ET AL., *supra* note 2; INST. OF MED., *supra* note 2; JOINT WHO/FAO EXPERT CONSULTATION, *supra* note 2; HENRY J. KAISER FAMILY FOUND., *supra* note 2; Byrd-Bredbenner & Grasso, *supra* note 3; Truls Østbye et al., *Food and Nutrition in Canadian “Prime Time” Television Commercials*, 84 CAN. J. PUB. HEALTH 370 (1993).

49. *See* CANADIAN CODE OF ADVER. STANDARDS *The Consumer*

appear to be available to penalize violations of the Children's Code at all.⁵⁰ While it is true that since 1974, the Canadian Radio-Television and Telecommunication Commission (CRTC) has typically required its private television broadcast licensees to comply with ASC's Children's Code during their seven-year licensing period,⁵¹ there is no evidence on record that the CRTC has ever considered violations of the Children's Code to determine whether a license should be renewed, revoked, or subjected to additional terms. If it did, the CRTC would likely only do so for clear, persistent, or egregious violations.⁵²

Furthermore, the ASC process for enforcing its provisions by publishing decisions is flawed and ineffective. First, ASC charges the Consumer Response Councils with judging alleged violations of the Children's Code. The councils are made up, primarily, of representatives from the advertising industry (i.e., advertisers, advertising agencies and the media) and a small minority of the public that ASC, itself, appoints.

In addition, access to ASC's complaint resolution process is onerous. For instance, a company may obtain pre-clearance approval of an advertisement for the Canadian dollar equivalent of approximately \$260 USD. However, a non-member pays approximately

Complaint Procedure (Adver. Standards Can. 2004), available at note 27.

50. See BROAD. CODE FOR ADVER. TO CHILDREN (Adver. Standards Can. 2004), available at *supra* note 28.

51. See Public Notice, Allan J. Darling, Sec'y Gen., Canadian Radio-Television and Telecomms. Comm'n, Revised Broadcast Code for Advertising to Children (June 30, 1993), available at <http://www.crtc.gc.ca/archive/ENG/Notices/1993/PB93-99.HTM> (adopting a revised version of the ASC Code within less than six weeks after receiving it from the applicant Canadian Association of Broadcasters and, evidently, without inviting public comments).

52. See generally License Renewals for Television Stations Controlled by CTV, Decision CRTC 2001-457 (Canadian Radio-Television & Telecomms. Comm'n, Aug. 2, 2001) (Can.), available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-457.htm> (renewing the licenses of television stations controlled by CTV). The relevant condition of license is specified in *id.* app. 2 ¶ 9. The CRTC canvassed the enforcement powers at its disposal in Genex Commc'ns Inc., CH01-FM-Non-renewal of license, Broadcasting Decision 2004-271, ¶¶ 141-42 (Canadian Radio-Television & Telecomms. Comm'n, July 13, 2004), available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2004/db2004-271.htm> (denying the application to renew the license of a Québec radio station for, *inter alia*, persistent, abusive on-air comments during programming (leave to appeal to the Fed. Court of Appeal, granted Aug. 8, 2004)).

\$30,000 in fees (from filing to a Trade Dispute Panel hearing) to register a complaint against a competitor's advertisement.⁵³ ASC does not charge a fee to consider consumer and "special interest group" complaints, but this comes at a different high price.⁵⁴ Specifically, ASC sacrifices economy on the altar of confidentiality, making it virtually impossible for the public to scrutinize the decision-making process. In fact, ASC reserves the right to discontinue review of a consumer complaint if ASC or the Consumer Response Council seized with the complaint believes that "the complainant is abusing [the] Consumer Complaint Procedure by having as one of the complainant's primary intentions to generate publicity for a cause or issue."⁵⁵ Similarly, the procedures governing complaints by noncommercial "special interest groups" (including consumer groups) indicate that Consumer Response Councils may decline to hear, or terminate consideration of, complaints if they believe they lack sufficient resources to resolve the complaint, or if any party to the complaint breaches *or has been represented to have breached* the confidentiality of the hearing process.⁵⁶ Further, under ASC's policies, ASC may refuse to consider any complaints from special interest groups that breached the confidentiality of complaint proceedings within the last five years.⁵⁷ Consequently, when ASC forsakes transparency and dispenses decisions contingent on the payment of sizeable fees, it appears demonstrably ill-suited to adequately discharge public interest mandates.

The lack of independence of the complaint resolution and pre-clearance processes of ASC—something that would be unthinkable in a court of law—further exacerbates concerns. So-named "Consumer Response Councils" tasked with judging alleged violations of the Code include, primarily, representatives from the advertising industry (advertisers, advertising agencies, the media)

53. See BRENDA PRITCHARD & SUSAN VOGT, *ADVERTISING AND MARKETING LAW IN CANADA* 45 (2004).

54. See ADVER. STANDARDS CAN., *SPECIAL INTEREST GROUP COMPLAINT PROCEDURE*, <http://www.adstandards.com/en/Standards/SIGComplaintProcedure.asp> (last visited Nov. 20, 2005).

55. See CANADIAN CODE OF ADVER. STANDARDS *The Consumer Complaint Procedure* (Adver. Standards Can. 2004), available at *supra* note 27.

56. ADVER. STANDARDS CAN., *supra* note 54, ¶ e (emphasis added).

57. *Id.* ¶ e(iii).

and a small minority of members of the public who, themselves, are appointed by ASC.

Pre-screening children's advertisements clothes the self-serving industry codes and ASC's oversight of them with a veneer of credibility. This has likely helped the industry forestall government regulatory intervention.⁵⁸ Additionally, by acting as an inexpensive bulwark against the publication of the most objectionable ads and a release valve for complaints about others,⁵⁹ the ASC pre-screening and complaint mechanism have probably diminished the likelihood of consumers initiating complaints in courts of law pursuant to federal or provincial consumer protection legislation. The courts are not self-interested and are vested with the authority to issue binding rulings that have precedential implications for all advertisers and children. Unlike with Consumer Response Councils, consumers could expect the courts to be, generally, less sympathetic to advertisers and more sympathetic to children.

In fact, there does not appear to be *any* reported Canadian court or ASC decisions⁶⁰ considering misleading advertising directed at children. This may be due to several factors:

1. Complaints of misleading advertising considered by ASC are confidential unless the organization finds a code infraction. Even then, ASC only makes summaries of its decisions available.⁶¹
2. Many misleading television advertisements are pre-cleared by ASC. This tends to preclude ASC from subsequently finding such advertisements misleading.⁶²
3. ASC has the explicit policy of rejecting any claim that it

58. See Morton, Heather, *Television Food Advertising: A Challenge for the New Public Health in Australia*, 14 COMMUNITY HEALTH STUD. 153, 153 (1990) (Austl.).

59. For example, ads involving sexual themes or posing risk of physical danger to children.

60. ASC reported only ten complaints alleging violations of Article twelve ("Advertising to Children") of the ASC Code during the period 1997 until the first quarter of 2004. All ten complaints were dismissed by ASC and reports of the decisions are confidential. See PREVIOUS AD COMPLAINTS REPORTS, *supra* note 37 (containing ad complaints reports for 1997–2004).

61. *E.g.*, ADVER. STANDARDS CAN., *supra* note 54, § (e); see also ADVER. STANDARDS CAN., *supra* note 36; PRITCHARD & VOGT, *supra* note 53, at 45.

