

Centre for Health Science and Law (CHSL)-NGO-Canada-Session

Committee on the Rights of the Child August 20, 2019 United Nations High Commissioner for Human Rights

1211 Geneva 10, Switzerland By email to: registry@ohchr.org

Re: Canada's fulfillment of key health obligations under the U.N. Convention on the Rights of the Child

Dear Chairman Luis Ernesto Pedernera Reyn:

Canada has not systematically implemented the U.N. Convention on the Rights of the Child¹ ("the Convention"), nearly three decades after ratifying the most widely supported treaty in UN history.² Mindful of the Committee's 2012 report on Canada and the Government of Canada's 2019 report, we alert the Committee to Canada's progress concerning Convention Articles 1, 3(1), 4, 24 (c & e), and 36³ on: (1) nutrition at school, (2) commercial advertising to children,

advertising and promotion of breast-milk substitutes, and (4) governance concerning children and the marketplace.

Child nutrition in Canadian schools

Canadian children are all eligible for public healthcare and elementary and secondary education when attendance is mainly required by law. Paragraph 120 of the government's report does not acknowledge that adherence to nutrition standards is voluntary, weakly monitored, and not enforced or that government funding is only enough to feed 4% of students. So, programs court community and food industry donations of cash and food with the attendant governance risks. The Coalition for Healthy School Food estimates that a fully funded program would cost approximately 2% of the public expenditures on elementary and secondary education. Numerous experts have stressed the importance and viability of a national program.⁴ The former U.N. Special Rapporteur on the Right to Food recommended that Canada:

"Formulate a comprehensive rights-based national food strategy...as part of this strategy, create a nationally funded children and food strategy (including school-feeding food literacy and school garden programmes) to ensure that all children, at all times, have access to healthy and nutritious food;⁵"

In its March 2019 Federal Budget Plan, the federal government stated:

"Critically important for a child's education is ensuring they have healthy meals before and during school. Currently, Canada has a mix of different school breakfast and lunch programs, but much more could be done. Budget 2019 announces the Government's intention to work with provinces and territories toward the creation of a National School Food Program." [emphasis in original]

REMEDY: Launch a national universal, publicly funded, environmentally sustainable, healthy school food program with commercial conflict of interest safeguards and cost-shared with other levels of government.

Advertising and promotion of food to children is still weakly regulated outside Quebec.

Since the Committee's 2012 report,⁶ the federal government has still not restricted advertising to children outside Quebec. It supported a Senator's bill to restrict advertising nutrient-poor foods, but weakened the protections (from age 16 to age 12) and was unable or unwilling to ensure the bill proceeded to a final vote before the summer recess preceding the 2019 election.⁷ Advertising nutrient-poor foods to children (especially soft drinks and restaurant foods) and sedentary leisure activities (e.g., video games, television and social media) contribute

to life-long unhealthy dietary and activity patterns of which obesity is only one stigmatizing and easily measured consequence. Nutrient-based advertising restrictions are vulnerable to legal challenge and cannot block restaurant place, mascot, logo, or generic meal ads. 8

The province of Quebec uses a different approach. Since 1981, the Quebec Consumer Protection Act has prohibited commercial advertising to children under age 13 of all products, services, and companies, not just certain foods, based on the premise that children are uniquely vulnerable to marketing and deserve protection from manipulation by commercial actors.⁹ The Supreme Court of Canada rejected a constitutional challenge to the Quebec advertising ban in 1989 brought by an aggrieved toy company, by concluding that all advertising to children is:

“...per se manipulative. Such advertising aims to promote products by convincing those who will always believe.”¹⁰

PO Box 4880 Station E Ottawa, Ontario, K1S 5J1 CANADA

Both the federal Competition Act and Food and Drugs Act prohibit misleading advertising which, we believe, includes all advertising to children. Provincial age of majority statutes stipulate that childhood ends at age 18 (like the Convention) or 19. And section 9 of the federal Competition Act states that only persons 18 years or older may officially complain about misleading ads.

REMEDY: Urge the federal government to promptly promulgate strict regulations on the advertising and promotion modelled on the Quebec approach, but raise the age of protection to all minors up to age 18 or 19 as applicable age-of-majority laws specify and to intervene to ensure that any judicial or administrative decisions respecting the statutory limits on misleading advertising are interpreted in the spirit of the Supreme Court Irwin Toy decision on the matter and in full consideration of the Convention on the Rights of the Child, Canadian age of majority laws, and the principle of the best interests of the child (Article 3).

