

Date: 20010323

Docket: T-2170-98
Neutral Citation: 2001 FCT 239

BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES

Applicant

- and -

**HER MAJESTY THE QUEEN
(DEPARTMENT OF JUSTICE OF CANADA)**

Respondents

- and -

**ASSOCIATION DES JURISTES
D'EXPRESSION FRANÇAISE DE L'ONTARIO**

Intervener

ORDER AND REASONS FOR ORDER

BLAIS J.

1] This is a remedy application by the Commissioner of Official Languages (the "Commissioner") under para. 78(1)a) of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31 (the "OLA") against the respondents on the ground that they have failed to comply with their duties and commitments in respect of language, as set out in Parts IV and VII of the OLA, in applying the *Contraventions Act*, S.C. 1992, c. 47 (the "CA") and the *Application of Provincial Laws Regulations* thereunder, SOR/96-312.

FACTS

2] On February 19, 1997, the *Association des juristes d'expression française de l'Ontario* ("AJEFO") filed a complaint with the Commissioner of Official Languages expressing concerns regarding the enactment and administration of the CA and the regulations thereunder.

3] AJEFO's concerns stemmed from the omission of the federal government to confirm in the *Act to amend the Contraventions Act and to make consequential amendments to other Acts*, S.C. 1996, c. 7, the maintenance of languages rights guaranteed in federal laws. More specifically, AJEFO's concerns stemmed from Bill 108 (*Streamlining of Administration of Provincial Offences Act, 1997*), the first reading of which was held in the Ontario Legislative Assembly on January 20, 1997.

4] Bill 108 (which was adopted on June 11, 1998, now *Streamlining of Administration of Provincial Offences Act, 1998*, S.O. 1998, c. 4 (hereinafter *Streamlining of Administration of Provincial Offences Act, 1998*)), provided for agreements authorising a municipality to perform courts administration and court support functions, including the functions of the clerk of the court, notably for application of the CA, but did not provide for the maintenance of existing language rights in Ontario at the municipal level.

5] After conducting the investigation provided for by the OLA, and specifically Part IX thereof, the Commissioner prepared a report which was filed on November 27, 1997. The Commissioner made five recommendations to Justice Canada:

1. That the Department of Justice undertake thorough consultations with the official language minority and jurists concerned in each province and territory before entering into an agreement with provincial or territorial governments pursuant to the CA;
 2. That the Department of Justice taken the necessary measures as soon as possible to ensure that the prosecution of federal contraventions by provincial authorities or any third party respects as a minimum the language rights guaranteed by the *Criminal Code* and Part IV of the OLA where applicable;
 3. That the Department of Justice ensure that both present and future agreements (i.e. with other provinces or territories) made under the CA include provisions whereby the related court administration and support functions respect the language rights of the accused and that court staff receive appropriate training in this regard;
 4. That the Department of Justice ensure that any agreement in which it enters pursuant to the CA include a provision whereby any subdelegation would require its approval and contain a comprehensive linguistic clause;
 5. That, in the context of the implementation of the CA, the Department of Justice establish accountability, control and recourse mechanisms to ensure the complete respect of the language rights flowing from the *Criminal Code*.
- 6] On December 3, 1997, AJEFO filed a second complaint against Justice Canada in relation to the CA and an agreement signed by the Department of Justice and the City of Mississauga on June 9, 1997. The Commissioner was continuing her investigation into that complaint as of the date for completing the evidence in this application.
- 7] The Deputy Minister of Justice, George Thomson, responded to the Commissioner's report on January 28, 1998, setting out the measures that his Department and the provinces were prepared to consider; these included:
- That the provinces had indicated that they were receptive to the idea of including provisions relating to respect for the spirit of the language provisions of the *Criminal Code* in agreements;

- That two clauses relating to ensuring respect for the language rights principles set out in the *Criminal Code*, developed by the Department, would be incorporated in agreements with the provinces, territories and municipalities, as the case may be;
- That the Department would consult with the minority groups concerned.

8] On February 12, 1998, Mr. Gagnon, the director of the “Contraventions Project” at the Department of Justice, stated that the Department would terminate all negotiations regarding agreements under the CA in the event that a province or territory refused to incorporate a clause in the agreement to ensure respect for language rights.

9] The Department negotiated the addition of a language clause when the agreement with the City of Mississauga was renewed on June 17, 1998. The City of Mississauga has since established mechanisms to ensure that services are provided in French in relation to parking tickets.

10] The Commissioner initiated a follow-up investigation under the provisions of the OLA, and specifically Part IX. In her report, which was submitted to the Deputy Minister of Justice, Morris Rosenberg, the Commissioner stated that the department had not followed the recommendations made in the report dated November 27, 1997, and pointed out that the complainant was entitled to bring a remedy application under the provisions of Part X of the OLA.

11] Throughout those proceedings, the Commissioner was in contact with and obtained information and documentation from both AJEFO and Justice Canada, and organized meetings with representatives of Justice Canada. Along with filing its

complaints with the Commissioner, AJEFO also made other overtures to Justice Canada and the Government of Ontario.

12] The Department of Justice went ahead with the CA without following the majority of the Commissioner's recommendations made in her report dated November 27, 1997. AJEFO then asked the Commissioner to bring this application under the OLA, which the Commissioner did on November 20, 1996.

CHRONOLOGY OF THE CA

13] In 1992, Parliament enacted the CA, the purpose of which is to provide a simplified procedure for the prosecution of violations of federal statutes and regulations. The Act is flexible and allows a person who receives a ticket to pay a fine without having to appear in court. The Act allows an offender to avoid the stigma normally associated with a conviction for a federal offence, which include being denied a passport and having a criminal record.

14] The Act was amended in 1996 to adapt it to the criminal justice system in each province and territory. Those amendments allowed the Government of Canada to make regulations enabling a province or territory to issue tickets and prosecute infractions under federal statutes and regulations under their own procedures.

15] Section 65.1 allows the provincial or territorial language rights scheme to be substituted for the language rights scheme provided in the *Criminal Code* with respect to infractions under federal statutes.

16] In 1996, the Minister of Justice made the *Application of Provincial Laws Regulations* under section 65.1 of the CA, giving certain provinces, and specifically Ontario, responsibility for prosecuting non-criminal federal infractions. Those regulations made the provincial laws of Ontario applicable, and specifically the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in administering tickets issued in Ontario under the CA.

17] Section 65.2 of the CA authorizes the Minister of Justice to enter into general agreements with a province, or specific provincial, municipal or local agreements, to specify the manner in which contraventions will be handled, and specifically in respect of the prosecution of contraventions and the discharge and enforcement of fines.

18] Following the amendment to the CA, a draft general agreement with Ontario was prepared in which the federal government empowered the province of Ontario to carry out the prosecution of a large number of non-criminal federal infractions, and to handle the related administrative duties. The parties thought it preferable to test the procedures before signing the agreement.

19] Under section 65.2 of the CA, Justice Canada entered into and signed two agreements: one with the City of Mississauga on June 9, 1997 (which was renewed on June 17, 1998, for one year) and one with the City of Ottawa on September 2, 1997.

APPLICANT'S ARGUMENT

20] The applicant contends that the provisions of the Charter apply to the Government of Canada, and specifically to the Minister of Justice and Attorney General of Canada, and their Department. She points out that the OLA applies to the Department of Justice under section 3 of the OLA.

21] She submits that by providing that the language rights set out in sections 530 and 530.1 of the *Criminal Code* no longer apply to federal contraventions where there is an agreement with a province or territory, the respondents have diminished or abrogated the language rights enjoyed by the Canadian public in dealing with a federal institution in a matter within the jurisdiction of Parliament. The measures set out in the body of the CA violate the letter and spirit of the Charter (sections 16 to 22) and of the OLA (Parts IV and VII).

22] The applicant contends that the defendant has a duty to amend the measures set out in the provisions of the CA, in the regulations thereunder and in the other agreements signed pursuant to that Act, in order to restore a language rights scheme that is at least similar to the one that applied before section 30 of the CA was made inapplicable to federal contraventions.

23] The applicant points out that section 25 of the OLA provides that institutions that are subject to the provisions of Part IV of the OLA have a duty to ensure, where services are provided by another person on their behalf, that those other persons offer services and are able to communicate with the public in either official language. The applicant contends that the Government of Ontario and Ontario municipalities are acting on behalf of the Government of Canada within the meaning of section 25 of the OLA when they prosecute and process federal offences under the CA.

Consequently, under section 25 of the OLA, they must comply with the provisions of Part IV of the OLA with respect to services, communications and active offer (relations between the prosecutor and the public). However, it is true that this duty, under Part IV of the OLA, encompasses only communications and services peripheral to the trial, that is, the administrative, non-judicial aspects of prosecutions.

24] The applicant notes that it is plain from section 65.3 of the CA that the federal government retains jurisdiction over prosecutions conducted by a province or municipality, and that those prosecutions are ultimately under its authority, since it may enter into agreements providing for the sharing of fines and fees collected in order to compensate the province or authority for administering the CA. This is therefore a service provided by the provinces or municipalities on behalf of the federal government. That interpretation is supported by clause 4 of the “Draft Agreement” between Justice Canada and the Government of Ontario, which provides: “Ontario shall at its expense provide the following services on behalf of Canada”. In fact, the Hon. Anne McLellan stated in her letter of August 20, 1997 to AJEFO that section 65.3 of the CA provides for payment of compensation to the provinces for services that they provide on behalf of the federal government.

25] The applicant asserts that the Ontario authorities that have entered into an agreement under the CA should ordinarily be subject to provisions that are comparable to those of Part XVII of the *Criminal Code*.

26] The applicant contends that the respondents have, either directly or through the intermediary of another person acting on their behalf under section 25 of the OLA (and specifically when the Attorney General of Ontario or the municipalities

prosecute offences under federal statutes in the place and stead of the Attorney General of Canada), violated their duties in respect of language under Part IV of the OLA in applying the CA, as amended, and the regulations thereunder, specifically the *Application of Provincial Laws Regulations*.

27] The applicant notes that the respondents have provided no language guarantee in the CA or the regulations thereunder, or in the “Draft General Agreement” with the Government of Ontario, the specific agreements entered into with the City of Mississauga or the specific agreement entered into with the City of Ottawa, and that they failed to do so despite the recommendations made to that effect in the Commissioner’s draft investigation report in August 1997 and reiterated in her final investigation report in November 1997.

28] The applicant submits that the respondents could not merely rely on, and trust to, the legislation that applies to French language services in Ontario, which is limited to areas of the province that are designated bilingual and does not apply to municipalities, to remedy the omissions in the CA and in those agreements and to ensure that the public was able to obtain communications and services in both official languages from court clerks’ offices and prosecutors’ offices with respect to prosecutions.

29] The applicant submits that the respondents have failed to comply with their commitments and duties in respect of language as set out in Part VII of the OLA, in that they have not provided for language rights similar to those guaranteed by Part XVII of the *Criminal Code* to be maintained, and they failed to consult the minority group and to consider the impact of these measures on the official language minority.

30] The applicant notes that the respondents have provided no language guarantee relating to the actual judicial aspects of prosecutions in the “Draft General Agreement” with the Government of Ontario, and so it is the provincial legislation in this regard that must be applied. Although the *Courts of Justice Act* does provide for language rights that are more or less equivalent to those provided in the *Criminal Code*, that Act is not applicable in all cases in municipalities, and the Government of Ontario chose, in Bill 108, to empower municipal authorities precisely to institute this kind of prosecution.

