

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF an Application for Declaration that By-Law No. 2001-170 of the City of Ottawa and the Bilingualism Policy of the City of Ottawa are illegal and *ultra vires* the City of Ottawa;

AND IN THE MATTER OF the constitutionality of By-Law No. 2001-170 and the said Bilingualism Policy;

AND IN THE MATTER OF Canadians for Language Fairness, a corporation without share capital incorporated pursuant to the laws of Ontario, and being a coalition of rate payers in the City of Ottawa;

B E T W E E N:

CANADIANS FOR LANGUAGE
FAIRNESS

Applicant

J. Arthur Cogan Q.C., for the Applicant

- and -

THE CITY OF OTTAWA

Respondent

Ronald F. Caza and Lissa Mussely, for the Respondent

- and -

L'ASSOCIATION FRANÇAISE DES
MUNICIPALITÉS DE L'ONTARIO
ASSOCIATION CANADIENNE
FRANCAISE DE L'ONTARIO CONSEIL
RÉGIONAL OTTAWA

Intervenors

Marc R. Labrosse, for the Intervenors

HEARD: May 18, 19, 23 and 24, 2006

METIVIER RSJ

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DECISION

Introduction

[1] This Application is for a declaration that By-Law No. 2001-170 of the City of Ottawa and a Bilingualism Policy, both adopted by the City of Ottawa on May 9, 2001 are illegal and *ultra vires* and for an order striking these down on the ground that they are in contravention of the guarantee of freedom of expression pursuant to section 2b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] The Applicant is a corporation whose objects are:

- (a) Securing public support in Canada for the enactment/repeal of legislation by the government dealing with bilingualism;
- (b) Making representations to the government for the enactment/repeal of such legislation;
- (c) Rendering assistance to the government by supplying information collected as a result of research carried on under the auspices of the corporation;
- (d) Co-ordinating activities of the corporation with those of similar organizations, societies and individuals in Canada; and such other complementary purposes not inconsistent with these objects

and is made up of rate payers in the City of Ottawa and elsewhere.

[3] The Respondent is the City of Ottawa, an entity that since 1999 represents the amalgamation of 12 former municipalities.

[4] The Interveners are L'Association Française des Municipalités de l'Ontario ("AFMO") et L'Association canadienne-française de l'Ontario-Conseil Régional Ottawa ("ACFO-Ottawa").

[5] AFMO is a non-profit organization made up of 41 municipalities and 44 associated members representing various segments of the community and other municipal and provincial organizations. It is dedicated to improving legislation and regulations related to the provision of

services in French and English to those locations designated in the *French Language Services Act*, R.S.O. 1990, c. F .32 [*F.L.S.A.*].

[6] ACFO-Ottawa exists to promote “la francophonie” in the national capital and elsewhere in Ontario.

The Grounds for the Application

[7] The grounds for the Application are as follows.

[8] The Province of Ontario has legislated provisions for various designated municipalities (of which the City of Ottawa is one) concerning the use of the English and French languages within the municipality. These are set forth in the *F.L.S.A.*

[9] Section 14 of the *F.L.S.A.* empowers designated municipalities to pass a by-law with respect to the administration of the municipality being conducted in both English and French and to all or specified municipal services being made available in both languages.

[10] In purported exercise of this authority granted by the Province of Ontario, the City of Ottawa passed By-Law No. 2001-170, and therein referred to a Bilingualism Policy (the “Policy”) also adopted by Council. Both were passed on the same day.

[11] The Applicant submits that there is no jurisdiction granted by the Province to the City to promulgate such an extraneous and substantive Policy. It states that the promulgation of the Policy is not authorized or is in excess of the powers granted in the enabling legislation and, moreover, is in itself unreasonable, unfair, discriminatory, vague and uncertain in its application. The Applicant submits that because the Policy may be amended from time to time, this is a delegation not permitted by the enabling legislation.

[12] Therefore, the Applicant states, the By-Law is invalid and *ultra vires*.

[13] The Applicant also submits that the provisions of the By-Law and Policy are contrary to the right of freedom of expression as guaranteed by section 2b) of the *Charter* and are not saved by section 1.

Historical Background

[14] The former City of Ottawa, then referred to as the Regional Municipality of Ottawa-Carleton, had a bilingual policy in place at the time of amalgamation. Extensive public consultations had been undertaken in the past concerning this policy.

[15] Three of the other cities, Vanier, Cumberland and Gloucester, also had bilingual policies in place at the time the new City was formed.

[16] The staff report to Council after amalgamation detailed the history of the old City of Ottawa:

- It adopted the first bilingualism policy in 1970. It provided for both English and French in the operation of Council and municipal administration.
- In April 1979, Council established an Advisory Committee on French Language Services to examine the City's 1970 policy and to develop guidelines to foster a climate where Francophone employees could work in either English or French; it provided for the recruitment of bilingual staff in management positions, as well as of those employees dealing with the public.
- In March 1980, the said Committee's Report was finalized. It was approved by City Council in October 1982.
- In April 1994, Council of that time approved a further report that modified the previous policy by designating all Executive and Senior Management positions as bilingual. It established recruitment and appointment criteria and set a target to achieve a 50% rate of bilingualism among said groups by December 1997.
- On November 25, 1999, Glen Shortliffe, Special Advisor to the Provincial Government on restructuring, recommended that the Council of the new City be required to establish guidelines for the delivery of bilingual services and for the use of the two languages

within the civic administration and that, in developing these guidelines, Council use the concept "where warranted."

Relevant Legislation

A. *French Language Services Act*

[17] In 1986 the Provincial Legislature enacted the *F.L.S.A.*

[18] The statute's underlying rationale is clear in its Preamble:

Preamble

Whereas the French language is an historic and honoured language in Ontario and recognized by the Constitution as an official language in Canada; and whereas in Ontario the French language is recognized as an official language in the courts and in education; and whereas the Legislative Assembly recognizes the contribution of the cultural heritage of the French speaking population and wishes to preserve it for future generations; and whereas it is desirable to guarantee the use of the French language in institutions of the Legislature and the Government of Ontario, as provided in this Act;

[19] Pursuant to this intention the *F.L.S.A.* provides for the right to provision of services in French, for translation of statutes and regulations into French and also legislates for a Minister and an Office for Francophone Affairs.

[20] Some of the provisions especially relevant in the case at bar are the following:

Right to services in French

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. R.S.O. 1990, c. F .32, s. 5 (1).

Existing practice protected

6. This Act shall not be construed to limit the use of the English or French language outside of the application of this Act. R.S.O. 1990, c. F .32, s. 6.

Limitation of obligations of government agencies, etc.

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. R.S.O. 1990, c. F .32, s. 7.

Municipal by-laws re official languages

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. R.S.O. 1990, c. F .32, s. 14(1).

Right to services in English and French

(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 available services to which the by-law applies, in either language. R.S.O. 1990, c. F .32, s. 14(2).

B. The *Municipal Act*

[21] The impugned By-Law and Policy were passed in May 2001. The current *Municipal Act, 2001*, S.O. 2001, c. 25 [*Municipal Act, 2001*] did not come into force until January 1, 2003. Accordingly, the former *Municipal Act*, R.S.O. 1990, c. M .45, as rep. by S.O. 2001, c. 25, s. 484(1) [*Municipal Act, 1990*] is applicable in this case.

[22] Section 103 of the *Municipal Act, 1990* is relevant to the case at bar and reads as follows:

English and French by-laws and resolutions

103. (1) Every council may pass its by-laws and resolutions in English or in both English and French.

Official plans

(2) Every council may adopt an official plan that is in English or that is in both English and French.

Proceedings of council

(3) Every council and every committee of council may conduct its proceedings in English or French or in both English and French.

Minutes

(4) Despite subsection (3), the minutes of the proceedings of council and all committees of council shall be kept in English or, where so authorized by a by-law of the council, in both English and French.

Conduct of affairs, etc., of municipality

(5) Unless otherwise directed by a by-law of the council, the officers and employees of a municipality may conduct the business and affairs of the municipality in such language, including a language other than English or French, as may be reasonable in the circumstances.

Proviso

(6) Nothing in this section,

(a) affects an obligation imposed by or under any Act to make, keep, use, file, register or submit any form, book, document or other paper of any kind in the language or languages specified by or under the Act;

(b) affects any requirement at law to give reasonable notice.

