Ford *and* Irwin Toy *30 Years Later: A Conversation with Justice de Montigny*

Han-Ru Zhou*

Thirty years ago, in a tense national political context, the Supreme Court of Canada rendered judgment in three cases that have had a profound impact on Canadian society and constitutional law: *Ford* v. *Québec (A.G.)* and its related appeal, *Devine* v. *Québec (A.G.),* and *Irwin Toy Ltd.* v. *Québec (A.G.)* decided a few months apart[1]. Against the backdrop of language conflicts in Québec and constitutional reform at the national level, this Supreme Court trilogy established the foundations of freedom of expression and the application of the notwithstanding clause of the *Canadian Charter of Rights and Freedoms*, as well as the quasi-constitutional nature of Québec's *Charter of Human Rights and Freedoms*. Before the Supreme Court of Canada, the Government of Québec was represented by Yves de Montigny — now a Justice of the Federal Court of Appeal — as lead counsel. On the occasion of the trilogy's 30th anniversary, Justice de Montigny was invited to the Université de Montréal, Faculty of Law, to share with first-year students his reflections on the three Supreme Court decisions as well as his experience as a young lawyer at the forefront of the major constitutional debates of the time.

Han-Ru Zhou

Justice de Montigny, thank you for accepting the invitation to come and meet us and look back on your experience in these landmark cases in constitutional law.

Justice Yves de Montigny

Thank you for inviting me. It's rare that we have such a large audience, I must say, and it warms my heart to be here with you today. I can't believe that forty years ago — I mean forty! — I was sitting in your place with my fellow classmates, so thank you very much for the invitation.

HRZ

What do you remember from your first year at the Faculty?

YdM

The first memory that comes to mind is the meeting with the Dean. I don't know if it's still being done on the first day. I think it was Yves Ouellette who was the Dean at the time. He told us: "Look to your right, look to your left; at the end of the term there is one of the three that will no longer be here". It encouraged us to work, but I really have fond memories, especially of my constitutional law courses, because when I entered the Faculty, I had no idea what the law was. I had no one in my family near or far who was in law school. I had come to law school a little by default because what interested me at first was philosophy, but my parents told me: "You won't make a living with that"…

HRZ

Let us move forward by a few years, but not too much because the events that are of particular interest to us this afternoon will happen soon afterwards. If I am not mistaken, you are still in your early thirties, freshly admitted to the Bar, and one day the Government of Québec calls you to entrust you with its constitutional files to the Supreme Court of Canada. How did this happen?

YdM

Indeed, in 1986, I had been teaching at the Faculty of Law in Ottawa for four years. I didn't have tenure yet. There was a former professor here, Réal Forest, who had left the Faculty a year or two before to work at the Québec Department of Justice, in constitutional affairs, and, at his instigation, I received a call from the department asking me if I was interested in working in government for a year or two as a lawyer on leave without pay from the University. I was told: you will have the opportunity to work on a lot of constitutional issues. I was thrilled and I said yes right away. The irony is that one of my duties was to represent the Government of Québec and the Attorney General in constitutional matters before the Supreme Court, but I had never argued a single case in my life because I was convinced that advocacy, litigation, was not for me. Another lesson to keep in mind for you too: things that don't seem natural to you, sometimes are worth a try.

So I find myself almost for the first time in my life in court, and that's the Supreme Court. In fact, the department had the good idea to send me to Saint-Jérôme to plead a *Charter* case in Superior Court against Jean-Claude Hébert, a well-known criminal lawyer in Québec and that was my one and only experience in court before going to the Supreme Court. Many of the cases I have argued since then have been interventions because the Government of Québec often intervenes in constitutional cases and so I have been involved as an intervener. It must be said that in this regard, it is much easier because interventions before the Supreme Court are normally limited to 20 or 30 minutes, so it is a good way to get used to it. Also, the Supreme Court is probably the easiest place to plead, because there is no procedure and there is no evidence or very little. It's really a legal argument, so for someone like me who had no experience, it was much easier to plead in the Supreme Court than to plead in the first instance with witnesses and cross-examinations; I would have been completely lost. So I left the Faculty of Law in 1986 to work in Québec City for a year, where I probably did a dozen interventions. I started working on the *Irwin Toy* and *Ford* files during my year in Québec City, but I decided to come back to the Faculty because I didn't see myself leaving the Faculty at the time and so I returned there in the summer of 1987. The government had left it to me to plead the *Irwin Toy* and *Ford* cases because I had written the briefs. It was ironic because the Minister of Justice at the time was none other than Herbert Marx, my former professor at the Faculty of Law.

