Date: 20060605

Docket: T-17-05

Citation: 2006 FC 699

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 5, 2006

PRESENT: THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER

BETWEEN:

PERSONS WISHING TO ADOPT THE PSEUDONYMS OF EMPLOYEE NO. 1, EMPLOYEE NO. 2 *ET AL.*

Applicants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] One hundred and nineteen employees and former employees of the Canadian Security Intelligence Service (CSIS) are applying to the Court to review the decision by the Director of CSIS to dismiss their group grievance to have commitments respected that, according to them, were allegedly made when they were hired in 1984.

BACKGROUND

[2] All the applicants were working for the Security Service of the Royal Canadian Mounted Police (RCMP) until the creation of CSIS in 1984, when Parliament decided to create a civilian intelligence service.

[3] The *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 (the Act) included certain transitional provisions, including subsections 66(1) and (2), which specified that

66. (1) Subject to subsection (5), (a) all officers and members of the Force, and (b) all persons appointed or employed under the *Public Service Employment Act* assigned to the security service immediately prior to the coming into force of this section become employees of the Service on the coming into force of this section.	66. (1) Sous réserve du paragraphe (5), les personnes suivantes affectées aux services de sécurité deviennent employés à l'entrée en vigueur du présent article : a) les officiers et les membres de la Gendarmerie; b) les personnes nommées ou employées en vertu de la *Loi sur l'emploi dans la Fonction publique*.
66. (2) Every person mentioned in subsection (1) continues, on the coming into force of this section, to have employment benefits equivalent to those that the person had immediately prior thereto, until such time as those benefits are modified pursuant to a collective agreement or, in the case of persons not represented by a bargaining agent, by the Service. (My emphasis)	66. (2) Le paragraphe (1) ne porte pas atteinte à l'équivalence des avantages attachés aux postes des personnes qu'il vise, sous réserve des éventuelles modifications consécutives aux conventions collectives ou, dans le cas des personnes qui ne sont pas représentées par un agent négociateur, à une décision du Service. (Mon souligné)

[4] CSIS employees, who were formerly RCMP members, were part of the unrepresented persons category for which the benefits could be modified by a CSIS decision. Since serious concerns had been expressed as to this power of the Director of CSIS to eventually eliminate the benefits attached to the positions of former RCMP members, the director-designate circulated a letter to all employees of the RCMP's Security Service in June 1984, which stated:

> Solicitor General
> Canada
>
> CONFIDENTIAL
>
> JUNE 1984
>
> P. 2 […]
>
> […], CSIS has a continuing need for people with the expertise, experience and integrity that has been developed within the Security Service. All existing Security Service members and employees will be offered positions in CSIS, with compensation and benefits at least equivalent to their current situation. Any changes proposed to the compensation package in the future will occur as a result of consultation with elected employee representatives or the bargaining agent.
>
> p. 4
>
> SALARY
>
> No employee will suffer a decrease in salary by moving into CSIS. […]
>
> A relatively small number of members may find that the salary range established for their new position is less than the salary they now receive. They will continue to receive their current salary, not the lower level. This salary protection will continue until the employee is moved into a position where the discrepancy in salary is eliminated.
>
> […] In addition, Public Service employees presently receiving a bonus for bilingualism will continue to do so, as in the past.
>
> p. 6
>
> BENEFITS AND ENTITLEMENTS

Member

The Commissioner of the RCMP, as an attachment to a letter dated January 23, 1984, provided a detailed outline of benefits and entitlements that currently apply to you. The benefits and entitlements outlined for members who join CSIS will continue to accrue until they are improved.

Solliciteur général
Canada

CONFIDENTIEL

JUIN 1984

p. 2 […]

[L]e SCRS a besoin, de façon permanente, de gens possédant les connaissances spécialisées, l'expérience et l'intégrité qui ont caractérisé le Service de sécurité [de la GRC]. Tous les employés actuels du Service de sécurité se verront offrir, à l'intérieur du SCRS, des postes qui, sur le plan de la rémunération et des avantages sociaux, seront au moins l'équivalent de leur situation actuelle. À l'avenir, des modifications ne seront proposées au plan de la rémunération globale qu'à la suite de consultations avec les représentants élus des employés ou l'agent négociateur […].

p. 4

TRAITEMENT

Personne ne subira de diminution de traitement en passant au SCRS. […]

Il se peut qu'un nombre relativement petit d'employés constatent que l'échelle des traitements fixée pour leur nouveau poste est inférieure à celle dont ils bénéficient actuellement. Ils continueront d'être rémunérés au taux actuel, et non au taux inférieur. Cette protection du traitement se poursuivra jusqu'à ce qu'ils accèdent à un poste où la différence de traitement se trouve éliminée.

