Federal Court of Appeal  Cour d'appel fédérale

Date: 20171219

Docket: A-41-16

Citation: 2017 FCA 250

CORAM: **STRATAS J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

OLEG SHAKOV, THE OFFICE OF THE COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS, MARC GIROUX and NIKKI CLEMENHAGEN

Respondents

Heard at Ottawa, Ontario, on June 13, 2017.

Judgment delivered at Ottawa, Ontario, on December 19, 2017.

REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	SCOTT J.A.
DISSENTING REASONS BY:	STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20171219

Docket: A-41-16

Citation: 2017 FCA 250

CORAM: **STRATAS J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

OLEG SHAKOV, THE OFFICE OF THE COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS, MARC GIROUX and NIKKI CLEMENHAGEN

Respondents

REASONS FOR JUDGMENT

GLEASON J.A.

[1] This is an appeal brought by the Attorney General of Canada from the judgments of the Federal Court (per Tremblay-Lamer, J.) in *Oleg Shakov v. Attorney General of Canada*, 2015 FC 1416 in which the Federal Court allowed two applications for judicial review from the decision of the Public Service Commission (the PSC) issued November 3, 2014 (2014-089-IB). In the

decision in question, the PSC revoked the term appointment of the respondent, Oleg Shakov, to the position of Director of the International Programs Division of the respondent Office of the Commissioner for Federal Judicial Affairs (the FJA), removed the authority of the respondents, Marc Giroux and Nikki Clemenhagen, to make further appointments and ordered that they undergo remedial staffing training.

[2] For the reasons that follow, I would allow this appeal in part and would vary the judgment of the Federal Court to remit to the PSC certain issues for re-determination in accordance with these reasons. I would award Mr. Shakov his costs in the agreed-upon amount of $4,500.00 and in the Court below, but would make no award in favour of the other parties as their success on the various issues is divided.

I. Background

[3] The FJA is a federal government department located in the National Capital Region. It is tasked with providing administrative services in respect of the federally-appointed judiciary to assist in ensuring its independence from the Department of Justice. Since 1996, the FJA has included an International Programs Division that facilitates international exchanges for judges and participates in judicial and court reform projects abroad.

[4] By 2011, the FJA's International Programs Division, which received funding exclusively from external sources, was lagging, with only a few programs running. In addition, in April of that year, the Division allowed important funding from the Canadian International Development

Agency (CIDA) to lapse. Shortly thereafter, the Director of the Division requested a transfer to another role and moved out of the position.

[5] Faced with the need to replace the Director quickly so as to reinvigorate the Division, the Acting Commissioner of the FJA, Mr. Giroux, and the FJA's Director, Compensation, Benefits and Human Resources, Ms. Clemenhagen, decided to appoint Mr. Shakov on an interim basis to head the Division as the FJA had no funding to re-staff the position on a permanent basis. They believed that Mr. Shakov had the skills and knowledge required to quickly and effectively assume the responsibilities of the Director in light of his several years' experience working as a consultant in the Division. However, his French language proficiency was limited.

[6] Mr. Giroux and Ms. Clemenhagen decided that it was essential to fill the Director role quickly or there was a real risk that the International Programs Division would collapse. They also felt that it would take too long to locate another suitable candidate and to have that candidate up and running in the Director position if it were to be staffed via a competitive process. They thus believed that the only viable option was to appoint Mr. Shakov on an interim basis to get the Division back on a more stable footing. They determined that the skill set required for the position was rare and that few public servants would possess the knowledge and qualifications essential for the Director position as the role of the Division is unique in the federal government. There is no evidence in the record to indicate that Mr. Giroux and Ms. Clemenhagen were mistaken in these beliefs.

[7] Mr. Shakov was working as a consultant for several different organizations, including the FJA, when he was approached by Mr. Giroux and Ms. Clemenhagen about accepting a term appointment as Director of the FJA. Mr. Shakov was initially reluctant to accept such an appointment as it would have meant a substantial drop in his revenue. However, he eventually agreed to accept the role in light of the troubled state of the FJA's International Programs Division and his belief that he could assist in ensuring it avoided demise. As he had previously done a substantial amount of work for the Division as a consultant, he shared the other individual respondents' conviction that the Division should not be allowed to collapse.

[8] Mr. Shakov's initial appointment was for a one-year term and was made on a non-advertised basis. The position was classified at the PM-06 level, a classification the appellant conceded is typically below the executive level in the federal public service.

[9] The linguistic profile for the term position was set as "English Essential", requiring only that the successful incumbent be fluent in English even though the position had previously been classified as a bilingual one. At the time, there were no permanent francophone employees working in the Division and all communications outside the FJA that the Director was required to undertake occurred in English (or Ukrainian, which Mr. Shakov spoke). It appears that there was a term employee in the Division for a few months in 2011, whose mother tongue might have been French, but she was bilingual and did not ever express the desire to be supervised in French. However, all the subordinate positions but one in the Division were classified as bilingual and management meetings at the FJA were typically conducted in both English and French.

[10] Both Ms. Clemenhagen and Mr. Giroux believed that the selection of English Essential as the linguistic profile for the Director position was appropriate and allowable in light of the linguistic needs of the employees in the Division and the fact that the work was conducted in English or Ukrainian. However, a junior human resources manager felt otherwise and wrote a memo to file indicating that she felt the position should have been classified as a bilingual one. There is no indication that she shared her views with Mr. Giroux.

[11] At the end of the initial one-year term, the FJA renewed Mr. Shakov's term appointment for a further year.

[12] Over the period from May 2011 to September 2012, Mr. Shakov worked at improving his command of the French language. In September 2012, he took and passed the federal public service second language tests, obtaining a rating of "BBB", the minimum rating for a bilingual supervisory position in the federal public service.

[13] In December 2012, Mr. Shakov was internally appointed to an indeterminate position as Head of International Projects within FJA, as the Director position was renamed. His eligibility for this internal appointment was premised on his holding an internal position at the FJA. This time, the linguistic profile of the position was set as "BBB", which Mr. Shakov met.

[14] The PSC conducted an audit of the FJA's external staffing action in appointing Mr. Shakov to the term position. In a report sent to the respondents on July 11, 2014 (File number 2013-FJA-00011.16335), the PSC investigator concluded that the FJA, Mr. Giroux

and Ms. Clemenhagen had engaged in "unsuitable behaviour that amount (*sic*) to improper conduct" (Appeal Book, Volume 1, page 142), within the meaning of section 66 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA), by reason of having set the language profile of the term position as requiring English only and in having decided to staff the position through an unadvertised process.

[15] The investigator concluded that the linguistic profile for the position had been improperly tailored to result in Mr. Shakov's appointment and that the other respondents had not provided an adequate explanation for staffing the position without a competition. On the basis of her conclusions, the investigator recommended that Mr. Giroux and Ms. Clemenhagen both be enrolled in mandatory remedial staffing training, that their delegated authority to make appointments be revoked until the completion of such training and that Mr. Shakov's term appointment be retroactively revoked, effective the last day he held the term position.

[16] In a Record of Decision issued November 3, 2014 (2014-089-IB), the PSC adopted the investigator's conclusions and ordered the remedies recommended by the investigator. While these remedies have not been implemented in light of the judicial review proceedings commenced by the respondents, if implemented, might well result in Mr. Shakov's losing his current indeterminate position as Head of International Projects within FJA. This is because Mr. Shakov's eligibility to compete for his current position was premised on his having been validly appointed to his former term position as Director of the International Projects Division as the FJA staffed the indeterminate position on an internal basis.