One thing I often mention: Herbert Marx was not the strongest supporter of Bill 101 [the *Charter of the French Language*] and he subsequently resigned when the government decided in 1988 to enact a new override provision to set aside the Supreme Court's decision in *Ford*, but I want to say this, and this is to Minister Marx's credit at the time: he was not involved at all in the drafting of the brief or in the pleading. He had given us *carte blanche* to plead all the arguments that we thought would establish the validity of Bill 101. He even took the time to call me in my room — I also remember that as if it were yesterday — at the Château Laurier in Ottawa, the Sunday evening before the auditions began, to wish me good luck for the upcoming week, and I am still very grateful to him.

HRZ

Now let us talk about the famous *Irwin Toy* and *Ford* cases. In the Québec Court of Appeal, if you remember correctly, the government loses in *Irwin Toy* and *Ford*. It "saves what can be saved" in *Devine* but only because the notwithstanding clause of section 52 of the Québec *Charter of Human Rights and Freedoms*[2] had not yet been amended to entrench the right to freedom of expression under section 3. Since then, the five-year period of effectiveness of the override provisions enacted by the National Assembly — this

maximum five-year period being imposed by subsection 33(3) of the Canadian *Charter* — has expired or is nearing its end and the three files are landing on your desk. It seems to me that things were not looking very good. What was your assessment of these files at that time?

YdM

You're absolutely right; it wasn't looking very good. The Court of Appeal decisions in these cases did not come out at the same time, but a strategic decision that had been made in the government was to try to plead all three at the same time before the Supreme Court because we thought the chances were better with *Irwin Toy* than with Bill 101 on freedom of expression, and because the concepts were the same at that level. We had therefore made the strategic choice to gather these files with the permission of the Supreme Court to plead them at the same time, telling us that it could ultimately help Bill 101 if we could win in *Irwin Toy* on freedom of expression.

HRZ

All this was brought before the Supreme Court in November 1987. Today, in a typical case before the Court, each party has one hour to make its oral argument. The interveners have five minutes. Now you've had a whole week! Can you describe to us this week in court?

YdM

I'd rather tell you that it was the most stressful week of my life. I was 33 years old with little experience and therefore a full week before the Supreme Court, which is very exceptional, it is perhaps the only time it has happened. I must tell you that the reason I found myself there was a little by default because, even if the government wanted me to handle the file because I had written the briefs, the other reason is that at the time, the Liberal government was very afraid to send a 33-year-old to defend the *Charter of the French Language*. They were obviously afraid of being told: "we know full well that you don't believe in the *Charter of the French Language*, you send a youngster… we see your strategy". In fact, the government had done everything possible to hire a more senior lawyer precisely to protect itself against such criticism, and I can tell you, without giving you names, that we were approaching very famous lawyers in Montréal at the time, who systematically refused because the Bill 101 file was considered a little toxic. At the time, we were either federalists or sovereignists; there were no in-betweens and people were very reluctant to get involved in defending Bill 101. Finally, it was a professor from the Université de Montréal, André Tremblay, who offered to help me, so we shared the task.

The first three days were about Bill 101, so *Devine* and *Ford*. It was quite impressive because all the interveners were against us, all the attorneys general of the provinces who intervened were against us, the federal government as an intervener was also against us. We really felt like we were in the lion's den with the whole world that was against us.

The other anecdote I would like to mention is that when we finished the pleading on Bill 101, I think it was Wednesday at noon — I remember because it was covered wall to wall by the media — I still see myself walking down the stairs outside the courtroom, it was lined with microphones and television cameras, and then a journalist asks André Tremblay who had the portion of the pleading on section 1 of the Canadian *Charter*: "What will happen if the Supreme Court finds you wrong?". Then I see André Tremblay saying: "In any case, if the Supreme Court finds us wrong, the government and people of Québec will draw their conclusions. "I was thinking, now I have to go back after this… they're going to kill me. I came into the room, they were nice, but I was very afraid.

HRZ

How did the exchanges with the justices go? On which topics were you most questioned?