31] Moreover, there is no language guarantee provided in the *Streamlining of Administration of Provincial Offences Act, 1998* for situations involving contraventions under that Act and future agreements between the Attorney General of Ontario and the municipalities in question.

32] The applicant points out that the clause added to the agreement with the Cities of Mississauga and Ottawa is inadequate because it refers only to the language of counsel for the prosecution and not to all the language rights that are needed by an accused, such as those set out in the *Criminal Code*.

33] The applicant submits that the province’s undertaking to take measures to respect the spirit of the language principles set out in the *Criminal Code* is inadequate, first, because it refers only to the spirit of the principles in the *Criminal Code* and not to the letter of the Code, and second, because it does not provide that type of clause in the event that powers are delegated to the municipalities.

34] The Commissioner submits that the solution lies not in language clauses negotiated on a case by case basis in individual agreements, but rather is achieved by adding a provision to the CA itself the aim of which is to set out the language rights that are applicable and to ensure that they are respected throughout Canada, in any agreement entered into by the Department with a province, territory or municipality under the CA.

35] The Commissioner asserts that the conduct of the respondents, whether by act or by omission, infringes the provisions of the OLA and of the Charter, and specifically the principle that the two official languages have equality of status and equal rights and privileges as to their use. She submits that the CA creates an asymmetry in language rights, which vary by province or territory that undermines the equality of status and use of the two official languages and that did not exist when Part XVII of the *Criminal Code* applied to federal contraventions.

36] The Commissioner is asking the Court for:

- (a) a declaration that the respondents:
 - (i) have not complied with their duties under Part IV;
 - (ii) have not complied with their duties under Part VII;
- (b) a declaration that Part IV of the OLA prevails over the CA and the regulations thereunder;
- (c) a declaration that the respondents, by the measures taken in enacting and applying the CA, are, either directly or indirectly through third parties acting on their behalf, violating the statutory language rights in the OLA and the constitutional language rights in the *Canadian Charter of Rights and Freedoms* (the "Charter") with respect to the status and use of the two official languages;
- (d) an order compelling the respondents, within such time as the Court shall determine:
 - (i) to take all necessary legislative, regulatory or other measures to ensure that the quasi-constitutional language rights of persons who are prosecuted for contraventions of federal statutes or regulations are respected by the third parties to which the federal government has

delegated, by regulation or contract, the responsibility for administering the prosecution of federal contraventions on their behalf;

- (ii) to ensure, in relation to present and future agreements negotiated pursuant to the OLA:
 - (A) that the language rights that are applicable under the Criminal Code and Part IV of the OLA are respected;
 - (B) that there is a mechanism for consultation with official language minority groups;
 - (C) that there is recourse to the Commissioner of Official Languages in the event of a violation of language rights;
- (e) Costs.

AJEFO'S ARGUMENTS

37] AJEFO argues that in this case the Court should interpret the duties that are incumbent on the respondents, both under the OLA and under the Charter, in such a way as to give full application to the spirit of the OLA and of sections 16 to 22 of the Charter, which is to advance the equality of status and use of the two official languages within Canadian society.

38] AJEFO maintains that in circumstances where the provisions of the CA eliminate language guarantees and therefore erode the rights that have been acquired by the minority French-speaking community outside Quebec, it cannot be said that this Act complies with the concept of advancement and progress set out in section 16 of the Charter.

39] AJEFO points out that the *Streamlining of Administration of Provincial Offences Act, 1998* does not provide language guarantees for the Franco-Ontarian community. In addition, the *Courts of Justice Act*, which contains language rights similar to the rights provided in the *Criminal Code*, does not apply to municipalities.

40] AJEFO maintains that the respondents' proposal to include an undertaking by the province, in agreements under the CA, that it will take measures to respect the spirit of the language guarantees provided in the *Criminal Code* and to ensure that any future agreement with a province, territory or municipality contains a clause of that nature is not consistent with the manner in which the Supreme Court has interpreted section 16 of the Charter.

41] AJEFO is of the opinion that in circumstances where the language guarantees are not part of the agreements, the respondents are in violation of section 20 of the Charter.

42] AJEFO contends that in the CA, the respondents have violated sections 16 and 20 of the Charter, by causing a loss of existing language rights. This violation of the Charter gives rise to a remedy or, in the alternative, makes the incompatible legislation inoperative. AJEFO contends that the remedies sought by the applicant and by AJEFO in this action are appropriate remedies in the circumstances.

RESPONDENTS' ARGUMENTS

43] The respondents contend that the Commissioner and AJEFO do not have the necessary standing to argue that the provisions of the Charter or of Part VII of the OLA have been violated. In addition, in this application, this Court does not have the requisite jurisdiction to entertain any allegation that the provisions of the Charter or of Part VII of the OLA have been violated, or to award any remedy whatsoever for such violations.

44] Neither paragraph 78(1)(a) of the OLA, under which the Commissioner brought this action, nor subsection 78(2), under which AJEFO appeared as a party, gives the Commissioner or a complainant sufficient standing to apply for the remedy for which Part X of the OLA provides.

45] The respondents point out that this remedy is provided for, and is delineated precisely, in section 77 of the OLA. It may only be sought in respect of the duties and rights provided in sections 4 to 7 and 10 to 13, Parts IV and V, and section 91 of the OLA.

46] In addition, the respondents submit that it is not within the jurisdiction conferred on this Court by Part X of the OLA to entertain any allegation that the provisions of the Charter or of the OLA have been violated or to award any remedy whatsoever in respect of any such violation.

47] The respondents submit that the issue in this case is limited to whether the allegations made by the Commissioner and AJEFO, that the provisions of Part IV of the OLA have been violated by the respondents, are correct.

48] In the alternative, the respondents submit that no language provision of the Charter has been violated by implementing the scheme provided by the CA in Ontario.

49] The respondents argue that in this instance, the issue is the status, rights and privileges afforded to the French language in the courts established by the province of Ontario and in provincial and municipal administrative authorities in Ontario. Those

institutions are neither institutions of Parliament nor institutions of the Government of Canada. Subsection 16(1) of the Charter therefore does not apply.

50] The respondents point out that the language situation in Canada varies tremendously from one region to another. If some asymmetry were not allowed, federal authorities would be unable to implement supplementary language measures in regions where there is sufficient potential and more urgent needs, because of the difficulty of implementing such measures in regions where the minority official language population is less concentrated.

51] The respondents suggest that subsection 16(3) of the Charter cannot operate to confer constitutional protection on Part XVII of the *Criminal Code* and prevent Parliament from amending the substance of that Part or the manner in which it is applied.

52] With respect to section 20 of the Charter, which is essentially implemented by Part IV of the OLA, the same reasons also apply here: the duties set out in that Part have not been violated.

53] With respect to Part VII of the OLA, the respondents maintain that the applicant and AJEFO do not have the necessary standing, as discussed *supra*. In the alternative, the respondents submit that they have not violated Part VII of the OLA.

54] The respondents maintain that Part VII does not apply to Parliament. A consistent distinction has been made between Parliament and the federal

government, or Government of Canada, in the OLA. When it was intended that a provision of the OLA apply to the institutions of Parliament and the institutions of the government, the concept of “federal institution”, as defined in subsection 3(1) of the OLA to refer to the institutions of the Parliament and Government of Canada, has been consistently used. The words “federal government”, which are used in section 41 of the OLA to delineate the scope of the commitment set out in Part VII, must be regarded as having been carefully chosen, and the effect of those words is to exclude Parliament from the scope of Part VII of the OLA.

55] The respondents contend that nowhere in Part VII of the OLA is there any duty imposed on the federal government to always take those measures that most enhance the vitality and support the development of minority communities or best advance both official languages, or any duty to systematically hold public consultations. That commitment is essentially political in nature.

56] The respondents argue that they considered all factors that they deemed to be relevant, including the commitment set out in Part VII. They decided to negotiate the incorporation of language clauses in the agreements to be entered into with other governments in order to coordinate federal, provincial and municipal services in both official languages in the realm of federal contraventions, in the spirit of section 45 of the OLA.

57] The respondents point out that since the issue is the exercise of discretion, this Court should refrain from reviewing the advisability of making the regulations in question or of entering into an agreement, or from reviewing the content of the agreement.

58] The respondents contend that there has been no violation of section 25 of the OLA because neither the Ontario Courts, the Attorney General of Ontario or his representatives, nor the City of Mississauga or the City of Ottawa or their representatives, are acting on behalf of the respondents.

59] The respondents submit that a mere contractual relationship, delegation of authority, administrative arrangement or agreement, or formal agreement between a federal institution and another party is not in itself a sufficient basis for concluding that the other party is acting on behalf of the federal institution.

60] In addition, the respondents argue that the provincial courts take their powers directly from the provincial enabling statute, and that there has been no agreement between those courts and the respondents, particularly in that the respondents have neither any duty nor any power under the CA to enter into such agreements with the provincial courts.

61] With respect to municipal governments, the respondents point to the fact that when those governments issue tickets, and handle the processing and prosecution of those tickets, they are exercising their jurisdiction under the Act on their own behalf.

62] In the alternative, the incorporation of language clauses in the agreements entered into with municipalities, and ultimately with other governments, is sufficient to establish compliance with section 25 of the OLA.

63] Lastly, the respondents submit that some of the remedies sought are inappropriate. For example, a court may not order the government to establish programs, or compel the government to adopt certain policies.

ISSUES

- 64]
1. Do the Commissioner of Official Languages and AJEFO have the necessary standing, and does this Court have sufficient jurisdiction, to allow for arguments based solely on the Charter and Part VII of the OLA to be made in this application?
 2. What are the duties of the respondents in relation to sections 16 to 22 of the Charter?
 3. Are the municipalities and the province of Ontario acting on behalf of the Attorney General of Canada within the meaning of section 25 of the OLA when they prosecute under the CA?
 4. Have the respondents, the Attorney General of Ontario and the municipalities complied with the duties set out in Part IV of the OLA and the rights guaranteed in sections 16 to 20 of the Charter in enacting and applying the CA and in making and applying the regulations thereunder?
 5. Have the respondents complied with the duties set out in Part VII of the OLA in enacting and applying the CA and making and applying the regulations thereunder?
 6. Are the remedies sought by the Commissioner appropriate?

ANALYSIS

65] This proceeding arises out of the enactment of section 65.1 of the CA.

65.1 (1) The Governor in Council may, for the purposes of this Act, make regulations making applicable, in respect of any contravention or any contravention of a prescribed class of contraventions, alleged to have been committed in or otherwise within the territorial jurisdiction of the courts of a province, laws of the province, as amended from time to time, relating to proceedings in respect of offences that are

65.1 (1) Pour l'application de la présente loi, le gouverneur en conseil peut, par règlement, prévoir que les lois d'une province — avec leurs modifications successives — en matière de poursuite des infractions provinciales s'appliquent, avec les adaptations nécessaires, aux contraventions ou aux contraventions d'une catégorie réglementaire qui auraient été commises sur le territoire, ou dans le ressort

created by a law of the province, with such modifications as the circumstances require, and, without limiting the generality of the foregoing, the Governor in Council may make regulations

- (a) adapting any provision or any part of a provision of those laws;
- (b) deeming any of the notices or other documents issued or entered into under those laws to be a ticket for the purposes of this Act or any of its provisions;
- (c) prescribing, for the purposes of subsection 65.3(2), categories of fees; and
- (d) providing for any other matter in respect of the application of those laws.

des tribunaux, de la province; il peut notamment, par règlementn :
a) adapter tout ou partie d'une disposition de ces lois;
b) assimiler les avis ou autres documents délivrés ou établis sous le régime de ces lois à un procès-verbal prévu par la présente loi ou une de ses dispositions;
c) établir, pour l'application du paragraphe 65.3(2), des catégories de frais;
d) prendre toute autre mesure d'application de ces lois.