II. Relevant Statutory Provisions, Regulations and Policies

[17] To place the issues in this appeal in context, it is necessary to first outline the relevant statutory provisions, regulations and polices as this appeal asks this Court to consider the scope of and interplay between a number of statutory and regulatory provisions and various federal policies concerning official languages and staffing.

A. *The PSEA*

[18] The preamble to the PSEA sets out the objects of the PSEA and provides:

Recognizing that […]	Attendu : […]
authority to make appointments to and within the public service has been vested in the Public Service Commission, which can delegate this authority to deputy heads;	que le pouvoir de faire des nominations à la fonction publique et au sein de celle-ci est conféré à la Commission de la fonction publique et que ce pouvoir peut être délégué aux administrateurs généraux;
those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which in turn is accountable to Parliament;	que ceux qui sont investis du pouvoir délégué de dotation doivent l'exercer dans un cadre exigeant qu'ils en rendent compte à la Commission, laquelle, à son tour, en rend compte au Parlement;
delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians; and	que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;
the Government of Canada is committed to a public service that	que le gouvernement du Canada souscrit au principe d'une fonction

embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues;	publique qui incarne la dualité linguistique et qui se distingue par ses pratiques d'emploi équitables et transparentes, le respect de ses employés, sa volonté réelle de dialogue et ses mécanismes de recours destinés à résoudre les questions touchant les nominations,

[19] Sections 30 and 31 of the PSEA govern the appointment process for public service staffing actions. They state:

30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.	30 (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.
Meaning of merit	Définition du mérite
(2) An appointment is made on the basis of merit when	(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :
(*a*) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and	*a*) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;
(*b*) the Commission has regard to	*b*) la Commission prend en compte :
(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,	(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,
(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and	(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) any current or future needs of the organization that may be identified by the deputy head.	(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.
[…]	[…]
Qualification standards	Normes de qualification
31 (1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.	31 (1) L'employeur peut fixer des normes de qualification, notamment en matière d'instruction, de connaissances, d'expérience, d'attestation professionnelle ou de langue, nécessaires ou souhaitables à son avis du fait de la nature du travail à accomplir et des besoins actuels et futurs de la fonction publique.
Qualifications	Qualifications
(2) The qualifications referred to in paragraph 30(2)(*a*) and subparagraph 30(2)(*b*)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).	(2) Les qualifications mentionnées à l'alinéa 30(2)*a*) et au sous-alinéa 30(2)*b*)(i) doivent respecter ou dépasser les normes de qualification applicables établies par l'employeur en vertu du paragraphe (1).

[20] Section 2 of the PSEA defines the "employer" for purposes of the PSEA as meaning the Treasury Board for federal government departments. Therefore, in respect of the FJA, subsection 31(1) authorizes the Treasury Board to establish qualification standards in relation to language.

[21] Under section 33 of the PSEA, appointments may be made on an advertised or non-advertised basis.

[22] Typically, the PSC's appointment authority under the foregoing provisions is delegated under section 15 of the PSEA to the deputy heads of the respective federal departments and institutions to which the PSEA applies. (Often, in practice, this authority is further sub-delegated within the organization under subsection 24(2) of the PSEA.)

[23] The PSC's authority to investigate an external appointment process and take corrective action as required is enshrined in section 66 of the PSEA:

66 The Commission may investigate any external appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may	66 La Commission peut mener une enquête sur tout processus de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut :
(*a*) revoke the appointment or not make the appointment, as the case may be; and	*a*) révoquer la nomination ou ne pas faire la nomination, selon le cas;
(*b*) take any corrective action that it considers appropriate.	*b*) prendre les mesures correctives qu'elle estime indiquées.

[24] Subsection 67(2) of the PSEA provides authority for the PSC to investigate and correct problems with internal appointments made by deputy heads, but only where requested to do so by the deputy head. The enumerated corrective measures are identical to those in section 66.

[25] An individual who loses his or her position as the result of a revocation under sections 66 to 69 of the PSEA may be re-appointed to another appropriate position pursuant to section 73 of the PSEA:

73 Where the appointment of a person is revoked under any of sections 66 to 69, the Commission may appoint that person to another position if the Commission is satisfied that the person meets the essential qualifications referred to in paragraph 30(2)(*a*).	73 En cas de révocation de la nomination en vertu de l'un des articles 66 à 69, la Commission peut nommer la personne visée à un poste pour lequel, selon elle, celle-ci possède les qualifications essentielles visées à l'alinéa 30(2)*a*).

B. *The Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.) (OLA) and Related Regulations and Policies*

[26] Part V of the OLA imposes obligations in the federal public service with respect to the language of work. Relevant for the present matter is subparagraph 36(1)(*c*)(i) (or paragraph 36(1)(*c*) in French) of the OLA, which states:

36 (1) Every federal institution has the duty, within the National Capital Region […] to […] (*c*) ensure that, (i) where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility […].	36 (1) Il incombe aux institutions fédérales, dans la région de la capitale nationale […] : […] *c*) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci […].

[27] Section 91 of the OLA places a limit on the imposition of mandatory linguistic profiles in staffing:

91 Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.	91 Les parties IV et V n'ont pour effet d'autoriser la prise en compte des exigences relatives aux langues officielles, lors d'une dotation en personnel, que si elle s'impose objectivement pour l'exercice des fonctions en cause.

[28] Under subsection 46(1) and paragraph 46(2)(*c*) of the OLA, the Treasury Board is provided the authority to make directives in order to give effect to Part V of the OLA (which includes subparagraph 36(1)(*c*)(i)):

46 (1) The Treasury Board has responsibility for the general direction and coordination of the policies and programs of the Government of Canada relating to the implementation of Parts IV, V and VI in all federal institutions other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner and Parliamentary Protective Service.	46 (1) Le Conseil du Trésor est chargé de l'élaboration et de la coordination générales des principes et programmes fédéraux d'application des parties IV, V et VI dans les institutions fédérales, à l'exception du Sénat, de la Chambre des communes, de la bibliothèque du Parlement, du bureau du conseiller sénatorial en éthique, du bureau du commissaire aux conflits d'intérêts et à l'éthique et du Service de protection parlementaire.
(2) In carrying out its responsibilities under subsection (1), the Treasury Board may	(2) Le Conseil du Trésor peut, dans le cadre de cette mission :
[…]	[…]
(*c*) issue directives to give effect to Parts IV, V and VI.	*c*) donner des instructions pour l'application des parties IV, V et VI.

[29] The Treasury Board has issued directives regarding the identification of appropriate linguistic profiles for positions within the public service. At the time of the events at issue in this matter, public service staffing was governed by the Treasury Board's *Directive on the Linguistic Identification of Positions or Functions*. The Directive stated:

> In regions designated as bilingual for language-of-work purposes […], institutions ensure that:
>
> - employees occupying bilingual […] positions are supervised in their preferred official language […];
> - employees receive personal and central services in their preferred official language.
>
> (emphasis in original removed)

[30] It is common ground between the parties that the National Capital Region has been designated as bilingual for language of work purposes.