YdM

I remember that, on the division of powers, we had not had many difficulties; neither on the discrimination aspect. The most interesting

debates were probably with the notwithstanding clause in section 33 of the Canadian *Charter*. We were a little concerned about that, but in any case, there was a part of Bill 101 that was no longer subject to the override (expired after five years in the absence of renewal). We thought that, even if we lose, it is of historical interest because the 1982 omnibus act[3] (which included an opt-out provision in all Québec laws) was adopted for strictly political purposes. There was little chance of a government using that strategy again, so with the omnibus legislation, it was a setback that we could accept. Where it got more problematic was on freedom of expression and particularly in the context of the *Charter of the French Language* because the arguments were twofold. This was the first case in the Supreme Court dealing with freedom of expression and in particular commercial speech. We argued that the commercial speech was excluded from the protection of the Canadian and Québec *Charters*, and that obviously if we lost on that, it made it quite difficult for us on the *Charter of the French Language* and for *Irwin Toy*. There was the whole debate about whether language choice was part of freedom of expression, and there was not much hope, I must say, given the Manitoba reference on language rights[4]. We thought it was hard to win. Where we had the most hope was on section 1 of the Canadian *Charter*, and we had exhaustive evidence of a sociolinguistic and demographic nature. This is called evidence of legislative facts, to show the context in which this law was adopted and the importance of legislating to preserve the French language, by requiring not only the use, but also the exclusivity, of French. That's where the hill was the steepest. We felt that there was a certain sympathy — and the Court wrote it in its judgment — in requiring that French be predominant in signage, but where we hit a wall was when we told them that it absolutely had to be exclusive. Now I admit that I didn't have much hope after the hearing.

HRZ

A year later, the judgments in *Ford/Devine* are announced; you lose 5-0. But when *Irwin Toy* comes out later, you will win by a close vote of 3-2. What is your reaction to the judgments?

YdM

It was already nice to win one of the three. *Irwin Toy* was released in April 1989 while the others were released in December 1988. We were obviously disappointed. It was a very tense time, politically. It must be understood that in June 1987 the Meech Lake Accord was concluded. This accord was a bit of a logical follow-up to the 1980 Québec referendum and the objective was to reintegrate Québec with honour and enthusiasm[5]. The Government of Québec said that it needed five conditions to sign the 1982 Constitution, among others: recognition of Québec's distinct character. It is in this context that Bill 101, *Irwin Toy*, *Ford* and *Devine* were argued. The Meech Lake Accord was signed in June 1987. We had pleaded in November 1987 and when the *Ford* and *Devine* judgments came out in December 1988, we were within the three-year deadline for ratification of the accord. It was to be ratified in June 1990 by all provinces and the federal government. The Bourassa government was on a tightrope because there was enormous pressure from both the premiers of the other provinces and the federal government for Mr. Bourassa not to enact an override provision to exempt the *Charter of the French Language* from the Supreme Court decision that had just told us: unilingual signage, forget it, it is against the Canadian and Québec *Charters*. So the only way to preserve unilingualism was to reintroduce an override. It was very divisive. Bourassa saw, I think, the danger for the survival of the Meech Lake Accord to enact an override provision, but the pressure was too great. He had the override passed[6]. History will judge, it's still a little early to come to a conclusion on that, but some think it was the last nail in the coffin. There was opposition across the country and the Meech Lake Accord never came into effect. What is interesting is that in 1993, following the expiry of the 1988 opt-out provision with respect to the *Charter of the French Language*, the Government of Québec decided not to renew it and instead legislated to provide for what the Supreme Court in *Ford* had found valid, namely the predominance of French in signage, and this is the system that currently prevails.

HRZ

An important detail to note in these three decisions is that two French-speaking Justices, L'Heureux-Dubé and La Forest, did not sit, and even four Justices did not sit in *Irwin Toy*. If the full Court had sat, would the face of constitutional law have changed?