Advertising and promotion of breast-milk substitutes is still weakly regulated.

The advertising and promotion of breast-milk substitutes and related products contributes to low breastfeeding rates which evidence shows undermines babies' immune systems and has other negative health effects. The Government of Canada endorsed the World Health Organization's International Code of Marketing of Breast-milk Substitutes in 1981 and supported more than two dozen subsequent relevant resolutions adopted by the World Health Assembly in its Geneva meetings.¹¹ In 2012, this Committee urge Canada to implement the Code.¹² However, in 2018, UNICEF reported that Canada is one of only a handful of 36 OECD (rich) countries designated as having “no legal measures in place” to curb the advertising and promotion abuses that the International Code aims to prevent.¹³ The rate of exclusive breastfeeding babies from birth to age six months remains low in Canada, 26%, despite high rates of initiation (89%).¹⁴ Canadian law allows powdered baby formula—which can be intrinsically contaminated with dangerous bacteria because powder cannot be manufactured under sterile conditions—to be sold without warnings of this risk and even allows them to carry preparation instructions that specifically expose infants to this risk.¹⁵

REMEDY: Promulgate regulations to restrict the advertising and promotion of breast-milk substitutes in Canada pursuant Canada's unwavering support for the global consensus at the World Health Organization since 1981, including supporting resolutions to reinforce and extend the scope of the Code to address baby food marketing innovations.

Governance safeguards do not ensure protection of most children from economic exploitation. The government report often cites only illustrations of provincial policies providing Convention protections instead of comprehensive reports of where gaps might leave millions of Canadian children unprotected. Also, the government report failed to note that the Prime Minister himself assumed the responsibility of Minister Responsible for Youth¹⁶; this unprecedented role raises the possibility that the Prime Minister could leverage transformative change where inter-departmental and federal-provincial cooperation and leadership are needed

(e.g., paras. 9 and 11).

As the government noted (at para. 58), governments generally do not require the interpretive concept “the best interests of the child” (Article 3(1)) and child impact assessments do not apply comprehensively for 98% of Canadian children,¹⁷ though environmental and gender image analysis has become routine and rigorous.¹⁸ Canadian governments often give generous access to government health, education and other services, but tolerate commercial practices that are exploitative, unfair and injurious to the health of children contrary to the Convention Article 36 commitment to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.” The effect is illustrated by the 2018 UNICEF report which ranked Canada 37th out of 41 “rich” countries on its food security index¹⁹ citing high childhood obesity and low food security as contributing factors.

REMEDY: Urge Canada to (a) prepare future reports as full child rights impact audits of its implementation of the Convention and quantify the number of Canadian children protected by each measure, (b) enshrine the protective principle of the “best interests of the child” into the federal Interpretation Act and counterpart provincial guidance,

(c) institute robust commercial conflict of interest safeguards in government advisory committees, such as the proposed Canadian Food Policy Advisory Council, and (d) optimize the impact of the appointment of the Prime Minister as the child-advocate-in-chief.

Respectfully submitted,

Bill Jeffery, BA, LLB

Centre for Health Science and Law, Ottawa, Canada

References

1 The United Nations. “Convention on the Rights of the Child.” Treaty Series 1577 (1989): 3.

2 As the widely ratified treaty in UN history, only the United States, South Sudan and Somalia have not ratified: <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child>

3 Article 1 For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier

Article 3 (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 4 States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 24.1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:...

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

Article 36 State Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child 's welfare.