Translations

(7) Where any form, book, document or other paper of any kind is submitted by a municipality to a ministry of the Government of Ontario in French, the municipality shall, at the request of the minister of the ministry to which the form, book, document or other paper was submitted, supply the minister with an English translation thereof. R.S.O. 1990, c. M.45, s. 103.

C. By-Law 2001-170

[23] The impugned By-Law No. 2001-170 that was passed on May 9, 2001 is the following:

A by-law of the City of Ottawa relating to bilingualism.

WHEREAS the Council of the City of Ottawa recognizes the bilingual character of the City of Ottawa;

AND WHEREAS Section 14 of the French Language Services Act permits the Council of a municipality in a designated area to 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;

AND WHEREAS the City of Ottawa is a designated area;

AND WHEREAS on May 9, 2001, City Council of the City of Ottawa adopted a policy on bilingualism (hereinafter referred to as the "bilingualism policy");

THEREFORE the Council of the City of Ottawa enacts as follows:

1. A citizen of Ottawa has the right to communicate in English and French in accordance with the bilingualism policy adopted by Council on May 9, 2001 and as may be amended from time to time.
2. A citizen of Ottawa has the right to receive available services in either English or French in accordance with the bilingualism policy adopted by Council on May 9, 2001 and as may be amended from time to time.
3. The implementation of the bilingualism policy shall not cause any employee of the municipality to lose his or her employment.
4. The implementation of the bilingualism policy shall be done in co-operation and consultation with collective bargaining groups.

ENACTED AND PASSED this 9th day of May, 2001.

D. Policy on Bilingualism

[24] The Bilingualism Policy also became effective on May 9, 2001. It is reproduced in full as the substance and tenor of the application focuses on its details.

Declaration of Principle

The City of Ottawa recognizes both official languages as having the same rights, status and privileges.

To this end, the City of Ottawa must:

Language of Work

- Encourage employees to work in the official language of their choice;
- Provide appropriate language training;
- Provide assistance to employees who must or wish to write in French;
- Develop and organize training programs in both official languages.

Language of Service

- Take the necessary steps to provide at all times the appropriate number of bilingual employees within work units;
- By appointing employees meeting the language requirements of the unit where the vacancy occurs or by providing language training to new incumbents.¹

Cultural Programs

- Ensure that cultural programs aimed at one official language group be developed by employees having full knowledge of the appropriate culture.

Complaints

- The Secretariat Services Branch (French Language Services Division) will follow up on citizens' complaints concerning services in both official languages.

¹ If a unilingual employee hired prior to January 1, 2001, from the former municipalities of the Region of Ottawa-Carleton, Ottawa, West Carleton, Goulbourn, Kanata, Rideau, Nepean, Osgoode, Gloucester, Cumberland, Vanier or Rockcliffe Park, applies for a position designated bilingual and is appointed to that position; the appointment will be for a period of not less than six months; the employee must however undergo language training.

The appointment will be confirmed if it is determined that the employee is able to become, and is making reasonable efforts to become, proficient in the second language; if not, the employee will revert to his/her former classification.

Employees hired after January 1, 2001 and outside candidates must meet the posted language requirements.

The career development of employees hired after January 1, 2001 could be related to their language skills.

Communication

- That all documents published by the City of Ottawa or its agencies and intended for the public (internal and external), be published in both official languages.

1. General Policy

- R.1 That the City of Ottawa reiterate the bilingual character of the City as well as equality of rights and privileges for both linguistic groups in light of services offered.
- R.1.1 That the City reaffirm to the community and to its employees its commitment to bilingualism and that it develop a plan and measures for furthering its policy on bilingualism.
- R.1.2 That the Department of Human Resources continue to use the report "Bilingualism Policy – Work Units" as a work instrument, and that appropriate guidelines be developed.
- R.1.3 That the General Manager, Human Resources be responsible for the development of this action plan and related measures.
- R.1.4 That the General Manager, Human Resources, be responsible for the development of regulations and guidelines and the implementation of linguistic policies affecting employees.
- R.1.5 That the City Manager submit a report indicating the appropriate cost of carrying out the recommendations contained this policy.
- R.1.6 That the City Manager, the General Managers, directors and managers all be accountable for the implementation of this action plan and related measures.
- That each year, the General Manager of each department prepare an annual plan on official languages describing the accomplishments during the last twelve months, submit plans or goals for the next twelve months and that they be approved with or without amendments, by City Council and made public.
- R.1.7 That the General Manager, Human Resources submit progress reports on the implementation of the bilingualism policy.
- R.1.8 That the City of Ottawa inform the community of the availability of services.

- R.1.9 That City Hall distribute to employees the information pertaining to the City's Policy on bilingualism and its provisions dealing with their rights and obligations.
- That the English and French languages be accepted as languages of work within the municipal administration.
- R.1.9.1 That the City inform its employees of this section and that it encourage them to use both official languages in their work.
- R.1.9.2 That employees who have the opportunity, and are able to do so, be encouraged to use French on the job.
- R.1.10 That Francophone employees working in related fields at City Hall be strongly encouraged to meet on a formal basis to discuss programs that could result in better services to the population.
- R.1.11 That each Department with whom the public has contact have a bilingual capacity in order to provide services in both official languages.
- R.1.11.1 That an assessment of needs in this area be undertaken.
- R.1.11.2 That the City actively promote its services in both official languages.
- R.1.12 That City Council reiterate its wish to offer to both official language groups comparable services and programs in their mother tongue and take the necessary action to achieve this objective.
- R.1.12.1 That the quality and level of services provided in French be equal to those in English.
- R.1.13 That work instruments (circulars, books and texts required for performance of duties) be made available simultaneously in both official languages.
- R.1.14 That the City of Ottawa lobby provincial authorities so that legal documents, regulations and legislation be available in French and that the French text be recognized as legal at the local level.

- R.1.15 That the necessary action be taken to ensure that action taken by City Council in French is recognized officially in French.
- R.1.16 That each of the employee associations and unions be consulted as detailed plans are developed for the implementation of the recommendations in this report.
- R.1.17 That City Council clearly give the mandate to its delegates on the Police Services Board to present in the form of recommendations all relevant aspects of the bilingualism policy adopted by City Council and to ensure that appropriate mechanisms of application are developed or implemented.
 - R.1.17.1 That annual performance appraisals include language objectives for employees occupying positions requiring a second language in order to evaluate progress in language training of employees who have been confirmed in their positions without first having met the language requirements of those positions.
 - R.1.17.2 That annual employee performance appraisals and departmental assessments reflect progress made in implementing the policy, and that quarterly and annual reports include statements on progress.
- R.1.18 That policies respecting bilingual postings and publications apply to all purchase of service groups providing services directly to the public and to community associations and groups whose activities are funded by the City of Ottawa at a rate of more than 30%. Such groups are to provide a minimum of bilingual personnel at the activity site.
 - R.1.18.1 That a clause respecting the spirit of this section be included in agreements with associations receiving grants from the City of Ottawa and in contracts signed by the City where appropriate in accordance with the intent of this policy.
 - R.1.18.2 That adherence/compliance of this section be monitored.
- R.1.19 That the City of Ottawa establish an Advisory Committee on French Language Services with a mandate to advise the municipal

administration and Council with regard to the implementation of the Policy on bilingualism.

- R.1.20 It is understood that these recommendations deal with the use of the two official languages. The City also recognizes the need of adapting its services to the needs of other language and cultural groups as the need arises and as the multi-cultural face of this community changes.

II. Language Training

- R.2 That the City of Ottawa clearly identify funds spent on language training for elected representatives.
- R.2.1 That the City of Ottawa advise all its employees of the opportunities for language training.
- R.2.2 That each year the municipal administration encourage its unilingual employees to acquire second language skills and advise them of available programs.
- R.2.2.1 That the priority for language training be given to work units whose main functions involve:
- i) communicating with the public;
 - ii) advising other employees;
 - iii) providing services essential to the effective operation of other Departments (administrative services, central registry, etc.).
- R.2.2.2 That language training be given to intermediate and senior staff in order to ensure that the following goals are met:
- i) service to the public in both official languages at all levels;
 - ii) the use of both official languages in the work place.
- R.2.3 That the City offer each year to some employees who have attained level 3 in the second official language, the opportunity to take during their working hours courses given by the City of Ottawa or other public organizations.

- R.2.4 That all employees who have reached levels 1 to 3 (proficiency levels: beginner, intermediate and advanced) in the second language be reimbursed any fees paid for courses taken after working hours and completed in any educational institution.
- R.2.5 That the Organizational Effectiveness Branch provide assistance to employees who either want or need to use written French. (This will help make cost effective use of existing resources).
- R.2.6 That concrete measures be developed to ensure that employees registered for language training and occupying positions having a bilingual requirement use their second language at work. (The Organizational Effectiveness Branch could elicit the cooperation of Francophones within the work units to support the training program by providing employees with opportunities to use their French or by providing work instruments in French).
- R.2.7 That the City adopt specific language training policies and procedures.
- R.2.8 That the municipal administration look into ways of improving language skills of employees at a level 3, i.e. time-off with partial day, personnel exchanges between cities of Montreal and Ottawa, etc.
- R.2.9 That the City of Ottawa encourage meetings to be chaired by bilingual persons, so that civic employees be able to use the official language of their choice at internal meetings, and depending on the type of meeting, that interpretation services be provided.

III. Professional Training

- R.3 That professional training and development programs necessary for employee competence on the job be available in both official languages (either through courses given by City Hall or through other organizations).
 - R.3.1 That courses could be given in both official languages or in either of them.

(It is assumed that over a number of years all successful courses of significance will be offered in both official languages).
 - R.3.2 That courses offered in French be equal in quality to those in English.

- R.3.3 That employees be advised of the availability of these services and use of these services be encouraged.
- R.3.4 That courses be provided in French even if registration is low to allow time for habits to change.
- R.3.5 That employees be encouraged to take their career development training in their second official language.
- R.3.6 That in the short term Francophones be encouraged to take courses in French.
- R.3.7 That guidelines be devised concerning the use of these services.

IV. Work Units

- R.4 That those units whose primary function is to deal directly with the public on a full-time basis, have a full complement of bilingual staff or at least that the majority be bilingual.
 - R.4.1 That each work unit at the City representing a separate and specific service to the public and/or employees be able to communicate in both official languages at all times.
 - R.4.2 That this bilingual capacity in each work unit be available at all levels including management, administration officers and support staff.
 - R.4.2.1 That the City of Ottawa redistribute its human resources more adequately and inform the public of this.
 - R.4.2.2 That the availability of services be ensured by judicious distribution of bilingual human resources.
 - R.4.2.3 That use of services in both official languages be actively promoted.
 - R.4.2.4 That the media be used to inform the public.
 - R.4.2.5
 - (i) That all Executive and Senior Management Group positions be designated bilingual.
 - (ii) That the City Manager set a target to achieve a 50% rate of bilingualism among all incumbents of

Executive and Senior Management Groups by
January 1, 2004.

(iii) Current incumbents who could not achieve level 3 proficiency in oral interaction and reading at least three (3) years prior to their earliest possible retirement date at full pension would be excluded from calculations in the achievement of the 50% target.

R.4.3 That with respect to services delivered in neighborhood and interacting with the community (i.e., community centers, planning offices) staff language skills will match neighborhood language needs. Where one official language group predominates in a neighborhood, civic employees with ability in the dominant language will be employed. Where both official groups represent significant portions of a neighborhood population, bilingual staff will be employed.

R.4.4 That all positions with a wide range of activities related to cultural programs directed to either of the two cultural groups be staffed by employees of the respective cultural group.

R.4.4.1 That all work units with a wide range of activities related to cultural programs directed to either of the two cultural groups be sufficiently staffed by employees having full knowledge of the appropriate cultural group.

R.4.4.2 That young people and senior citizens be given priority in the delivery of services.

R.4.4.3 That special effort be made so that Francophones in the Fire Services Branch have the opportunity of working in French and so that the Francophone communities can receive services in French. This program is to be developed and implemented in close collaboration with the Fire Fighters Association and so as to maintain the safe operation of the service.

R.4.4.4 That firefighters work in the language of their choice but that each group always have at least one firefighter who can communicate in both official languages.

- R.4.4.5 Since the safety of the public is a prime consideration, that City Council see that this section is put into effect as soon as possible.
- R.4.4.6 That bilingual firefighters be assigned to strategically located fire stations.
- R.4.4.7 Allowing for the different work shifts, that there always be a bilingual person on duty.
- R.4.4.8 This section shall not apply to the volunteer firefighters component of the Fire Service.

V. Written Communication

- R.5 That civic employee records be kept in the official language of their choice.
 - R.5.1 That employees be advised of this possibility.
 - R.5.2 That all documents published by City Hall or its agencies and addressed to the public appear in both official languages (instructions, regulations, municipal by-laws, etc.).
 - R.5.3 That publications be made available in both official languages simultaneously or in the language of the target group (i.e., schedule of courses in French).
 - R.5.4 That all written communication from the General Managers and Department of Human Resources to a number of employees and any other general circular be in both official languages.
 - R.5.4.1 That all other written communication may be in either official language of the choice of the writer.
 - R.5.5 That supervisors' memos addressed to employees of both language groups be written in both official languages.
 - R.5.6 That these documents always be printed side by side or back to back, except in the cases of maps, plans, or similar documents which do not lend themselves to this type of printing.
 - R.5.7 That the agendas of City Council meetings and its committees be available in both official languages.

R.5.8 That the publicity relating to programs and services offered to the public always be in the language of the said program.

R.5.8.1 That those responsible for the programs and services ensure the accuracy of the information and coordinate its dissemination.

R.5.8.2 That the Secretariat Services Branch see to the application or coordination of this item by ensuring that advertised, and related information, actually exists.

R.5.9 That all signs on City property or that of its agencies be bilingual or make use of international symbols.

R.5.9.1 That signs be replaced as required.

VI. Staffing

R.6 Subject to R.6.3 below, it is to be made clear that the language requirements of various positions will be fulfilled by training of the present incumbent when the incumbent does not meet language requirements, and in no instance will employees be terminated or suffer reduction in salary or wages for not meeting job language requirements.

R.6.1 That City Hall ensure that prospective employees of both language groups enjoy the same job and career opportunities within the municipal administration and that it implement mechanisms to meet these objectives and that implementation of mechanisms be referred to employee associations for suggestions and report back to the Corporate Services and Economic Development Committee.

R.6.2 That language capability be an integral part of any resource and career planning that the Corporation may adopt.

R.6.3 That City Hall make every effort to appoint bilingual people to all management positions and especially those of General Manager.

R.6.3.1 That
i) effective immediately all external candidates considered for Level 1 to 3 management positions be bilingual. Any exceptions, after having undertaken a comprehensive recruitment effort, shall require Council approval.

ii) prior to December 31, 2009, all internal candidates who are not bilingual and who are promoted to Level 1 to 3 management positions be required to take second language training to meet the language requirements of the position.

iii) as of December 31, 2009, bilingualism be considered a prerequisite for any internal promotion to a designated bilingual position within Level 1 to 3 management groups. Any exceptions, after having undertaken a comprehensive recruitment effort, shall require Council approval.

iv) Internal candidates promoted to Level 1 to 3 management positions pursuant to paragraphs (ii) and (iii) who could not achieve level 3 proficiency in oral interaction and reading at least three (3) years prior to their earliest possible retirement date at full pension would be exempted from meeting the language requirements of the position.

R.6.4 That where in any of the work units recommended by the Senior Management Team and approved by Council there is a deficiency in the number of employees who meet the bilingual requirement of the unit, the deficiency is to be corrected in the following manner:

i) subject to R.6.6 below, by the appointment of a sufficient number of persons with a bilingual capability to vacancies that may arise from time to time in the work units, and

ii) by the provision of language training to a sufficient number of employees in the work unit.

R.6.5 That appointments involving employees recruited from outside the City, personnel be subject to the same conditions as applied in the case of appointments involving internal employees.

R.6.6 That where under R.6.4 i) a vacant position is to be filled in a work unit that has a deficiency in the number of employees who meet the bilingual requirement of the work unit, and application for the position is made by an employee who (i) has been in the continuous

full-time employment of the former Regional Municipality of Ottawa-Carleton, or any of the former area municipalities, since before January 1, 2001, and (ii) does not have the required bilingual capacity:

R.6.6.1 i) the employee may be appointed to the position but on an acting basis for a period of not less than six months and not more than twelve months on the understanding that he/she will be provided with and will undertake the required language training;

ii) the employee's appointment to the position will be confirmed if, following six months of training, it is determined that the employee is able to become, and is making reasonable efforts to become, proficient in the second language; and

iii) the employee will revert to his/her former classification and salary whenever it is determined that he/she is not able to become, or is not making reasonable efforts to become proficient in the second language.