YdM

This is always the case when the Court does not sit with nine justices — we can always ask ourselves the question. In the case of Justice Le Dain, he had fallen ill, he was present at the hearing, but he was not able to take part in drafting the reasons and Justice Estey also, it seems to me, had fallen ill. As for Justices La Forest and L'Heureux-Dubé, why they did not sit, I have no idea. It is possible that the situation would have been different, although Justice Beetz had dissented in *Irwin Toy*. He was with the rest of the Court in *Ford/Devine*, so would having another Justice from Québec (L'Heureux-Dubé) and a francophone Justice from the Maritimes (La Forest) have changed the result? I don't know. But what is interesting and what we often forget is that there was a little demagoguery on this judgment. We were disappointed, of course, but you will have noticed that the Court renders its decision on the basis not only of the Canadian *Charter* but also of the Québec *Charter*. The override provision that had been inserted by the Government of Québec was not in opposition to the rights guaranteed by the Canadian *Charter*; it was a political gesture. On one hand, the government did not want to be bound by the Canadian *Charter*, but it had no objection to the Québec *Charter* applying. On the other hand, when people in Québec said, "We know full well, the Supreme Court has put obstacles in our way again by using the Canadian *Charter*," that is not true. We would have lost even if there had not been a Canadian *Charter*. In fact, section 58 of the *Charter of the French Language* was not declared invalid under the Canadian *Charter* but under the equivalent provisions in the Québec *Charter*, section 3 on freedom of expression and section 10 on discrimination. So we can criticize the Supreme Court's decision; we can find that it was not sensitive enough to the reality of the French fact in Québec, but the fact remains that the Justices reached their conclusion based not only on the Canadian *Charter* but also on the Québec *Charter*. I think that's one thing to keep in mind.

HRZ

On these judgments, 30 years later, has your opinion changed?

YdM

I was satisfied with the decision in *Irwin Toy*, but in any event today, all that is obsolete because the regulation of television advertising does not have much impact and the provisions no longer exist, but still it was an important decision for the government of the day, and I think it was the right decision. As for the *Charter of the French Language*, at the time I was convinced that the Québec Government was right and that unilingual French signage was necessary to preserve Québec's linguistic landscape, but also because the situation of French was still and will always be vulnerable. At the time, we thought, and I think it was a fairly widespread feeling in Québec, that exclusivity was required, and therefore that predominance was not enough to preserve this linguistic landscape, particularly in Montréal. It is a mainly Montréal problem. We agree that outside Montréal, the question was more or less raised. Is this still the case today? With the predominance that is always ensured, personally it seems less dangerous to me. Once again, this is a debate that is a little obsolete given the opening of borders and that today we cannot control what enters the country, particularly through the Internet, or through cable or radio, so no matter how much we legislate to protect French within borders, the protection of French cannot be based solely on legislation.

HRZ

Time is running out, I still have a few more questions, but I think this sets the stage for our exchange period with the students.

A student

I have a question more in relation to the socio-political context of the time. Bill 101 was passed by the Parti Québécois, but it was the Liberal Party that had to defend it in court. Then you said, and I was a little surprised, that you were given *carte blanche* to defend and write the brief. Was that really the case? The Liberal government had no intention of interfering in your work? You were told, "Go ahead and see what happens"? Was there no particular will to get this or that point through?

YdM

Be careful, the government wanted to defend Bill 101, there is no doubt about that. The watchword, the strategy, was: we defend Bill 101. Of course, I was not alone in my office writing and then sending the brief to the Supreme Court. As with any file in government, we work together, and the authorities, the superiors were aware of it. What I'm telling you is that there was no political intervention in the drafting of the brief and in the choice of arguments that would be used to defend Bill 101. That I think is to the government's credit, because it was done on a strictly legal basis and it is all the more interesting because we knew that Minister Marx was not the most ardent defender of Bill 101, but he did not get involved at all and we never had a political order like: "No, you can't invoke that argument". When we were defending exclusivity, there was no order to say: "No, you can't go that far".

The same student

Precisely, in *Ford*, the Court pointed out that the importance of the exclusivity of French had not been addressed at all in the pleadings, when it could have helped your case.

YdM

We pleaded it, but as I told you, we hit a wall on it. There was not a Justice who accepted — we could see it by their questions, by their body language — when we told them that to preserve the French character of Québec, it was not enough to make French mandatory or even predominant, but we had to prevent the use of another language. Now we knew it wasn't working. In fact, that is where we lost, but we saw that it was a difficult battle to fight, we had no illusions about it, but we did and there is no one who can tell me that the government did not use all the legal means at its disposal to defend that position.