4 Including the former Chief Public Health Officer for Canada, the Ontario Healthy Kids Panel, a Harvard University research group, the World Cancer research Fund, the World Bank, the Organization for Economic Cooperation and Development, and the World Food Program, the House of Commons Standing Committee on Finance, the Standing Senate Committee on Social Affairs, Science and technology, and Senate Motion 358 of The Honourable Art Eggleton cited as follows:

World Scientific. Global School Feeding Sourcebook. Lessons from 14 countries. 2016. (Singapore/Geneva: World Scientific, 2016); and World Food Program, State of School Feeding Programs Worldwide (Rome: WFP, 2013):

https://documents.wfp.org/stellent/groups/public/documents/communications/wfp257481.pdf?_ga=2.30297657.70688965.1531516853-1353648354.1531516853 ;

The 1997 House of Commons Standing Committee on Finance stated:

“The Committee further recommends that the federal government partner with communities, parents, provincial governments, private corporations, the agri-food industry and voluntary organizations such as the Canadian Living Foundation to create a national school nutrition program. This type of partnership approach could apply to other organizations and initiatives as well. [citing Martha O’Connor, former Director General of the, now defunct, Breakfast for Learning Program:] 70% of Canadians believe that child hunger in Canada is more important than national unity or the deficit. Strategic investment in a national school nutrition program is an investment in the future of all Canadians” (at <http://www.ourcommons.ca/DocumentViewer/en/36-1/FINA/report-2/page-45#D>)

David Butler-Jones, The Chief Public Health Officer’s Report on the State of Public Health in Canada 2008, (Ottawa: Public Health Agency of Canada, 2008) at 41 states:

“When children go to school hungry or poorly nourished, their energy levels, memory, problem-solving skills, creativity, concentration and behaviour are all negatively impacted. Studies have shown that 31% of elementary students and 62% of secondary school students do not eat a nutritious breakfast before school. Almost one quarter of Canadian children in Grade 4 do not eat breakfast daily and, by Grade 8, that number jumps to almost half of all girls. The reasons for this vary – from a lack of available food or nutritious options in low-income homes, to poor eating choices made by children and/or their caregivers. As a result of being hungry at school, these children may not reach their full developmental potential – an outcome that can have a health impact throughout their entire lives.”

J Larry Brown, William H. Beardslee, Deborah Prothrow, Impact of School Breakfast on Children’s Health and Learning: An Analysis of the Scientific Research (Nov. 2008) Unpublished Manuscript. Harvard School of Public Health. Available at: http://www.sodexofoundation.org/hunger_us/Images/Impact%20of%20School%20Breakfast%20Study_tcm150-212606.pdf, A November 2008 scientific literature review by experts at Harvard University concluded that, even before the U.S. government strengthened its nutrition standards: “...more than 100 published research articles, provides the scientific basis for concluding that the [US] federal School Breakfast Program is highly effective in terms of providing children with a stronger basis to learn in school, eat more nutritious diets, and lead more healthy lives both emotionally and physically...significantly improves their cognitive or mental abilities, enabling them to be more alert, pay better attention, and to do better in terms of

reading, math and other standardized test scores. Children getting breakfast at school also are sick less often, have fewer problems associated with hunger, such as dizziness, lethargy, stomach aches and ear aches, and do significantly better than their peers

who do not get a school breakfast in terms of cooperation, discipline and inter-personal behaviors.”

Senate Standing Committee on Social Affairs, Science and Technology, Obesity in Canada, 2016: https://sencanada.ca/content/sen/committee/421/SOCI/Reports/2016-02-25_Revised_report_Obesity_in_Canada_e.pdf recommended:

“that the Minister of Health in discussion with provincial and territorial counterparts as well as non-governmental organizations already engaged in these initiatives:... Advocate for childcare facility and school programs related to breakfast and lunch programs...and nutrition literacy courses;”

Ontario Healthy Kids Panel, No Time to Wait: The Healthy Kids Strategy, 2013 (Toronto: Ontario Ministry of Health and Long-term Care):

http://www.health.gov.on.ca/en/common/ministry/publications/reports/healthy_kids/healthy_kids.pdf

recommended:

“2.8 Establish a universal school nutrition program for all Ontario publicly funded elementary and secondary schools.

2.9 Establish a universal school nutrition program for First Nations communities.”

World Cancer Research Fund, Policy and Action for Cancer Prevention Food, Nutrition, and

Physical Activity: a Global Perspective, (London: WCRF, 2009):

https://www.wcrf.org/sites/default/files/Policy_Report.pdf recommended:

“Provide healthy daily meals for all staff and pupils, together with facilities for active recreation, activity and sports

Incorporate food and nutrition (including food preparation and cooking skills) and physical education into the mandatory core curriculum Ensure that teaching materials are independently originated and free from commercial bias

Do not allow vending machines that offer snacks high in sugar, fat or salt, or sugary drinks and withdraw such ‘fast’ foods and drinks from school canteens.”