[…] En outre, les employés de la Fonction publique qui reçoivent actuellement une prime de bilinguisme continueront de le faire, comme dans le passé.

p. 6

AVANTAGES SOCIAUX ET PRESTATIONS

Membre

> Le commissaire de la GRC a annexé à une lettre en date du 23 janvier 1984 un exposé détaillé des avantages sociaux et des prestations dont vous pouvez bénéficier actuellement. Les prestations et avantages sociaux prévus pour les membres qui entrent au SCRS continueront de leur être accordés jusqu'à ce que des améliorations soient apportées.

[5] The parties agree that between 1984 and 1999, the applicants' benefits and entitlements were kept at a level that was equivalent to those paid by the RCMP. They agreed that any time that the RCMP agreed to increase the benefits and entitlements of their employees, CSIS would also improve those paid for the applicants. However, such equivalency was not maintained regarding salary or wages, particularly as of 1991, when salaries in the public service were frozen.

[6] That year, salary increases (pay) at the RCMP came into effect on January 1, 1991, while since 1985, increases at CSIS had to come into effect on April 1, 1991.

[7] Under the *Public Sector Compensation Act*, S.C. 1991, c. 30, the salaries of both organizations, which entered into force on February 26, 1991, were subject to the freeze. Afterwards, the statutory increases set forth in subsequent acts were applied to those salaries for a period of six years.

[8] The parties agreed that this salary gap has been decreased since 2002.

[9] Moreover, in 1994, the Federal Court of Appeal confirmed that RCMP employees had been entitled to a bilingualism bonus since the program entered into force, which was well before 1984.

[10] According to the applicants, they should have been paid that bonus in order to comply with the principle of equivalency. Although the Federal Court of Appeal's decision in 1994 in *Gingras v. Canada*, [1994] F.C.A. No. 270 only directly applies to Mr. Gingras, a former member of the RCMP who was transferred to CSIS in 1984, that bonus was paid retroactively to all RCMP members by the Commissioner of the RCMP. It was also paid by CSIS to former members of the RCMP over a certain time.

[11] However, it appears that the Director of CSIS had decided not to grant such a bonus to the members of its service. The legality of this decision by CSIS regarding its employees was affirmed by the Federal Court of Appeal in *Gingras*, above. However, the Court of Appeal did not discuss promises made by the director-designate to former members of the RCMP, since no submissions or evidence was filed in that regard.[1] The decision only deals with the power of the Director under subsection 66(2) of the Act.

[12] On August 20, 1999, the applicants sent a lengthy demand to the Director of CSIS in which they claimed reimbursement for what they had lost in 1991 with respect to salary. Since several of the applicants were retired by then, they also called for an adjustment to their retirement benefits. This letter remains unanswered.

[13] On May 10, 2000, the applicants filed an action with the Federal Court in order to claim the amounts that they argued were owed to them. They also demanded the payment of $5,000 to each of the applicants as damages for trouble and inconvenience.

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[1] It is clear that, with respect to Mr. Gingras, that decision had the force of *res judicata*. With respect to that, the Court cannot review the question of the bilingualism bonus, even though the arguments handled by the Court of Appeal are not the same as those being made before me. In fact, Mr. Gingras would have had to present all his arguments before the Court of Appeal when it heard his case.

[14] In defence of that action, the respondent attacked the Court's jurisdiction by citing the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, and the Act. It argued that the grievance was the only remedy open to the applicants.

[15] In May and June 2004, the action was heard on merits by Justice Michel Beaudry (see *Persons wishing to adopt the pseudonym of employee no 1 v. Canada*, [2004] F.C.J. No. 1470, 2004 FC 1221), which allowed the defendant's position such that the plaintiffs would have had to proceed with an application for judicial review, except with respect to their claim for damages. However, the Court allowed the plaintiffs to file a motion for an extension of time in order to allow them to file such an application for judicial review. In his decision, Beaudry J. indicates that the formal demand from August 20, 1999 was equivalent to a third level grievance and that a failure to respond to it was equivalent to a rejection of the grievance by the Director of CSIS.