62. PREVIOUS AD COMPLAINTS REPORTS, *supra* note 37.

deems has “as one of the complainant’s primary intentions to generate publicity for a cause or issue”⁶³ or where any party to the complaint breaches or has been represented to have breached the confidentiality of the hearing process.⁶⁴

4. Patently weak substantive and enforcement provisions of the ASC code, high rates of dismissed complaints, and the adjudicating Consumer Response Councils’ obvious conflict of interest may discourage some offended parents from bothering to pursue complaints with ASC.

5. Allegations of misleading advertising considered by the federal Commissioner of Competition are also conducted in private unless the Commissioner exercises her discretion to have the Competition Tribunal subject the advertising to a “review” under section 74.01(1) of the Competition Act (the “civil” track).⁶⁵ Also, the Commissioner can refer the matter to the Canadian Attorney General for a quasi-criminal prosecution.⁶⁶

6. Even if children had the technical capacity to formulate the required written complaints (e.g., most children would not comprehend the basis of the complaints), Canadians under the age of eighteen actually do not have legal standing under the Competition Act to petition the Commissioner of Competition to commence an investigation of misleading advertising.⁶⁷ Fewer complaints are likely to be produced when only adults are allowed to bring suit concerning advertisements they are less likely than children to see.

7. Individual advertising campaigns often run for short time periods. This may preclude the advertisements from coming to the attention of courts and being subject to penalties before the conclusion of the campaign.

8. Many government regulatory authorities first pursue

63. CANADIAN CODE OF ADVER. STANDARDS *The Consumer Complaint Procedure*, Non-Reviewable Complaints (Adver. Standards Can. 2004), available at *supra* note 27.

64. ADVER. STANDARDS CAN., *supra* note 54, ¶ e.

65. Competition Act, R.S.C., ch. C-34, § 10(3) (1985) (Can.).

66. *Id.* § 23.

67. *Id.* § 9(1).

“voluntary compliance” by regulated parties before prosecuting violations in court.⁶⁸ While this approach is conciliatory and likely cost-effective, it diminishes the opportunity for rulings that promote general deterrence of prospective malfeasors.

9. Finally, advertisers generally have a financial stake in ensuring that private and public decision-making bodies intervene as little as possible in commercial affairs. Thus, they have little incentive to pursue complaints advocating an expansive view of misleading advertising that might have the effect of prohibiting, outright, all ads directed at children.

B. Statutory Restrictions on Misleading and Deceptive Advertising

Recent calls for legislative reform,⁶⁹ coupled with the manifest inadequacy of industry self-regulation,⁷⁰ beg for a reconciliation of legal restrictions on misleading advertising (particularly outside Québec) with existing legal and psychological acknowledgment of children's vulnerable status as consumers and citizens.⁷¹ That is, existing prohibitions on misleading commercial advertising contained in the federal Competition Act and comparable federal and provincial consumer protection statutes should be applied to advertisements directed at children in a manner that reflects the manifestly unique vulnerability of children to commercial advertising. Thus far, courts applying the Competition Act (and its precursor, the Combines Investigation Act) have only taken the age of the intended advertising targets of advertising into account after guilty verdicts were returned (i.e., as an aggravating factor in sentencing).⁷² To begin this reconciliation, the next section reviews

68. COMPETITION BUREAU, STAYING 'ON-SIDE' WHEN ADVERTISING ON-LINE: A GUIDE TO COMPLIANCE WITH THE *COMPETITION ACT* WHEN ADVERTISING ON THE INTERNET 11 (2001).

69. See *supra* Part III.

70. See *supra* Part IV.A.

71. WILCOX ET AL., *supra* note 22; see also *infra* notes 130–61 and accompanying text.

72. Telephone Interview with Anne Barbara Pelletier, Counsel, Competition Bureau, Legislative Affairs Div. (Nov. 4, 2004). Section 74.1(5)(c) of the Act also specifies that, in determining the amount of an administrative monetary penalty the following criterion shall be taken into

relevant statutory limits on misleading advertising in Canada.

1. The Federal Competition Act

As is the case in most countries, a number of Canadian statutes prohibit false, misleading or deceptive advertising.⁷³ For example, the Canadian federal Competition Act proscribes such advertising under quasi-criminal and civil enforcement regimes.⁷⁴ Defendants can be held accountable under either provision of the statute, but not both. The provisions state, in part:

52(1) 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.⁷⁵

74.01(1) 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.⁷⁶

This legislation not only safeguards scrupulous sellers' shares in a competitive marketplace, but also protects the interests of consumers *vis a vis* sellers in the marketplace.⁷⁷ In *R. v. Wholesale*

account: "the vulnerability of the class of persons likely to be adversely affected by the conduct . . ." Competition Act, R.S.C., ch. C-34, § 74.1(5)(c) (1985) (Can.).

73. *See, e.g.*, Competition Act §§ 52(1), 72.01(1); Food and Drugs Act, R.S.C., ch. F-27, § 5(1) (1985) (Can.).

74. *See* Competition Act §§ 52(1), 72.01(1).

75. *Id.* § 52(1). Subsection 52(5) sets the maximum penalty as five years imprisonment and a fine in the discretion of the court (which, presumably, could be much higher than the \$200,000 limit for fines plus one year imprisonment upon conviction of a summary offense). *Id.* § 52(5).

76. *Id.* § 74.01. Subsection 74.1(1) of the Act authorizes a court, on application of the Commissioner of Competition, to order a corporation to stop engaging in the impugned conduct, to publish appropriate corrective advertising, and to pay a monetary penalty up to \$100,000 for a first offense. *Id.* § 74.1(1).

77. *See id.* § 74.01(1).

Travel Group Inc.,⁷⁸ the Chief Justice of the Supreme Court of Canada wrote: "I am prepared to accept that preventing false/misleading advertisers from benefiting from false/misleading advertising *and* protecting consumers from the detrimental effects of false/misleading advertising is sufficiently important to warrant overriding constitutionally protected rights and freedoms."⁷⁹

This Article focuses on the federal Competition Act for three reasons. First, the Competition Act's scope is not limited by provincial boundaries.⁸⁰ Second, it is not limited by the nature of the product promoted (that is, it covers toys, recreational/entertainment products, and food),⁸¹ or the media used (i.e., it applies to all media of communication, including print, broadcast, billboards, packaging and, notably, the Internet).⁸² Finally, it has a citizen-initiated formal complaint investigation procedure.⁸³ However, many of the principles and much of the evidence and case law canvassed in this analysis is applicable, at least by analogy, to arguments made under other legislation in Canada and elsewhere. At the federal level, this is most notably true of the Food and Drugs Act.⁸⁴

2. Provincial and territorial consumer protection legislation

Opportunities to safeguard children against commercial exploitation also exist at the provincial and territorial levels through legislative reform and litigation. Most provincial and territorial

78. [1991] 3 S.C.R. 154 (Can.).

79. *Id.* at 191 (emphasis added). The judgment decided two parallel appeals by both parties. While some parts of the judgment involved several minority dissenting opinions, Justices LaForest and McLachlin appear to have agreed with these reasons of the Chief Justice (the full court of nine decided the matter) and no other justices commented on this aspect of the Crown's case or contradicted the Crown's position on this point. *See id.*

80. *See* Competition Act § 1.1 (setting forth the purpose).