[31] In terms of the level of language proficiency required, the Directive stated:

> To ensure services of quality in both official languages, the language proficiency levels of positions or functions involving service to the public or to employees, as well as supervision of employees, are identified at the "BBB" level or higher.
>
> To ensure that the work environment is conducive to the effective use of both official languages:
>
> - positions or functions at the assistant deputy minster level and other assistant deputy head titles […] anywhere in Canada are identified at the "CBC" proficiency level […];
> - the proficiency levels of executive positions or functions in regions designated as bilingual for language-of-work purposes are set at least at "CBC" if the positions or functions include at least one of the following activities:
>   - o supervision of employees occupying bilingual positions […].
>
> (emphasis in original removed)

[32] The Directive further provided that:

> Deputy heads are accountable for implementing this directive in their institutions.
>
> (emphasis in original removed)

[33] Appendix 2 to the Directive dealt with staffing rules applicable to institutions subject to the PSEA. It provided that indeterminate bilingual positions, below the executive EX-02 level, could be staffed on a non-imperative basis with unilingual candidates in accordance with the *Public Service Official Languages Appointment Regulations*, SOR/2005-347 (the PSOL Appointment Regulations) and the Public Service Official Languages Exclusion Approval Order, SI/2005-118 (the Exclusion Approval Order).

[34] The PSOL Appointment Regulations and the Exclusion Approval Order provide a mechanism for appointing unilingual candidates into indeterminate bilingual positions to be staffed on a non-imperative basis. Under them, such an appointment can be made as long as the successful candidate meets all of the other required merit criteria and the deputy head determines that the bilingual position does not require, at the time of appointment, a bilingual incumbent. In such case, the employer must provide language training to the appointee with the aim of securing the requisite linguistic profile within two years. This period can be extended in certain (generally exceptional) circumstances. If the appointee cannot achieve the required ratings, he or she will be deployed into an appropriate position.

[35] Under the Treasury Board's *Directive on the Linguistic Identification of Positions or Functions*, where such appointments occur, managers were charged with "[p]utting in place

measures to fulfil the tasks and functions linked to the position while the person occupying the position does not meet the language requirements".

[36] The Directive also contemplated exceptional staffing situations, stating:

> The following are examples of staffing situations in which a candidate who does not meet the language requirements may be considered:
>
> - when the potential applicant pool is very limited due to the highly specialized nature of the duties and the knowledge needed for a position;
> - when the institution would receive an insufficient number of applications from members of one or the other official language community.

C. *PSC Guidelines*

[37] Finally, the PSC has developed its own guidelines to assist in choosing corrective measures to address failures in appointment processes. In its *Guidance Series – Corrective Action and Revocation*, the PSC provides that corrective actions must address the impact of the impropriety and that such impact is identified by considering who the error or omission affected and what parts, if any, of the appointment process needed to be corrected. The guideline goes on to state that if the defect in the process was that the chosen candidate did not meet an essential qualification, "there may be no choice but to revoke the appointment". When revocation and possible re-appointment are on the table as an appropriate corrective measure, the PSC instructs in the same policy document that a decision to revoke an appointment should be informed by considering the candidate's role in any misconduct, the length of time the individual has been in the position and fairness to the individual. The PSC notes, in addition, that the overall integrity of the appointment process must be considered and that the individual making the decision to

revoke an appointment must consider: "[w]hat message will leaving the person in the position send to other employees in the organization?"

III. The Decision of the PSC and the Federal Court

[38] With this backdrop in mind, it is now possible to review the decisions made by the PSC and the Federal Court in these matters.

A. *The PSC Decision*

[39] Turning first to the PSC decision, as the PSC adopted the investigator's report and recommendations, the report is to be considered as the PSC's reasons for decision: see, by analogy, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paras. 37-38, [2006] 3 F.C.R. 392; *Tan v. Canada (Attorney General)*, 2015 FC 907 at para. 48, [2015] F.C.J. No. 954; *Shaw v. Royal Canadian Mounted Police*, 2013 FC 711 at para. 44, [2013] F.C.J. No. 772.

[40] To begin with, the investigator noted that "a position's language profile should be established objectively based on the functions of the position and not on the linguistic preference of the employees reporting to the incumbent of the position" as provided by section 91 of the OLA (Appeal Book, Volume 3, page 617). The investigator continued by noting that the investigation revealed that the employees who were to be supervised by Mr. Shakov at the time of his appointment did not oppose being supervised solely in English. However, given the high turnover in the Division, the investigator found that it was likely that at least one employee in the

Division might request supervision in French. In addition, Mr. Shakov admitted during the course of the investigation that his lack of French undermined his ability to fully participate in management committee meetings, which were conducted in both official languages. The investigator therefore concluded that the position of Director ought to have been bilingual.

[41] Consequently, the investigator found that the position's linguistic profile had been re-classified to English Essential in order to accommodate Mr. Shakov's lack of ability to work in French. She based her conclusion on the following: the linguistic profile for the Director position had been CCC bilingual since its creation and only became English Essential immediately prior to Mr. Shakov's initial appointment; an HR employee had advised Ms. Clemenhagen that the language profile for the position should be at a minimum BBB given that four out of five positions under the Director's supervision were bilingual; management-level meetings were conducted in English and French; the Director was the only director within FJA not required to be bilingual; Mr. Giroux and Ms. Clemenhagen knew that Mr. Shakov had limited proficiency in French; and the language requirement was changed to BBB within a month of Mr. Shakov obtaining that profile in French.

[42] The investigator further found that Mr. Giroux and Ms. Clemenhagen had opted for a non-advertised external process without justification. Ms. Clemenhagen informed the investigator – and Mr. Giroux confirmed – that a non-advertised process was chosen because the former Director had unexpectedly left the position, putting the Division in jeopardy and that Mr. Shakov possessed the highly specialized skills for the position and otherwise met the essential qualifications for the position. The investigator did not accept these explanations. She

held that there was no basis for pursuing a non-advertised process, concluding that there were other candidates who likely possessed the required skills and there was nothing to suggest that Mr. Shakov would have stopped assisting FJA on a contractual basis had he not been appointed.

[43] However, there was no evidence before the investigator to support the assumption that other candidates possessed the required skills; the investigator premised this assumption on the fact that Mr. Giroux and Ms. Clemenhagen had not run a competitive process to determine whether there were any such potential candidates and that the FJA had engaged consultants other than Mr. Shakov in the past. Neither of these two facts establishes that there were other qualified candidates available to the FJA. The investigator also gave no credence to Mr. Giroux's concern that a contract with Mr. Shakov to perform the duties of the Director on a contractual basis might have exceeded the applicable regulatory expenditure limits.

[44] Although not included in the "Analysis" section of her report, the investigator also noted that the former Director and Mr. Giroux differed in their recollections of the circumstances of the former Director's departure. While Mr. Giroux suggested that the Director position needed to be filled imminently due to the former Director's departure and incapacity, the former Director noted that he had been willing to stay and assist in a transition and had previously received positive performance reviews (and performance pay) for his work as Director. What the investigator failed to note is that Mr. Giroux did not ask the former Director to remain on until a competitive process could be run and a new individual trained. Given the state of the Division under the former Director's leadership, it is unsurprising that no such offer was made.

[45] The investigator identified both processes – the linguistic profile reclassification and the choice not to advertise the appointment process – as constituting improper conduct within the meaning of section 66 of the PSEA. As noted, on the basis of her conclusions, the investigator recommended that:

- Mr. Giroux and Ms. Clemenhagen both be enrolled in mandatory remedial staffing training;
- Mr. Giroux and Ms. Clemenhagen's delegated authority to make appointments be revoked until their completion of that training; and
- Mr. Shakov's term appointment be retroactively revoked, effective the day before he was appointed to his current position on an indeterminate basis.