[16] The motion for an extension of time was allowed by Beaudry J. in December 2004 *Persons wishing to adopt the pseudonym of employee no 1 v. Canada* (December 9, 2004), Ottawa 04-T-46 (F.C.). In his decision, he indicated:

> [TRANSLATION]
>
> Here, the defendant is arguing that the formal demand from August 20, 1999 is not a grievance within the meaning of grievance policy adopted by CSIS. In my decision from September 7, 2004, at paragraph 17, I have already determined that this formal demand was a third level grievance. In addition, the defendant submits that even if this missive were a grievance, it would be statute barred. I believe that this question should be submitted to the judge who will hear the application for judicial review for a fair and complete determination of the rights of the parties to the litigation. It may very well be that some claims are statute barred, while others are not, but at this stage, at the risk of repeating myself, I believe that justice should be done between the parties.

[17] That order was not appealed.

[18] However, the respondent appealed part of the judgment by Beaudry J., which allowed the applicants to file an amended action related to their claim for damages and which stayed that amended action until a final judgment is made in this application for judicial review. The respondent also appealed the findings of Beaudry J. in which the formal demand from August 20, 1999, was a third level grievance and that the failure to reply to it was a negative decision.

[19] The Federal Court of Appeal determined that the debate on the Court's jurisdiction and on the appropriate choice of proceedings is moot, in that the parties were reported to be satisfied that the question of damages would be determined as part of a new grievance that the Director of CSIS would determine at the third level. (*Person wishing to adopt the pseudonym of employee no 1 v. Canada*, [2005] F.C.J. No. 1039, 2005 FCA 228)

[20] In that regard, at paragraph 24 of the decision, Robert Décary J.A. said:

> In the circumstances, it would be both useless and rash to go beyond what is satisfactory to the parties. This litigation has been going on for too long to allow the parties to become bogged down in formal discussions which would have no bearing on the final disposition of the case.

[21] He also indicated at paragraph 21 that, as Michel Beaudry J. accepted regarding the essence of the applicants' claims, the respondent's arguments and that the respondents did not file an appeal, "an application for judicial review proceeds as if it were in fact a grievance, we cannot go back over this".

[22] Lastly, it should be noted that the applicants have included claims in this application that deal with matters that were not before the decision-maker in August 1999. At the hearing, the parties therefore agreed that those questions cannot, and do not have to be, dealt with by the Court.

[23] Therefore, the issue essentially deals with a director's refusal to grant pay equivalency after the transfer and the right of the applicants to receive a bilingualism bonus.

[24] In his decision, Robert Décary J.A. had indicated that the litigation had been going on for too long to allow the parties to become bogged down in formal discussions. In that context, and although in the reply record, the respondent still challenged that the letter from August 20, 1999, was a grievance that was validly filed at the third level, it withdrew that argument at the hearing, being agreed that such a withdrawal was not a precedent and that it did not have to be interpreted as such.

ISSUES

[25] Therefore, the questions to be determined by the Court are the following:

a) Was the grievance from August 20, 1999, filed late?

b) Did the Director of CSIS err by refusing to ratify the principle of pay equivalency and refusing to pay the bilingualism bonus?

ANALYSIS

[26] The Court must proceed with a pragmatic and function analysis to determine the applicable standard of review for those questions. Therefore, I will consider the four contextual factors that are found at paragraph 26 of the Supreme Court of Canada's decision in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226.

[27] As indicated by Beaudry J. in his decision, following the transfer of security services in 1984, it is the Director of CSIS under subsection 8(1) of the Act who has the authority to determine the classification of duties, salaries and other benefits of CSIS employees. When the applicants filed their grievance, the provisions of sections 91 and 92 of the former *Public Service Staff Relations Act*, R.S.C. 1985 c. P-35 (PSSRA), applied due to the definition of "grievance" that then appears in section 2 of the Act. The applicants, however, were not entitled to the arbitration provided by the PSSRA because the decision dealing with labour conditions had to be made by the Director of CSIS.