Earlier, Han-Ru, you asked me the question, if there had been nine Justices rather than seven or five, might it have been different, but maybe it would have been different too if we had pleaded these cases five years later. I'll explain why. American legislative interventions have been used as evidence, with varying degrees of success because they have not even been noted in the judgments. I seem to remember that at the time, Florida legislated to impose the use of English because Spanish was taking over. We said in court: imagine if English is threatened in the United States to such an extent that some states are starting to think about passing laws to protect English, perhaps you could think it is legitimate to do the same thing in Québec for French. At the time, it was quite marginal; there were perhaps one or two states that had legislated. I think there are many more today, so would it have been different if we had been able to prove that many states, especially in the southern United States, had legislated to protect English? Maybe.

A student

I was wondering if the Supreme Court misinterpreted the spirit of the Québec *Charter* by ruling that Bill 101 contravened it. Did they misjudge the purpose of the *Charter* or the purpose of the law to come to a conclusion like that?

YdM

Personally, I don't think so. How can the right to freedom of expression in the Québec *Charter* mean anything other than the right to freedom of expression in the Canadian *Charter*? I don't see how. The only distinction is at the level of the limiting provision. It is true that section 9.1 of the Québec *Charter*[7] is drafted differently than section 1 of the Canadian *Charter*. Moreover, the Supreme Court recognized this in its decision, but it was not enough for the government

to win its case and say that it was reasonable, regardless of the justification we were trying to use; it was not an argument that was accepted. In fact, I think that since that time, litigants who have contested a legislative provision have been using the Québec *Charter* as an ulterior motive. It is the Canadian *Charter* that is being argued and everyone takes it for granted that, despite the slightly different wording from one *Charter* to another, it is essentially the same guarantee that is being sought. I do not think it can be argued that the Supreme Court erred on this. I think the concepts, despite the difference in the wording, are essentially the same. Where it is different is in the protection of socio-economic rights in the Québec *Charter*, for which there is no equivalent in the Canadian *Charter*. For the rest, it is essentially the same for the protection of freedom of expression. For me, it is clear that when we talk about freedom of expression, there can be no different concepts.

Of course, if you are in the United States, the history of freedom of expression is not the same, and we were told that freedom of expression in Canada had traditionally been understood as political freedom of expression. That's what we called the implied bill of rights. Then came the 1960 *Canadian Bill of Rights.* Freedom of expression had always been understood as political freedom of expression and this was an argument that was widely promoted. There was a lot of emphasis on the fact that freedom of expression could not include such banal things as selling toilet paper on TV, for example, but the Court ruled against us on that. My opinion is that freedom of expression should not include concepts like these. The perverse effect I see is that we create an expectation by saying that all forms of expression are protected, but at the section 1 stage, we say that there are forms of expression that are less important despite everything, and we will therefore accept justifications more easily. We are doing a little bit like the United States, saying that we protect everything, but the "reasonableness" of justifications will be easier to establish in some cases than in others and therefore we create an expectation that is not always true in the end and I am not entirely comfortable with that. Like violent forms of expression that are not protected by the *Charter*, could we not have said the same thing about commercial expression? The debate was open at the time.

A student

You talked about the dissenting ministers and members of the Liberal Party in the context of the Meech Lake Accord. Within the government and the Liberal Party, had there been any discussion to delay the enactment of the override provision in Bill 101?

YdM

I can't really answer you. I was involved but really on the sidelines. I wasn't in politics. I was the government prosecutor. Once the decision came out, I didn't really have a role to play anymore. It was a strictly political decision. I was consulted on some possible legal scenarios. I guess that must have been part of the discussions. What is certain, however, is that after the failure of the Meech Lake Accord, there was a new attempt with the Charlottetown Accord in 1992, and Bill 101 was no longer in the picture, there was no longer an override provision, etc., and it did not produce any more results. If you want my personal opinion, it is because it suited the people who opposed the Meech Lake Accord, but would the accord have passed had it not been for Québec's use of the notwithstanding clause? I have my doubts; I think that was a useful excuse under the circumstances.

A student

Most of us were not born in 1983. What was the reaction of the people of Québec and Canada in general to the use of the notwithstanding clause for political purposes?

YdM

This is a debate that is still ongoing, we think that the notwithstanding clause should not be used, but we still commonly see that it is a possibility in some cases. There is a kind of opinion that has crystallized that the notwithstanding clause can never be used, but I think it is a safety valve in some cases. And if there had not been a notwithstanding clause in the Canadian *Charter*, it

would never have been adopted. You must never lose sight of that.

To answer your question, it is certain that in the rest of the country, it was very frowned upon, because once again we must understand that it was a Parti Québécois government that used the notwithstanding clause to protest against repatriation. In Québec, I remember that there were surveys that said that a significant majority of the population was in favour of the *Charter*, despite the fact that the repatriation had been done in a way that more or less met Québeckers' expectations. The *Charter* as such was relatively popular and therefore it was not a rejection of the values represented by the *Charter*; it was a political protest movement, so necessarily, if you were a sovereignist you agreed with this protest movement, if you were a federalist you were less so. It was in this perspective alone that the override provision and the omnibus bill were analyzed: it is a strictly political act. It would have been something else if we had tried to use the override to dismiss rights and freedoms ideologically. Moreover, in the case of the *Alliance des professeurs de Montréal*[8], which is cited in the *Ford* decision, the question arose. There it was the right to strike that was at issue; it was a teachers' union protesting against the measures taken by the school board and they were told that they could not use their freedom of association to assert their rights because the override provision applied, and I can tell you that they were not very happy with this provision. So when it came to substance, it was clearly less popular, but in itself to enact an override provision by political protest, the split was strictly sovereignist-federalist.

A student

Was it not dangerous to enact an override provision from the Canadian *Charter*?

YdM

Remember that the Québec *Charter* applied. It showed once again that the objective was not to override fundamental rights protections because, if that had been the objective, we would have put an override provision in both the Québec *Charter* and the Canadian *Charter*, but that is not what the government did. It was only under the Canadian *Charter* that the exemption applied. The Québec *Charter*, on the other hand, continued to apply.

A student

You talked about a charged political context at the time these decisions were made. As a lawyer, have you encountered any obstacles? Was it more difficult to work in that climate?

YdM

Now you're taking me into another chapter of my life, but I'm happy to talk about it. Just to put you in context, I worked for the Government of Québec in 1987, and I returned to law school because I didn't see myself doing anything else in my life, even though I had loved my experience at the Supreme Court. Then, I was involved in the time of Charlottetown as an advisor to the Québec government. In 1995, second referendum; I am still at the Faculty of Law and there — there are pivotal moments in life, and that is one — a few weeks after the referendum, I receive a phone call from one of my former students, whom I had not seen for many years, asking me if I would be interested in getting involved in the constitutional debate. I said yes because I had experienced it close up: when we were in the Outaouais, in Gatineau, where I lived, sovereignty would certainly have had a direct impact, we were on the border, literally speaking. I was interested but I had no political contact. He answers me: I know the leader of the Liberal Party of Québec; I will tell him that you are interested. One thing led to another, I found myself chairing the constitutional committee of the Liberal Party of Québec with Yves-Marie Morissette, who is a Justice of the Québec Court of Appeal, Marc-André Blanchard, who is now our ambassador to the UN, Michel Bélanger, former president of the National Bank, Claude Ryan, former minister in the Bourassa government, and Jean-Marc Fournier, who was a longtime minister in Québec City. We produced a report; I did it *pro bono*; I kept teaching at the Faculty, and that was it.

A few months later, I received a phone call from the Ministry of Intergovernmental Affairs in Ottawa to work with them on the follow-up to the 1995 referendum. I thought it was a great opportunity, that I would do this for a year or two and then I would go back to my university quarters. These were exciting years. I was a civil servant; I was not on the political side. I was there from the time the Supreme Court rendered its decision in the reference on the secession of Québec in the summer of 1998 until the adoption of the *Clarity Act*[9] in 2000, so for three years we worked on this legislation. I will not go into detail because it is confidential. At the time, there was the Minister of Intergovernmental Affairs, Stéphane Dion, who knew of this bill in its first drafts, the Prime Minister, the Deputy Minister and myself. During the first six months that this bill was discussed and developed, only the four of us knew about it. I can tell you that in some respects I had reservations and I expressed them. This period was the most difficult for me because I seriously asked myself the question: do I continue or do I go home and back to university? I would say that this is often the case for public servants, especially when you are at a higher level, where public servants are there to do what the elected government asks them to do but you do not necessarily agree for all kinds of reasons. Despite everything, I did my job. The justification I found was that I had the opportunity to be on the inside and therefore to be able to express my concerns, objections, etc. Which I couldn't have done from the outside.