The Federation of Canadian Municipalities resolved in its 2018 annual meeting to:

“WHEREAS, 1.7 million Canadian households experience food insecurity, and the current patchwork of school food programming reaches only a small percentage of our over 5 million students, with Canada remaining one of the only Organization for Economic Co-operation and Development nations without a national school food program;

WHEREAS, the Coalition for Healthy School Food is working at a national level to advocate for the creation of a cost-shared Universal Healthy School Food Program that will enable all students in Canada to have access to healthy meals at school, serving culturally appropriate, local, sustainable food to the fullest extent possible;

RESOLVED, that the Federation of Canadian Municipalities advocate for a Universal Healthy School Food Program to the federal government.”

See: <https://www.fcm.ca/home/about-us/corporate-resources/fcm-resolutions.htm?lang=en-CA&resolution=8cf4c343-602c-e811-adbf-005056bc2614&srch=%25food%25&iss=&filt=false>

Senator Art Eggleton's Motion M-358, which has not yet been put to a vote, states:

"That the Senate urge the government to initiate consultations with the provinces, territories, Indigenous people, and other interested groups to develop an adequately funded national cost-shared universal nutrition program with the goal of ensuring healthy children and youth who, to that end, are educated in issues relating to nutrition and provided with a nutritious meal daily in a program with appropriate safeguards to ensure the independent oversight of food procurement, nutrition standards, and governance."

5 UN Human Rights Council. Report of the Special Rapporteur on the right to food, Olivier De Schutter on his Mission to Canada. A/HRC/22/50/Add.1. Online at: <http://www.srfood.org/en/gender-and-the-right-to-food-3>

6 Committee on the Rights of the Child, United Nations Human Rights Council, Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012), CRC/C/CAN/CO/3-4, December 6, 2012. Online at <https://tinyurl.com/CRC-Canada2012>

64. The Committee recommends that the State party address the incidence of obesity in children, by inter alia promoting a healthy lifestyle among children, including physical activity and ensuring greater regulatory controls over the production and advertisement of fast food and unhealthy foods, especially those targeted at children.

7 Liberal political leadership of the current federal government supported an individual Conservative Senator's bill to restrict advertising of some food to children, but was unable or unwilling to ensure that bill proceeded to a final vote legislative proposal for restrictions on the advertising and promotion of certain foods to children of yet-to-be defined nutrient-poor foods. Bill S-228 was proposed by (now-retired) Senator Nancy Green Raine, an Olympic gold medalist skier who was voted Athlete of the 20th Century by Maclean's Magazine (a leading national news magazine). The federal government successfully urged the Senate to expand protections in the bill to protect some teenagers, then narrowed it to cover only pre-teens before possibly allowing it to be defeated altogether for want of a single final vote in the Senate chamber before the October 2019 election. Reportedly, the bill was defeated by a procedural convention that allows a minority of unelected Senators to delay a vote indefinitely.

8 Bill Jeffery. Testimony on Bill S-228 before the Standing Senate Committee on Social Affairs, Science and Technology Available at: https://sencanada.ca/content/sen/committee/421/SOCI/Briefs/Bill_Jeffery_brief_e.pdf
Bill Jeffery, Protecting Quebec Kids from Advertising: The Charter of Rights and the Supreme Court Make Canadian History, 2017:2, Food for Life Report at 22-23.

Even if the bill were still passed in its current form in a subsequent Parliament, its full implementation would be delayed several years, hampered by major loopholes, and vulnerable to legal challenge. A future Parliament would need to restart the legislative approval process. Then, a future cabinet would need to promulgate regulations to stipulate nutrition criteria for eligible advertisements, but an express exemption for sports team sponsorships and place/brand advertising (restaurants and mascots), and a foreseeably loophole for cross promotions (e.g., nutritionally vacuous diet drinks resembling sugary beverages) could greatly diminish the impact of the law in a marketing environment that is heavily dominated by soft drink and fast food restaurant ads on television. The law would likely be effective at preventing ads for candy and cheese, the nature of which products are less suited to the foreseeable loopholes. However, a proposed approach to front-of-pack nutrition labelling which would spare the vast majority of sugar cereals to carry a high-sugar warning, could become a lever for food companies to legal challenge in the courts stricter proposed nutrient limits for child-directed advertising.