[28] The Act does not include a privative clause and does not specify a right to appeal regarding a decision made at the third level for the applicants' grievance. In addition, as the Supreme Court of Canada indicated in *Vaughan v. Canada*, [2005] 1 S.C.R. 146 at paras 27–29, subsection 96(3) of the PSSRA is not a complete privative clause that may influence the deference to be granted to the decision-maker.

[29] As I have already said, the purpose of the Act is the administration and management of CSIS. The particular relevant provisions give the Director the authority to implement a mechanism

for the effective handling of disputes and grievances that deal with labour conditions. As for sections 91 and 92 of the PSSRA, they aim to implement an effective mechanism for the settlement of disputes and grievances in the public service.

[30] In this case, this is a private or personal issue for the applicants. However, some deference appears appropriate to me, since the decision comes from the third level, that being the Director of CSIS.

[31] As for the nature of the questions raised by the grievance, it is quite clear that the question of the limitation date is a question of law that does not involve any determination of facts because the relevant facts are not being impugned. Therefore, this is applying the general principles of labour law and the Director of CSIS has no more expertise than the Court in that regard. That factor is in favour of a lower level of deference.

[32] To determine the merits of the grievance, the Director also had to review the Act and interpret the employment contracts of the applicants in 1984 in light of the documents exchanged at the time. For the applicants, these are mainly questions of law, while for the respondent, that involves mixed questions of facts and of law.

[33] In this case, the Court does not believe that the qualification of those questions is essential. In fact, even if we consider that the determination of commitments made in 1984 involves mixed questions of facts and of law, it is quite clear that those questions have a strong legal connotation, rather than factual. The Director has no more expertise than the Court to decide the arguments raised by the applicants in this case.

[34] In light of my analysis of the various contextual factors, I believe that the applicable standard of review for all those questions is that of correctness.

[35] For the reasons that I will detail hereinafter, the Court is satisfied that the Director's decision regarding the application for pay equivalency is correct and that the decision to dismiss the grievance regarding the bilingualism bonus was not.

1) Was the grievance filed late?

[36] As I have already indicated, section 8 of the Act allows the Director of CSIS to set the procedural rules regarding the behaviour and discipline of its employees and the presentation of grievances.

[37] He in fact adopted Grievance Policy number HUM-502. Although this was replaced on July 2, 2002, the new policy is identical to the former one regarding the questions that interest us.

[38] Under the terms of section 5.1 of the Policy, an employee must present a grievance to the designated first level manager no later than 25 working days following the day on which he or she first becomes aware of the action or circumstance that is the subject of the grievance.

[39] The parties agree that in the particular circumstances of this case, if we consider the letter from August 20, 1999, as being a grievance, it should have been submitted within the 25-day deadline set forth in paragraph 5.1 of the Policy.

[40] In their grievance, the applicants claimed retroactive damages and attacked decisions made several years before 1999. They submit that under the principle of the "continuing grievance", they can file a grievance despite the expiry of the applicable mandatory deadline for the initial decision from CSIS to not pay them a bilingualism bonus or a salary that is equal to the amount paid by the RCMP.

[41] The Court carefully examined all the submitted authorities and found that in fact, the decisions regarding salary and the bilingualism bonus are decisions that allow for the application of the continuing grievance principle, since they have created repetitive effects for those employees. Although they are a starting point, they repeat either directly or indirectly every time a salary is paid to the applicants.

[42] However, it is clear that even by applying the concept of the continuing grievance, the applicants cannot claim an adjustment for a period prior to the one that started 25 working days before the filing of the grievance of August 20, 1999. Their right to file a grievance and to claim amounts due before that date is definitely barred by statute (*Yearwood v. Canada (Attorney General)*, [2003] B.C.J. No. 257 aff. by [2004] B.C.J. No. 345 (B.C.C.A.) and *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (F.C.A.)).

[43] In addition, the applicants who retired 25 working days before the date this letter from August 20, 1999, was received (which are those who are described in paragraph 82 of the response affidavit from Nina Myrianthis)[2] are not entitled to invoke the principle of continuing grievance because there has not been any decision regarding their salaries as CSIS employees since that date.

The salary or wages that were used in the calculation of their pension plan was definitively set before the 25-day period. Therefore, there was no longer a CSIS decision that was repeating itself in their regard.