81. *Id.* pt. I, § 2.

82. *Id.*

83. *Id.* § 9.

84. Similarly, section 5(1) of the Canadian federal Food and Drugs Act states: "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." Food and Drugs Act, R.S.C. ch. F-27, § 5(1) (1985) (Can.). Section 31 of the Food and Drugs Act sets the maximum penalty for violating food-related provisions of the Act at three years imprisonment plus a fine of \$250,000. *Id.* § 31.1(b).

governments have some form of consumer protection legislation prohibiting misleading advertising or unconscionable trade practices.⁸⁵

a. Constitutional considerations

Provincial and federal legislative authority over advertising directed at children co-exist under Canadian constitutional law. For instance, according to the Supreme Court of Canada in *Irwin Toy*,⁸⁶ the Québec Consumer Protection Act⁸⁷ derives its authority from §§ 92(13) and 92(16) of the Constitution Act of 1867.⁸⁸ Similarly, the Supreme Court of Canada held that the entire federal Competition Act, which, in part, regulates commercial advertising,⁸⁹ was properly enacted pursuant to federal authority to regulate trade and commerce specified in § 91(2) of the Constitution Act of 1867.⁹⁰

The doctrine of “paramountcy”—which is analogous to, but distinct from, the American constitutional law principle of “federal preemption”—stipulates that a federal law will prevail only to the extent of an operational conflict with a provincial law. There is no

85. *E.g.*, Trade Practices Act, R.S.N.L., ch. T 7, §§ 5(w), 6(f), 7 (1990); Business Practices Act, R.S.P.E.I., ch. B 7, §§ 2(a)(xiii), 2(b)(i), 3(1) (1988); Business Practices Act, S.M., ch. 6, § 3 (1990–91); Trade Practices Inquiry Act, C.C.S.M., ch. T110, §§ 2(a)(v), 2(a)(viii) (2006); Consumer Protection Act, S.S., ch. C 30.1, §§ 5, 6(o), 7 (1996); Fair Trading Act, R.S.A., ch. F 2, §§ 6(2)(b), 4(a), 4(b), 7 (2000); Business Practices and Consumer Protection Act, S.B.C., ch. 2, §§ 4(1), 4(3)(b)(vi), 8(3)(b), 9 (2004). These statutes are available at http://www.canlii.org/index_en.html; see also OFFICE OF CONSUMER AFFAIRS, CANADIAN CONSUMER HANDBOOK 29 (2005), available at [http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/CCHandbook_2005.pdf/\\$FILE/CCHandbook_2005.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/CCHandbook_2005.pdf/$FILE/CCHandbook_2005.pdf).

86. [1989] 1 S.C.R. 927 (Can.).

87. R.S.Q., ch. P-40.1 (2004) (Can.).

88. Constitution Act, 1867, 30 & 31 Vict., c. 3 (Eng.). Section 92(13) confers provincial authority over property and civil rights, and section 92(16) confers authority on provinces over “[g]enerally all [m]atters of a local or private [n]ature.” *Id.* § 92(16). The Court’s decision was unanimous on this point. *Irwin Toy*, [1989] S.C.R. at 944, 953, 958, 1005; see also *Attorney General of Québec v. Kellogg’s Company*, [1978] 2 S.C.R. 211, 220 (Can.) (finding provincial authority in sections 92(13) and 92(16) of the Constitution Act for the Québec government to prohibit the use of cartoons to advertise products to children).

89. *E.g.*, Competition Act, R.S.C., ch. C 34, §§ 52(1), 74.01 (1980) (Can.).

90. *Gen. Motors of Can. Ltd. v. City Nat’l Leasing*, [1989] 1 S.C.R. 641, 694 (Can.).

conflict when a person can comply with both laws by adhering to the stricter one.⁹¹ "A provincial law that is supplementary or duplicative of a federal law is *not* deemed to be inconsistent with the federal law."⁹² Federal law operates to the extent of the conflict, and the conflicting provisions of the provincial law are suspended.⁹³

In both *Irwin Toy* and *Kellogg's*, the issue was partly whether provincial children's advertising restrictions could be applied to the federal undertaking of television broadcasting. In both *cases*, the Supreme Court determined that the federal government had authority to regulate broadcast advertising directed at children because broadcast undertakings are subject to federal legislative control.⁹⁴ As such, the Supreme Court in *Irwin Toy* accepted the proposition that the provincial government's authority to regulate all advertising directed at children was limited to "partial success" because of its constitutional incapacity to regulate cable signals originating from outside of the province.⁹⁵ Further, the majority in *Kellogg's* held

91. See *Irwin Toy*, 1 S.C.R. at 963–64 (quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 191 (Can.)). The discussion in *Irwin Toy* further supports the view that the Supreme Court believed that the federal government has authority to restrict advertising directed at children. *Id.* at 964.

92. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 358 (2d ed. 1985) (emphasis added); see also *Garland v. Enbridge Gas Distribution Inc.*, [2004] 1 S.C.R. 629, 654 (Can.), available at http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0629.html; *Multiple Access Ltd.* 2 S.C.R. at 161.

93. See HOGG, *supra* note 92, at 335. Even if the "double-aspect doctrine" does not apply, established Supreme Court jurisprudence holds that a law validly founded on an enumerated head of power may have some impact on matters entrusted to the other level of government provided the intruding provisions are rationally and functionally connected to the main head of power. This permits a flexible standard to give the enacting body some leeway in selecting legislative techniques. See *id.* The test for paramountcy originated in the Ontario Court of Appeal in *Papp v. Papp*, [1976] 1 O.R. 331 (Ont. C.A.) (Can.), and was later applied by the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (Can.), and *R. v. Zelensky*, [1978] 2 S.C.R. 940 (Can.).

94. See *Att'y Gen. v. Kellogg's Co.*, [1978] 2 S.C.R. 211, 218–25 (Can.); *Att'y Gen. of Québec v. Irwin Toy, Ltd.*, [1989] 1 S.C.R. 927, 930 (Can.).

95. *Irwin Toy*, 1 S.C.R. at 958. According to a report of the Parliamentary Research and Information Service, Article 2006 of the Canada-United States Free Trade Agreement (FTA) prohibits Canadian governments from requiring Canadian cable companies rebroadcasting U.S. cable signals to strip advertisements. Canadian-U.S. Free Trade Agreement, U.S.-Can., art. 2006, ¶ 2(b), Jan. 2, 1988, 27 I.L.M. 281, available at <http://www.dfait-maeci.gc.ca/>

that the advertising ban applied to the toy company in the case (i.e., not a federal undertaking) and was a general prohibition with only “incidental” effects on federal broadcast undertakings.⁹⁶ Similarly, the *Irwin Toy* Court held that the advertising ban was not a colorable attempt to regulate a federal undertaking,⁹⁷ did not affect an “essential or vital element” of the federal undertaking⁹⁸ and (even if it did) the impact was incidental,⁹⁹ and did not impair the operation of the broadcast undertaking.¹⁰⁰

b. The province of Ontario

Although a detailed analysis is beyond the scope of this paper, the Ontario Consumer Protection Act¹⁰¹ also warrants special attention. The Ontario Consumer Protection Act covers Ontario’s twelve million residents, representing approximately half of the English language television and magazine market in Canada. It also applies to Toronto businesses, which include the vast majority of major Canadian broadcasting and magazine publication company headquarters.