9 The Quebec legislation is not proactively enforced, but complaints from the Quebec-based NGO Coalition Poids have led to effective enforcement actions against McDonald's, Coca-Cola, Burger King, Saputo, and General Mills, etc. See: <https://www.cqpp.qc.ca/en/our-priorities/food-marketing/marketing-to-kids/complaints-lodged/>

11 In 1981, the World Health Assembly adopted the International Code of Marketing of Breast-milk Substitutes, reinforced and clarified by subsequent resolutions of the World Health Assembly and subsequent resolutions of the World Health Assembly: WHA33.32 (1980), WHA34.22 (1981), WHA35.26 (1982), WHA37.30 (1984), WHA39.28 (1986), WHA41.11 (1988), WHA43.3 (1990), WHA45.34 (1992), WHA46.7 (1993), WHA47.5 (1994), WHA49.15 (1996), WHA54.2 (2001), WHA55.25 (2002), WHA58.32 (2005), WHA59.21 (2006), WHA61.20 (2008), and WHA63.23 (2010).

12 Committee on the Rights of the Child, United Nations Human Rights Council, Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012), CRC/C/CAN/CO/3-4, December 6, 2012. Online at <https://tinyurl.com/CRC-Canada2012>

62. The Committee recommends that the State party:

Establish a programme to promote and enable all mothers to successfully breastfeed exclusively for the first six months of the infant's life and sustain breastfeeding for two years or more as recommended by the Global Strategy for Infant and Young Child Feeding;

Strengthen the promotion of breastfeeding and enforce the International Code of Marketing of Breast-milk Substitutes, and undertake appropriate action to investigate and sanction violations...

13 UNICEF/World Health Organization, and the International Baby Food Action Network. Marketing of Breast-Milk Substitutes: National Implementation of the International Code Status Report 2018, (New York: UNICEF, 2018) Online at: <http://apps.who.int/iris/bitstream/handle/10665/272649/9789241565592-eng.pdf?ua=1> The others being: Australia, Israel, Japan, New Zealand, and the United States.

14 According to World Health Organization experts, every year, sub-optimal breastfeeding leads to the deaths of approximately 823,000 babies worldwide especially due to diarrhea and respiratory infections, and more than 20,000 mothers due to breast cancer. Cesar G Victora, Rajiv Bahl, Aluísio J D Barros, Giovanny V A França, Susan Horton, Julia Krusevec, Simon Murch, Mari Jeeva Sankar, Neff Walker, Nigel C Rollins, for The Lancet Breastfeeding Series Group*, Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect, The Lancet 2016; 387: 475–90.

15 Preparation instructions are often systemically misleading on steps to minimize this risk, e.g., by instructing parents to mix with water heated to only 37°C to preserve questionable probiotic benefits, rather than 70°C that the WHO recommends to kill bacteria such as salmonella and cronobacter. It is also possible that the long-term health risks of formula feeding and the ill-effects on the development of children's immune systems of formula-feeding have been under-estimated in Canada.

See World Health Organization guidance and Health Canada guidance on its website that also advocates heating water to 70°C. However, Health Canada and the Canadian Food Inspection Agency allow formula companies to undermine these precautions by recommending on labels that water be heated only to 37°C, warm tap water. The Canada Safety Council advises setting home water heaters to no more than 49°C to avoid scalding injuries that can occur at the factory default setting of 60°C.

16 This is in addition his appointment of Dr. Jean-Yves Duclos as Minister of Families, Children and Social Development (para. 8).

17 The sub-national government of New Brunswick has implemented a cabinet-level child rights impact assessment tool to vet new provincial regulatory and program decisions, but this covers only 2% of Canadian children in provincially regulated issues.

18 Federal and provincial governments do routinely conduct mandatory environmental impact assessments and the federal government has recently implemented a system of Gender-Based Analysis Plus (GBA+) for vetting

federal budget-making which it proposes to entrench in legislation following the upcoming federal election.

19 UNICEF. Building the Future: Children and the Sustainable Development Goals in Rich Countries. (UNICEF: New York, 2018) online at: https://www.unicef-irc.org/publications/pdf/RC14_eng.pdf