66] The *Application of Provincial Laws Regulations*, made under section 65.1 of the CA, provide:

1. The laws of a province referred to in the schedule apply, as amended from time to time, to the prosecution of contraventions designated under the *Contraventions Regulations*, to the extent and with the adaptations indicated in the schedule.

1. Les lois provinciales visées à l'annexe, avec leurs modifications successives, s'appliquent de la manière qui y est indiquée à la poursuite des contraventions prévues au *Règlement sur les contraventions*.

67] Schedule 1 to the Regulations contains the provisions relating to the province of Ontario:

1. (1) Subject to subsections (2) and (3), the following enactments apply in respect of contraventions alleged to have been committed, on or after August 1, 1996, in Ontario or within the territorial jurisdiction of the courts of Ontario, namely,

- (a) the *Provincial Offences Act* of Ontario, R.S.O. 1990, c. P.33, any regulations made under that Act and any Act of that province referred to in that Act relating to proceedings in respect of offences created by a law of that province; and

1. (1) Sous réserve des paragraphes (2) et (3), les textes suivants s'appliquent aux contraventions qui auraient été commises, le 1^{er} août 1996 ou après cette date, sur le territoire de la province d'Ontario ou dans le ressort des tribunaux de celle-ci, notamment:

- a) la *Loi sur les infractions provinciales de l'Ontario*, L.R.O. 1990, ch. P.33, et ses règlements d'application, ainsi que toute loi de cette province qui y est mentionnée et qui vise la poursuite des infractions de cette province;
- b) les règles de pratique prises en vertu de la *Loi sur les tribunaux judiciaires* de l'Ontario, L.R.O.

(b) the rules of court made under the *Courts of Justice Act* of Ontario, R.S.O. 1990, c. C.43.

2. (1) Subsections 12(1), 17(5) and 18.6(5) of the *Provincial Offences Act* of Ontario do not apply in respect of the prosecution of a contravention.

(2) For the purposes of Part II of the *Provincial Offences Act* of Ontario, contraventions related to the unlawful parking, standing or stopping of a vehicle, regardless of where in Ontario they were committed, are deemed to have been committed in a municipality designated by regulations made under that Part.

(3) For the purposes of any agreement entered into pursuant to subsections 65.2(2) and 65.3(1) of the *Contraventions Act*, section 18.6 of the *Provincial Offences Act* of Ontario and the regulations made under Part II of that Act shall be read as authorizing a municipality that has entered into such an agreement to collect fines in respect of contraventions related to the unlawful parking, standing or stopping of a vehicle.

1990, ch. C.43.

2. (1) Les paragraphes 12(1), 17(5) et 18.6(5) de la *Loi sur les infractions provinciales* de l'Ontario ne s'appliquent pas à la poursuite des contraventions.

(2) Aux fins de la partie II de la *Loi sur les infractions provinciales* de l'Ontario, les contraventions liées au stationnement, à l'immobilisation ou à l'arrêt illégaux d'un véhicule, indépendamment de l'endroit où elles sont commises en Ontario, sont réputées avoir été commises dans une municipalité désignée par règlement en vertu de cette partie.

(3) Aux fins d'un accord conclu en vertu des paragraphes 65.2(2) et 65.3(1) de la *Loi sur les contraventions*, l'article 18.6 de la *Loi sur les infractions provinciales* de l'Ontario ainsi que les règlements pris en vertu de la partie II de cette loi sont réputés autoriser la municipalité qui a signé l'accord à recouvrer les amendes relatives aux contraventions liées au stationnement, à l'immobilisation ou à l'arrêt illégaux d'un véhicule.

68] This case may be summarized as follows. By an oral agreement, the federal government delegated its powers under the CA to the Government of Ontario. In so doing, the federal government did not include a clause guaranteeing the language rights of offenders prosecuted under the CA. Formerly, language rights were protected by sections 530 and 530.1 of the *Criminal Code* and section 16 of the Charter, with respect to the “judicial” aspect of prosecutions, and by Part IV of the OLA and section 20 of the Charter, with respect to the “administrative” or “extra-judicial” aspect of prosecutions.

69] The respondents submitted in evidence the affidavit of Jean-Pierre Baribeau, counsel with the Department of Justice. Mr. Baribeau explains, at paragraph 23 of his affidavit, that the reason why the agreement with the Government of Ontario did not specify protection for the language rights of francophones derived from the fact that, according to their information, those rights were already protected by the *Courts of Justice Act*.

70] Thus, since the agreement delegating powers relating to prosecutions under the CA to the provincial government was signed, the laws that are applied with respect to language rights in Ontario are the *Courts of Justice Act*, which relates to the “judicial” aspects of prosecutions, and which provides for, *inter alia*, a bilingual trial (sections 125, 126), and the *French Language Services Act*, R.S.O. 1990, c. F.32, which relates to the “administrative” aspects of prosecutions.

71] When Ontario enacted the *Streamlining of Administration of Provincial Offences Act, 1988*, it provided for certain powers deriving from the CA to be transferred to the municipalities. That Act does not provide for bilingual trials or trials in French, and not all Ontario municipalities are subject to the *Courts of Justice Act*. In addition, only the municipalities named in Schedule 1 to the *French Language Services Act* may be subject to that Act, and then only if the municipalities have passed a bylaw to that effect in accordance with subsection 14(1) of the *French Language Services Act*.

72] A similar situation also arose when the federal government delegated its prosecutorial powers directly to the municipality of Mississauga, without including a clause to protect offenders’ language rights. That agreement was subsequently

amended to provide for the right to a prosecutor who speaks French and English when the trial is a bilingual trial under the *Courts of Justice Act*. The agreement between the federal government and the municipality of Ottawa included a clause identical to the clause added to the agreement between the federal government and the municipality of Mississauga.

73] The applicant and the intervener are therefore of the view, first, that the language rights of an offender who was entitled to a trial in French under the *Criminal Code*, the OLA and the Charter would be significantly eroded in the provincial courts if the *Courts of Justice Act* were applied, even though the contravention fell within federal jurisdiction. The applicant and the intervener further submit that regardless of whether the delegating authority is the federal government or the provincial government, the municipalities are not necessarily subject to the obligations in respect of language to which the delegating authority was subject, whether in relation to “judicial” services or to “extra-judicial” services relating to prosecutions. These were the concerns that prompted the applicant to bring this application.

- 1. Do the Commissioner of Official Languages and AJEFO have the necessary standing, and does this Court have sufficient jurisdiction, to allow for arguments based solely on the Charter and Part VII of the OLA to be made in this application?**

Part VII of the OLA

74] Part X of the OLA is entitled “Court Remedy”; subsection 77(1) in that Part provides for a remedy for violation of the rights and duties set out in certain sections of the OLA. Subsection 77(1) provides:

77. (1) (1) Any person who has made a complaint to the Commissioner in respect of

77. Quiconque a saisi le Commissaire d'une

a right or duty under sections 4 to 7, sections 10 to 13 or Part IV or V, or in respect of section 91, may apply to the Court for a remedy under this Part.

plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV ou V, ou fondée sur l'article 91 peut former un recours devant le tribunal

sous le régime de la présente partie.

75] In this case, however, the Commissioner herself applied for the remedy provided in section 77 of Part X of the OLA, as permitted by paragraph 78(1)(a), which provides as follows:

78.(1) The Commissioner may:
(a) within the time limits prescribed by paragraph 77(2)(a) or (b), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;

78.(1) Le commissaire peut selon le cas:
a) exercer lui-même le recours, dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête ou des recommandations visées au paragraphe 64(2) ou dans le délai supérieur accordé au titre du paragraphe 77(2), si le plaignant y consent;

76] It must be noted that subsection 77(1) of the OLA makes no reference to Part VII of the OLA, which is entitled "Advancement of English and French". This deliberate omission on the part of Parliament leads to the conclusion that subsection 77(1) does not allow for an application to be made to the courts for a violation of Part VII of the OLA.

77] In *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, the Federal Court of Appeal stated:

... the 1988 Official Languages Act does not create new jurisdictions other than those, vested in the Commissioner of Official Languages and the Federal Court Trial Division, which it creates expressly.

78] Recently, in *Devinat v. Canada*, (September 19, 1999) A-336-98 (F.C.A.), the Federal Court of Appeal considered the scope of the provisions of Part X of the OLA. In that case, the parties were not challenging the Motions Judge's conclusion that subsection 77(1) of the OLA did not allow the appellant to apply to the Federal

Court of Canada since his complaint was not based on one of the sections referred to in subsection 77(1) of the OLA but rather on section 20 of the OLA. The appellant argued, however, that subsection 77(5) was not limited to section 77 and that he retained his right to bring a court action for any other complaint not covered by the procedure laid down in section 77. The appellant also argued that subsection 77(5) gave him a right of action in the Federal Court, in particular under section 18.1 of the *Federal Court Act*.

79] Subsection 77(5) reads as follows:

77(5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

77(5) Le présent article ne porte atteinte à aucun autre droit d'action.

80] Also in *Devinat, supra*, the Federal Court of Appeal held that in *Viola, supra*, Mr. Justice Décary had not disposed of the question:

It goes without saying that Décary J.A. did not rule on the jurisdiction of "judicial" tribunals under the OLA, and did not preclude it.

We accordingly conclude that, with respect, the Motions Judge wrongly concluded that the OLA did not allow the appellant to bring the action covered by section 18.1 of the FCA for an alleged breach of section 20 of the OLA.

81] In Part VII of the *OLA*, section 41 provides:

41. The government of Canada is committed to
(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
(b) fostering the full recognition and use of both English and French in Canadian society.

41. Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

82] Section 2 of the OLA describes the purpose of the Act as follows:

2. The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

2. La présente loi a pour objet :

a) d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, leur égalité de statut et l'égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l'administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en oeuvre des objectifs de ces institutions;

b) d'appuyer le développement des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles

83] The applicant drew the Court's attention to a number of passages taken from the debates of the House of Commons at the time the amendments to the *Official Languages Act* were enacted in 1988.

84] It is clear, both from the wording of sections 2 and 41 of the Act and from section 16 of the Charter, that at that time, and still today, both the OLA and the Charter sent a clear message to all Canadians regarding the equality of status of the two official languages of Canada and the firm intention of the government to strive to achieve the ultimate goal of equality of status between the two languages.

85] In its recent decision in *R. v. Beaulac*, [1999] 1 S.C.R. 768, the Supreme Court went so far as to characterize the OLA as quasi-constitutional; at pages 788 and 789, the Court said:

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter* ..., it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it".

...

The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code* ... constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; ...

86] The complaint filed by AJEFO related to a breach of a duty set out in Part IV of the OLA, not in Part VII. However, the Commissioner of Official Languages conducted an exhaustive investigation into the situation, as it is her right and duty to do, and in her conclusions she went well beyond the duties set out in Part IV and identified what were, in her view, breaches of the duties set out in Part VII of the OLA.

87] In the submission of the applicant, the fact that the Commissioner expanded the scope of the investigation opens the door for the Federal Court to find that it has jurisdiction that is conferred on it, not expressly by subsection 77(1) of the OLA, but rather by extension from subsection 77(4) of the OLA, which provides:

(4) Where, in proceedings under subsection (1), the court concludes that a federal institution has failed to comply with this Act, the court may grant such remedy as

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux

it considers appropriate and just in the circumstances.

88] The question to be decided here is not whether the respondents have breached their duties under Part VII of the OLA, but rather whether, at this stage, the Federal Court may impose sanctions for that breach, if breach there has been, in an application brought by the Commissioner under paragraph 78(1)(a) OLA.

89] It is important to note that the powers conferred on the Commissioner of Official Languages to investigate and make recommendations may not be confused with the possible court remedies identified in Part X of the OLA. While the Commissioner of Official Languages has very broad powers to investigate and make recommendations, it seems clear that the court remedies provided by Parliament in subsection 77(1) of the OLA are much narrower.

90] Consequently, the applicant has not satisfied me that recent developments in the case law, and specifically the decision in *Beaulac, supra*, have made it possible for the Federal Court to intervene, in an application brought under paragraph 78(1)(a) of the OLA, in respect of alleged violations of Part VII of the OLA.

91] On the other hand, it should be noted that the Federal Court of Appeal held in *Devinat, supra*, that applications may still be brought under section 18.1 of the *Federal Court Act* in respect of breaches of the parts of the OLA that are not referred to in subsection 77(1) of the OLA. I need not revisit that issue in this case, except to say that the applicant has chosen to use only the procedures set out in paragraph 78(1)(a) of the OLA and it is therefore in that regard that I must make my decision.

92] However, it does not seem to me to be either necessary or desirable to approach the allegations that sections 16 to 20 of the Charter have been violated with the same rigour.

93] The Charter applies to all Canadians, and it is not necessary that a remedy under the Charter be specified in order for the Charter to be given effect.

94] On this point, the applicant has satisfied me that it was entirely proper for the Court both to consider the allegations that the provisions of Part IV of the OLA had been violated and to examine the alleged violation of the provisions of the Charter, in relation to the provisions of Part IV of the OLA, and that it was entirely within the Court's jurisdiction to do so.

95] On the question of the standing of the applicant and the intervener, the Supreme Court held in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, in considering the decisions in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 and *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

96] The decisions in *Thorson*, *McNeil* and *Borowski* establish that there are three criteria to be considered when evaluating whether standing should be granted:

(1) a justiciable issue has been raised;

- (2) the applicant has a genuine interest as a citizen in the validity of the decision that raises a question of public interest;
- (3) there is no other reasonable and effective manner in which the issue may be brought before the courts.

97] In this case, the issues raised by the applicant are serious. They deal with a failure to comply with duties in respect of language and with the maintenance of language rights, as provided in the Charter and also in the OLA, in relation to the enactment and application of the CA. They are justiciable, and in fact there is provision for an application of this nature in Part X of the OLA. Because the OLA gives the Commissioner responsibility for monitoring the application of the OLA, she entirely satisfies the test of genuine interest. AJEFO, the *Association des juristes d'expression française de l'Ontario*, is, as its name suggests, an association engaged in promoting the French language in matters relating to the law in Ontario. It has a genuine interest in the maintenance of language rights in legal matters. There is also provision in the OLA for the application by AJEFO, as a complainant. In my view, the first two criteria have been met.

98] The respondents in this case maintain that there are other reasonable and effective ways in which the issue may be brought before the Court. There might well be other ways of bringing the issue before the courts, for instance by an offender within the meaning of the CA. However, Parliament has expressly provided in the OLA for the Commissioner and the complainant, in this instance AJEFO, to have the power and standing to act in this proceeding.

99] The Supreme Court has also allowed for discretion to be exercised in granting standing despite the fact that an applicant does not meet the tests.

100] The first decision that addressed this question post-Charter was *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 in which the Supreme Court held:

The recognized standing of the Attorney General to assert a purely public interest in the limits of statutory authority by an action of his own motion or on the relation of another person is a recognition of the public interest in the maintenance of respect for such limits. For the reasons indicated in *Thorson*, I do not think that his refusal to act in such a case should bar a court from the recognition, as a matter of discretion in accordance with the criteria affirmed in *Borowski*, of public interest standing in a private individual to institute proceedings. The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*.

101] In *Canadian Council of Churches v. Canada (M.E.I.)*, [1992] 1 S.C.R. 236 the Supreme Court stated:

In 1982 with the passage of the Charter there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The Charter enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those Charter rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the Charter. By its terms the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law. ...

Courts are the final arbiters as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the Charter. ...

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition

some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

102] Consequently, I have no hesitation in finding that the Commissioner of Official Languages and AJEFO have the requisite standing in respect of the application brought, and also in finding that the Federal Court has full jurisdiction to hear this case, in terms of arguments based both on Part IV of the OLA and on the relevant sections of the *Canadian Charter of Rights and Freedoms*, as they relate to the provisions set out in Part IV of the OLA.

103] It will first be necessary to determine whether the respondents have complied with their duties under Part IV of the OLA; we will then be able to ascertain whether there has in fact been a breach of the Charter duties. We shall therefore return to the question later.

2. What are the duties of the respondents in relation to sections 16 to 22 of the Charter?

104] Sections 16 to 22 deal with the use of the two official languages of Canada.

105] Section 16 of the Charter provides:

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

106] Section 20 provides:

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or
(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante;
b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

107] Section 21 reads as follows:

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

21. Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du

expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.

Again, in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, Dickson C.J. stated, at p. 365, after noting the caution of Beetz J. in *Société des Acadiens du Nouveau-Brunswick*, *supra*:

. . . however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

...

Another reference, with regard to education this time, *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, reinforced the cultural purpose of language guarantees. At p. 850, the Court said:

Several interpretative guidelines are endorsed in *Mahe* for the purposes of defining s. 23 rights. Firstly, courts should take a purposive approach to interpreting the rights. Therefore, in accordance with the purpose of the right as defined in *Mahe*, the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province. Secondly, the right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights.

110] The Court went on to say:

The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees;

111] The Court explained, with respect to section 16:

The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights,

equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (House of Commons Debates, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

...

Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights. A. Riddell, in "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988), 29 C. de D. 829, at p. 846, underlines that a political compromise also led to the adoption of ss. 7 and 15 of the Charter and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the Charter, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 73; *Mahe, supra*, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.

Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick, supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin.

112] The Supreme Court has clearly held that language rights are as important as the other constitutional rights, and the fact that they result from a political compromise does nothing to change that status. Under the Charter, the respondents are required to ensure that language rights are respected. Before the CA was enacted, the respondents were required to maintain equality in respect of the language rights guaranteed by the Charter and provided in the OLA and the *Criminal Code*. The respondents cannot limit constitutional language rights by enacting legislation transferring the administration of certain prosecutions to the provinces. If the respondents fail to respect the rights guaranteed in the Charter in enacting and applying the CA, they are in violation of the Charter. That position is particularly clear when we consider the recent decision of the Supreme Court in *Beaulac, supra*.

3. Are the municipalities and the province of Ontario acting on behalf of the Attorney General of Canada within the meaning of section 25 of the OLA when they prosecute under the CA?

113] Section 25 of the OLA provides:

25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

25. Il incombe aux institutions fédérales de veiller à ce que, tant au Canada qu'à l'étranger, les services offerts au public par des tiers pour leur compte le soient, et à ce qu'il puisse communiquer avec ceux-ci, dans l'une ou l'autre des langues officielles dans le cas où, offrant elles-mêmes les services, elles seraient tenues, au titre de la présente partie, à une telle obligation.

114] The respondents have jurisdiction in respect of federal contraventions. They decided to streamline the procedure by enacting the CA, thereby permitting a person who commits a contravention to pay the fine without having to appear in court and without the stigma of a criminal record.

115] Section 65.3 of the CA provides:

65.3 (1) The Minister may enter into an agreement with the government of a province or with any provincial, municipal or local authority

(a) respecting the sharing with that province or authority of fines and fees imposed under this Act that are collected in respect of contraventions, for the purpose of providing for compensation by Canada of that province or authority, in whole or in part, in respect of the administration and enforcement of this Act; and

(b) notwithstanding subsections 17(1) and (4) of the Financial Administration Act, authorizing the government of the province or that authority to withhold amounts, in accordance with the terms and conditions of the agreement, from the fines and fees referred to in paragraph (a) to be remitted to the Receiver General and deposited in the Consolidated Revenue Fund.

65.3 (1) Le ministre peut conclure avec le gouvernement d'une province ou une autorité provinciale, municipale ou locale un accordn :

a) portant sur le partage avec cette province ou autorité des amendes et des frais perçus, imposés en vertu de la présente loi pour des contraventions, en vue de l'indemnisation totale ou partielle de cette province ou autorité par le Canada pour l'application de la présente loi;

b) autorisant, par dérogation aux paragraphes 17(1) et (4) de la Loi sur la gestion des finances publiques, le gouvernement de cette province ou cette autorité à prélever, conformément aux modalités de l'accord, des sommes d'argent sur le produit des amendes et des frais visés à l'alinéa a) qui doit être remis au receveur général pour dépôt au Trésor.

116] As suggested by counsel for the applicant, section 25 of the OLA simply confirms the constitutional principle that a government may not divest itself of the constitutional obligations to which it is bound by the Charter by delegating certain of its responsibilities. The duty that is incumbent on the Attorney General of Canada, to offer administrative services relating to prosecutions for federal contraventions in both official languages, is imposed not only by Part IV of the OLA, but also by the

Charter. The applicant suggests that a constitutional duty cannot be avoided by delegating, by incorporation by reference, or by any other process.

117] The respondents submit that section 25 of the OLA does not apply to judicial matters. Moreover, neither the Ontario Courts nor the Attorney General of Ontario or his representatives, nor the City of Mississauga or the City of Ottawa or their representatives, are acting on behalf of the respondents.

118] The respondents suggest that the Attorney General of Ontario or of any other province, and even municipal authorities where they are performing functions in relation to the implementation of the CA, are not acting on behalf of a federal institution. They suggest that those provincial entities are merely exercising powers that are conferred on them directly by the CA. The respondents propose the example of paragraph 1(2)(b) of Part I of the Schedule to the *Application of Provincial Laws Regulations*, which provides that in Ontario, "prosecutor" includes the Attorney General, as defined in the CA. Section 2 of the CA defines "Attorney General" as follows:

"Attorney General" means the Attorney General of Canada or the Attorney General of a province, and includes counsel or an agent exercising any of the powers or performing any of the duties and functions of the Attorney General for the purposes of the applicable laws of a province or this Act, as the case may be; ...

119] It is also suggested by the respondents that when provincial prosecutors exercise the prosecutorial powers conferred on them by the federal statute, they are doing so on their own behalf, and specifically in accordance with their general power in relation to the administration of justice as provided in section 92(14) of the *Constitution Act, 1867*. They are exercising a jurisdiction which is concurrent to the

power of the Attorney General of Canada, and are doing so under the CA as they do when they institute proceedings under the *Criminal Code*.

120] On this point, a distinction should be made between prosecutions under federal statutes that are enacted pursuant to the federal jurisdiction under section 91(27) and prosecutions under federal statutes that fall within other fields of federal jurisdiction. In *Droit constitutionnel*, 3rd ed., Cowansville, Yvon Blais, 1997, at page 511, H. Brun and G. Tremblay state, with respect to the administration of the federal justice system in non-criminal matters:

[TRANSLATION] In enacting legislation, Parliament naturally sought to assign responsibility for implementing the legislation to federal officials. Parliament's authority in that regard has never been doubted. See *R. v. Whiskeyjack* (1984), 16 D.L.R. (4th) 231 (Alta. C.A.) and the cases cited therein. This was the basis for the recognition in *R. v. Hauser*, [1979] 1 S.C.R. 984 of the federal authority to assign responsibility for initiating and conducting prosecutions under a statute other than a criminal statute, within the constitutional meaning, to the Attorney General of Canada, to the exclusion of the attorneys general of the provinces. Presumably, that federal authority is an integral part of the authority in relation to the substantive law in question.

121] The decision in *R. v. Hauser*, [1979] 1 S.C.R. 984 established that Parliament had jurisdiction to promulgate legislation authorizing the Attorney General of Canada to institute and conduct prosecutions under a statute other than the *Criminal Code*. On that point, the Supreme Court said:

I find it clear that the effect of this enactment is to make the Attorney General of Canada the "Attorney General" in respect of all criminal proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of this government in respect of an offence or conspiracy pertaining to a statute other than the Criminal Code. This results in the exclusion of the Attorney General of a province from any authority in respect of such proceedings so instituted.

...

Whatever may be said as to the necessity of limiting the extent of the federal power over criminal procedure so as to preserve provincial jurisdiction over the administration of justice in criminal matters, it appears to me that one must accept, at least, what is conceded by three provinces: unrestricted federal legislative

authority over prosecutions for violations or conspiracies for violations of federal enactments which do not depend for their constitutional validity on head 27 of s. 91 (Criminal Law). It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except in what may properly be considered as “criminal law”.

122] However, the question of the administration of federal legislation enacted pursuant to the federal “criminal law” power is more ambiguous, because of the federal jurisdiction in relation to the administration of justice set out in section 92(14) of the *Constitution Act, 1867*. In *Droit constitutionnel, supra*, H. Brun and G. Tremblay state on this point, at page 509:

[TRANSLATION] The most difficult question raised by section 92(14) is whether the “administration of justice” includes the administration of criminal justice. Since the time of Confederation, most of those concerned have assumed that it does, and all the provinces have tirelessly set about (via measures taken in respect of the police, investigation and the conduct of prosecutions) implementing the substantive and procedural criminal law enacted by the federal government. However, in two decisions reached only with great difficulty, in which strong dissenting opinions were expressed, the Supreme Court has stated a different opinion: *A.G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; and *R. v. Wetmore*, [1983] 2 S.C.R. 284.

123] In *Canadian National Transportation, Ltd., supra*, the Supreme Court concluded as follows:

I find it difficult, indeed impossible, to read s. 92(14) as not only embracing prosecutorial authority respecting the enforcement of federal criminal law but diminishing the *ex facie* impact of s. 91(27) which includes procedure in criminal matters. As a matter of language, there is nothing in s. 92(14) which embraces prosecutorial authority in respect of federal criminal matters. Section 92(14) grants jurisdiction over the administration of justice, including procedure in civil matters and including also the constitution, maintenance and organization of civil and criminal provincial courts. The section thus narrows the scope of the criminal law power under s. 91, but only with respect to what is embraced within “the Constitution, Maintenance, and Organization of Provincial Courts ... of Criminal Jurisdiction”. By no stretch of language can these words be construed to include jurisdiction over the conduct of criminal prosecutions.

124] However, although the Supreme Court held in these cases that the federal government has exclusive jurisdiction in relation to criminal prosecutions, H. Brun, G.

Tremblay and P. W. Hogg argue that this jurisdiction is not exclusive, but rather concurrent.

125] In *Constitutional Law of Canada, supra*, P.W. Hogg writes, at pages 19-17:

The *CN Transportation* and *Wetmore* cases establish the existence of federal power to provide for the prosecution of federal offences, whether created under the criminal law power or some other head of federal power. Despite an obiter dictum of Laskin C.J.'s to the effect that this federal power is exclusive, the better view in my opinion is that the federal power is concurrent with provincial prosecutorial authority derived from the administration of justice in the province. Concurrence flows more naturally from the earlier decision in *Di Iorio* where, it will be recalled, the Supreme Court of Canada, over Laskin C.J.'S dissent, upheld provincial power to hold an inquiry into organized crime in the province of Quebec. And concurrence accords more happily with the long history of provincial prosecution of Criminal Code offences.

126] In *Droit constitutionnel, supra*, H. Brun and G. Tremblay also agree with the interpretation stated by P. W. Hogg regarding the concurrent jurisdiction of the provinces and the federal government in relation to criminal prosecutions; at page 509, they say:

[TRANSLATION] In reality, the *ratio* of these decisions is quite narrow: it holds that the federal government has jurisdiction to govern the conduct of criminal prosecutions (and thus assigns it to the Attorney General of Canada rather than to the attorneys general of the provinces). Even though the majority add, *obiter*, that this federal jurisdiction is exclusive, the authoritative trend in the case law agrees with the idea that the provinces have concurrent jurisdiction over the same subject-matter. What those cases say is that section 92(14) covers the administration of both criminal and civil justice.

127] There is therefore no doubt that the federal government has exclusive jurisdiction in respect of prosecutions relating to federal statutes enacted pursuant to federal powers other than the power set out in section 91(27) of the *Constitution Act, 1867*.

128] On the question of jurisdiction in respect of prosecutions relating to offences under federal statutes enacted by the federal government pursuant to the power set out in section 91(27) of the *Constitution Act, 1867*, the decisions cited *supra* hold that the federal government has exclusive jurisdiction.

129] However, I am mindful of the arguments made by learned authors that the federal jurisdiction in relation to criminal prosecutions is concurrent with the jurisdiction of the provinces.

130] On the other hand, those arguments, when applied to the suggestion by counsel for the respondents that municipal governments exercise their powers under the CA on their own behalf when they issue tickets and process and prosecute contraventions, seem to me to be much less persuasive.

131] Municipalities are creatures of the provincial government, and there is nothing in either the Constitution or the Charter that guarantees their existence.

132] They have no power apart from that which is assigned to them by the provincial authorities.

133] I do not dispute the right of the federal and provincial governments to assign the administration of certain functions, and even those relating to prosecutions, to certain municipal authorities, or the legitimacy of their doing so. However, while the general jurisdiction in relation to the administration of justice set out in section 92(14) of the *Constitution Act, 1867* could, if stretched, give concurrent powers to the attorneys general of the provinces, the respondents have not persuaded me that

municipal governments have the authority to exercise those powers in relation to contraventions, as might be the case for the attorneys general of the provinces if we agreed that the province has concurrent jurisdiction in respect of prosecutions relating to offences under federal statutes enacted pursuant to section 91(27) of the *Constitution Act, 1867*.

134] However, it must be acknowledged that the Attorney General of Canada and the Attorney General of the province of Ontario are entirely within their rights to assign the implementation of the CA within the territory of their provinces to certain municipal governments, and, to that end, to make precise agreements from time to time to govern that delegation of powers.

135] In the circumstances, it seems clear that the federal government has full power to delegate to the provincial government or to municipalities, the administration of prosecutions for violations of federal statutes and regulations. The Government of Ontario then chose to delegate this power to administer, by way of legislative regulation and specific agreements relating to the administration of certain contraventions by municipal authorities.

136] Under this analysis, the authority that has received the delegated power still has a duty to comply with the language laws that were binding on the delegating authority, whether the Government of Canada or the Government of Ontario, as the case may be.

137] It would therefore seem important to ensure that the legal obligations of the delegating authority, the federal government, or of the delegates, the Government

of Ontario and municipal governments, particularly with regard to language rights, which were characterized earlier as constitutional rights, are delineated and specified sufficiently to ensure that the rights of every accused person will be respected, whether the legislation relating to contraventions is administered by the federal government, the Ontario Government or the municipal authorities.

138] I therefore conclude that the province of Ontario and the municipalities that have been given the province's delegated powers are acting on behalf of the Government of Canada in implementing the CA and that the municipal governments that have signed an agreement with Justice Canada are also acting on behalf of the Government of Canada.

139] In addition, even if it were agreed that in administering the CA the Government of Ontario was acting pursuant to the powers granted to it by section 92(14) of the *Constitution Act, 1867*, that government would still be obliged to respect the quasi-constitutional language rights set out in the OLA and in sections 530 and 530.1 of the *Criminal Code*.

140] It must be recalled that in administering the CA, the Government of Ontario is applying a federal statute within the territory of the province. Accused persons are entitled to expect the same language rights guarantees as if it were the Attorney General of Canada administering the CA.

141] A federal law of general application such as the OLA cannot be applied throughout Canada in a discriminatory manner, depending on who is responsible for applying the CA. The language guarantees set out in the OLA and in the *Criminal*

Code must therefore apply regardless of whether the Attorney General of Canada, the Attorney General of Ontario or the municipalities are given the authority to administer the CA.

142] Consequently, the real question that the Court must answer is whether the Attorney General of Ontario and the municipalities have complied with the duties to which the Attorney General of Canada himself must adhere with respect to protecting the language rights set out in the OLA, and specifically, the rights in sections 530 and 530.1 of the *Criminal Code*, which were enacted in 1988 at the same time as the amendments to the OLA and which have acquired the same quasi-constitutional force.

4. Have the respondents, the Attorney General of Ontario and the municipalities complied with the duties set out in Part IV of the OLA and the rights guaranteed in sections 16 to 20 of the Charter in enacting and applying the CA and in making and applying the regulations thereunder?

143] The respondents have a duty in relation to language rights under the Charter, as discussed *supra*. They also have a duty under the OLA, a quasi-constitutional federal statute this is itself based on the Charter.

144] In *Viola, supra*, the Federal Court of Appeal stated:

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter*, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects

"certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it".

145] Before the CA was amended in 1996, communications with the public and the provision of extra-judicial services in relation to the administration of prosecutions of federal contraventions were handled by the Department of Justice Canada, in both official languages, in accordance with Part IV of the OLA and section 20 of the Charter.

146] The relevant sections of Part IV of the OLA read as follows:

21. Any member of the public in Canada has the right to communicate with and to receive available services from federal institutions in accordance with this Part.

21. Le public a, au Canada, le droit de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie.

22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities (a) within the National Capital Region; or (b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

22. Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux -- auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services -- situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

...

...

24. (1) Every federal institution has the duty to ensure that any member of the public can communicate in either official language with, and obtain available services in either official language from, any of its offices or facilities in Canada or elsewhere

24. (1) Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leurs bureaux, tant au Canada qu'à l'étranger, et en recevoir les services dans l'une ou l'autre des langues officielles :

(a) in any circumstances prescribed by regulation of the Governor in Council that relate to any of the following:

a) soit dans les cas, fixés par règlement, touchant à la santé ou à la sécurité du public ainsi qu'à l'emplacement des bureaux, ou liés au caractère national ou

(i) the health, safety or security of members of the public,

(ii) the location of the office or facility, or

(iii) the national or international mandate of the office; or

(b) in any other circumstances prescribed by regulation of the Governor in Council where, due to the nature of the office or facility, it is reasonable that communications with and services from that office or facility be available in both official languages.

...

25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

...

27. Wherever in this Part there is a duty in respect of communications and services in both official languages, the duty applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services.

28. Every federal institution that is required under this Part to ensure that any member of the public can communicate with and obtain available services from an office or facility of that institution, or of another person or organization on behalf of that institution, in either official language shall ensure that appropriate measures are taken, including the provision of signs, notices and other information on services and the initiation of communication with the public, to make it

international de leur mandat;

b) soit en toute autre circonstance déterminée par règlement, si la vocation des bureaux justifie l'emploi des deux langues officielles.

...

25. Il incombe aux institutions fédérales de veiller à ce que, tant au Canada qu'à l'étranger, les services offerts au public par des tiers pour leur compte le soient, et à ce qu'il puisse communiquer avec ceux-ci, dans l'une ou l'autre des langues officielles dans le cas où, offrant elles-mêmes les services, elles seraient tenues, au titre de la présente partie, à une telle obligation.

...

27. L'obligation que la présente partie impose en matière de communications et services dans les deux langues officielles à cet égard vaut également, tant sur le plan de l'écrit que de l'oral, pour tout ce qui s'y rattache.

28. Lorsqu'elles sont tenues, sous le régime de la présente partie, de veiller à ce que le public puisse communiquer avec leurs bureaux ou recevoir les services de ceux-ci ou de tiers pour leur compte, dans l'une ou l'autre langue officielle, il incombe aux institutions fédérales de veiller également à ce que les mesures voulues soient prises pour informer le public, notamment par entrée en communication avec lui ou encore par signalisation, avis ou documentation sur les services, que ceux-ci lui sont offerts dans l'une ou l'autre langue officielle, au choix.

29. Tous les panneaux et enseignes signalant les bureaux d'une institution fédérale doivent être dans les deux langues officielles, ou placés ensemble de façon que les textes de chaque langue soient également en évidence.

known to members of the public that those services are available in either official language at the choice of any member of the public.

29. Where a federal institution identifies any of its offices or facilities with signs, each sign shall include both official languages or be placed together with a similar sign of equal prominence in the other official language.

147] Following the enactment of section 65.1 of the CA, the *French Language Services Act* of Ontario appears to determine that province's language rights.

148] However, it would be wrong to say that the successive and cumulative application of the CA, the *French Language Services Act* of Ontario and the agreements between the respondents and the Attorney General of Ontario and the municipalities of Mississauga and Ottawa could make Part IV of the OLA, or section 20 of the Charter, inoperative.

149] Part IV of the OLA and section 20 of the Charter still apply, and if any conflict arises with the *French Language Services Act* of Ontario, the OLA and section 20 of the Charter must prevail.

150] The *French Language Services Act* provides:

1. In this Act,

"government agency" means,

(a) a ministry of the Government of Ontario, except that a psychiatric facility, residential facility or college of applied arts and technology that is administered by a ministry is not included unless it is designated as a public service agency by

1. Les définitions qui suivent s'appliquent à la présente loi.

«organisme gouvernemental» S'entend des organismes suivants :

a) un ministère du gouvernement de l'Ontario, sauf que les établissements psychiatriques, les foyers et les collèges d'arts appliqués et de technologie

the regulations,

(b) a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council,

(c) a non-profit corporation or similar entity that provides a service to the public, is subsidized in whole or in part by public money and is designated as a public service agency by the regulations,

(d) a nursing home as defined in the *Nursing Homes Act* or a home for special care as defined in the *Homes for Special Care Act* that is designated as a public service agency by the regulations,

(e) a service provider as defined in the *Child and Family Services Act* or a board as defined in the *District Social Services Administration Boards Act* that is designated as a public service agency by the regulations,

and does not include a municipality, or a local board as defined in the *Municipal Affairs Act*, other than a local board that is designated under clause (e); ("organisme gouvernemental")

"service" means any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose. ("service")

...

5. (1) A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

administrés par un ministère ne sont pas inclus, à moins d'être désignés par les règlements en tant qu'organismes offrant des services publics;

b) un conseil, une commission ou une personne morale dont la majorité des membres ou des administrateurs sont nommés par le lieutenant-gouverneur en conseil;

c) une personne morale à but non lucratif ou une organisation semblable, qui fournit un service au public, reçoit des subventions qui sont prélevées sur les deniers publics, et est désignée par les règlements en tant qu'organisme offrant des services publics;

d) une maison de soins infirmiers au sens de la *Loi sur les maisons de soins infirmiers* ou un foyer de soins spéciaux au sens de la *Loi sur les foyers de soins spéciaux* qui sont désignés par les règlements en tant qu'organismes offrant des services publics;

e) un fournisseur de services au sens de la *Loi sur les services à l'enfance et à la famille* ou un conseil d'administration au sens de la *Loi sur les conseils d'administration de district des services sociaux* qui sont désignés par les règlements en tant qu'organismes offrant des services publics.

Sont exclus les municipalités, de même que les conseils locaux au sens de la *Loi sur les affaires municipales*, à l'exception des conseils locaux qui sont désignés aux termes de l'alinéa e). («government agency»)

«service» Service ou procédure qu'un organisme gouvernemental ou une institution de la Législature fournit au public. S'entend en outre des communications faites en vue de fournir le service ou la procédure. («service»)

...

(2) When the same service is provided by more than one office in a designated area, the Lieutenant Governor in Council may designate one or more of those offices to provide the service in French if the Lieutenant Governor in Council is of the opinion that the public in the designated area will thereby have reasonable access to the service in French.

(3) If one or more offices are designated under subsection (2), subsection (1) does not apply in respect of the service provided by the other offices in the designated area.

...

7. The obligations of government agencies and institutions of the Legislature under this Act are subject to such limits as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made.

8. The Lieutenant Governor in Council may make regulations,

(a) designating public service agencies for the purpose of the definition of "government agency";

(b) amending the Schedule by adding areas to it;

(c) exempting services from the application of sections 2 and 5 where, in the opinion of the Lieutenant Governor in Council, it is reasonable and necessary to do so and where the exemption does not derogate from the general purpose and intent of this Act.

9. (1) A regulation designating a public service agency may limit the designation to apply only in respect of specified services provided by the agency, or may specify services that are excluded from the designation.

...

5. (1) Chacun a droit à l'emploi du français, conformément à la présente loi, pour communiquer avec le siège ou l'administration centrale d'un organisme gouvernemental ou d'une institution de la Législature et pour en recevoir les services. Chacun jouit du même droit à l'égard de tout autre bureau de l'organisme ou de l'institution qui se trouve dans une région désignée à l'annexe ou qui sert une telle région.

(2) Lorsque le même service est fourni par plus d'un bureau dans une région désignée, le lieutenant-gouverneur en conseil peut désigner un ou plusieurs des bureaux afin qu'ils fournissent le service en français, s'il est d'avis que le public de la région désignée bénéficiera ainsi d'un accès raisonnable au service en français.

(3) Si un ou plusieurs bureaux sont désignés en vertu du paragraphe (2), le paragraphe (1) ne s'applique pas à l'égard du service offert par les autres bureaux de la région désignée.

...

7. Si toutes les mesures raisonnables ont été prises et que tous les projets raisonnables ont été élaborés afin de faire respecter la présente loi, les obligations qu'elle impose aux organismes gouvernementaux et aux institutions de la Législature sont assujetties aux limitations raisonnables et nécessaires qu'exigent les circonstances.

8. Le lieutenant-gouverneur en conseil peut, par règlement :

a) désigner des organismes offrant des services publics, aux fins de la définition du terme «organisme gouvernemental»;

b) modifier l'annexe en y ajoutant des régions;

14. (1) The council of a municipality that is in an area designated in the Schedule may pass a by-law providing that the administration of the municipality shall be conducted in both English and French and that all or specified municipal services to the public shall be made available in both languages.

(2) When a by-law referred to in subsection (1) is in effect, a person has the right to communicate in English or French with any office of the municipality, and to receive

c) exempter des services de l'application des articles 2 et 5 si, de l'avis du lieutenant-gouverneur en conseil, cette mesure s'avère raisonnable et nécessaire et si elle ne porte pas atteinte à l'objet général de la présente loi.

9. (1) Le règlement qui désigne un organisme offrant des services publics peut restreindre le champ d'application de la désignation de sorte que celle-ci ne porte que sur des services précis que fournit l'organisme, ou préciser les services qui sont exclus de la désignation.

...

14. (1) Le conseil d'une municipalité située dans une région désignée à l'annexe peut adopter un règlement municipal prévoyant que l'administration de la municipalité se fera en français et en anglais et que les services municipaux au public, ou une partie précisée de ces services, seront fournis dans ces deux langues.

(2) Lorsqu'un règlement municipal visé au paragraphe (1) est en vigueur, chacun a droit à l'emploi du français ou de l'anglais pour communiquer avec tout bureau de la municipalité et pour recevoir les services visés par le règlement municipal.

(3) Si une région désignée à l'annexe fait partie d'une municipalité régionale ou de communauté urbaine et que le conseil d'une municipalité situé dans la région adopte un règlement municipal en vertu du paragraphe (1), le conseil de la municipalité régionale ou de communauté urbaine peut également adopter un tel règlement municipal en ce qui

available services to which the by-law applies, in either language.

concerne son administration et ses services.

(3) Where an area designated in the Schedule is in a metropolitan or regional municipality and the council of a municipality in the area passes a by-law under subsection (1), the council of the metropolitan or regional municipality may also pass a by-law under subsection (1) in respect of its administration and services.

151] With respect to the judicial processing of prosecutions for federal contraventions, the language guarantees in section 16 of the Charter were protected, before the amendments to the CA, by the effect of sections 530 and 530.1 of the *Criminal Code*.

152] Sections 530 and 530.1 of the *Criminal Code* provide:

530. (1) On application by an accused whose language is one of the official languages of Canada, made not later than

530. (1) Sur demande d'un accusé dont la langue est l'une des langues officielles du Canada, faite au plus tard :

(a) the time of the appearance of the accused at which his trial date is set, if

a) au moment où la date du procès est fixée:

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or

(i) s'il est accusé d'une infraction mentionnée à l'article 553 ou punissable sur déclaration de culpabilité par procédure sommaire,

(ii) the accused is to be tried on an indictment preferred under section 577,

(ii) si l'accusé doit être jugé sur un acte d'accusation présenté en vertu de l'article 577;

(b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

b) au moment de son choix, s'il choisit de subir son procès devant un juge de la cour provinciale en vertu de l'article 536 ou d'être jugé par un juge sans jury et sans enquête préliminaire en vertu de l'article 536.1;

(c) the time when the accused is ordered to stand trial, if the accused

c) au moment où il est renvoyé pour subir son procès :

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be

(i) s'il est accusé d'une infraction mentionnée à l'article 469,

(ii) s'il a choisi d'être jugé par un tribunal composé d'un juge seul ou d'un juge et d'un jury,

(iii) s'il est réputé avoir choisi d'être jugé par un tribunal composé d'un juge et d'un jury,

un juge de paix, un juge de la cour provinciale ou un juge de la Cour de justice du Nunavut ordonne que l'accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury, selon le cas, qui parlent la langue officielle du Canada qui est celle de l'accusé ou, si les circonstances le justifient, qui parlent les deux langues officielles du Canada.

(2) Sur demande d'un accusé dont la langue n'est pas l'une des langues officielles du Canada, faite au plus tard à celui des moments indiqués aux alinéas (1)a) à c) qui est applicable, un juge de paix ou un juge de la cour provinciale peut rendre une ordonnance à l'effet que l'accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury, selon le cas, qui parlent la langue officielle du Canada qui, de l'avis du juge de paix ou du juge de la cour provinciale, permettra à l'accusé de témoigner le plus facilement ou, si les circonstances le justifient, qui parlent les deux langues officielles du Canada.

(3) Le juge de paix ou le juge de la cour provinciale devant qui l'accusé comparaît pour la première fois avise l'accusé, s'il n'est pas représenté par procureur, de son droit de demander une ordonnance en vertu des paragraphes (1) ou (2) et des délais à l'intérieur desquels il doit faire une telle demande.

(4) Lorsqu'un accusé ne présente aucune demande pour une ordonnance en vertu des paragraphes (1) ou (2) et que le juge de

tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

(5) An order under this section that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony may, if the circumstances warrant, be varied by the court to require that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

530.1 Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

(a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;

(b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;

paix, le juge de la cour provinciale ou le juge devant qui l'accusé doit subir son procès -- appelés «tribunal» dans la présente partie -- est convaincu qu'il est dans les meilleurs intérêts de la justice que l'accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury qui parlent la langue officielle du Canada qui est celle de l'accusé ou, si la langue de l'accusé n'est pas l'une des langues officielles du Canada, la langue officielle du Canada qui, de l'avis du tribunal, permettra à l'accusé de témoigner le plus facilement, le tribunal peut, par ordonnance, s'il ne parle pas cette langue, renvoyer l'accusé pour qu'il subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury qui parlent cette langue ou, si les circonstances le justifient, qui parlent les deux langues officielles du Canada.

(5) Une ordonnance rendue en vertu du présent article, à l'effet qu'un accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury qui parlent la langue officielle du Canada qui est celle de l'accusé ou la langue officielle du Canada qui permettra à l'accusé de témoigner le plus facilement peut, si les circonstances le justifient, être modifiée par le tribunal de façon à exiger que l'accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury qui parlent les deux langues officielles du Canada.

530.1 Lorsqu'il est ordonné, sous le régime de l'article 530, qu'un accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury qui parlent la langue officielle qui est celle de l'accusé ou la langue officielle qui permettra à l'accusé de témoigner le plus facilement :

a) l'accusé et son avocat ont le droit d'employer l'une ou l'autre langue officielle au cours de l'enquête préliminaire et du procès;

(c) any witness may give evidence in either official language during the preliminary inquiry or trial;

(d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;

(e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,

(ii) a transcript of any interpretation into the other official language of what was said, and

(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and

(h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

b) ils peuvent utiliser l'une ou l'autre langue officielle dans les actes de procédure ou autres documents de l'enquête préliminaire et du procès;

c) les témoins ont le droit de témoigner dans l'une ou l'autre langue officielle à l'enquête préliminaire et au procès;

d) l'accusé a droit à ce que le juge président l'enquête parle la même langue officielle que lui;

e) l'accusé a droit à ce que le poursuivant -- quand il ne s'agit pas d'un poursuivant privé -- parle la même langue officielle que lui;

f) le tribunal est tenu d'offrir des services d'interprétation à l'accusé, à son avocat et aux témoins tant à l'enquête préliminaire qu'au procès;

g) le dossier de l'enquête préliminaire et celui du procès doivent comporter la totalité des débats dans la langue officielle originale et la transcription de l'interprétation, ainsi que toute la preuve documentaire dans la langue officielle de sa présentation à l'audience;

h) le tribunal assure la disponibilité, dans la langue officielle qui est celle de l'accusé, du jugement – exposé des motifs compris -- rendu par écrit dans l'une ou l'autre langue

officielle.

153] Recently, in *Beaulac, supra*, Mr. Justice Bastarache examined the scope of section 530 of the *Criminal Code* and stated:

Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with. The interpretation given here accords with the interpretative background discussed earlier.

154] In enacting the CA, the respondents were obliged to guarantee and maintain the language rights set out in the Charter and the OLA. The respondents contend that they have fulfilled their duty by incorporating a clause in the specific agreements.

155] The following is the clause that appears in the agreement with the City of Mississauga:

4.4 The Corporation shall prosecute “not guilty” pleas for parking tickets in accordance with its practices concerning prosecution of parking offences under its by-laws. When a prosecution is being conducted as a bilingual proceeding under the *Courts of Justice Act*, R.S.O. (1990) Chap. C-43, the municipal prosecutor assigned to the case must be a person who speaks both the English and the French languages.

156] A similar clause was included in the agreement with the City of Ottawa.

157] The *Courts of Justice Act* provides:

125.(1) The official languages of the courts of Ontario are English and French.

125.(1) Les langues officielles des tribunaux de l'Ontario sont le français et l'anglais.

126(1) A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.

126.(1) Une partie à une instance qui parle français a le droit d'exiger que l'instance soit instruite en tant qu'instance bilingue.

(2) The following rules apply to a proceeding that is conducted as a bilingual proceeding:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.
2. If a hearing that the party has specified is held before a judge and jury in an area named in Schedule 1, the jury shall consist of persons who speak English and French.
3. If a hearing that the party has specified is held without a jury, or with a jury in an area named in Schedule 1, evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.
4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.
5. Oral evidence given in English or French at an examination out of court shall be

(2) Les règles suivantes s'appliquent aux instances qui sont instruites en tant qu'instances bilingues :

1. Les audiences que la partie précise sont présidées par un juge ou un autre officier de justice qui parle français et anglais.
2. Si une audience que la partie a précisée se tient devant un juge et un jury dans un secteur mentionné à l'annexe 1, le jury se compose de personnes qui parlent français et anglais.
3. Si une audience que la partie a précisée se tient sans jury, ou devant un jury dans un secteur mentionné à l'annexe 1, les témoignages et observations présentés en français ou en anglais sont reçus, enregistrés et transcrits dans la langue dans laquelle ils sont présentés.
4. Toute autre partie de l'audience peut être instruite en français si le juge ou l'autre officier de justice qui préside est d'avis qu'il est possible de le faire.
5. Le témoignage oral donné en français ou en anglais lors d'un interrogatoire hors de la présence d'un tribunal est reçu, enregistré et transcrit dans la langue dans laquelle il est donné.
6. Dans un secteur mentionné à l'annexe 2, une partie peut déposer des actes de procédure et d'autres documents rédigés en français.
7. Partout ailleurs en Ontario, une partie peut déposer des actes de procédure et d'autres documents rédigés en français, si les autres parties y consentent.
8. Les motifs d'une décision peuvent être rédigés soit en français, soit en anglais.
9. À la demande d'une partie ou d'un avocat qui parle français mais pas anglais, ou vice versa, le tribunal fournit l'interprétation de tout ce qui est donné oralement dans l'autre langue aux audiences visées aux

received, recorded and transcribed in the language in which it is given.

6. In an area named in Schedule 2, a party may file pleadings and other documents written in French.

7. Elsewhere in Ontario, a party may file pleadings and other documents written in French if the other parties consent.

8. The reasons for a decision may be written in English or French.

9. On the request of a party or counsel who speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraphs 2 and 3 and at examinations out of court, and translation of reasons for a decision written in the other language.

dispositions 2 et 3 et aux interrogatoires hors de la présence d'un tribunal, ainsi que la traduction des motifs d'une décision rédigés dans l'autre langue.

158] The clauses in the agreements with the cities of Mississauga and Ottawa guarantee the offender a bilingual trial under the *Courts of Justice Act*, in addition, the municipalities have undertaken to provide a bilingual prosecutor. If prosecutions are instituted by the province of Ontario, under the general oral agreement with the respondents, the *Courts of Justice Act* applies.

159] It is necessary to determine whether these measures, which have been taken both by the provincial government and by the municipal authorities, ensure that the respondents, the Attorney General of Ontario and the municipalities have not failed and will not fail to comply with their duties either under the Charter or under the OLA.

160] With respect to extra-judicial services relating to the administration of prosecutions for contraventions under the CA, the Court notes that the *French Language Services Act* of Ontario covers only the named regions where the Act is to apply, and that not all municipalities are subject to the Act.

161] Counsel for the applicant correctly pointed out that language rights as they relate to signs, the right to make a complaint to the Commissioner of Official Languages and the right to an active offer of services in French are now not available as the *Contraventions Act* applies in Ontario, since they are not included in the *French Language Services Act* or the *Courts of Justice Act*.

162] It was also clearly noted that when an individual wishes to obtain information in French regarding an offence committed in Ontario in relation to a federal statute, the individual will not necessarily contact the offices of the Department of Justice in Ottawa or Toronto, where services are provided in both official languages, but rather will contact the place where the ticket was received, and that it is not at all certain that the individual will be able to receive adequate information services in French.

163] Thus, although the *French Language Services Act* of Ontario has expanded access to French language services in Ontario, it can not be regarded as ensuring the language rights guaranteed by Part IV of the OLA and section 20 of the Charter.

164] On the question of the judicial processing of prosecutions for federal contraventions, the Court was presented with, and even participated in, a virtually microscopic examination both of the provisions of sections 530 and 530.1 of the *Criminal Code* and of sections 125 and 126 of the Ontario *Courts of Justice Act*.

165] Certainly, at first glance, the provisions of section 126 of the Ontario *Courts of Justice Act* seem to be comparable to section 530.1 of the *Criminal Code*, the effects of which have been suspended by the implementation of the CA and the regulations thereunder.

166] However, it must not be forgotten that, as was pointed out in *R. v. Beaulac*, *supra*, that in Canadian law, substantive equality is the applicable norm. It is advisable to reproduce the following excerpts of the decision *R. v. Beaulac*, which I have [besides] cited abundantly at question 2 *supra*:

Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada.

...

It seems to me that all persons living in a country which recognizes two official languages must have the right to use and be understood in either of those languages when on trial before courts of criminal jurisdiction. I repeat that a trial before a judge or jury who understand the accused's language should be a fundamental right and not a privilege. The right to be heard in a criminal proceeding by a judge or a judge and jury who speak the accused's own official language, even if it is the minority official language in a given province, surely is a right that is a bare minimum in terms of serving the interests of both justice and Canadian unity. It is essentially a question of fairness that is involved.

...

This principle of substantive equality has meaning. ... It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.

...

Given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, as described here, and the objective of s. 686, I believe that

the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity.

(Emphasis added)

167] Section 125(2) of the Ontario *Courts of Justice Act* clearly establishes the context, which is that English is the language of the administration of justice in Ontario unless otherwise provided and that those exceptions are delineated in detail by the provisions of the next section, section 126.

168] It is clear that the *Courts of Justice Act* does not adopt the principle of the substantive equality of the two official languages that is recognized by the Charter and the OLA, and that in fact the principle that governs the *Courts of Justice Act* is that there is one principal language in the administration of the courts in Ontario, English, and that the place assigned to French is that of a secondary language that it is agreed will be accommodated. This is particularly clear when we consider the subsequent provisions of the *Courts of Justice Act*.

169] The principle that underlies the Ontario *Courts of Justice Act* is precisely the principle that Mr. Justice Bastarache rejected in *R. v. Beaulac, supra*, when he interpreted the language rights guaranteed by the OLA and the Charter. He wrote:

As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.

170] It must be recalled that the *Criminal Code* establishes that the language of the accused is the rule, and this is not stated formally in the provisions of the Ontario *Courts of Justice Act*.

171] It is clear that section 530(3) provides for an active offer of services in French, and that the judge must make the necessary arrangements so that the offer is made for an accused to be tried in French. No equivalent provision is made in the Ontario Act.

172] Moreover, given the fact that sections 530 and 530.1 of the *Criminal Code* are no longer applied in respect of the processing of contraventions under the new scheme, accused individuals will no longer be able to file a complaint with the Commissioner of Official Languages, and this is no small matter.