[44] Although it is regrettable that through their inaction, certain applicants lost their rights, the Court cannot remedy that situation.

2) Merits of the decision

a) Salary

[45] With respect to the claim by all unretired employees on the 25th day before filing the grievance, there is a need to determine the merits of the negative decision by the Director of CSIS.

[46] As I have indicated, the parties do not agree on the documents that the Court can consider when determining the commitments made to the applicants during their transfer to CSIS in 1984. However, there is no need to focus on that subject. The Court is satisfied that his interpretation of the contract remained the same, that we only considered the circular letter from June 1984 and the letter from the Commissioner of the RCMP from January 23, 1984, which was attached to it, or that those two letters were examined in light of the letter from May 2, 1984 addressed to Mr. Gingras by Mr. Finn,[3] executive director of the transition group of the Security Intelligence Service at the Office of the Solicitor General.

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[2] On April 21, the parties notified the Court that some adjustments had to be made to that list, but that the parties agreed on that matter.

[47] The other documents to which the applicants referred are dated well after their transfer to CSIS. Although they indicate how certain members of the administration interpreted the commitments found in the documents that were submitted to the applicants before their transfer, that interpretation does not in any way bind the Court and does not in any way change the scope of the contract (in that matter, see Hugh B. Beale, *Chitty on Contracts*, vol. 1, 29th ed. Toronto, Carswell, 2004 at paras 12-117 to 12-126). The applicants did not argue that their contract had been amended after 1984. They submit that their grievance is founded on the contract as signed on that date.

[48] The letter dated June 1984, which was partially reproduced at paragraph 4 above, clearly indicates that with respect to compensation and benefits (p.2), the applicants had to receive at least the equivalent of their situation at the time. They were also guaranteed that the proposed amendments to the overall compensation plan (that being compensation and benefits) would only be adopted after consultation.

[49] The letter then very distinctly addresses the question of "salary" and that of "benefits and entitlements". The Court recognizes that the usage of various expressions in the same document is unfortunate. However, it can only accept that the benefits and entitlements described in the section of the same name and in the letter dated January 24, 1984, from the Commissioner of the RCMP include the salary or wages of the applicants, even if that list of benefits and entitlements includes some benefits for which the description includes the word "pay" (page 108 of the applicant's record):

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[3] After the creation of CSIS, Mr. Finn became its director.

PAY AND ALLOWANCE

1) Overtime
2) Acting Pay
3) Service Pay
4) Shift Differential
5) Pay on Discharge By Decease
6) Retroactive Pay
7) Pay in Lieu of Annual Leave on Discharge
8) Plain Clothes Allowance
9) Kit Upkeep Allowance
10) Isolated Posts Directives Allowance
11) Red Circle-Pay Protection

[50] The terms “acting pay” or “service pay”, for example, despite what we may think at first, refer in my view to benefits and entitlements resulting from particular circumstances, like all the other elements in this list. They do not refer to the amount or base rate paid by the RCMP and determined by grade.

[51] In that regard, the Court carefully reviewed the example collective agreement used in the public service submitted jointly by the parties, as well as the various definitions found in labour relations dictionaries, such as the Labour Relations Glossary from the Public Sector Labour Relations Board. Those documents contribute nothing and do not support the applicants’ position.

[52] That being said, the Court is satisfied that in the circular letter from June 1984, CSIS guaranteed that the applicants would suffer any loss of salary (or pay) during their transfer. However, that guaranteed minimum salary applied only until an employee took a position where the salary difference would be eliminated.

[53] That commitment is exactly the same as what we find in the letter from May 2, 1984.

[54] The difference between the commitment made regarding "salary" and the one regarding "benefits and entitlements" is also evident in that letter. In fact, at the third paragraph, it is indicated that the benefits and entitlements will be adjusted so that they match future adjustments that RCMP officers would receive.

[55] Under the circumstances, the Court is satisfied that the decision by the Director of CSIS is, in that regard, correct.

