

**AWARDING OF COSTS**

Claim Number: 100

1. The Reference rules found in Appendix C of the Plan confirm that I have the power to determine the subject matter of the Reference and, at my discretion, "to award costs in accordance with a tariff to be established by the Courts" ( Rule 1g). According to a recent decision rendered by the Supreme Court of British Columbia in the *Endean v. Canadian Red Cross et al. case*, 2006, BCSC 1496, such a tariff was approved by the Courts of Quebec, Ontario and British Columbia. No one can deny that such a tariff applies in this case. However, this tariff exists as an official version only in the English language, a situation which I regret, but with which I must agree as well as the parties involved, if we want to bring this affair to a close as readily as possible. Me Bourque agreed that I resolve the matter relating to costs in accordance with the English version of the tariff.

2. As explained in my decision of August 14, 2006, this hearing took place over a period of six days: May 30, 2003, January 24, 2004, August 16 and 17, 2005 and on June 6 and 7, 2006. The Claimant acted on her own behalf on May 30, 2003 and then, through the assistance of Me Honoré Bourque. She based her Reference on her own testimony and that of five other witnesses, including a nurse, Mrs. Greta Doucet. The Administrator called four witnesses, including a doctor, a nurse and a doctor's assistant. A large number of medical documents were tabled as evidence during the hearing. We eventually examined not only the Claimant's files but also those of other patients who had been hospitalized during the same period but without, naturally, revealing or knowing anything about their identity.

3. The tariff provides for three categories of refundable costs to a Claimant under the Compensation Fund: "reasonable out-of-pocket expenses incurred in the Reference", "fees incurred as result of representation... by a lawyer" and "fees incurred as a result of representation... by a representative who is not a lawyer but is a professional or paralegal with a previously established practice of charging for professional or paralegal services".

4. In his letter of September 26, Me Bourque asked if the fees for nurse Greta Doucet could be paid under the third tariff category, that is, in the form of fees paid to a

representative who was not a lawyer. Yet, in his letter of October 26, 2006, Me Bourque claimed the refund of "the expert witness fees - Greta Doucet, nurse".

5. In my view, the third category in no way applies to the role played by Greta Doucet at the hearing. The Claimant was represented at the hearing by Me Bourque, not by Greta Doucet, even if the latter's testimony was meant to support the Claimant's case. On the other hand, I agree that witness expenses can fall under the first category but only as far as such expenses were "reasonable out-of-pocket expenses incurred in the Reference".

6. As I indicated in paragraphs 45 and 55 of my decision, Mrs. Doucet's testimony was very weak. Besides, the evidence submitted to me before Mrs. Doucet's testimony left little doubt that if the Claimant received a blood transfusion on September 8, 1987 during her stay at the *Hôpital régional de Saint Jean*, she received it by mistake. This having been said, I do not want to suggest that such evidence had the effect of eliminating the Claimant's right to introduce another version of the facts. On the contrary, I granted her that right. I simply note that as regards to the previous evidence, another version of the facts must be well supported to justify that costs be associated to it. Since the version presented by Mrs. Doucet was poorly supported, all associated costs cannot, in my opinion, be considered reasonable. In any case, I did not receive evidence establishing that such costs had really been incurred, as provided under the tariff. Me Bourque claimed \$800 "for the preparation of a report, the preparation of the witness and one day of court testimony" but he did not submit any invoice from Mrs. Doucet. For those reasons, I award \$200 for the report and for Mrs. Doucet's testimony. I also award \$259.92 for the other expenses mentioned by Me Bourque in his letter of October 26, 2006, which brings the total to \$459.92 for the first category.

7. Regarding the Claimant's lawyer's fees, Me Bourque claimed in his letter of September 26, 2006 that he had billed 104.9 hours with regard to the Claimant's file and that his fees amounted to \$13,862.50 plus \$1,940.75 in taxes for a total of \$15,803.25. In his letter of October 26, 2006, Me Bourque alleged that I had the power to award such an amount to the Claimant "by interpreting freely the tariff provision". In his letter of September 26, 2006, he claims that such an amount was justified by "the complexity of

the case ...One only has to review your decision of August 14, 2006 (25 pages) to come to this conclusion". Me Bourque repeated the same observations in his final submission which I received on December 6, 2006.

8. On behalf of his client, Me Faille objected to the argument that I had the power to award higher amounts than those covered under the tariff provision. The relevant wording of the tariff reads as follows: "A claimant may be reimbursed for fees incurred by a lawyer acting on their behalf as follows: Full Day Oral Hearing, up to \$1,200.00". In his letter of November 24, 2006, Me Faille described the decision in the *Endean v. Canadian Red Cross et al.* case mentioned above, in the following terms:

In this case, the counsel representing the Compensation Fund had submitted a motion to the court calling for the amendment of the tariff governing the lawyers' fees appearing on behalf of claimants in references before a referee or an arbitrator.

The mere fact that this procedure exists demonstrates that any amendment or variation related to the tariff in question requires the approval of the court. Moreover, Mr. Justice Pitfield notes in paragraph 3, that "changes cannot be made without court orders." In this case, there was also a question of amending the compensation amount for lawyers appearing in the name of a Claimant. It is evident that when one reads this decision, such an amendment to the quantum would require a preliminary court approval.

9. Having read the decision in the *Endean case*, I accept Me Faille's observations about the reasoning of Justice Pitfield. I would add that in paragraph 23 of this decision, Justice Pitfield specifically ruled that "the amounts stipulated in the tariff in respect of written submissions, half day hearings and a full day hearing" can be modified only with the preliminary approval of the courts. Yet, such amounts are all limited in the tariff provision by the English expression "up to... ". It then follows that the maximum amount which I can award to the Claimant for Me Bourque's fees is \$1,200 per day of hearing. Furthermore, contrary to what he asserted in his letter of September 26, Me Bourque represented the Claimant during only 5, and not 6 days of hearing. He did not represent her during the first day of hearing, on May 30, 2003, and although January 24 and 25, 2004 had been set aside as dates of hearing, the second day was cancelled at the end of the first one. As a consequence, under the second tariff category provision, I award

the amount of \$6,000 with regards to the Claimant's lawyer's fees. No amount is refundable under the third category.

10. In conclusion, I award Claimant's costs to the amount of \$6,459.92. This amount will be refunded by the Compensation Fund.

Signature on original

David Garth Leitch, Referee.

December 7, 2006 (handwritten)

Date