173] The Court also noted that only the summary convictions part of the *Criminal Code* has been imported in applying the CA in Ontario, under section 5 of the Act. The result of this is that an accused person has no remedy in respect of the rights set out in sections 530 and 530.1 of the *Criminal Code*. Those sections might have been used to protect an accused's rights if it were established in a provincial court that the rights provided by the Ontario *Courts of Justice Act* did not fully protect the rights provided in sections 530 and 530.1 of the *Criminal Code*.

174] On this point, it was also established in this Court that section 30 of the CA has never been brought into effect, and this gives further weight to the argument set out *supra*. Section 30 of the CA provides:

30. The choice of a defendant in responding to a ticket as to the official language, being the defendant's language, in which the defendant wishes to be tried is deemed to be an order granted under section 530 of

30. L'indication au procès-verbal, par le défendeur, de la langue officielle étant la sienne qu'il désire être celle du procès est présumée être une ordonnance rendue en vertu de l'article 530 du Code criminel et, par

the Criminal Code and accordingly sections 530.1 and 531 of that Act apply in respect of the choice.

conséquent, les articles 530.1 et 531 de cette loi s'appliquent.

175] Counsel for the applicant gave several examples of differences between the provisions of section 126 of the Ontario *Courts of Justice Act* and section 530.1 of the *Criminal Code*. For example, where section 530.1(b) of the *Criminal Code* provides that documents filed at the trial or preliminary inquiry may be filed in either language, the Ontario Act provides that a party may file pleadings and other documents written in French only in the areas named in Schedule 2, and that everywhere else in Ontario a party may file pleadings and other documents written in French if the other parties consent (my emphasis). The fact that the consent of the other party is required in order to file pleadings and documents in French is obviously a major impediment to the language rights set out in section 530.1.

176] The provisions of sections 126(4) and 126(5) relate only to the filing of documents before the trial or preliminary inquiry, or the filing of pleadings. It seems plain that counsel who wishes to file a document in French at trial, during examination or cross-examination of a witness, could not do so without securing the consent of the other party or requesting an adjournment and obtaining a translation of the document, and this creates an unacceptable and inappropriate situation, in the circumstances.

177] Counsel for the applicant also drew the Court's attention to the fact that the rights provided in section 530.1(e) give the accused the right to have a prosecutor who speaks his or her language. Section 126(2.1) of the *Courts of Justice Act* provides that in a bilingual proceeding, the prosecutor assigned to the case must be

a person who speaks English and French, and in my view this covers the language rights provided in the section. However, counsel for the applicant argued forcefully that at the municipal level, the protection afforded to language rights is contractual, in that it is the agreement that requires the municipality to have a prosecutor who is bilingual. In the event that this right were not granted, for one reason or another, the accused could not argue violation of his or her quasi-constitutional rights, but merely his or her right to a fair hearing under section 164(4) of the Act since the accused is not a party to the agreement with the municipality.

178] On this point, it is entirely conceivable that a French-speaking individual who also speaks English, but who nonetheless wishes to be tried in French in an Ontario city, might find himself or herself in a situation in which the city is not able to provide a prosecutor who is bilingual pursuant to the agreement entered into with the government. An individual who complained about this under the Act could end up with a decision by a provincial judge finding that his or her right to a fair hearing has not been infringed, since he or she was capable of understanding English and French, and the argument that the municipality failed to provide a French-speaking prosecutor would be rejected.

179] In the same scenario, but with quasi-constitutional protection afforded to language rights, the question of whether or not there was a fair hearing is no longer important, since the mere fact that a prosecutor who spoke French could not be provided is in itself an infringement which could ultimately nullify the proceedings against the accused, if his or her language rights were violated.

180] This is an important nuance that clearly establishes that language rights protection is definitely not the same at the municipal level as it is at the provincial or federal level.

181] Counsel also pointed out that the provisions of section 530.1(f) of the *Criminal Code* grant an unconditional right to an interpreter to assist the accused, his or her counsel or a witness during the preliminary inquiry or at trial. Section 530.1(g) sets out the right to a transcript of everything that was said during the proceedings in the official language in which it was said, and to a transcript in the other official language of everything that was said. Item 9 of subsection 126(2) of the *Court of Justice Act* provides that the court shall provide interpretation of anything given orally in the other language and at examinations out of court, but not a transcript of the interpretation, as is provided in the *Criminal Code*; what is even more disquieting is that this service is provided only in the case of a party or a lawyer who speaks French but not English, which makes it virtually impossible, properly speaking, to use that provision, since it could apply only in the case of accused persons or counsel who speak only French and do not speak English. This is a significant erosion of rights in comparison to the rights guaranteed by sections 530 and 530.1 of the *Criminal Code*, not to mention that it must be rare for a lawyer practising in Ontario to speak only French and not English.

182] I therefore have no hesitation in concluding that the measures taken by the respondents regarding the application of the CA and the agreements entered into by the respondents and the Government of Ontario and the subsequent municipal agreements do not adequately and completely protect the quasi-constitutional

language rights provided by sections 530 and 530.1 of the *Criminal Code* and by Part IV of the OLA.

183] The violation of the language rights provided in sections 530 and 530.1 of the *Criminal Code* and Part IV of the OLA also constitutes a violation of the rights provided in sections 16 to 20 of the Charter.

184] The respondents did not think it necessary to raise section 1 of the Charter. In fact, they consistently maintained that they had not infringed the Charter, in any event.

185] It is important to recall that the burden of proof in respect of section 1 of the Charter rests on the respondents, since it is they who have limited the rights guaranteed by the Charter.

186] In this case, no additional evidence, apart from the evidence presented in respect of whether the language rights had been violated, was presented by the parties in order to determine whether the Charter rights were made subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

187] Consequently, I do not think it worthwhile to go any further into an analysis in respect of which the parties chose to remain silent.

5. Have the respondents complied with the duties set out in Part VII of the OLA in enacting and applying the CA and making and applying the regulations thereunder?

188] For the reasons explained earlier in the analysis of the answer to issue number 1, it is clear that the Court has no jurisdiction to examine any breaches there may have been of the duties set out in Part VII of the OLA in enacting and applying the CA and in making and applying the regulations thereunder. It is therefore not necessary to address this question.

6. Are the remedies sought by the Commissioner appropriate?

189] In answering this question, I shall address the remedies sought one by one. First, the applicant is asking the Court to make a declaration that the respondents have not complied with their duties under Part IV and Part VII; on this point, I stated earlier that my conclusions were that the respondents had not complied with their duties under Part IV of the OLA. The second part of the declaration sought, that the defendants have not complied with their duties under Part VII, must be rejected for the reasons stated earlier.

190] With respect to the second remedy sought, a declaration that Part IV of the OLA prevails over inconsistent provisions of the CA and the regulations thereunder, the response already given by the Court to this concern was that no party before the Court argued that the CA was illegal or contained any clause that was illegal; however, it seems clear that the Government of Canada was entirely at liberty to enact the CA and to make the regulations thereunder. Nonetheless, Parliament has decided to suspend the application of two sections of the *Criminal Code*, sections 530 and 530.1, which had been enacted at the time that the amendments were made to the OLA. Moreover, the rights provided in Part IV of the OLA were not

maintained when the CA was enacted and in the subsequent agreements under the CA. Those language rights provisions having already been held by the courts to be quasi-constitutional, it seems plain that the CA must be enacted, and the regulations thereunder made, in such a way as to comply with the Constitution and the Charter, and that if there is a conflict between the existing language rights, as subsequently upheld by the Supreme Court, and another Act of the same Parliament designed to erode, in one way or another, the language rights guaranteed by Part IV of the OLA and the Charter, and protected by Part XVII of the *Criminal Code* (sections 530 and 530.1), there is no doubt that the language rights prevail.

191] With respect to the remedy set out in paragraph (c), the Court would simply say that it seems clear that in the measures they have taken in enacting and applying the CA, the respondents have violated the statutory language rights in the OLA, and the provisions of the Charter, with respect to the status and use of the two official languages in the province of Ontario.

192] With respect to the order sought in paragraph (d), the Court would simply point out that the CA is entirely legal and that the Court will simply order the respondents to take the necessary measures, whether legislative, regulatory or otherwise, to ensure that the quasi-constitutional language rights provided by sections 530 and 530.1 of the *Criminal Code* and Part IV of the OLA, for persons who are prosecuted for contraventions of federal statutes or regulations, are respected in any present or future regulations or agreements with other parties that relate to responsibility for administering the prosecution of federal contraventions.

193] With respect to the oral agreement between the respondents and the Government of Ontario, the main elements of which were set out in a draft agreement which has never been signed by the two parties, the respondents must ensure that the agreement, whether oral or in writing, is amended to ensure that there is a clear reference to the quasi-constitutional language rights provided in sections 530 and 530.1 of the *Criminal Code* and Part IV of the OLA. The respondents will have one year from the date of this order in which to comply with the order. At the end of that time, if the existing oral agreement between the respondents and the Government of Ontario has not been amended to comply with this order, it will become void.

194] In any measure taken to delegate administrative powers in relation to the application of the CA to the Government of Ontario, whether such measures, present or future, be legislative or regulatory in nature or in the form of agreements with the Government of Ontario, the respondents shall incorporate a clause to provide that the government of Ontario, when it delegates its administrative powers in relation to the application of the CA to third parties, including municipalities, whether by legislation or regulation or by agreement, must include in such measures a provision that the third parties must respect the quasi-constitutional language rights provided by Part IV of the OLA which apply to persons who are prosecuted for contraventions of federal statutes or regulations, when the conditions set out in sections 22 and 24 of the OLA and section 20 of the Charter apply. The respondents shall also incorporate a clause to provide that the Government of Ontario, when it delegates its administrative powers in relation to the application of the CA to third parties, including municipalities, whether by legislation or regulation or by agreement, must include in such measures a provision that the third parties must

respect the quasi-constitutional language rights provided by sections 530 and 530.1 which apply to persons who are prosecuted for contraventions of federal statutes or regulations. Regarding the existing agreements, if any, the respondents shall, within no more than one year from the date of this order, ensure that the said agreements are amended to comply with the order. Upon the expiry of that time, if the agreements have not been amended, they will become void.

195] The respondents shall also, within no more than one year from the date of this order, ensure that the agreements between the respondents and the municipalities of Mississauga and Ottawa in relation to the application of the CA are amended to ensure that the quasi-constitutional language rights provided by sections 530 and 530.1 of the *Criminal Code* and Part IV of the OLA are clearly referred to. Upon the expiry of that time, if the agreements have not been amended to comply with this order, they will become void.

196] In other words, the respondents must ensure that the quasi-constitutional language rights of all Canadian citizens are guaranteed by any measure taken to arrange for the implementation of the CA.

197] With respect to the consultation mechanism suggested by the applicant, it does not seem to me to be useful, at this stage, to add another consultation mechanism on top of the one that already exists and the numerous discussions among the parties that accompany the investigation process conducted by the Commissioner of Official Languages.

198] With respect to suggested recourse to the Commissioner of Official Languages where language duties have been violated, that suggestion seems to me to be redundant, in that this recourse is statutory and is governed by the existing provisions of the Act, and the Court does not believe that it has jurisdiction to mandate recourse to the Commissioner of Official Languages if it is not already provided by the Act. In a case in which it is already provided, as in the present situation, it is not necessary to reopen it.

199] Costs will also be awarded against the respondents.

Pierre Blais
Judge

OTTAWA, ONTARIO
March 23, 2001