Bilingualism bonuses

[56] First, the respondent indicated in his factum that the Court had to consider the fact that a group grievance, filed on March 27, 1996, to claim payment of this bonus between [TRANSLATION] "March 5, 1985, and the date of the grievance and for the future", had been dismissed by the Director of CSIS on May 17, 1996. That decision by Mr. Elcock, Director of CSIS, was founded essentially on the Federal Court of Appeal's decision in *Gingras*, above, and he said:

> [TRANSLATION]
>
> In replying to your grievance, I remind you that the Federal Court of Appeal in *Gingras v. Her Majesty the Queen in Right of Canada* determined that CSIS, as a separate employer, was not required to disburse any amount of money whatsoever to any non-unionized employee in the Service, with the exception of Mr. Yvon Gingras. That decision confirms that the Service's policy of paying the bilingualism bonus only to unionized employees working at CSIS is legal and legitimate.
>
> In that context, having considered all the circumstances surrounding your grievance regarding the bilingualism bonus, and existing Service policy, I must dismiss your grievance.

[57] No application for judicial review was made to challenge the validity of that decision, according to the respondent, and in that case, the Director was able to consider the matter to be closed.

[58] That argument was not discussed at all by the parties at the hearing. However, the respondent did not formally waive its citation.

[59] It must first be said that the list of applicants (exhibit 13 confidential) and the list of employees who participated in the group grievance in 1996 are not identical. The Court identified at least forty-six (46) applicants for whom the claim was not statute barred and who were not involved in that grievance. Clearly, that argument does not concern them.

[60] As for the applicants who participated in the 1996 grievance, the Court notes that the respondent did not submit any authority in support of his claim that there had been a *res judicata*. In *Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway* (1981), 120 D.L.R. (3d) 42, Alfred Monnin J.A., as he then was, stated on page 48:

> I therefore conclude that res judicata and estoppel have no place in the settlement of labour disputes by private tribunals or by boards of arbitration. It is a principle to be reserved for the court rooms.

[61] On appeal of that decision, the Supreme Court of Canada "agree[s] substantially with the reasons of Monnin J.A." (*Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway*, [1981] 2 S.C.R. 180).

[62] That position was adopted by the Court of Appeal of New Brunswick in *Canadian Red Cross Society v. United Steelworkers of America*, [1991] N.B.J. No. 314 and more recently in *Memorial University of Newfoundland Faculty Assn. v. Memorial University of Newfoundland*, [2001] N.J. No. 179. Therefore, it appears that the courts agree that a second adjudicator may review a grievance decision if he or she is of the view that the first decision had deficiencies.

[63] Naturally, since the Court does not have the benefit of a written decision from the Director in this case, it is difficult to determine if he found that he had to apply the principle of *res judicata* and, if so, why. The Court must assume that if he did so, and dismissed this grievance on that basis, it is because he found that his decision from 1996 was still sound. Since this is essentially a question of law, the Court must review that finding according to correctness (see in another context *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, [2003] 3 S.C.R. 77). That question will be determined after having reviewed the merits of the substance of the applicants' arguments since, in 1996, the Director does not appear to have considered the impact of commitments made in 1984.

[64] On the merits, the respondent submitted that in *Gingras*, above, the Federal Court of Appeal had not considered several relevant documents that were protected at that time by section 39 of the *Evidence Act*, R.S.C. 1985, c. C-5. According to the respondent, if the Court considers the claim of the applicants, it will also need to review that evidence and find that, in contrast with the Court of Appeal's decision in *Gingras*, the Treasury Board Directive did not apply to the RCMP in 1977 or in 1984.

[65] The respondent also argues that the bilingualism bonus was not part of the commitments made by CSIS with respect to maintaining the benefits received at the RCMP because that was a new privilege that was granted to RCMP members after the 1984 transfer.

[66] With the exception of questions of jurisdiction and of breaches of the principles of natural justice or procedural fairness, it is settled law that the Court can only consider the evidence that was before the decision-maker whose decision is the subject of the application for review (see for example, *Ontario Association of Architect v. Association of Architectural Technologist of Ontario*, [2003] 1 F.C. 331 at para 30). There is no evidence that the formerly protected documents, which had been filed as exhibit A of Ms. Myrianthis's affidavit, were in the decision-maker's record in 1999.

[67] It must then be remembered that in *Gingras,* above, the Federal Court of Appeal found that the bilingualism bonus was a benefit within the meaning of subsection 66(2) of the Act, and that CSIS had to grant equivalency during the transfer.