[46] By virtue of removing the officials' delegated staffing authority, the investigator also implicitly recommended that any authority to re-appoint Mr. Shakov be delegated back up to the PSC. The investigator did not recommend that the PSC exercise such authority to appoint Mr. Shakov to any other position.

B. *The Federal Court Decision*

[47] In allowing the applications, the Federal Court focused on three issues: the existence of improper conduct, the alleged tailoring of the language requirement and the justification for undertaking a non-advertised appointment process.

[48] Recognizing the deference owed to the PSC's decision under the reasonableness standard, the Federal Court nevertheless reasoned that the investigator equally owed deference to Mr. Giroux's discretionary authority, as Acting Deputy Commissioner, to establish the qualifications for the impugned position. According to the Federal Court, Mr. Giroux's decision

"should not be interfered with [by the PSC] unless there is evidence that [he exceeded his] jurisdiction by acting on considerations unrelated to the interest of the office" (Reasons at para. 55). The Federal Court essentially operated on the premise that, as long as Mr. Giroux's staffing decisions were reasonable, interference on the part of the PSC would be unreasonable. The Federal Court held that Mr. Giroux's managerial decision to establish an English Essential language profile for the Director fell within the range of reasonable outcomes and that the PSC's contrary decision was unreasonable for two reasons.

[49] First, the Federal Court considered the operational context surrounding the FJA officials' decision to establish the Director position as English Essential to see if that decision met the definition of improper conduct under section 66 of the PSEA. Based on a review of the case law, the Federal Court held that improper conduct "is found in cases where managerial concerns were set aside to favour the interests of a particular individual" and has not been found where a decision is "based on legitimate, objective managerial imperatives" (Reasons at para. 52). Applying this test, the Federal Court found that no improper conduct had occurred because "[t]he decision to establish the linguistic profile as English Essential was designed solely for the best interest of the FJA and not tailored to benefit Mr. Shakov" (Reasons at para. 62).

[50] Second, the Federal Court considered whether there was a legislative requirement that mandated the position of the Director to be bilingual. In the Federal Court's view, subparagraph 36(1)(*c*)(i) of the OLA does not impose such a requirement. The Court held in this regard (Reasons at para. 61):

> There was no legislative requirement that the position be bilingual because in the short term there was no concern regarding the ability to supervise

> employees in the language of their choice. While the other Director positions in the FJA have an imperative bilingual profile in order to allow bilingual employees to address their Director in the official language of their choice, at the time of the Appointment Process none of the International Programs Division employees required supervision in French. At the hearing, counsel for the FJA acknowledged that one of the employees was not an Anglophone but noted that this person held a bilingual position. There is no indication that this employee ever needed or asked to communicate with Mr. Shakov in French.

[51] Turning to consider FJA's use of a non-advertised process, the Federal Court concluded that Mr. Giroux's decision fell within the range of reasonable outcomes and therefore the PSC's intervention was unreasonable. The Court considered the pressures facing FJA at the time of the decision and concluded "there was nothing improper or unsuitable in making a decision in the best interests of the FJA and the survival of the International Programs" (Reasons at para. 71). In the Federal Court's view, the investigator failed to appreciate the explanation provided by the FJA officials as to why a non-advertised process was appropriate. This failure led the investigator to second-guess Mr. Giroux's managerial decision in an unreasonable manner.

[52] Although the Federal Court's conclusions on improper conduct were adequate to grant the applications, the Court went on to comment on the reasonableness of the corrective measures adopted by the PSC. According to the Court, none of the measures could withstand scrutiny as they did not reinforce the integrity of the appointment process because all of the impugned conduct had been carried out to support the interests of the FJA and not Mr. Shakov.

IV. The Issues on Appeal

[53] The appellant Attorney General of Canada raises three issues on appeal.

[54] First, the Attorney General takes issue with the overall approach applied by the Federal Court, submitting that instead of assessing the PSC's decision on the deferential reasonableness standard, the Federal Court erroneously put itself in the shoes of the PSC to re-evaluate the FJA's staffing decision. The Attorney General says that, in so doing, the Federal Court asked the wrong question as Mr. Giroux's managerial decision was not the subject of the applications for judicial review.

[55] Second, the Attorney General submits that the Federal Court erred in finding the PSC's decision to be unreasonable insofar as concerns the Court's assessment of the official languages issue. The Attorney General asserts in this regard that the combined effect of paragraph 30(2)(*a*) of the PSEA, subsections 36(1) and 46(1), paragraph 46(2)(*c*) and section 91 of the OLA as well as the Treasury Board *Directive on the Linguistic Identification of Positions or Functions* required that the linguistic profile for the Director position be set at a minimum at BBB bilingual as it was located in the National Capital Region and required the supervision of incumbents in several positions that had bilingual linguistic profiles.

[56] More specifically, the Attorney General maintains that the Directive is the means that the Treasury Board has adopted to ensure that subparagraph 36(1)(*c*)(i) of the OLA is respected and that it establishes an essential qualification under paragraph 30(2)(*a*) of the PSEA. Responding to the Federal Court's finding that official languages requirements can be relaxed in certain circumstances, the Attorney General says that essential qualifications for a position cannot be abrogated by "additional" qualifications under subparagraph 30(2)(*b*)(i) of the PSEA.

[57] Because linguistic capacity is identified as an essential qualification under paragraph 30(2)(*a*) of the PSEA and because the Director position ought to have been classified as a bilingual one, the Attorney General submits that it was reasonable for the PSC to find that the selection of English Essential for the linguistic profile was improper conduct, within the meaning of the PSEA. The Attorney General asserts in this regard that behaviour which "undermines [linguistic duality] – including contraventions to the legislative scheme – may reasonably be construed as improper conduct" (appellant's memorandum of fact and law at para. 39).

[58] Third, the Attorney General maintains that the Federal Court erred in finding the remedies to be unreasonable, arguing that the PSC's corrective measures all fall within the broad discretion afforded under section 66 of the PSEA. The Attorney General also notes that any harshness in the remedy may well be abrogated by the PSC deciding to appoint Mr. Shakov to his current position – an option that the Attorney General submits is still open by virtue of section 73 of the PSEA.

[59] The respondents disagree on all points, submitting that the Federal Court's judgment ought not to be disturbed. While recognizing there might have been what they termed "a technical" violation of the Treasury Board *Directive on the Linguistic Identification of Positions or Functions*, the respondents nonetheless maintain that the PSC's decision was unreasonable as the investigator failed to consider the exigent and exceptional circumstances that were at play and instead opted for a narrow and mechanistic application of the Directive, without regard to the jeopardy to the Division if Mr. Shakov had not been appointed. The respondents also say that the

remedies selected – and most especially that revoking Mr. Shakov's appointment – are unreasonable as they do not further the merit principle. Mr. Shakov adds that the revocation is unreasonable as it fails to respect the PSC's own Corrective Action and Revocation guideline as the PSC failed to consider the unduly harsh consequences the revocation would have on him and the fact that he was innocent of any possible wrongdoing.

V. Analysis

[60] As this is an appeal from a decision of the Federal Court in a judicial review application, the standard of review we are to apply is prescribed by the Supreme Court of Canada in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. That standard requires an appellate court to step into the shoes of the trial court, determine whether that court selected the appropriate standard of review and, if so, assess whether it applied that standard correctly. Thus, we are in effect called upon to re-conduct the required judicial review analysis.