R.6.7 That the scheduling of the provision of language training to City employees with respect to R.6.4 ii) above be made in the context of the availability of language training facilities and the degree of priority assigned to the bilingual requirement of the work unit as recommended by the Senior Management Team and approved by Council.

R.6.8 That employees who have already become or subsequently become full-time continuous employees of the City of Ottawa on or after January 1, 2001, be informed that their career development with the City could well be related to their proficiency in both official languages, and that they be encouraged to acquire this proficiency.

R.6.9 That cultural programs aimed at one official language group be designed by employee(s) of that same cultural group.

R.6.9.1 That cultural programs aimed at one official language group be designed by employees having full knowledge of the appropriate culture.

R.6.9.2 That in this regard, civic departments, when filling a vacancy in a work unit that provides cultural programs

and reviewing the draft job description prepared by the Classification Unit of the Human Resources Department, will give particular attention to the need to identify the cultural component of the job and the required knowledge of the appropriate culture.

R.6.10 That Human Resources Department develop and administer a comprehensive set of tests to assess effectively the knowledge of both official languages of all candidates for positions designated bilingual and that only those having the required language skills be considered.

R.6.10.1 That all tests administered to determine candidates skills and competence be available in both official languages.

R.6.10.2 That candidates be advised that some tests are available in the language of their choice.

R.6.10.3 That a work plan and time frame be established for the translation of other tests.

R.6.11 That all selection boards set up in view of filling a bilingual position be composed of a bilingual staff to allow candidates to use the language of their choice.

R.6.11.1 That guidelines be established with respect to the composition of selection boards.

R.6.11.2 That candidates be advised of this policy.

R.6.12 That hiring and promotion of staff at the City of Ottawa shall continue to be according to the merit principle. Notwithstanding other provisions of this policy, decisions about the hiring and promotion of staff are, subject to any applicable collective agreement or contract of employment, based on the ability of the candidate to perform the duties of the position applied for and the suitability of the candidate for that position.

VII. Translation

R.7 That the City establish an adequate Translation and Revision Section.

- R.7.1 That the Secretariat Services Branch (French Language Services Division) carry out an analysis and evaluation of these services on a regular basis.
- R.7.2 That adequate human resources be made available to ensure a reasonable turnaround time.
- R.7.3 In order to ensure fast, quality service at a reasonable cost, that the use of freelance translators, revisors or interpreters be considered, and that a directory of such resources be compiled.
- R.7.4 That the City of Ottawa set priorities and requirements with regards to translation.
- R.7.5 That the City of Ottawa adopt a policy on the use of translation and interpretation services.
- R.7.6 That a precise policy be established with respect to:
- general access to services (translation and interpretation);
 - general revision and revision of previously translated documents;
 - standardization of terminology.
- R.7.7 That use of these services be encouraged and that employees be informed of their existence and the policies governing their use.
- R.7.8 That the City of Ottawa be selective in its use of translation and that the section concentrate on revision and editing of texts as the requirements for translation decrease.

VIII. Language of Supervision

- R.8 The policy that civic employees be supervised in the official language of their choice be a long term objective to which the City move in a gradual, practical manner.

- R.8.1 That services to staff (salary, counselling, etc.) be available in the official language of the employees.

IX. Complaints

- R.9 That a follow-up procedure be established for handling complaints and for receiving comments and suggestion; and that the City make the general public aware of this procedure.

E. Second By-Law

[25] A further By-Law was passed on the same day.

BY-LAW NUMBER 2001-173

A by-law of the City of Ottawa to confirm proceedings of the Council of the City of Ottawa at its meeting held on May 9, 2001.

WHEREAS Section 9 of the Municipal Act, R.S.O. 1990, Chapter M.45, as amended, provides that the powers of a municipal corporation are to be exercised by its council;

AND WHEREAS subsection (1) of Section 101 of the said Municipal Act provides that the powers of every council are to be exercised by by-law;

AND WHEREAS it is deemed expedient that the proceedings of the Council of the City of Ottawa at this meeting be confirmed and adopted by by-law;

THEREFORE the Council of the City of Ottawa enacts as follows:

1. The action of the Council of the City of Ottawa in respect of each recommendation contained in Corporate Services and Economic Development Committee Report Nos. 6A and 7, Emergency and Protective Services Committee Report No. 4, Environment Services Committee Report Nos. 5 and 5A, Health, Recreation and Social Services Committee Report Nos. 5, 5A and 6, Nominating Committee Report No. 2, Planning and Development Committee Report Nos. 7 and 7A, Report of the General Manager, Planning and Development, respecting Changes to the Development Services Department Capital Budget and Transportation and Transit Committee Report Nos. 4A and 5, and any reports of committees and of local boards and commissions and each motion and resolution passed and other action taken by the Council of the City of Ottawa at this meeting is hereby adopted and confirmed as if all such proceedings were expressly embodied in this by-law.

2. The Mayor and the appropriate officials of the City of Ottawa are hereby authorized and directed to do all things necessary to give effect to the action of the Council of the City of Ottawa referred to in the preceding section.

3. The Mayor, or in the absence of the Mayor, the Deputy Mayor and the City Clerk, or in the absence of the City Clerk, the Deputy City Clerk, are authorized and directed to execute all documents necessary in that behalf and to affix thereto the corporate seal of the City of Ottawa.

ENACTED AND PASSED this 9th day of May, 2001.

[26] The committee reports referred to in the above By-Law had already been discussed by Council and included the report of the Corporate Services and Economic Development Committee concerning bilingualism. That report is reflected in the Policy.

Position of Each Party

The Applicant

[27] The Applicant relies on the evidence deposed by one of its members, Sebastian Anders, and on the Statistics Canada 2001 Census.

[28] The Applicant states that the By-Law (170) and the Policy are illegal and *ultra vires* for the following reasons:

- The By-Law exceeds the jurisdiction of the *F.L.S.A.* by purporting “to equalize civil rights, a matter strictly reserved for the Legislature and Parliament” and has thus “abrogated the civil rights of the majority.”
- The By-Law is brief, lacks specificity and refers the reader to an extraneous document, a Bilingualism Policy, which “may be amended from time to time.” This is an improper delegation of power.
- The By-Law is defective also in its failure to repeat the terms of the enabling legislation, section 14 of the *F.L.S.A.*, that the administration shall be conducted in both languages and that all or specified municipal services be made available in both languages.

- The Policy deals with matters of “culture, private contractual relationships with the City, hiring, career advancement, attendant pension entitlement ramifications, and, most telling and significant, a recognition and reiteration of the equality of rights, status and privileges of both linguistic groups,” all matters which are beyond the authority granted by the *F.L.S.A.* and not contemplated by the legislation.
- The Policy was passed first and there was no authority to have it in place prior to the By-law. Municipal powers are required to be exercised by by-law (section 101, *Municipal Act*, 1990; section 5, *Municipal Act*, 2001).
- The By-Law and Policy were passed for improper and collateral purposes, such as “culture, assimilation and equalization privileges and rights,” which are in no way connected to the objects of the *F.L.S.A.*

[29] The Applicant submits that for the following reasons, the By-Law and Policy are unconstitutional and in contravention of fundamental guarantees contained in the *Charter*:

- The By-Law and the Policy “are discriminatory in nature and they arbitrarily permit designation of various employment positions within the City as bilingual with no limit or regard to the rights of the majority.”
- In the City’s attempt to legislate equality of language rights, they have infringed upon these freedoms and rights. For example, the City, by its By-Law and Policy, expressly states civic employees are “encouraged to speak French” otherwise their “career development” could be affected. This is a blatant abrogation of the right to express oneself in one’s language of choice without fear of penalty or repercussion.
- Delivering services and conducting the administration of the municipality in both languages “is a laudable objective” and the Applicant takes no issue with it. Providing access to services of the municipal government in the language of the citizen’s choice is in keeping “with the highest sense of fairness which is embraced by not only the citizens of Ottawa but all Canadians.” But, the Applicant submits, the implementation of this

objective must be fair and there must be proportionality between the objective and its implementation. The By-Law and Policy fail to meet these criteria.

[30] Finally, the Applicant states that the designation process, by which positions have been or will be designated bilingual, results in unfairness for the following reasons:

- The City is undertaking a process of reviewing every one of its 16,000 positions to determine which ones will be designated bilingual. Because outside consultants have been hired to review all of the positions, the Applicant alleges that the By-Law and the Policy “improperly delegates the designation of positions as bilingual to administrative personnel and outside consulting firms with no criteria, transparency or accountability to the public which creates a process open to bias, misuse and unfairness.”
- The requirement that all 37 senior management positions be bilingual is especially objectionable. The demographical composition of the City of Ottawa does not warrant this “exercise in social engineering” that mandates that 100% of senior management positions be bilingual to serve and administer a city that is less than 15% French mother tongue. According to the Census numbers, 61% of English unilingual residents will be deterred from even making applications for a position with their municipal government.
- Although section R.6 of the Policy expressly states that, “in no instance will employees be terminated or suffer reduction in salary or wages for not meeting job language requirements,” the Applicant says it is clear that such employees would never be able to advance in their careers with the new City.
- The statement that the merit principle will continue to be used is contradictory to the policy statement that “career development...could well be related to...proficiency in both official languages.”

The Respondent

[31] The City submits its By-Law and the Policy are valid on three grounds: they are within the powers of a municipality; they are authorized by section 14 of the *F.L.S.A.*; and they are also

authorized by the power given by section 11(1) of the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sch. E. to determine the scope and content of the Policy.

[32] The Respondent submitted affidavits from various persons who spoke to the issue of his or her own personal experience and views. Some of the points they made included the following:

Dyane Adam, Commissioner of Official Languages

- Ever since the City instituted the 1982 Bilingualism Policy and By-Law, the Commissioner of Official Languages (“COL”) has expressed its approval with the progress at the City of Ottawa. In its 1988 report, the COL stated, “Ottawa is endowed with a linguistic policy, which makes it a leader in providing services in French.”[Translated]
- In October 1999, when proposals were being made about the amalgamation of the City of Ottawa, the COL expressed her concerns regarding restructuring and the effect the amalgamation would have on an official language community, where the language rights and socio-cultural fabric had been established and built up over generations. This impact is especially important in the National Capital of a country whose Constitution proclaims that ‘English and French are the official languages of Canada.’

Pierre Pagé, City Clerk for the City of Ottawa and President of the International Institute of Municipal Clerks in 2002-2003

- Mr. Pagé remembers that at the beginning of his career with the City in 1978 it was difficult for him, as a Franco-Ontarian, to work in his native tongue, as there was a generally negative attitude towards Francophones in the City. He would regularly hear comments such as ‘speak white’ in the work place. The fact that in the past and future he has the opportunity to use his language at work increases significantly his ability to retain his language. Before having such an opportunity, he was gradually losing his language. The reality for him of the ability to work in French is a re-affirmation of the importance of the French language.

Raymond Breton, Professor of Sociology, University of Toronto

- Since the City of Ottawa permits Francophones to work in French and have access to services in French this starts socio-psychological and symbolic processes, which contribute to prevent, and even reduce, linguistic assimilation. To reduce or eliminate jobs and services offered in French would have in all probability the opposite effect.

Guy Cousineau, Vanier City Councillor (1974-1991), Mayor of Vanier (1991-2000)

- Before amalgamation, English and French were the official languages of the City of Vanier. As for the hiring of employees, interested candidates had to be fluently bilingual; however, unilingual candidates were considered on condition that they became proficient in the second language in order to become bilingual. Accordingly, when amalgamation proposals were made in 1999, the City of Vanier expressed concern about the impact of the proposed amalgamation on Francophones.

Marion Dewar, former Alderman, Deputy Mayor and Mayor of the City of Ottawa

- Ms. Dewar recalls that when she started in politics “there was an unwritten rule which existed by which no French-Canadians could be promoted to a management position with the City.” However, in 1982, the City adopted the 1982 Bilingualism Policy and By-law. Ms. Dewar was Mayor at this time and explained that City council had decided to promote French language services in a pragmatic way. Language courses were offered to improve the employee’s ability to speak and work in French with a vocabulary adapted to his or her job needs. Ms. Dewar was very proud that at the time she left politics in 1985, bilingualism at the City was no longer seen in a negative light and that more employees were working in French and the City of Ottawa provided a wider array of services to the Francophone residents of the City.

Linda Laviolette, Human Resources Department, City of Ottawa (1997 - present)

- Ms. Laviolette has reviewed the relevant records at the City of Ottawa and did not find even one situation where an employee of the old or new City of Ottawa had lost their job, suffered a reduction in salary or been refused a promotion as a result of the Bilingualism Policy and/or By-Law.

[33] The Respondent outlines the vulnerability of Ontario’s linguistic minority and points to the Legislature’s intention to “preserve the cultural heritage of the French speaking population.”

[34] The Respondent submits that it is essential that as many opportunities as possible to speak French be made available to employees and to citizens. It states that offering services and allowing city employees to work in either French or English ensures proper respect for both official language groups and is thus in keeping with the intent of the *F.L.S.A.*

[35] The City stated that the municipalities which today form the vast majority of the new City of Ottawa (namely Gloucester, Vanier, Cumberland and the Regional Municipality of Ottawa-Carleton (RMOC)) have, for several decades, ensured that the two founding language groups, the French and the English, have a right to receive their services, and indeed a right to work, in the official language of their choice. The Respondent submits that linguistic rights granted in the past are an important part of the context relevant to this application.

[36] The City provided the following evidence as to bilingualism in the pre-amalgamation context.

[37] Before amalgamation, the 17,200 residents and all employees of Vanier, originally known as Eastview, enjoyed English and French as official languages, which were said to "...possess and enjoy equality of status and equal rights and privileges as to their use in Council, in all committees of Council and in the Municipal Administration." As for the hiring of employees, the policy provided that "Interested candidates must be fluently bilingual. However, unilingual candidates will be considered on condition that they become proficient in the second language in order to become bilingual."

[38] The Township of Cumberland had a bilingual policy requiring that "all negotiations or transactions between the Township of Cumberland personnel and individuals, lessors, contractors or concessionaires must be carried out in the official language chosen by the groups." Further, it provided that at all public meetings, Township of Cumberland personnel "must be in a position to make submissions or to reply to questions in both official languages"; and when conducting inspections, Township of Cumberland personnel "must ensure that oral or written information or statements are given in the official language of the citizen." The 50,400 residents and all employees of the Township had these rights before amalgamation.

[39] In 1993, the City of Gloucester adopted a Bilingual Policy and By-Law recognizing "the rights of its citizens to communication with the [City] in either official language." All 108,430 residents and all employees had these linguistic rights before amalgamation.

[40] The RMOC had in 1973 declared that English and French were the official languages of the regional government. The RMOC refined its policy over many years after 1973, recognizing the importance of fostering a work environment that encouraged the use of both languages and the necessity of formally designating certain positions as bilingual in order to ensure the eventual presence of a sufficient number of employees to serve the public. The practicalities of the workplace were such that if employees were permitted or encouraged to use French at work, this required that employees then be managed by persons who are able to interact, receive reports, and give directions in French as well as English. Otherwise, all internal communication, both written and oral, would be done in English.

[41] In 1982, the RMOC adopted a new Bilingualism Policy and By-Law. Its mandate included: to develop guidelines to create a climate where Francophone employees can work in the official language of their choice; to recommend appropriate action to increase the City's capacity to serve the Francophone population in its first language; and to consider recruitment of bilingual staff in management positions as well as in those positions dealing with the public.

[42] In 1994, all Executive and Senior Management Group positions were designated bilingual with goals set to achieve a 50% rate of bilingualism by 1997. Therefore, before amalgamation, the 327,000 residents of RMOC and all employees had these rights.

[43] Accordingly, the day before amalgamation, a total of 503,030 citizens in the various municipalities had "bilingual" rights.

[44] In February 2000, as the Ottawa Transition Board prepared for the amalgamation of the 11 local municipalities and the Regional Municipality of Ottawa-Carleton, the Board prepared a Bilingualism Policy for which it received submissions from over 5,000 individuals and organizations.

[45] The City Manager at the time, Bruce Thom, delivered his report on the Bilingualism Policy to the Corporate Services and Economic Development Committee. He reported that, with respect to the 50% rate of bilingualism for all incumbents in the Executive and Senior Management Groups, 68.13% of them had achieved an advanced level of "proficiency 2" or better (there were 3 levels). No one had ever lost his or her job as a result of the past Bilingualism Policy. He also reported that there are "direct and indirect benefits" of a bilingual city. Tourism statistics, for example, showed that 30% of visitors to Ottawa in 1999 were French speaking. More than 82,000, representing 15% of international visitors, came from France.

[46] That report, including the 1982 Bilingualism Policy (with some amendments including that the merit principle would be the guiding one in hiring), was adopted pursuant to By-Law 2001-173 passed on the same day as By-Law 2001-170.

[47] The City's evidence is that language training has been working: "From January 2004 to December 2005, over 90% of the 1,573 employees following second language training, be it in French or English, met or exceeded the language requirements needed for their position."

[48] The Respondent submits that, contrary to the allegation made by the Applicant, detailed information is available with respect to the process of designating which positions will be bilingual. The City also provided evidence as to the process by which its 16,000 positions will be designated. The designation process is based on the actual needs of the position and so linguistic abilities are an integral part of the abilities needed for a position.

[49] The submission is that the first goal of designating positions is to provide the City with the necessary tools so that it can offer services in French and English to its citizens and employees. Therefore, all designation criteria flow from this goal. To date, approximately one-third of all full-time positions have been reviewed and it was recommended that 18% of them be designated as bilingual. It is expected that the remainder of the reviews will show lower percentages since the process began with the front line positions, those dealing with the public.

[50] The City of Ottawa states "There is not one shred of evidence of any unilingual employee complaining of having been treated unfairly as a result of any of the bilingual policies adopted by any of the relevant municipalities in the last 30 years."

The Interveners

[51] The interveners also submit that no employee of the City of Ottawa made any objection to the contents of the Bilingualism Policy.

[52] ACFO-Ottawa supports the City of Ottawa in its implementation of the Bilingualism Policy in question.

[53] The interveners submit in addition that several other municipalities offer services in French. Specifically the City of Clarence, of Rockland, of Hawkesbury and the City of Hearst among others all have terms which ensure that those positions in which employees directly interact with the public are filled with bilingual people.

[54] They also stress the importance of having bilingual managers, explaining that if a unilingual anglophone individual is the manager of a department, all communications with this manager, and all work flowing from this person must be in English. Department meetings, public meetings, employee evaluations, all these important aspects of municipal business must take place in English if the manager is a unilingual anglophone.

[55] The interveners state that the fact that the Policy was adopted separately is merely a procedural matter that does not affect the validity of the exercise of power by the City.

[56] The interveners submit that a municipality must have the choice of which terms of bilingualism best meet the interests of its ratepayers.

Issues

[57] The Applicant frames the issues as follows.

1. Are By-Law 2001-170 and the Bilingualism Policy illegal and *ultra vires* of the City of Ottawa because they are in excess of the authority granted by section 14 of the *F.L.S.A.*?
2. Are By-Law 2001-170 and the Bilingualism Policy of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*] because they are in breach of *Charter* guarantees of freedom of expression and mobility rights?

Analysis

1. By-Law 2001-170

Is it within the power granted by the enabling legislation?

[58] The Applicant relies firstly on the principle that municipalities, being creatures of statute, require an express grant of power to create a by-law. This statement of principle on its own is well accepted.

[59] The Applicant cites *Re Trumble and Town of Kapuskasing* (1986), 57 O.R. (2d) 139 (H.C.J.) [*Re Trumble*] as authority for the application of this principle in the case at bar. This was an application for an order quashing a municipal by-law that designated the municipality as bilingual and guaranteed the provision of municipal services in both the official languages. The applicants claimed that the municipality lacked authority in respect of the designation and the stated policy of hiring bilingual persons to fill municipal employment positions. The impugned clause of that by-law stated: “The English and French languages are hereby designated to be the official languages of the Town of Kapuskasing for all municipal government purposes and the use of either by members of the public at Council meetings, at meetings of committees of Council and in municipal administration and operation shall carry equality of status, rights and privileges.”

[60] The application was allowed and the by-law was quashed on the basis that while the municipality had the authority to make a bilingual designation, it did not have power to legislate in respect of equality of status or rights and privileges in relation to languages. The Court held that the language “shall carry” was beyond declaratory and was directory.

[61] In contrast, the Ottawa By-Law merely “recognizes the bilingual character of the City of Ottawa” and the Policy states that it “recognizes both official languages as having the same rights, status and privileges.” Both statements are declaratory only and not directory. The *Re Trumble* case must be distinguished on this ground.

[62] Further, *Re Trumble* was decided before the enactment of the *F.L.S.A.*, which gives express powers to designated municipalities, of which Ottawa is one, to offer services in French and English and to conduct the administration of the municipal government in both English and French. This further distinguishes the case.

[63] The Applicant then relies on *Chaperon v. Sault Ste. Marie (City)* (1994), 19 O.R. (3d) 281 (Gen. Div.) [*Chaperon*], which stands for the proposition that the City could not rely on a **resolution** when the power given by the *F.L.S.A.* was to pass a **By-Law**.

[64] In early 1990, the Council of the Corporation of the City of Sault Ste. Marie had passed a resolution purportedly in accordance with the provisions of section 103 [now section 247] of the *Municipal Act*, 1990. The resolution recognized that English had been the working language of the City and declared that it was the official language of communication with its citizens in all levels of government. The applicants moved for a declaration that the resolution was void as being *ultra vires*.

[65] The Court held that the original resolution and the confirming resolution were *ultra vires*, void and of no effect. The City of Sault Ste. Marie could not rely on section 14 of the *F.L.S.A.*, as it requires that the municipality pass a by-law and the City had only passed a **resolution**.

[66] In contrast, in the case at bar, the City of Ottawa did in fact pass a By-Law with respect to bilingualism and expressly relied on section 14 of the *F.L.S.A.* for the authority to do so; as well, it passed a separate by-law to incorporate the Policy. The *Chaperon* case is distinguished on these facts.

[67] As importantly, since the decisions in the above two cases, there is now a different approach to the interpretation of municipal powers (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 [*United Taxi Drivers'*]).

[68] In *R. v. Sharma*, [1993] 1 S.C.R. 650 the Supreme Court of Canada enunciated the principle that the municipal powers granted extend to those powers **necessarily** or **fairly implied** by the express power and those **indispensable powers essential** to the effectuation of **the purposes** of the corporation.

[69] In *United Taxi Drivers'* at para. 6, the Supreme Court of Canada advocated a generous construction of a grant of power and commented on the "modern" approach to the interpretation of municipal powers:

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy

has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced [...]. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters [...]. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes [...].

[70] The modern approach is also consistent with sections 8 and 9 of the *Municipal Act, 2001*:

Powers of a natural person

8. A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act. 2001, c. 25, s. 8.

Interpretation

- 9.(1) Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,
 - (a) to enable them to govern their affairs as they consider appropriate; and
 - (b) to enhance their ability to respond to municipal issues. 2001, c. 25, s. 9 (1).

[71] I do not accept the view of the Applicant when it states that the “benevolent” or “deferential” interpretation now embraced by the courts in interpreting municipal legislation ought not to apply to the case at bar because of the By-Law’s deficiencies. This submission is without merit. The proper construction is that enunciated by the Supreme Court of Canada.

[72] I conclude that the City acted within the power granted to it by the province as allowed by the modern construction of those powers. The ability to provide for the practical details of how the City would offer services in English and French and how employees would work in both languages was an essential part of the grant of power. These details are set out in exhaustive detail in the Policy.

Use of Statistics

[73] I go on to consider whether, in the context of numbers of citizens in each language group, the Policy is invalid.

[74] The Applicant submits that the *F.L.S.A.* was intended: "To provide for quality accessible services to the Francophone minority."

[75] I would point out that the legislation does not describe only a "francophone" as beneficiary of the legislation, but the target rather is "a person" as set out in section 14(2).