[68] In that regard, it is appropriate to note that the decision in *Gingras* was statutory in that it did not create a right. It only acknowledged that since 1977, that bonus was a benefit attached to the positions held by the applicants at the RCMP, even before their 1984 transfer.

[69] In my view, by that circular letter from June 1984, CSIS committed itself to respecting the decision of the Commissioner of the RCMP regarding the benefits and entitlements that were attached to the positions held by the applicants within that organization in 1984. Subsection 66(2) of the Act also requires that the Director respect the Commissioner's decisions regarding the entitlements and benefits linked to those positions before the transfer.

[70] There is no evidence that since *Gingras*, above, the Commissioner of the RCMP has questioned the application of the Treasury Board Directive within his service, whether for the period from 1977 to 1984 or after. The Director of CSIS does not have the power to question the appropriateness or validity of decisions by the Commissioner of the RCMP in that regard.

[71] It is not appropriate to review the question being debated before the Federal Court of Appeal in *Gingras*, as to the applicability of the Directive to RCMP members before 1984 without the RCMP being able to participate in the debate.

[72] The exact nature of the bilingualism bonus was not the subject of a debate before the Court. The parties appear to agree that this bonus is only considered to be salary or wages for the purposes of certain specific acts, such as the *Pensions Act*, R.S.C. 1985, c. P-6.

[73] However, after the hearing, the Court noted that in the circular letter from June 1984, there is reference to the bilingualism bonus paid to employees of the public service under the heading "Salary" (at page 4).

[74] Whatever the case may be, the Court is satisfied that it does not have to dispose of that question. In fact, whether this is a benefit or pay, the bilingualism bonus was part of the compensation and benefits attached to the applicants' positions before 1984. The Director of CSIS could not abolish it in March 1985, given the specific commitments that bound him and that went beyond what was specified in subsection 66(2) of the Act. Nothing in *Gingras*, above, prevents the applicants (other than Mr. Gingras) from asking for those commitments to be respected, since that argument was clearly not considered by the Court of Appeal. As indicated, in his decision on the 1996 grievance, the Director did not do so either. That is a significant deficiency that warrants this question being re-reviewed.

[75] As for the interest claimed by the applicants, the Court reviewed the additional submissions that were filed on April 21, 2006. The applicants were not able to cite any statutory or regulatory provision that provided that interest is due on the amounts that the Crown must pay to public employees as salary or benefits. Instead, they relied on section 36 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. However, that section is not relevant as part of a judicial review like this one.

[76] The Court accepts the respondent's arguments (letter dated April 21, 2006) and it finds that in this case, there was no rule in law that allowed the Director of CSIS to pay interest on amounts due to the applicants.

[77] Without ruling on that question, I note that if the applicants find it to be appropriate, they will still be able to try and make up that shortfall as part of their action in damages.

[78] At the hearing, the respondent confirmed that he did not insist on the payment of his costs. In light of the shared success of this application, the Court is of the view that each of the parties will need to assume its costs.

[79] Given the time that has passed, the parties agree that the Court needs to make an order that gives specific instructions, rather than proceed with a simple reconsideration. Given that much information is missing in order to make a definitive judgment on the merits, the Court has determined that the case shall be sent back to the Director so that he can determine specifically, in accordance with these reasons, the amount due to each of the applicants for whom the claim was not statute barred when the grievance was filed.

JUDGMENT

THE COURT ORDERS that:

1. The application is allowed in part.
2. The Director's decision regarding the payment of the bilingualism bonus is set aside.
3. The Director of CSIS will need to determine the amount payable to each of the applicants for whom the claim was not statute barred, considering the reasons of this judgment.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-17-05
STYLE OF CAUSE:	PERSONS WISHING TO USE THE PSEUDONYMS OF EMPLOYEE No. 1, EMPLOYEE No. 2 ET AL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL
DATE OF HEARING:	JANUARY 10, 2006
REASONS OF JUDGMENT:	GAUTHIER J.
DATED:	JUNE 5, 2006

APPEARANCES:

JACQUES BÉLAND	FOR THE APPLICANT
RAYMOND PICHÉ AND NADIA HUDON	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BÉLAND LACOURSIÈRE, MONTRÉAL	FOR THE APPLICANT
JOHN H. SIMS, DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT