



This feature profiles a famous Canadian case from the past that holds considerable public and human interest and explains what became of the parties and why it matters today.

# Whatever Happened To . . . The Irwin Toy Company

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**T**his is the story of how Canada's oldest toy company famously challenged advertising restrictions in the courts shortly even before the arrival of the *Charter of Rights and Freedoms*. Ultimately, in a *Charter* case, several new and enduring legal principles on corporate expression rights emerged, and Saturday morning children's television ads were changed forever in Quebec. But this well-known Canadian independent, family-owned toy distributor and manufacturer would not itself survive.

## Corporate History

Irwin Toy began in 1926 as an importer and distributor of dry goods and clothing – effectively a wholesale souvenir shop – operating out of Samuel and Beatrice Irwin's home. The business eventually moved to a warehouse in the west end of Toronto. When Samuel's two sons, Arnold and Mac, took over, they added wholesale toy sales. By the 1950s, Irwin Toy sold many traditional toys and sporting goods. The business was incorporated in 1954, and remained a completely family-owned business until 1969, when it went public.

Irwin's profits were mostly generated from licensing and distributing other companies' toys, which meant Irwin was the distributor of most of the popular toys in Canada until the 1990s. American toy companies like Kenner and Parker had wanted their toys sold in Canada, but the size of the size of the market and tariffs could not justify setting up their own plants or sales offices here.

The company expanded quickly through the 1970s and early 1980s, reaching annual gross revenues of C\$120 million by 1983. Irwin Toy was responsible for Canadian distribution of many well-known toys, including the Hula Hoop, the Atari Video computer, Care Bears, Slinky, Easy Bake Ovens, Frisbee, Sega video games, and Star Wars action figures. Throughout this period of growth and success, the Irwin family retained a majority stake in the company, as share ownership was passed down through three generations. Some 350 employees worked at their downtown Toronto factory.

Irwin Toy Limited was known for its “junior shareholders”, since many parents bought shares of the company for their children. As a result, some shareholder meetings had a large contingent of children in attendance.

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### Quebec's Consumer Protection Act

The Quebec legislature considered children's TV as a particularly dangerous thing because children cannot resist the persuasive forces of television advertizing. The concern addressed by the legislation was really the pressure the children might exert against their parents to buy advertized toys.

Section 248 of the Act read, “no person may make use of commercial advertising directed at persons under thirteen years of age.” That prohibition was focused on television ads. Irwin Toy saw this as a threat to its toy business which sold many toys to children in Quebec. It could still advertize children's toys to older siblings and parents but this was not nearly as successful.

### Irwin Toy Goes to Court

In late 1980 Irwin Toy advertized toys to children under 13 and was charged with 188 violations of the Act. Irwin claimed that the province cannot regulate broadcasting in this way because broadcasting was exclusively federal jurisdiction. If it could do so, Irwin argued in the alternative, this advertizing ban violated their rights to corporate expression under the *Quebec Charter of Human Rights and Freedoms*. Irwin lost at the first instance but in 1982 the *Canadian Charter of Rights* was enacted and Irwin incorporated this new constitutional rights document into its case at the Supreme Court of Canada almost a decade after the charges were laid.

In 1989, Irwin Toy's case was one of the first *Charter* freedom of expression cases to be heard by the Supreme Court of Canada. By only a three to two majority, the judges in the end upheld the Quebec legislation and found Irwin Toy subject to the advertizing restrictions.

The legislation was found to be of general application in relation to consumer protection and not a “colourable” attempt to legislate broadcasting, which is under the purview of the federal government. The Act applies to advertizers, not to broadcasters.

The Government of Quebec had indicated that this legislation was to override the *Canadian Charter of Rights*, but that override had lapsed in June 1987. Accordingly, the *Charter* applied to protect Irwin when the case was heard in 1989.

The Supreme Court of Canada developed an analytical framework for freedom of expression cases.

- First, the court determines if the activity comes within the expression protected by the *Charter*. Expression pursuing truth, participation in the community, individual self-fulfillment and human flourishing are protected. Expression which does not convey meaning or content, or only a violent meaning or expression, is not protected.
- Second, the court determines whether the government action (i.e. this legislation) restricted Irwin's freedom of expression. The Quebec government's purpose in enacting section 248 of the *Consumer Protection Act* was to prohibit content of expression in the name of protecting children.

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The question then turned to whether children under 13 could make choices and distinctions about products advertised. If not, is the restrictive legislation justified?

The Court said children are not as equipped as adults to evaluate the persuasive force of advertising and it can easily manipulate them. It is a legitimate pressing and substantial public policy concern to protect all children in this age group. This advertising ban rationally connects to protecting children and amounted to a minimal impairment of Irwin Toy's free expression rights. The two dissenting judges disagreed on this point only. They thought insufficient risk to children was shown to exist from this advertising and a total television advertising prohibition over an arbitrary age range made no attempt to achieve proportionality.

Irwin had also argued for a remedy under section 7 of the *Charter*. The Court dismissed this ground by concluding that only individuals, and not corporations, can assert section 7 rights. The opening word "everyone," read in light of the rest of the section, excludes corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and includes only human beings.

Irwin Toy was bound by the Quebec legislation *not* to advertise to children under 13 years of age.

### What Happened to Irwin Toy?

The Supreme Court of Canada decision and the validity of the Quebec legislation would themselves have little impact on sales. The changing realities of the industry and trade proved the biggest challenge to Irwin.

Beginning in the mid-1980s, with the decline of Atari and the loss of U.S. toy company distributorships, Irwin's revenues took a serious hit. Major toy companies like Hasbro and Mattel bought up smaller companies that had licensed to Irwin. The *Free Trade Agreement*, and later *NAFTA*, made it easier for American companies to do business directly in Canada. Irwin regained most of its ground with more in-house product development and a new contract with Sega Japan.

The business struggled financially as it rounded the millennium. It was sold in 2001 to a private investment group in Toronto for approximately \$55 million. Eighteen months later, the new Irwin Toy owners declared bankruptcy and liquidated after 76 years of operations. The original factory was converted to loft condominiums.

In 2003, the Irwin Toy name, patents and some products were re-purchased by George and Peter Irwin and continued as Itoys Inc. That company appears to have changed to an Ontario numbered company which filed bankruptcy papers in late 2010.

Thus, a Canadian corporate pioneer has come full circle, interrupted by a famous judicial decision that continues to live on.

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