[76] The Applicant takes issue with what it refers to as the "expanded definition" of Francophone, which the City has used. That definition of Francophone is "someone who speaks French" and who "may or may not have French as his/her mother tongue and may speak several languages, one of which would be French." It submits that the standards of fairness, proportionality and necessity need to be examined in light of the demographical composition of the population of Ottawa. This expanded definition, says the Applicant, is artificial and misleading since it suggests that 38.4% of the Ottawa population is Francophone therefore "lending false credence to its sweeping and discriminatory Policy."

[77] In order to highlight the unfairness of the Bilingualism Policy, the Applicant has relied on the 2001 census, which states that only 15% of the population is Francophone "mother tongue." Therefore it is submitted that to require 100% of senior management positions to be bilingual is to engage in "social engineering." There is no significant demand or need for such a wide discrepancy.

[78] The Applicant's use of the census is not entirely clear. There are various breakdowns on the use of language at home. The analysis of the Applicant has ignored any numbers where people have responded with a double answer (French and English). The percentages referred to do not take into account, in either language group, those under 20 and those over 65. Does this change the percentage quoted in reaching the conclusion of denial of opportunities? Statistics need to be interpreted carefully and no expert evidence of any kind was tendered as to the interpretation of these numbers. One must question whether the assertion that 61% of Ottawa residents, being those who are unilingual Anglophones, are denied employment opportunities by the Bilingualism Policy may be a sweeping overgeneralization. I find that the evidence before the court cannot support the conclusions suggested by the Applicant as to the inevitable result of the census numbers as they are used.

[79] There are some misstatements of the facts in the Applicant's material. For example, the Applicant alleges that the City, by its By-Law and Policy, expressly states civic employees are "encouraged to speak French" otherwise their "career development could be affected." Two important modifiers have been omitted. R.1.9.2 of the Policy says "encouraged to speak French **if they have the opportunity and are able to do so.**" In fact, the Policy states that the City must "encourage employees to work in the official language of their choice." As to the relationship of language to career, the Policy states: "The career development of employees hired after January 1, 2001 **could** be related to their language skills."

[80] The evidence is that the result of the Policy's application has not prevented seven unilingual Anglophones from being appointed to fill some of the 17 positions that have become available amongst the 37 senior management positions (all of which are designated bilingual). The Policy permits, on the merit principle, the appointment of a unilingual person to one of these bilingual positions if Council approves it.

[81] The Applicant argues that Ontario is not a bilingual province. While that is correct, the preservation of the rights of minorities, including the protection of French language and culture was a central concern in the Confederation bargain. The respect and protection of minority rights within this country was made clear by the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 81:

The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation [...]. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

[82] It cannot be, as the Applicant seems to suggest, that the demographic majority should somehow dictate the extent of the methods intended to protect minority rights. Minority rights by definition cannot be subject to a mathematical analysis.

Purpose of the *French Language Services Act*

[83] The Applicant states that the purpose of section 14 of the *F.L.S.A.* has been far exceeded by the By-Law and Policy. A proper construction of the enabling legislation would restrict the power of the City to pass a By-Law, which goes beyond the purpose of the grant of power.

[84] The Respondent advocates a purposive and generous interpretation of the legislation. The By-Law and Policy, it submits, serves the purpose intended by section 14 of the *F.L.S.A.* by serving the needs of the community in the manner detailed in the Policy.

[85] Furthermore, language rights, it contends, are to be treated as fundamental human rights and are to be accorded a generous interpretation by the court (*Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549 [*Société des Acadiens*]).

[86] The Ontario Court of Appeal in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.) at para. 112 [*Lalonde*] repeated the language of Dickson J., in *Société des Acadiens* at para. 19: “Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history.”

[87] *Lalonde* was an appeal by the Hôpital Montfort, Lalonde and others to determine the validity of the directions issued by the Health Services Restructuring Commission to substantially reduce its health services. The Hôpital provided services in French 24 hours a day. It was the hospital for a substantial francophone community (located in the Ottawa region), and provided training to French-speaking health care professionals.

[88] The Court of Appeal concluded in *Lalonde* that the Constitution's structural principle of respect for and protection of minorities is a bedrock principle that has a direct bearing on the interpretation to be accorded the *F.L.S.A.* It went on to say that

The *F.L.S.A.* is an example of the provincial legislature of Ontario using s. 16(3) to build on the language rights contained in the Constitution Act, 1867 and the Charter to advance the equality of status or use of the French language. The aspirational element contained in s. 16(3) -- advancing the French language toward substantive equality with the English language in Ontario -- is of significance in interpreting the *F.L.S.A.* (para. 129).

[89] Section 16(3) of the *Charter* reads as follows: "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French."

[90] The Court also wrote "the principle of respect for and protection of minority language rights is a useful tool [...] in interpreting the *F.L.S.A.*" (para. 130). The Court further noted

As the title of the *F.L.S.A.* indicates, the Act is about the right to receive services in the French language. The interpretive principles derived from the language-rights jurisprudence have a significant bearing on the approach to be adopted to the *F.L.S.A.* (para. 131). [...] [G]eneral principles of statutory interpretation also apply. (para. 140).

[91] Finally, the Court stated

The legislative history and the comments of the members of the legislature when the *F.L.S.A.* was enacted permit this court to draw a number of inferences and conclusions about the underlying purposes and objectives of the *F.L.S.A.* and the intention of the legislature enacting it. One of the underlying purposes and objectives of the Act was the protection of the minority francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. (para. 143).

[92] I conclude that the purpose of the *F.L.S.A.* is to promote the use of French and English and to advance the equalization of status or use of English and French while offering services in French and thus protecting the rights of the minority francophone population in Ontario.

[93] The By-Law serves the purpose of the enabling legislation interpreted in the manner outlined in *Lalonde, supra* para. 86.

[94] I have not addressed the amendments made to the *City of Ottawa Act, 1999*, S.O. 1999, c.14, Sch.E., as am. by S.O. 2005, c.3. These amendments, which were assented to March 9, 2005, made the adoption of a policy respecting the use of English and French mandatory and provided that the scope and content of the policy was to be determined by the City. This requirement was to be independent of and unaffected by section 14 of the *F.L.S.A.* However, these amendments were not in place in 2001, the relevant time in the case at bar.

Is Language a Work Skill?

[95] Finally, the City submits that the language proficiency in those positions designated bilingual is merely a skill required in performing employment related duties.

[96] The evidence is that pursuant to the Bilingualism Policy, the services offered by the City in various places will vary in nature and form. There may be merely the availability of a telephone contact with a bilingual person at some sites, while at other sites there will be a requirement that all staff dealing with the public be bilingual.

[97] The designations are different for each position. For example, a food service employee may not require writing skills in either language, but may need to speak both English and French to serve the public. That may be the case in Vanier but not in Kinburn (a rural municipality in the west of the city). The Manager of Financial Services will not need the vocabulary required for the Urban Planning or other department. The designations will reflect these disparate needs.

[98] The evidence of the partially completed designation process reveals that only 18% of those positions reviewed to date have been designated bilingual.

[99] The use of outside resources for the designation process, which was criticized by the Applicant, is inevitable in the face of the large number of positions to be reviewed and in view of the complexity of that task. There is no evidence to support the conclusion that this factor leaves the process open to bias, misuse and unfairness. On the contrary the evidence suggests a fair and unbiased process dedicated entirely to assessing the linguistic needs of each position.

[100] In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 at para. 54, the Supreme Court of Canada has outlined a three-step test for determining whether a standard is a bona fide occupational requirement. The elements of this test are as follows:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (para. 54).

[101] On the application of each of these steps, the evidence of the City is persuasive that the purpose of the Bilingualism Policy, as it affects the skills needed for each position, is to permit employees to do their work competently (i.e. to provide services in French and English).

[102] Based on the evidence before me, I find that the Bilingualism Policy has a purpose rationally connected to the workplace and was adopted for a good faith and honest belief that it was necessary for that purpose.

[103] The City is using the Policy on a functional and practical basis where it is warranted and justified. With respect to the top 37 management positions, the evidence was that these people are recipients of much information, which can be in either French or English; they

have a significant public presence and are called on to speak to groups or be interviewed by the media in both languages. The need for the ability to speak both languages is rationally connected to the professional obligations of the senior management levels.

[104] The Applicant produced no other evidence to show discrimination or an abrogation of rights and relied on the fact that there was no significant demand for French services based on the census figures.

[105] The court accepts however that accommodating diversity usually does exact a cost to the majority, even if in some cases the cost is merely social adaptation. In this case, the person who speaks only one language and needs to speak two will have to agree to learn a second one. While the Anglophone may need to make a special effort to learn French, this is a reasonable cost in the circumstances.

Other Submissions

[106] I find no merit in the Applicant's submission that since the Policy was passed first in time it is invalid (there being no power at the time to do other than pass a by-law). The method of proceeding was to adopt the report (recommending the Policy), to pass By-Law 170 incorporating that Policy, and then to pass By-Law 173 to adopt and confirm that Policy. The precise order is irrelevant since the City was within section 14 of the *F.L.S.A.* at all times and its intention was clear throughout. By-Law 173 (pages 24 and 25 herein) is described as confirming the proceedings of the Council and adopting the Reports by By-Law.

[107] In all of the circumstances, including the fact that both By-Laws and the Policy were passed on the same day, I accept the submission of the Interveners that the Policy was merely a procedural tool, which was duly incorporated into a By-Law. Nothing turns on the fact that it could be amended from time to time. Similarly, a By-Law could be so amended or varied from time to time.

[108] The fact that the impugned By-Law is brief and lacks specificity, another of the Applicant's grounds for declaring the By-Law and Policy invalid, has no relevance. The

submission that it does not repeat the terms of section 14 is also without merit. The By-Law is squarely within the ambit of section 14 of the *F.L.S.A.*

[109] The Applicant alleges that private contractual relationships are interfered with unfairly when the City outlines the need for bilingualism in contracts signed by the City. The Policy states that the “spirit” of the Policy should be reflected in agreements with associations receiving grants or in the contracts “where this is appropriate.” The court sees nothing “unfair” and this allegation is dismissed.

[110] The Applicant alleges that the very use of the word “bilingualism” of these titles of the By-Law and Policy is offensive and proof that the true intention was to “implement a doctrine and a system of discrimination on the basis of language.” The Applicant submitted that this is the definition of an “ism” and thus this is a dangerous thing. There is no merit to this submission.

Conclusion as to Issue No. 1.

[111] The text by Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., looseleaf (Toronto: Thomson Carswell, 2003) vol. 1 at para. 190.3 states that “Unless the invalidity of the exercise of power appears on the face of the Act correctness is presumed until the contrary is shown.” The Applicant has not rebutted this presumption.

[112] Further, there is a presumption in favour of the validity of a By-Law which was enacted under competent authority and this is especially so where the matter is of a long-standing nature. In this case, the By-Law was passed in May 2001 and the challenge to it was not commenced until 2004.

[113] I find that the By-Law and Policy were *intra vires* the City of Ottawa and are both valid. This leaves us to consider whether any breach of *Charter* rights has occurred.

2. Constitutional Question

[114] Section 2b) of the *Charter* says the following: “Everyone has the following fundamental freedoms: [...] b) freedom of thought, belief, opinion and expression [...].”

[115] The Applicant submits that the unilingual Anglophones’ rights to freedom of expression are abrogated by the By-Law and the Policy. Unilingual English employees are required to take additional measures to be bilingual. The Policy is invasive and discriminatory and thus a contravention of the *Charter* and various United Nations International Covenants.

[116] While reference to international covenants is interesting, such covenants are not persuasive. In any case, I do not find that their provisions would apply given the facts of this case.

[117] The Applicant submits that a broad and purposive approach should be applied to the Constitution and the *Charter* freedoms. On that basis, it cannot be said “100% of management being bilingual to provide service to 15% of the population nor to administer the municipality in both languages is carefully designed or rational.”

[118] There is no evidence offered in support of this proposition except for the census numbers showing that unilingual Anglophones make up the majority of the population.

[119] The Supreme Court of Canada set out a two-step test to determine whether an individual’s freedom has been infringed (see *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927).

[120] The first step is to determine whether an activity falls within the freedom of expression. The *Charter* does not protect activity that either does not convey or attempt to convey a meaning.

[121] The activity of being required to learn a second language in order to obtain a certain employment is not one that has a meaning or any content.

[122] But, if the activity did have meaning, the second step is to determine whether the purpose or effect of the action was to restrict freedom of expression.

[123] The evidence in the case at bar is that the purpose and effect of the Policy is to ensure that both English speaking and French speaking citizens can obtain services in the official language of their choice. The evidence is persuasive that for City employees, working in one's language of choice facilitates the provision of services to the public in both English and French. Therefore there is no attempt to prevent any expression of thoughts, opinion or beliefs in a policy designed to promote the use of both languages. The right to express oneself in the language of one's choice is specifically guaranteed in the Policy.

[124] If there were such an expression found in the ability to refuse to learn a second language in order to obtain a particular employment, then I would go on to invoke section 1 of the *Charter* to determine whether this limitation of a *Charter* right is reasonable and demonstrably justified in a free and democratic society. The following test, succinctly stated by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para. 117, would then be applied:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

[125] It is conceded by the Applicant that the objective of providing quality services to both official language groups is sufficiently important to override a constitutionally protected freedom.

[126] The second criterion is the one in issue, the proportionality test. The Applicant submits that the measures taken are unfair to the largest segments of the population of Ottawa

and cannot be said to be “carefully designed to achieve the objective,” therefore they are “not rationally connected to that objective” and they are, instead, arbitrary. The Applicant also submits “to deny the ability of a unilingual Anglophone Ottawa resident to gain employment or promotion in their municipal government solely on the basis that they choose or wish to speak English only, does not impair the right of freedom of expression as little as possible.”

[127] I agree with the Respondent’s submission that the purpose underlying the *F.L.S.A.*, and more particularly By-Law 2001-170 and the Bilingualism Policy, is properly characterized as an attempt to supplement constitutionally protected rights, a goal that is particularly important given the City’s historical, political, and symbolic significance. The City states that Canada is a country with two official languages and an international reputation for its acceptance of diversity. As the capital of Canada, Ottawa is, by extension, a powerful symbol for all Canadians, as well as for the rest of the world, of the bilingual status of our state.

[128] In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 Wilson J. notes at para. 168:

It seems to me that this Court has agreed that a form of “reasonableness” test may be preferable to a strict application of the minimal impairment branch of Oakes in those circumstances where the Legislature must mediate between the claims of competing groups, and especially where, in doing so, it opts to protect the interests of the disadvantaged and disempowered. In those cases, the Court will defer to the choice of the legislature so long as alternative measures for meeting or promoting the government’s goals are not clearly superior.

[129] In this case, the City has instituted a Bilingual Policy to respect the language rights of its citizens. The Bilingualism Policy recognizes and encourages the use of the two official languages in the City’s administration and the services it provides to its citizens. The measures currently in place review all City positions to determine whether bilingualism is in fact necessary for the position in question. There does not seem to be a more fair or reasonable way to carry out this measure. The Applicant has offered no suggestion as to any alternative measures.

[130] The freedom to express oneself in either French or English and the right to do so remain unchallenged by this Policy. If a citizen wishes to qualify for certain positions as either service providers in some cases or in senior management, one of the skills required will be the willingness to learn a second language up to the specific level required for the particular position.

[131] The evidence discloses that all necessary measures have been taken to protect unilingual employees by designating only certain positions as bilingual and by using the merit principle so that a unilingual candidate, if he or she is the best one, can obtain the position on condition of learning the other official language. Of the current top management positions seven are held by unilingual Anglophones. The Policy has evidently not prevented these people from advancing to the highest positions. In the face of such evidence I find this requirement for a willingness to acquire a skill is a minimal impairment.

[132] Accordingly, the two-step test outlined above does not lead to a conclusion of a breach of a *Charter* right. Thus, I do not need to consider section 1.

Conclusion as to Issue No. 2

[133] There is no restriction of the right to freedom of expression even if the activity of not learning a second language were an activity that had meaning or content.

[134] While the Applicant referred to “mobility rights” in his material, no submissions were made on that point and I shall not deal with it.

Summary

[135] The By-Law No. 2001-170 is valid. The Policy passed on the same day and incorporated in By-Law No. 2001-173 is valid.

[136] There is no breach of any *Charter* right.

[137] Accordingly, the application is dismissed.

Costs

[138] The parties may provide brief written submissions (maximum 3 pages). The Respondent within 15 days of the issuance of this Decision and the Applicant within a further 15 days. The Interveners advised they would not be seeking costs.


The Honourable Madam Justice M. Métiwain

Released: October 3, 2006