Section 14(1) of the Ontario Consumer Protection Act¹⁰² states: “It is an unfair practice for a person to make a false, misleading or deceptive representation.”¹⁰³ Subsection (2) provides examples of such representations, “[w]ithout limiting the generality” of subsection (1). Most notably in this context, subsection (2) includes the following:

tna-nac/documents/cusfta-e.pdf. However, paragraph 2006(3)(a)(iii) authorizes both governments to restrict “abusive . . . material, alcoholic beverages or other prohibited products,” provided that those measures were in effect on October 4, 1987—a requirement that longstanding restrictions on misleading advertising would arguably satisfy. Andrew Kitching, *Signal Substitution of Restricted Advertising*, PARLIAMENTARY INFO. & RES. SERVICE, Sept. 2004, at 1, 3.

96. *Kellogg’s Co.*, 2 S.C.R. at 218–25.

97. *Irwin Toy*, 1 S.C.R. at 953–54.

98. *Id.* at 958.

99. *Id.* at 951, 955, 958, 960.

100. *Id.*

101. R.S.O., ch. 30, § 14(1) (2002) (Can.).

102. *Id.*

103. *Id.* Additionally, section 17 of the Ontario Consumer Protection Act states: “No person shall engage in an unfair practice.” *Id.* § 17(1).

(14)(2)(14) A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.¹⁰⁴

(14)(2)(15) A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.¹⁰⁵

Also, Section 15 states, in part:

(1) It is an unfair practice to make an unconscionable representation.¹⁰⁶

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,¹⁰⁷

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors.¹⁰⁸

V. AIDS FOR INTERPRETING RESTRICTIONS ON MISLEADING ADVERTISING WHEN AIMED AT CHILDREN OUTSIDE QUÉBEC

A. Definitions

Even when targeted at adults, there is a fine line between misleading and nonmisleading advertising. For instance, many adults may not be alert to the possibility that even the "programming" portion of television talk shows—in which musicians, authors, actors, and others are interviewed—may ostensibly be feature length commercials promoting the guests' entertainment products. Advertising has become an increasingly sophisticated method of enlisting the help of the target to achieve the commercial ends of the proponent. The word "advertising" comes from the Latin

104. *Id.* §14(2)(14).

105. *Id.* § 14(2)(15).

106. *Id.* § 15(1).

107. *Id.* § 15(2).

108. *Id.* § 15(2)(a).

word "*advertere*," which means to "direct one's attention toward."¹⁰⁹ The Concise Oxford English Dictionary defines "mislead" as: "lead astray, cause to wrong, in conduct or belief."¹¹⁰ An Ontario superior court justice stated that "[a]dvertising can be an effective tool in persuading the public to utilize a particular product or service. By its nature, it is one-sided and usually does not convey a full and balanced analysis. To do so, of course, might diminish its persuasive power."¹¹¹ Ultimately, determining when advertising crosses the line from mere "steering" to "leading astray"—by direct or subtle exaggeration, mischaracterization, factual omissions, or otherwise taking advantage of the buyer—involves a determination of the moral blameworthiness of the seller's conduct.

B. Legal Benchmarks For Assessing Misleading Advertising

Since 1971, uncontradicted provincial appellate court rulings concerning the meaning of "misleading advertising" have established two principles relevant to the issue of advertising directed at children. First, to determine what constitutes "misleading," courts must consider the issue from the vantage point of the advertisement's intended recipient.¹¹² Second, courts should assume the advertisement will be interpreted by persons of "average" abilities appropriate to the circumstances and not by well informed or sophisticated persons.¹¹³ The leading Canadian case on point comes from the appellate division of the Alberta Superior Court.¹¹⁴ This case set the standard by quoting, with approval, the ruling of a United States Circuit Court judge who stated that "[t]he law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the

109. CASSELL'S LATIN DICTIONARY 23 (DP Simpson ed., 5th ed. 1968).

110. CONCISE OXFORD ENGLISH DICTIONARY 647 (J.B. Sykes ed., Oxford Univ. Press 1982) (1911).

111. *Purolator Courier Ltd. v. United Parcel Serv. Can. Ltd.*, [1995] 60 C.P.R.3d 473, 490 (Ont. Ct. Gen. Div.) (Can.).

112. *See R. v. Int'l Vacations Ltd.*, [1980] 56 C.P.R.2d 255-56 (Ont. C.A.) (Can.); *R. v. Viceroy Construction Co. Ltd.*, [1975] 23 C.P.R.2d 281, 284 (Ont. C.A.) (Can.).

113. *R. v. Imperial Tobacco Prods. Ltd.*, [1971] 3 C.P.R.2d 178, 195 (Alta. C.A.) (Can.).

114. *Id.*

credulous"¹¹⁵

Clearly then, to determine whether an advertisement directed at children is "misleading," courts must examine it from the perspective of an average child to whom it is targeted. These authorities make it plain that a court should not apply the same analysis to an ad aimed at a child that it would apply to one aimed at an adult, which could include a literal analysis of its logical structure.¹¹⁶ Instead, in determining whether an ad aimed at children is misleading, a court should consider the impressive body of relevant developmental psychology evidence, which the Supreme Court of Canada has found to be satisfactory for establishing children's unique vulnerability to advertising.

C. Interpreting "Misleading" From the Vantage Point of a Child

1. The Supreme Court of Canada's 1989 appraisal of the evidence concerning children's capacity to receive commercial advertising

Legal recognition of the limited capacity of children was most eloquently articulated by the Supreme Court of Canada in *Attorney General of Québec v. Irwin Toy, Ltd.*¹¹⁷ There, the Court examined the constitutionality of the near-total statutory restriction on commercial advertising directed at children in Québec, holding that the ban was an acceptable incursion on commercial freedom of expression that is demonstrably justified in a free and democratic society.¹¹⁸

The court had been called upon by an aggrieved toy company to assess whether the legislature's objectives in enacting the impugned provisions were sufficiently pressing and substantial.¹¹⁹ In addition, the court dealt with whether the means chosen to achieve those objectives: (1) were rationally connected with the objectives; (2) minimally impaired the constitutional freedom of expression; and, if so, (3) impaired the freedom in proportion to the objectives sought

115. *Id.* (quoting *Aronberg v. F.T.C.*, 132 F.2d 165, 167 (7th Cir. 1942)). The Alberta decision was followed by the British Columbia Court of Appeal in *R. v. Cunningham Drug Stores*, [1973] 13 C.P.R.2d 244, 248 (B.C. C.A.) (Can.).

116. *E.g.*, *R. v. Suntours Ltd.*, [1974] 20 C.P.R.2d 179, 181 (Ont. Provincial Ct.) (Can.).

117. [1989] 1 S.C.R. 927, 988 (Can.).

118. *Id.* at 1000.

119. *Id.* at 971-73.

by the legislation.¹²⁰

In reaching its decision, the Court relied heavily on the 1981 U.S. Federal Trade Commission's Final Staff Report and Recommendation, entitled: In the Matter of Children's Advertising. The report summarized its findings as follows:

In summary, the rulemaking record establishes that the specific cognitive abilities of young children lead to their inability to fully understand child-oriented television advertising, even if they grasp some aspects of it. They place indiscriminate trust in the selling message. They do not correctly perceive persuasive bias in advertising, and their life experience is insufficient to help them counter-argue. Finally, the content, placement and various techniques used in child-oriented television commercials attract children and enhance the advertising and the product. As a result, children are not able to evaluate adequately child-oriented advertising.¹²¹

The Court opined that "[t]he Report . . . provides a sound basis on which to conclude that television advertising directed at young children is *per se* manipulative. Such advertising aims to promote products by convincing those who will always believe."¹²² Additionally, the Court noted that it was:

reasonable to extend this conclusion in two ways. First, it can be extended to advertising in other media. . . . Second, it can be extended to advertising aimed at older children (7-13). . . . The studies suggest that at some point between age seven and adolescence, children become as capable as adults of understanding and responding to advertisements.¹²³

Even though Congress ultimately compelled (cf. note 135) the FTC to counsel against a ban, the Court relied on the FTC's report to justify the ban's impairment of the constitutional freedom of expression. It explained:

120. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.), available at <http://www.canlii.org/ca/cas/scc/1986/1986scc7.html>.

121. *Irwin Toy*, 1 S.C.R. at 988 (quoting F.T.C., FINAL STAFF REPORT AND RECOMMENDATION: IN THE MATTER OF CHILDREN'S ADVERTISING (1981)).

122. *Irwin Toy*, 1 S.C.R. at 988.

123. *Id.* at 988-89.

The strongest evidence for the proposition that this ban impairs freedom of expression as little as possible comes from the FTC Report. Because the Report found that children are not equipped to identify the persuasive intent of advertising, content regulation could not address the problem. The Report concluded that the only effective means for dealing with advertising directed at children would be a ban on all such advertising because “[a]n informational remedy would not eliminate nor overcome the cognitive limitations that prevent young children from understanding advertising” (p. 36). . . . Because the FTC Report focussed on the effect of advertising aimed at young children (2–6) and proceeded on the basis that advertising directed at older children (7–13) did not pose a problem, it concluded, reasonably enough, that no definition could distinguish adequately between advertising directed at young children and advertising directed at older children (at pp. 44–45). . . . Sections 248 and 249 preserve the rationale for a ban contained in the FTC Report at the same time as overcoming the practical limitations suggested therein. The sections contemplate a larger age group than that envisaged by the FTC Report, and always allow advertising aimed at adults, thereby avoiding the difficulties identified in the Report both with a ban based on audience composition and with a ban based on the definition of “advertising directed to children” *The Application Guide for Sections 248 and 249* helps to illustrate this. It specifies a number of time periods during the day when, based on Bureau of Broadcast Measurement (BBM) statistics, over 15 per cent of the audience is made up of children aged 2 to 11. It was possible to arrive at these time periods despite the FTC’s arguments precisely because a larger target group was specified.¹²⁴

In his dissenting opinion, Justice McIntyre, joined by Justice Beetz, opined that it had not been demonstrated to his satisfaction that children suffer harm from advertising, and that “even if it could be shown that some child or children have [sic] been adversely

124. *Id.* at 994–97 (emphasis omitted).

affected by advertising of the kind prohibited," he would still be of the opinion that the ban is unsustainable.¹²⁵ In so holding, he emphasized the social benefit of commercial speech: "Over and above its intrinsic value as expression, *commercial expression* which, as has been pointed out, *protects listeners as well as speakers* plays a significant role in *enabling individuals to make informed economic choices*, an important aspect of individual self-fulfillment and personal autonomy."¹²⁶

However, this viewpoint fails to acknowledge the fact that advertising directed at children—whose age renders them incapable of understanding the messages—promotes ill-informed economic choices and ultimately fails to protect children, who, as listeners, are particularly vulnerable to media influences, especially one-sided commercial promotions.

The majority, unlike Justice McIntyre, was satisfied that under the civil standard of proof, "the balance of probabilities," children under age thirteen are manipulated by commercial advertising.¹²⁷ This civil standard is generally lower than the standard required to obtain a conviction for quasi-criminal strict liability offences, such as misleading advertising under section 52(1) of the Competition Act, which is "beyond a reasonable doubt" (at least for the *actus reus* element of the offence).¹²⁸ However, the civil standard plainly does not fall short of the threshold for proof necessary to prosecute under the so-called "civil" provision of the Competition Act, which deems misleading representations to be "reviewable conduct," subject to

125. *Id.* at 1008 (McIntyre, J., dissenting). It is unclear and possibly moot whether the evidence canvassed in the introduction of this Article would convince him otherwise.

126. *Id.* at 1006 (emphasis added).

127. *Id.* at 991.

128. See *Gen. Motors of Can. Ltd. v. City Nat'l Leasing*, [1989] S.C.R. 641 (Can.), available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol11/html/1989scr1_0641.html. In the conclusion to part VII of the unanimous decision in *Gen. Motors of Can. Ltd.*, Chief Justice Dickson ruled that the entire "Combiner Investigation Act [as it was then called] is valid under the federal trade and commerce power, in particular, [under the] 'second branch'" of that power, the power "over 'general' trade and commerce." *Id.* at 642-43. The constitutional basis, under the *Charter of Rights and Freedoms*, of the misleading and deceptive advertising provisions was examined in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (Can.); however, the authority of the federal government to legislate in the area was assumed.

financial penalties by the Competition Tribunal.¹²⁹ Moreover, in meeting the criminal standard of proof, the cause of children is aided by the recent accumulation of scientific evidence corroborating the Court's conclusion in *Irwin Toy*.

2. Post-1989 evidence from developmental psychology literature

Since 1989, the scientific literature has accumulated increasingly convincing evidence of children's incapacity to interpret commercial advertising. In 2004, the American Psychological Association's Report of the APA Task Force on Advertising and Children concluded the following:

[T]he evidence points directly to one fundamental concern: that advertising targeting children below the ages of 7–8 years is inherently unfair because it capitalizes on younger children's inability to attribute persuasive intent to advertising. As a result of this limitation, children below this age comprehend the information contained in television commercials uncritically, accepting most advertising claims and appeals as truthful, accurate, and unbiased.¹³⁰

The report also noted that “[f]urther investigation is needed to establish the upper age boundary of children who are uniquely vulnerable to televised commercial persuasion as a function of normative developmental limitations on their information-processing capabilities.”¹³¹

The Hastings report on food advertising to children also canvassed child development literature.¹³² In its review of evidence concerning the development of “cognitive defences,” the report found that around age eight, children are just “beginning to respond to advertising in a more sophisticated way.”¹³³ However, the report noted that children's ability to retrieve and process information is still developing between the ages of eight and twelve.¹³⁴ In light of these findings, the APA report concluded:

129. See Competition Act, R.S.C., ch. C-34, § 74.01(1)(a) (1980) (Can.).

130. WILCOX ET AL., *supra* note 22, at 7.

131. *Id.* at 5.

132. HASTINGS ET AL., *supra* note 2, at 23.

133. *Id.* at 35–36.

134. *Id.* at 36.

While the FTC did drop its effort to restrict advertising to children [in 1981 under pressure from Congress], it stated in its final order that the issue of advertising to young children is one that should remain a public concern, given the compelling body of scientific evidence documenting young children's unique vulnerability to commercial persuasion. . . . The strength of the research documenting young children's limited ability to recognize and defend against television advertising has improved substantially since the 1970s, when both the FCC and the FTC seriously considered, although ultimately eschewed, broad-based restrictions on advertising targeting audiences of young children. We believe that the accumulation of evidence on this topic is now compelling enough to warrant regulatory action by the government to protect the interests of children, and therefore offer a recommendation that restrictions be placed on advertising to children too young to recognize advertising's persuasive intent.¹³⁵

Furthermore, the APA Report noted:

In sum, the numerous empirical studies in this realm indicate that the ability to recognize persuasive intent does not develop for most children before 8 years of age. Even at that age, such capability tends to emerge in only rudimentary form, with youngsters recognizing that commercials intend to sell, but not necessarily that they are biased messages which warrant some degree of skepticism.¹³⁶

In contrast, for adults, the recognition that a certain portion of television content is commercial advertising triggers a cognitive filter that takes into account the unique perspective of the ad sponsor, its intent to persuade, its bias, and the need for the viewer to apply different interpretative strategies.¹³⁷ Children, by the very nature of their immature cognitive development, are deprived of this cognitive defence when targeted by commercial advertisements.¹³⁸ Ironically, although section 2 of the Canadian (adult) Code of Advertising

135. WILCOX ET AL., *supra* note 22, at 7.

136. *Id.* at 9.

137. *Id.* at 6.

138. *Id.* at 6-7.

Standards stipulates that "no advertisement shall be presented in a format or style which conceals its commercial intent,"¹³⁹ the provision, in actuality, only affords adults a modicum of assistance in triggering their cognitive defences.¹⁴⁰ By contrast, the literature indicates that children do not have such cognitive defences to marshal, even if prompted to do so by cues.

*D. Recent Research on the Relationship Between
Advertising and Premature Death,
Disability Due to Chronic Inactivity, and Diet-Related Disease*

Recently, substantial evidence has surfaced establishing the nexus between advertising (especially when directed at children) and preventable chronic noncommunicable disease. Under the Competition Act, the state (or private complainant) need not furnish evidence that anyone was actually misled or injured; however, courts should be apprised of this research. In addition, courts should not lightly dismiss calls for child-friendly, rather than seller-friendly, interpretations of statutory restrictions on misleading advertising.

Since 1989, there has also been mounting scientific evidence and official recognition (outside Québec) that poor diet and physical inactivity have deleterious effects on health, especially in relation to the risk of heart disease, stroke, certain forms of cancer, diabetes, osteoporosis, and obesity.¹⁴¹ The fact that enormous global resources are poured, world-wide, into food advertising directed at children is evidence, in itself, that such ads do in fact achieve the intended result.¹⁴² Surely, unpublished evaluations of the effectiveness of

139. CANADIAN CODE OF ADVER. STANDARDS, *supra* note 27, ¶ 2.

140. WILCOX ET AL., *supra* note 22, at 6.

141. See, e.g., JOINT WHO/FAO EXPERT CONSULTATION, *supra* note 2, at 3, 14; see also Peter T. Katzmarzyk et al., *The Economic Burden of Physical Inactivity in Canada*, 163 CAN. MED. ASSOC. J. 1435, 1438 (2000), available at <http://www.cmaj.ca/cgi/reprint/163/11/1435.pdf> (conservatively estimating both the number of annual deaths and the health care costs attributable to physical inactivity to be 21,340 deaths and \$2.1 billion annually); Diane Gorman, Assistant Deputy Minister of Health, Address at the Stakeholder Meeting on the Review of Canada's Food Guide to Healthy Eating in Ottawa, (Jan. 20, 2004) (transcript available at http://www.hc-sc.gc.ca/fn-an/alt_formats/hpfb-dgpsa/pdf/food-guide-aliment/pres_speech_adm-pres_contexte_sma_e.pdf) (estimating the value of health care costs and lost productivity due to diet-related disease to be \$6.6 billion annually in Canada).

142. HASTINGS ET AL., *supra* note 2, at 7–8; JULIET B. SCHOR, BORN TO

advertising sponsored by food companies (and accessible by pretrial civil discovery) must demonstrate the continuing commercial profitability of this expensive method of promotion. Furthermore, published literature assessing advertising's contribution to poor diet and/or physical inactivity (especially in relation to food advertising directed at children) supports this interpretation. For instance, Hastings' seminal systematic review of published literature on advertising directed at children concluded that there is reasonably strong evidence that food promotion affects both brand and category preferences, as well as children's purchasing and purchase-related behavior.¹⁴³

The Hastings Report also demonstrates that foods marketed to children in the United States and elsewhere tend to be of very low nutritional value. This finding is consistent with the most recently published review of television advertising directed at adults and children in Canada.¹⁴⁴ Furthermore, the WHO's Technical Report #916 concluded that "[h]eavy marketing of energy-dense foods and fast-food outlets" is a probable cause of obesity.¹⁴⁵ Additionally, the U.S. Kaiser Foundation's report on the role of media in childhood obesity, though lamenting the absence of *definitive* evidence, concluded that food advertising is the most likely mechanism by which media use contributes to childhood obesity.¹⁴⁶

BUY, THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 21, 122 (2004); WILCOX ET AL., *supra* note 22.

143. HASTINGS ET AL., *supra* note 2, at 19, 138.

144. *Id.* at 87–88; *see also* PREVENTING CHILDHOOD OBESITY, *supra* note 22, at 172.; Østbye et al., *supra* note 48, at 370–72 (describing the so-called "TV diet").

145. JOINT WHO/FAO EXPERT CONSULTATION, *supra* note 2, at 148.

146. HENRY J. KAISER FAMILY FOUND., *supra* note 2, at 1, 10. The Kaiser article further states:

[I]t appears likely that the main mechanism by which media use contributes to childhood obesity may well be through children's exposure to billions of dollars worth of food advertising and cross-promotional marketing year after year, starting at the very youngest ages, with children's favorite media characters often enlisted in the sales pitch. Research indicates that children's food choices—and parents' food purchases—are significantly impacted by the advertising they see.

Id. at 10.

*E. Statutory and Common Law Acknowledgement of
Vulnerability and Deficiencies in the
Developmental Capacity of Children and Older Minors*

Courts are accustomed to creating and applying legal norms that recognize the vulnerable status of young people, thereby extending them preferential treatment under the law to accommodate that status. The Toronto-based nongovernmental organization Justice for Children and Youth (JCY) published a list of age-specific legal milestones (i.e., rights and responsibilities) specific to federal and provincial statutes and common law affecting children in the province.¹⁴⁷ Of the nearly six dozen distinct, age-delimited milestones, only two vest in children under twelve years of age: the statutory requirement to attend school from age six, and the authority to withhold consent to be adopted at age seven.¹⁴⁸ Most rights and responsibilities do not accrue to children until they reach the age of majority, which is eighteen or nineteen years depending on the province.¹⁴⁹ Accordingly, the age of reason accepted by the Supreme Court in *Irwin Toy* was extremely accommodating to advertisers in light of numerous stricter age-delimited legal thresholds.¹⁵⁰ For example, the provincial Age of Majority and Accountability Act in Ontario deems the age of majority to be eighteen (though five of the other nine provinces set it at nineteen years of age).¹⁵¹ The milestones note that minors under the age of eighteen in Ontario can only be sued on contracts for “necessities” (such as housing) or for

147. JUSTICE FOR CHILDREN AND YOUTH, SUMMARY OF AGE-BASED LEGAL MILESTONES FOR YOUTH IN ONTARIO, <http://www.jfcy.org/age/milestone.html> (last visited Nov. 20, 2005).