It is no big secret to tell you: all great public servants at some point in their lives have this kind of dilemma. In particular, in sensitive ministries, it is clear that the positions that the government defends or wants to promote are not necessarily yours. It was during this period that I had the greatest dilemmas, but not when defending Bill 101 because when you are a lawyer in a case, you represent a client, you don't have to agree with your client. We defend the client who came to us with the best arguments we have.

HRZ

As part of the readings I assign to my students, we read, especially in respect of the Canadian *Charter*, many decisions from the 1980s and early 1990s, such as *Irwin Toy* and *Ford*, which are still precedent today. In your opinion, is there a quality in the Supreme Court's case law of that time that would perhaps be less present in subsequent case law?

YdM

I think one of the reasons why we remember the great judgments of that time more is that they were the first beginnings, the founding judgments, I would say, in many respects. On freedom of expression, *Irwin Toy* is certainly a major judgment, it was the first one where the right to freedom of expression was articulated in such a comprehensive way and therefore these judgments leave more traces than the following ones when we come to refine over the years the main principles already established. I think that's a good reason why these judgments continue to set a precedent today, whereas when you get to the fine-tuning or the detail, you remember them less. Were the judgments at that time more detailed? I would not comment on that. What is clear, and this strikes me, is that the Supreme Court issued 150 to 160 judgments per year. At the moment we are more around 60 to 70. Strangely enough, each Supreme Court Justice has four law clerks, whereas at the time they only had one, but there are all kinds of possible explanations. We see the same thing in our Federal Courts, at a lower level: there are fewer judgments as well, but the decisions are more complex than at the time, the cases are more complex and here I am not just talking about the *Charter*. At the time, of the 150 to 160 judgments rendered by the Supreme Court, there were several that were relatively simple, whereas today, even if there are only 60 to 70, there are not many whose outcome can be predicted without risk of error. This must be taken into consideration. At the time, there were many more decisions on the division of powers than there are today, and these were not easy decisions either. The only explanation I can conceive is that the decisions made at the time were fundamental to the *Charter*, which is no longer the case today.

HRZ

I see that time is running out; on these words I thank you for your questions. Mr Justice, Yves, we are really happy that you have agreed to share this moment with us…

YdM

What I will tell you in closing: don't be afraid to try things you think you're not necessarily made for. It took me twenty years to understand that. It's not to belittle my time at the University, as teaching was perhaps the best job I've ever had, but I was convinced that I couldn't do anything else but in that place. Then when I made the first jump to the Government of Québec and then to the federal government, I realized that, well, there were other things that interested me. If you had told me, at the age you are now, that one day I would find myself in the Federal Court doing intellectual property, aboriginal law, electoral law, and taxation, I would have said: never! And I find a lot of pleasure there. Once again, my only message: feel free to step outside your comfort zone, life is long, your career will be successful, take every opportunity available to you. The worst thing that can happen is that you don't like it; you will do other things. I'll leave you with this. Good luck and a long career!

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The editors wish to thank Martin Gotthelf for his translation of the original French interview.

Endnotes

* Associate Professor, Faculty of Law, Université de Montréal.

1 See *Ford v Québec (AG)*, [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*]; *Devine v Québec (AG)*, [1988] 2 SCR 790, 55 DLR (4th) 641 [*Devine*]; *Irwin Toy Ltd v Québec (AG)*, [1989] 1 RCS 927, 58 DLR (4th) 577 [*Irwin Toy*].

2 Section 52 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 [Québec *Charter*], reads as follows: "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter." Until 1982, the previous version of this provision only referred to ss. 9 to 38.

3 *An Act respecting the Constitution Act, 1982*, CQLR c L-4.2.

4 *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

5 In a noted speech in Sept-Îles during the 1984 federal election campaign, Brian Mulroney promised to ensure that Québec would adhere to the Canadian *Constitution* "*dans l'honneur et l'enthousiasme*".

6 See *An Act to amend the Charter of the French Language*, SQ 1988, c 54, ss 1, 6.

7 Québec *Charter*, *supra* note 2, s 9.1: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

8 *Alliance des professeurs de Montréal v Québec (AG)*, [1985] CA 376 (CA), 21 DLR (4th) 354.

9 *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26.