[61] Here, I agree with the Federal Court that the deferential reasonableness standard applies to the review of the PSC's decision both because the interpretation and application of section 66 of the PSEA is a matter that Parliament has remitted to the PSC and because it is a matter that falls squarely within the heartland of the PSC's expertise: *Agnaou v. Canada (Attorney General)*, 2015 FC 523 at para. 28, 479 F.T.R. 304; *MacAdam v. Canada (Attorney General)*, 2014 FC 443 at paras. 50, 77, 75 Admin. L.R. (5th) 194 [*MacAdam*]; *Erickson v. Canada (Public Service Commission)*, 2014 FC 888 at paras. 21-22, 464 F.T.R. 39 [*Erickson*], and by analogy, *Dunsmuir*

v. New Brunswick, 2008 SCC 9 at paras. 54-55 and 68-70, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Canada (Attorney General) v. Kane*, 2012 SCC 64 at paras. 5-9, [2012] 3 S.C.R. 398.

[62] The deferential reasonableness standard requires that a reviewing court assess whether an administrative decision is transparent, justifiable and intelligible and whether the result reached is defensible in light of the facts before the administrative decision-maker and the applicable law: *Dunsmuir* at para. 47.

[63] Turning to the assessment of the reasonableness of the decision at issue in this appeal, I agree with the Attorney General that the focus of the inquiry must be the PSC's decision. In assessing whether it is reasonable, it is useful to commence by examining the Attorney General's submissions regarding the requirements of the applicable legislation, regulations and policies in matters of official languages as these issues lie at the centre of the Attorney General's argument.

[64] In my view, the combined effect of paragraph 30(2)(*a*) of the PSEA, subsections 36(1) and 46(1), paragraph 46(2)(*c*) and section 91 of the OLA and the Treasury Board *Directive on the Linguistic Identification of Positions or Functions* might well be to require that the linguistic profile of supervisory positions within federal government departments in the National Capital Region be classified as bilingual as subsection 36(1) and paragraph 46(2)(*c*) of the OLA provide the Treasury Board authority to establish the linguistic requirements for positions and the Directive stated that such positions should, at a minimum, be set as BBB bilingual.

[65] However, the issue of what the Directive required was not the issue that the PSC was tasked with examining. Rather, the PSC was required to determine whether the FJA, Mr. Giroux and Ms. Clemenhagen had engaged in improper conduct, within the meaning of section 66 of the PSEA.

[66] The case law recognizes that, while intent is not required for there to be improper conduct within the meaning of section 66 of the PSEA, there must nonetheless be some conduct that undermines the values enshrined in the PSEA, and, most notably, the merit principle: *MacAdam* at paras. 77-78; *Erickson* at paras. 21, 28-34; and, more generally, *Mabrouk v. Canada (Public Service Commission),* 2014 FC 166 at paras. 42-51, [2014] F.C.J. No. 202. As the Federal Court stated in *MacAdam* at paragraphs 77-78, improper conduct under section 66 of the PSEA:

> 77. […] may reasonably be found where unsuitable behaviour related to the appointment process undermines one or more of the PSEA's guiding values. […] on a plain language reading of the legislation, a bad faith intent is not a necessary requirement notwithstanding its incorporation in prior PSC decisions.
>
> 78. Under the applicable policies related to appointments, a fair process requires that staffing decisions are made objectively and free from political influence or personal favouritism.

[67] Here, the investigator found there to be conduct that undermined the values in the PSEA because the linguistic profile for the term Director position was set as English Essential to tailor it to meet Mr. Shakov's abilities. However, in the unusual circumstances of this case – where the survival of an important Division was imperiled – there were other factors that the investigator was required to also consider before reaching her conclusion that there had been improper conduct.

[68] More specifically, the FJA, Mr. Giroux and Ms. Clemenhagen were faced with a situation where competing values enshrined in the PSEA of ensuring selection of an urgently-required competent candidate and compliance with linguistic requirements applicable to the staffing process were pitted against one another. The only individual who was reasonably likely to be able to fill the urgent needs of the FJA and ensure the continued survival of the International Programs Division was Mr. Shakov.

[69] If the FJA had the funding, it could have staffed the Director position on an indeterminate basis, set the linguistic requirement as bilingual and appointed Mr. Shakov on a non-imperative basis to the position by virtue of the PSOL Appointment Regulations and the Exclusion Approval Order. In other words, if it had the funding, it could have proceeded exactly as it did without violating the Directive.

[70] However, the funding to staff the position on an indeterminate basis was lacking – in part perhaps because the CIDA funding had been allowed to lapse. Thus, if the Directive required that the term position be staffed as a bilingual one, the FJA, Mr. Giroux and Ms. Clemenhagen were faced with a situation of compliance with the Directive on one hand versus running the real risk that the International Programs Division would cease to exist.

[71] Rather than grappling with whether the choices they made in these unusual and exigent circumstances amounted to improper conduct, the investigator instead completely side-stepped the issue by making unreasonable factual findings.

[72] As already noted, the investigator concluded there were candidates other than Mr. Shakov likely available who could have performed the tasks required of the Director. Yet there is not any evidence to support this finding. In my view, the investigator could not reach this conclusion without evidence, despite her expertise as a PSC investigator, given the direct knowledge of the respondents of the needs of the FJA and of the requirements of the Director role. In short, the investigator's assumption as to the availability of other potential candidates fundamentally recast the issues that faced the FJA, Mr. Giroux and Ms. Clemenhagen by ignoring the fact that, assuming the Directive required that the term position be classified as bilingual, compliance with the Directive would very possibly have resulted in the collapse of the Division.

[73] The investigator also concluded that Mr. Shakov might have been persuaded to stay on as a consultant and take on the Director's duties. Even if this had been allowable under the applicable financial limits for contracts, I fail to see how this would have helped ensure the protection of employees' linguistic rights as Mr. Shakov would have *de facto* been doing the same thing as he did.

[74] The investigator thus failed to engage with the factual situation she was called upon to adjudicate and this failure renders her decision unreasonable as she failed to answer the question remitted to her, namely, whether it is improper conduct, within the meaning of section 66 of the PSEA, to classify a term supervisory position in the National Capital Region as English essential if that is required to avoid the likely collapse of a portion of the public service that provides an important international service.

[75] In so determining, I am fully cognizant that the rights afforded under the OLA are fundamental in nature and entirely endorse the comments of my colleague, Stratas, J.A., in his reasons at paragraphs 111-116 and 119-122. However, this recognition does not mean that the PSC's decision should be upheld where it failed to address the key issue remitted to it. Were we to do so, this Court would usurp the role that Parliament has left to the PSC. I therefore believe that the PSC's decision must be set aside.

[76] In addition to the PSC's failure to address the issue that it was required to address, I also believe that the portion of its remedial order that set aside the term appointment of Mr. Shakov on a retroactive basis, effective the day before he was appointed to his current indeterminate position, is unreasonable. At the point this remedy was issued, the term appointment was over and Mr. Shakov had met the linguistic requirements of a bilingual supervisory position. He had also been appointed to his current position on an indeterminate basis. Thus, the only effect of this portion of the remedial order was to remove a qualified and meritorious individual from a position that is difficult to staff.

[77] While the remedial jurisdiction of administrative tribunals – particularly in the labour and employment arena – is broad, it is not limitless. A remedial order will be unreasonable if it contradicts the objects and purposes of the legislation under which it was issued: *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 68, 193 N.R. 81; *VIA Rail Canada Inc. v. Cairns*, 2004 FCA 194 at para. 63, [2004] F.C.J. No. 866.

[78] In my view, the portion of the PSC's order retroactively abrogating Mr. Shakov's term appointment contradicts the object and purposes of the PSEA as it removes a qualified candidate from a position that is difficult to fill, which is the antithesis of the merit principle.

[79] Indeed, the Attorney General at least implicitly recognizes the unreasonable nature of this portion of the remedy selected by the PSC as the Attorney General submits that, even if the PSC's decision stands, it would still be open to the PSC to appoint Mr. Shakov to his current indeterminate position under section 73 of the PSEA. Such an appointment would entirely undo this portion of the PSC's award.

[80] Moreover, I agree with Mr. Shakov that this portion of the PSC's remedy contradicts its own guideline on appropriate remedies as the PSC failed to consider the fact that Mr. Shakov was not at all complicit in the impugned decisions and the remedy affects him in a very harsh manner. He reluctantly accepted the term appointment at financial cost to himself for the good of the FJA International Programs Division, yet the remedial order would leave him without employment after he has occupied the position for several years.

[81] I thus believe that this portion of the PSC's remedial order cannot stand. It therefore follows that in its reconsideration of the issues to be remitted, it would not be reasonable for the PSC to make the same remedial order with respect to Mr. Shakov.

VI. Proposed Disposition

[82] In light of the foregoing, I would grant this appeal in part and would vary the judgment of the Federal Court to remit the investigation to the PSC for reconsideration in accordance with these reasons.

[83] The parties agreed that the costs of this appeal should be fixed in the all-inclusive amount of $9,000.00 and that if both respondents were successful the Attorney General should pay half that amount to Mr. Shakov and the other half to the other respondents.

[84] The quantum agreed to is reasonable, and as Mr. Shakov was successful, I would award him costs on this appeal in the amount of $4,500.00. I would also award him his costs in the Federal Court in the amount set by that Court. However, I would order that the other parties bear their own costs of this appeal and in the Federal Court as their success was divided.

"Mary J.L. Gleason"
J.A.

"I agree.
A.F. Scott J.A."

STRATAS J.A. (Dissenting Reasons)

[85] My colleague finds that the decision of the Public Service Commission, based as it is on the investigator's report, is unreasonable. She suggests (at para. 71) that the investigator failed to grapple with the key issue in this case: whether, in these urgent and exceptional circumstances, the decision of Mr. Giroux and Ms. Clemenhagen to appoint Mr. Shakov as Director of the International Programs Division of the Office of the Commissioner for Federal Judicial Affairs amounted to improper conduct within the meaning of section 66 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13.

[86] I disagree. The investigator grappled with this very thing.

[87] The investigator's report sets out a number of the urgent and exceptional circumstances affecting the International Programs Division at the time of Mr. Shakov's appointment as Director. The report refers to the "jeopardy" the Division faced, including an imminent funding collapse, and it notes the fact the Division was "performing badly" (paras. 8, 21, 27, 32, 33 and 48 of the investigator's report). The urgency was heightened by the former Director's sudden departure (paras. 21, 22, 36 and 70). Available was Mr. Shakov who had tailor-made experience and competencies (paras. 9, 15, 26 and 71) and there was a lack of viable hiring alternatives (paras. 22 and 34).

[88] Aside from these express references, the affidavit of Mr. Giroux discloses much detail about the urgent and exceptional circumstances affecting the International Programs Division at

the time of Mr. Shakov's appointment. Absent an indication to the contrary, the Public Service Commission must be presumed to have been aware of the evidentiary record, including Mr. Giroux's affidavit, and must be taken to have considered it. See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.

[89] Despite the urgent and exceptional circumstances affecting the International Program Division, the Public Service Commission nevertheless determined that there was "improper conduct that affected the selection of [Mr. Shakov]" within the meaning of section 66 of the *Public Service Employment Act*.

[90] Mr. Giroux and Ms. Clemenhagen established the supervisory position of Director of the International Programs Division as "English essential" despite the advice of Human Resources in these circumstances that it should be a bilingual position. At the time of his hiring as the Director, Mr. Shakov spoke one official language, English; he supervised employees occupying bilingual positions, one of whom was francophone, and Federal Judicial Affairs meetings were conducted in both French and English: see the investigator's report at paras. 64 and 66. The language requirements for the position of Director were improperly tailored to facilitate Mr. Shakov's appointment: see Briefing Note to the Commission; Appeal Book at page 596.

[91] As well, according to the investigator, Mr. Giroux and Ms. Clemenhagen improperly followed a non-advertised appointment process. The investigator found that they did this in order to skew the process in favour of the candidate they desired to appoint, Mr. Shakov. The

investigator found that there were candidates other than Mr. Shakov who likely possessed the required skills and who, if an advertised process were followed, might have applied for the position.

[92] In short, on the facts, the investigator rejected the idea that advertising the position would have, in the words of my colleague, caused the "likely collapse of a portion of the public service that provides an important international service" (at para. 74).

[93] My colleague impugns the investigator's finding that advertising would have resulted in qualified persons applying for the position. Assessing the evidentiary record herself, my colleague observes that the position was "difficult" to fill (at paras. 76 and 78). She notes that the investigator had no evidence of a wider pool of candidates.

[94] The investigator did not need specific evidence of this. Parliament did not vest decision-making authority over this subject-matter in a body of generalist judges sitting in court who will need evidence of every last thing. Rather, Parliament chose to vest decision-making authority in the Public Service Commission, including investigators employed by it—a body acting within a specialized area of employment, armed with expert appreciation of the nature and functioning of this area.

[95] The Commission knows the skills and capabilities of people who apply for various types of public service positions and the operational needs and pressures bearing upon a staffing

decision. From this, the Commission can determine whether an advertising process likely would have found qualified candidates for the position in a timely way.

[96] To insist that the Commission have the sort of evidence a court would require on every element of this determination is to ossify and over-judicialize a process that Parliament intended to be fair and more informal, one enriched by knowledge and insights built from years of administrative specialization and expertise. We should not depart from the decades-old principle of administrative law that "[t]he purposes of beneficent legislation must not be stultified by unnecessary judicialization": *Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355 at p. 373, 21 O.R. (2d) 292 at p. 310 (C.A.).

[97] In the end, the Commission ordered corrective measures: training for Mr. Giroux and Ms. Clemenhagen and the revocation of Mr. Shakov's appointment. This outcome, the respondents say, is disproportionate on the facts and the law. They say it cannot survive reasonableness review. I disagree.

[98] Expert labour and employment adjudicators making findings of fact and applying known legal standards to the facts normally enjoy a broad margin of appreciation. This is all the more so in the specialized and complex area of public service employment. See, *e.g.*, *Canada (Attorney General) v. Kane*, 2012 SCC 64, [2012] 3 S.C.R. 398; *Teti v. Canada (Attorney General)*, 2016 FCA 82 at para. 5; *Baragar v. Canada (Attorney General)*, 2016 FCA 75, 483 N.R. 52 at paras. 14-15, 18; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 at para. 33; *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 74.

[99] In arriving at the outcome it did, the Public Service Commission relied upon the evidence before it, made appropriate findings, applied known statutory standards to the findings and exercised its remedial discretion in an acceptable way. The remedy may strike some as harsh but it is not unacceptably or indefensibly disproportionate on these facts: see, *e.g.*, *Boogaard* at paras. 79-81.

[100] Our assessment of the reasonableness of the outcome reached by the Commission is shaped by the terms of the legislation under which it operates and the purposes of that legislation. Section 66 of the *Public Service Employment Act* describes the remedies the Commission can impose as "corrective action". Understood in light of the purpose of section 66, the remedies are "administrative measures" aimed at protecting "the integrity of the appointment process in the public service rather than disciplining delinquent employees": *Seck v. Canada (Attorney General)*, 2012 FCA 314, [2014] 2 F.C.R. 167 at paras. 48-51.

[101] Section 66 also sits within a practical context. Usually deputy heads of institutions subject to the Commission's oversight, such as Mr. Giroux, have risen to their positions because they are excellent professionals, fully capable of making sound and fair appointments. When the Commission imposes "corrective action", it is not condemning or punishing those persons. Rather it is trying to correct a miscue and vindicate one of the key objectives of the *Public Service Employment Act*, namely merit-based, non-partisan appointments in the public service.

[102] Here, the record shows that the appointment process proceeded the way it did for what all involved genuinely felt were good reasons and in the very best interests of the organization and

resulted in a candidate who, by all accounts, has turned out to be a very good appointment. But viewed objectively alongside the legislative standards and purposes, the Commission considered the process to be unnecessarily and unjustifiably skewed to favour this candidate. The Commission felt it needed to impose a remedy to correct a flawed process and to send a signal to the rest of the public service that appointment processes, pursued for what may appear to those involved to be good reasons, may nevertheless be impugned if they fall short of the standards in the Act. In short, under this legislative regime, the ends do not always justify the means. The outcome the Commission reached on this record was an acceptable and defensible one.

[103] The Commission's decision passes muster under reasonableness review on another basis. The Supreme Court has instructed us that in conducting reasonableness review, we are to assess the outcome reached by administrative decision-makers, not necessarily the express reasons they actually gave. If the outcome is acceptable and defensible on the basis of reasons that could have been given or reasons that when viewed in light of the record must be seen as implicit, the decision is reasonable: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48; *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572; *Newfoundland Nurses* at paras. 11-12; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 51-55.

[104] I believe the Public Service Commission offers fleeting, implicit reasons on the failure of this appointment process to fulfil official language requirements: see the references at paras. 57 and 64-66 of the investigator's report. On this record, it could have amplified its reasons to

support even better the outcome it reached. In my view, the failure in this case to fulfil official language requirements is another pillar—a sturdy one—supporting the reasonableness of the outcome reached by the Commission. In fact, so sturdy is this pillar that I doubt that the Commission could reasonably reach a different outcome on the facts and the law.

[105] On the facts, we have the record before the Commission from which it made two key, factually suffused findings. These must stand under reasonableness review. First, the Commission found that advertising the vacant position of Director would have prompted qualified candidates to apply immediately; this was not a situation where advertising would have resulted in no applicants. Second, the urgent and exceptional circumstances affecting the International Programs Division, alleged difficulties in staffing, and Mr. Shakov's evident skills and capability for the position did not justify the staffing conduct in this case.

[106] On the law, certain legislative and administrative standards concerning official language rights apply in this case. They are informed by clear case law of the Supreme Court concerning the nature and importance of official language rights. We also have the legislative mandate of the Commission, which requires it to look beyond the effects on the workplace in issue in determining whether there is improper conduct and what corrective measures should be imposed. These points deserve a more fulsome explanation.

[107] Those entrusted with appointing public servants, known in the *Public Service Employment Act* as "deputy heads", must adhere to the Act, the Public Service Commission's

appointment policies, and administrative standards the Treasury Board has set out in directives: *Public Service Employment Act*, ss. 16, 29(3) and 31(2).

[108] From these things, a forest of principles emerges. In some circumstances, hiring processes that undermine these principles can offend the prohibition against "improper conduct" in section 66 of the *Public Service Employment Act*: *MacAdam v. Canada (Attorney General)*, 2014 FC 443.

[109] In the area of official language rights, these principles are as follows:

- "[T]he Government of Canada is committed to a public service that embodies linguistic duality" (preamble of the *Public Service Employment Act*);

- "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the…government of Canada," "officers and employees of institutions of the…government of Canada should have equal opportunities to use the official language of their choice while working together in pursuing the goals of those institutions," "English-speaking Canadians and French-speaking Canadians should, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment in the institutions of the…government of Canada," "the Government of Canada is committed to achieving, with due regard to the principle of selection of personnel according to merit, full participation of

English-speaking Canadians and French-speaking Canadians in its institutions," and "the Government of Canada is committed to enhancing the bilingual character of the National Capital Region" (preamble to the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.));

- Appointments are to be made "on the basis of merit" (subsection 30(1)); this means, among other things, that the person to be appointed meets the essential qualifications for the work to be performed…including official language proficiency (paragraph 30(2)(*a*) of the *Public Service Employment Act*);

- Institutions within the National Capital Region, such as the Office of the Commissioner for Federal Judicial Affairs, must ensure that "supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility" where "it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages" (*Official Languages Act*, subparagraph 36(1)(*c*)(i));

- There are specific ways in which language requirements for a position are to be established; language proficiency levels for those supervising employees must be at a certain level, one beyond Mr. Shakov's level at the time of his appointment ("Directive on Linguistic Identification of Positions or Functions" and "Directive on Official Languages for People Management", Appeal Book, pages 565-582);

- The government has a positive obligation to cultivate a workplace environment that fosters linguistic duality and ensures equal status for minority language employees, regardless of their language capabilities: *Schreiber v. Canada* (1999), 69 C.R.R. (2d) 256 at p. 293, aff'd *Schreiber v. Canada* (2000), 193 F.T.R. 151, 92 A.C.W.S. (3d) 231 (Fed. C.A.).

[110] Where these principles apply, three other contextual matters can affect the content and application of official language rights in the workplace: the significance of language, the importance of work, and the concept of substantive equality.

[111] First the significance of language. Language is not merely functional. "It is…a means by which a people may express its cultural identity" and "the means by which the individual expresses his or her personal identity and sense of individuality": *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at para. 17, citing *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 at pp. 748-49. Language is intimately associated with personal and cultural identity, dignity, and personhood.

[112] Next, the importance of work. For many of us, work takes up most of the time we are awake, a cornerstone or at least a dominant part of our lives. Dickson C.J. put it well:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole

> compendium of psychological, emotional and physical elements of a person's dignity and self-respect.

(*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 at p. 368).

[113] From this, one can appreciate that the combination of language and work—the language of work—is no trifling thing. Unsurprisingly, Parliament and the government's primary employer, the Treasury Board, have devoted significant legislative and administrative attention to it. As the Commission interprets and applies legislation and administrative measures and policies and as we review Commission decisions, the deep role played by the language of work must be kept front of mind.

[114] Now to substantive equality. Substantive equality recognizes that facially neutral conduct that treats individuals identically "may frequently produce serious inequality": *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at para. 17, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 at p. 164. Substantive equality asks whether there is a disproportionate or adverse impact on a particular group in light of that group's background and characteristics. To take cognizance of substantive equality, one must dig beneath the surface and consider the "actual impact [of an impugned measure or decision]…taking full account of social, political, economic and historical factors": *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 39.

[115] Two decades ago in *Beaulac*, the Supreme Court cemented substantive equality into our understanding of language rights. The Supreme Court put it this way (at paras. 22 and 24):

> Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law.
>
> …
>
> This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State [citations omitted]…It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation.

[116] Since *Beaulac*, restrictive interpretations of language rights have evaporated in favour of a purposive approach infused with the principle of substantive equality: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3 at para. 31; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 at para. 22; *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194 at para. 31; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139 at paras. 29-30; Warren J. Newman, "Understanding Language Rights, Equality and the Charter: Towards a Comprehensive Theory of Constitutional Interpretation", (2004) 15 Nat'l J. Const. L. 363 at p. 394.

[117] All of this deepens our appreciation of what happened in this case and, if left uncorrected, what might happen in other public service workplaces.

[118] At the time Mr. Shakov was appointed, he supervised bilingual employees only in English. The employees could hear and understand Mr. Shakov in English. However, that does not bestow upon them full substantive equality as far as their language of choice is concerned. For example, in stressful moments such as performance reviews and workplace discipline—potentially work-defining and, thus, life-defining moments—might these employees feel more comfortable speaking to their supervisor in their first-learned language?

[119] Take employees who—unlike others in a particular work unit and their supervisors—are forced always to operate in their less-preferred language or are made to feel uncomfortable using their official language of choice. Will these employees be as well placed or as comfortable as others to persuade their work units to adopt, say, a bold and innovative plan? Will these employees feel as confident in taking the initiative and becoming leaders among their colleagues? Will they be as able or as comfortable in performing the linguistic gymnastics needed to notify supervisors, tactfully, professionally and respectfully, about a colleague's underperformance on a project? Will the employees be able to use as well or as comfortably an idiom or expression with no origin or parallel in the employees' cultural or linguistic background? If these employees are questioned about a recent dip in productivity, will they be as well-placed or as comfortable to convey to their supervisors the emotional stress caused by a recent family tragedy?

[120] These employees may be able to perform competently in their work units. But can it be said that they truly enjoy substantive equality? Translations of office memos and bilingual computer software may treat employees identically, but by themselves do not necessarily achieve

the goal of substantive equality. Language equality in the workplace cannot be measured solely by whether employees can comfortably raise their hand in a meeting, understand an email, or dialogue with a supervisor. In the end, proper and linguistically appropriate staffing in the right places is an essential step on the road to substantive equality.

[121] It is no answer to say that some sort of accommodation can be arranged to assist an employee or to minimize prejudice, such as involving a person who can speak the employee's preferred official language when necessary. Accommodation and temporary fixes fall short of full recognition and affirmation of the language right. See *Beaulac* at paras. 24 and 45; *Industrielle Alliance, Assurance et Services Financiers Inc. v. Mazraani*, 2017 FCA 80 at paras. 22-23; *DesRochers* at para. 31; *Tailleur v. Canada (Attorney General)*, 2015 FC 1230 at para. 82. Nor do accommodation and temporary fixes advance or fulfil the goal of substantive equality: *ibid.* and *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321. Relying upon accommodation and temporary fixes—treating the exercise of language rights like an exception or anomaly to be tolerated and managed when necessary—tears at the notion of equal status, membership and belonging that lies at the core of the concept of equality. The vision of substantive equality, deployed in *Beaulac*, "cannot be accomplished by [reacting to a situation] and then muddling through as best as one can given the existing resources"; instead, *Beaulac* requires that the "government conduct itself as though it is linguistically a part of both official language communities": Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?", (2002) 47 McGill L.J. 593 at p. 620.

[122] In many settings, all languages, whether official or not, are often tolerated, perhaps grudgingly by some. But more than grudging tolerance is required for official languages. To breathe life into their status as official languages, both French and English must be not only tolerated but also embraced, encouraged and promoted: Michel Bastarache, *Language Rights in Canada*, 2d ed. (Cowansville: Éditions Yvon Blais Inc., 2004) at p. 6; see also Leslie Green, "Are Language Rights Fundamental?", (1987) 25 *Osgoode Hall Law Journal* 639 at p. 660.

[123] Of course, like all rights and freedoms, official language rights in the workplace are not absolute. Certain circumstances—defined expressly or impliedly in constitutionally valid legislation and directives that are not subject to legal objection—will override the imperatives of linguistic equality: see, *e.g.*, "Directive on Official Languages for People Management", Appendix 4; Appeal Book at p. 580. Acting under legislation or directives, the Public Service Commission may sift through the evidentiary record, weigh factors such as the operational needs of a particular department against official language rights, and conclude that the appointment of a unilingual supervisor in a work unit is entirely justified. This sort of sensitive weighing lies at the heart of the statutory mandate and expertise of the Commission, not a reviewing court.

[124] The Public Service Commission chose not to articulate fulsomely the force of the foregoing principles. Nevertheless, if the entire record is read holistically and organically with the Commission's statutory mandate and the nature and importance of official language rights firmly in mind, the strong remedy imposed by the Commission in this case can only be seen as acceptable and defensible.

[125] The Commission was not restricted to just a narrow examination of this workplace. The *Public Service Employment Act* and its purposes allow the Commission to consider the wider public service and the nature and importance of official language rights. The Commission performs an oversight role in order to "maintain and safeguard the fundamental values of public service": *Seck* at para. 32. This oversight mandate acts as a counterbalance to the decentralized and delegated hiring decisions encouraged by the *Public Service Employment Act*: *Seck* at para. 32.

[126] This suggests that while the Commission can focus on the particular workplace and correct improper conduct in workplace staffing, it should also consider the wider effect of any corrective measure it orders. Will its corrective measure send a useful signal to the wider public service regarding what hiring conduct is acceptable and unacceptable, preserve the integrity of public service hiring, and safeguard the fundamental values of the public service, one of which is linguistic duality? See preamble to the *Public Service Employment Act*; *Seck* at paras. 23-33. These broader considerations, live in this case, serve to sustain the reasonableness of the Commission's decision.

[127] Finally, in evaluating the issue of urgency and exceptionality and weighing it in the balance, the Commission must have also drawn upon its appreciation of the nature of public service workplaces, one enriched by its many years of regulatory experience. The Commission knows that many workplaces require employees of very particular capability and skills to discharge narrow and technical mandates. For this reason, those in charge of hiring in many workplaces can readily construct seemingly plausible claims of urgency, exceptionality of the

position and difficulties in staffing it in order to skew a hiring process in favour of a particular candidate. If the Commission accepts claims such as these too lightly, they will become frequently used off-ramps veering the public service away from the destinations set by legislation and administrative directives: hiring based on merit and non-partisanship, and respect for the equality of the official languages.

[128] In conclusion, the outcome the Commission reached—the finding of improper conduct and the corrective measures it ordered—was acceptable and defensible on the applicable legal principles and the factually suffused findings the Commission made.

[129] For the foregoing reasons, I would allow the appeal, dismiss the applications for judicial review and grant the Attorney General of Canada its costs here and below.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-41-16
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. OLEG SHAKOV ET AL.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 13, 2017
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	SCOTT J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	DECEMBER 19, 2017

APPEARANCES:

Alain Préfontaine Youri Tessier-Stall	FOR THE APPELLANT
Emily McCarthy	FOR THE RESPONDENT (Oleg Shakov)
Jacques A. Emond Sarah Lapointe	FOR THE RESPONDENTS (The Office of the Commissioner for Federal Judicial Affairs, Marc Giroux and Nikki Clemenhagen)

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT

Power Law Ottawa, Ontario	FOR THE RESPONDENT (Oleg Shakov)
Emond Harnden LLP Ottawa, Ontario	FOR THE RESPONDENTS (The Office of the Commissioner for Federal Judicial Affairs, Marc Giroux and Nikki Clemenhagen)