148. *See id.*

149. In Ontario, the Age of Majority and Accountability Act, R.S.O., ch. A-7, § 1 (1990) (Can.), sets the age of majority at eighteen-years old, although five of the other nine provinces set it at nineteen-years old. *See* DEP'T OF JUSTICE CAN., AGE OF MAJORITY BY PROVINCE ON TERRITORY, <http://canada.justice.gc.ca/en/ps/sup/steps/s2c.html> (last visited Feb. 18, 2006); *see also* ROGER TASSE & KATHLEEN LEMIEUX, CONSUMER PROTECTION RIGHTS IN CANADA IN THE CONTEXT OF ELECTRONIC COMMERCE, A REPORT TO THE OFFICE OF CONSUMER AFFAIRS INDUSTRY CANADA 5 n.7 (1998), *available at* [http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Full_e.pdf/\\$FILE/Full_e.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Full_e.pdf/$FILE/Full_e.pdf).

150. *Att'y Gen. of Québec v. Irwin Toy, Ltd.*, [1989] 1 S.C.R. 927, 989–90 (Can.).

151. DEP'T OF JUSTICE CAN., *supra* note 149.

non-necessities, if beneficial to the minor.¹⁵² The Supreme Court of Canada appeared to acknowledge this concept in *Irwin Toy*. Pursuant to common law contract doctrine the court stated:

In sum, the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation, viz. 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.¹⁵³

Indeed, "age of majority" statutes were enacted to lower the common law age of majority that was twenty-one years old.¹⁵⁴ Ironically given the contribution of its marketing to the diets of youngsters, McDonald's Restaurant once argued that lack of legal capacity to enter contracts (like contracts for the sale of food) should undermine the capacity of some of its teenage employees to hold union cards.¹⁵⁵

Though instructive, the JCY list is plainly not exhaustive. For instance, it fails to reference subsection 9(1) of the Competition Act itself, which stipulates that citizens must be at least eighteen years of age to petition the Commissioner of Competition to commence an

152. JUSTICE FOR CHILDREN AND YOUTH, *supra* note 147. The Supreme Court appears to have acknowledged this in *Irwin Toy*, 1 S.C.R. at 990.

153. *Irwin Toy*, 1 S.C.R. at 990. Though provincial age of majority laws generally indicate that young children are legally authorized to enter contracts for obtaining the "necessities of life," it is not at all clear that courts would accept the proposition that candy, soda pop, sugar cereals, or video games comprise the necessities of life. See *Miller v. Smith & Co.*, [1925] 2 W.W.R. 360, 377 (Can.) ("An infant may bind himself to pay for his necessary meat, drink, clothing, medicine, and likewise for his teaching or instruction.").

154. See LAWRENCE M. BEZEAU, EDUCATIONAL ADMINISTRATION FOR CANADIAN TEACHERS ch. 15 (4th ed. 2004), available at <http://www.unb.ca/education/bezeau/eact/eact.html> ("At one time, 21 years was the common [age] limit, but during the 1960s and 1970s many provinces reduced this. Now there is pressure to restore the higher age limits."); see also *Int'l Accountants Soc'y, Inc. v. Montgomery*, [1935] O.W.N. 364, 365 (Ont. C.A.) (Can.) (holding that a student who was not yet twenty-one was not liable to pay college tuition because it was not a necessity of life).

155. See JEFFERY WILSON, WILSON ON CHILDREN AND THE LAW § 5.39 (3d ed. 1994).

inquiry under the Act.¹⁵⁶ If minors are deemed incompetent to challenge the legality of a commercial advertisement, it is difficult to accept that they could be judged capable of independently interpreting the advertisement. Moreover, section 16 of the Canada Evidence Act, a vitally important tool for aiding courts' appraisal of credibility of evidence in civil and criminal proceedings, creates a presumption that children under the age of fourteen are not trustworthy witnesses.¹⁵⁷ As the Supreme Court of Canada articulated in 1962, "[t]he difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility."¹⁵⁸

Finally, three Canadian national bodies prescribe several general age-delimited controls on advertising directed at children. Two of these bodies set the cut-off at twelve years old, including the Advertising Standards Canada Codes, and a self-imposed ban by the Canadian Broadcasting Corporation¹⁵⁹ (CBC, the major public television broadcaster) on ads directed to children during certain self-designated programs. The Canadian Marketing Association's Code of Ethics and Standards of Practice prescribes three age-triggered levels of caution for children under age thirteen, and teenagers below

156. Competition Act, R.S.C., ch. C-34 § 9(1) (1985) (Can.).

157. Canada Evidence Act, R.S.C., ch. E-10, § 16 (1985) (Can.).

158. Kendall v. The Queen, [1962] S.C.R. 469, 473 (Can.) (citation omitted). Amendments to the relevant provisions of the Act were enacted and assented to on July 20, 2005 and became effective January 2, 2006. The new section 16.1 will remove the reverse onus for receiving testimony from a witness under age fourteen (i.e., such testimony will become *prima facie* admissible). An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, 2005 S.C., ch. 32, § 16.1(1) (Can.) (assented to July 20, 2005), available at http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-2_4.PDF in force January 2, 2006 per P.C. 2005-1817, C. Gaz. 2005.II.2550, SI/2005-104 (available at page 2550 at <http://gazetteducanada.gc.ca/partII/2005/20051116/pdf/g2-13923.pdf>).

However, children will remain particularly subject to having their capacity challenged and testimony completely barred by reason of their age, at the instance of either the presiding judge or on application by a party. *Id.* § 16.1(4). In addition, children will be uniquely excused from the general duty to swear an oath or solemn affirmation prior to testifying. *Id.* § 16.1(2).

159. CAN. BROAD. CORP., SUMMARY OF CBC ADVERTISING STANDARDS (2003), <http://cbc.radio-canada.ca/docs/policies/advertising.shtml>.

and above the age of sixteen.¹⁶⁰ ASC also purports to prohibit advertising directed at “pre-schoolers” from nine a.m. to noon on weekdays.¹⁶¹ Though these codes provide inadequate substantive protection for children, they do add more credence to the wisdom of setting the age of reason at least as late as the commencement of adolescence.

*F. Since the Kid Gloves Came Off:
Public Policy Considerations Related to Recent Industry Practices*

There has been a staggering increase in the amount of marketing resources committed to targeting children during the two-and-a-half decades that followed the Québec ad ban. In the United States, spending on marketing to children is estimated to have increased 150-fold from \$100 million in 1983 to \$15 billion in 2004.¹⁶² McDonald’s restaurants alone spend approximately \$500 million annually on world-wide advertising, 40% of which is targeted at children.¹⁶³ Additionally, the number of ads children see on TV has doubled from 20,000 to 40,000 since the 1970s, and the majority of ads targeted to kids are for candy, cereal, and fast food.¹⁶⁴

Now, more than ever before, child development experts, brain scientists, and psychologists are helping advertisers translate the “desire for love into concrete objects, shapes, music, and themes for ads.”¹⁶⁵ Indeed, the American Psychological Association Task Force report red-flagged the ethical implications of psychologists helping to enhance the persuasive effect of ads on children. In particular, children are unable to recognize and defend against commercial persuasion and “careful examination is warranted to insure that psychologists hold faithful to their mission to benefit their research subjects, their clients, and the society at large.”¹⁶⁶

160. CODE OF ETHICS & STANDARDS OF PRACTICE (Can. Mktg. Ass’n 2004), available at *supra* note 30.

161. Though this does not appear to be included in the actual provision of any ASC Code, it is noted in an official ASC publication. See Adver. Standards Can., *supra* note 46.

162. SCHOR, *supra* note 142, at 21.

163. *Id.* at 122.

164. HENRY J. KAISER FAMILY FOUND., *supra* note 2, at 10.

165. SCHOR, *supra* note 142, at 46.

166. WILCOX ET AL., *supra* note 22, at 9.

In her book, *Born to Buy*, sociologist Juliet Schor observed from extensive interviews with U.S. marketing executives that the formula for advertising children's products from the 1920s through the post-war era was to convince mothers (the "gatekeepers") that the advertised product was beneficial for the child.¹⁶⁷ However, Schor notes that the gatekeeper model collapsed in the 1980s, and that current marketing strategies aim to undermine parental authority in the name of "kid power." Advertisers that once depicted mothers as loving and wise, now depict parents as "neglectful, incompetent, abusive, invisible, or embarrassing." These ads represent authority figures as "laughable," and convey the message that the only one capable of understanding children is the corporate sponsor.¹⁶⁸ A Toronto-based children's marketing company recently characterized the new marketing strategy for targeting the so-called "tweens" market cohort as "gatecrashing."¹⁶⁹

Since the 1980s, this approach has been enabled and amplified by the proliferation of commercial cable television channels devoted mainly or exclusively to youth audiences,¹⁷⁰ and the trend toward households owning two or more television sets.¹⁷¹ As the APA Task Force noted, in the days of limited channel capacity, the amount of television programming targeted to children was limited and relegated to time slots unpopular with adults such as Saturday mornings.¹⁷² Now, children can be exposed to child-oriented advertisements all day.¹⁷³ And now more than ever, marketers have unsupervised access that allows them to manipulate young viewers. While part of this effort will lead to children making their own purchases at the urging of marketers, it also prompts them, however indirectly, to pester their parents to make purchases. A 2002 U.S.

167. SCHOR, *supra* note 142, at 16.

168. *Id.* at 54–55, 180.

169. Max Valiquette & Mike Farrell, Remarks at Marketing Magazine "Youth Access" seminar, Montréal, Can., Marketing to Young Canadians in 2006 (Dec. 7, 2005) (referring to PowerPoint slides 35–36) (on file with author).

170. Such channels include *Much Music*, *YTV*, and *Teletoon* in Canada, and *MTV* and *Nickelodeon* in the United States.

171. Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 743, 761 n.84 (2003).

172. WILCOX ET AL., *supra* note 22 at 21.

173. *Id.*

poll indicated that 83% of children aged twelve to thirteen reported asking their parents to buy or let them buy something they had seen advertised; of those, 71% repeated the request an average of eight times, and 11% repeated the request more than fifty times.¹⁷⁴ By contrast, a randomized, controlled trial of third and fourth grade students demonstrated that reductions in TV viewing led to a 70% reduction in children's requests for toy purchases.¹⁷⁵

Finally, Augie Fleras noted that while advertisements once provided product information to consumers, pitches now focus on creating an emotional connection between the product or brand and the consumer. This is achieved by using imagery that has little obvious connection to the product's qualities.¹⁷⁶ By not making verifiable (and therefore, falsifiable) claims that are clearly subject to regulatory scrutiny, this shift in approach could allow advertisers to partially or completely remove advertising from the oversight of traditional statutory controls on misleading advertising if those controls are narrowly interpreted. As the APA Task force observed:

[A]dvertising to children avoids any appeal to the rational. Emphasising instead that ads are entertainment and 'enjoyable for their own sake,' as opposed to providing any real consumer information. . . The most common persuasive strategy employed in advertising to children is to associate the product with fun and happiness, rather than to provide any factual product-related information. . . [For example, commercials aimed at children might show] Ronald McDonald dancing and singing, and smiling in McDonald's restaurants without any mention of the actual food [or images of] Tony the Tiger, Cap'n Crunch. . . to help children identify the products.¹⁷⁷

The trend toward using increasingly sophisticated image marketing in advertising directed at children to, perhaps, bypass regulatory

174. SCHOR, *supra* note 142, at 54–55, 62.

175. Thomas N. Robinson, *Effects of Reducing Television Viewing on Children's Requests for Toys: A Randomized Controlled Trial*, 22 DEV. & BEH. PEDIATRICS 179, 179–82 (2001).

176. AUGIE FLERAS, MASS MEDIA COMMUNICATION IN CANADA 186, 210 (2003); Heather Morton, *Television Food Advertising*, 14 COMMUNITY HEALTH STUD. 153, 153 (1990) (observing that few food advertisements in Australia make any nutritional claims whatsoever).

177. WILCOX ET AL., *supra* note 22, at 23.

controls on advertising, simply underscores the importance and necessity of a total prohibition on advertising targeted at such easily manipulated consumers.

VI. CONCLUSION FOR COURTS AND LEGISLATURES

Child development evidence demonstrates that commercial advertising is inherently misleading to children. As such, this marketing information obstructs rather than supports informed economic choices and sends misleading market signals to sellers. Certainly, Parliament and provincial legislatures could not have intended that misleading advertising provisions of the Competition Act, the Food and Drugs Act, and other consumer protection statutes be interpreted in a manner that protects adults and older teenagers, but not children under the age of thirteen. In interpreting the scope of restrictions on advertising contained in the Competition Act (or other comparable consumer protection legislation), one must be cognisant of the unique vulnerability of children in order to ensure that they receive no less protection than more experienced and intellectually mature consumers (though, plainly, even sophisticated adults are not impervious to the effects of advertising).¹⁷⁸ The need for such a purposive interpretation of consumer protection rules is more pressing now than ever.

In the last two decades, rampant proliferation and unprecedented sophistication of marketing efforts have yielded well financed campaigns tailor-made to hone in and snatch money out of children's trusting hands—often by disparaging parents or provoking intra-family conflict with the objective of agitating additional product sales. This, of course, says nothing about the poorly studied but predictable impact of the effect of materialistic commercial advertising on children's sense of self-worth¹⁷⁹ and the demonstrably dismal prospects for media literacy, especially for young children.¹⁸⁰

178. Adults are not immune to manipulation. A recent note in the Harvard Law Review argued that advertising contributes to the development of unhealthful diets (in adults) by distorting consumers' ability to evaluate products, especially about credence attributes, like nutritional features, that cannot be evaluated without expert assistance. See Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1168–70 (2003).

179. See WILCOX ET AL., *supra* note 22 at 30.

180. *Id.* at 35.

The dignitary interests, economic security, and health of children depend on courts righting the balance.

Federal and provincial legislators are ill-advised to be mere spectators to legal challenges. Without express statutory or regulatory bans on advertising aimed at children, litigious sellers or advertisers can ensure that it remains "open season" on children for at least another decade until the Supreme Court makes another pronouncement on this point. But the adverse health effect of another decade of peddling junk food and kid-vid to children is too high a price to pay for a game of political wait-and-see.