DECISION **2017 NSUARB 88**
M02295

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF AN APPLICATION by **PEV INTERNATIONAL RESEARCH & DEVELOPMENT INCORPORATED** for legal and other costs reasonably incurred, to be paid to it by the **MUNICIPALITY OF THE DISTRICT OF GUYSBOROUGH,** in respect to the expropriation of land situate at Route #316 Goldboro, Municipality of the District of Guysborough

BEFORE:	Roberta J. Clarke, Q.C., Member
APPLICANT:	**PEV INTERNATIONAL RESEARCH & DEVELOPMENT INCORPORATED** Victor J. Goldberg, LL.B. Justin D. Morrison, J.D.
RESPONDENT:	**MUNICIPALITY OF THE DISTRICT OF GUYSBOROUGH** Robert G. Grant, Q.C. Tipper McEwan, LL.B.
HEARING DATE:	March 30, 2017
DECISION DATE:	**June 7, 2017**
DECISION:	**A total of $303,912.17 is allowed for costs.**

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I INTRODUCTION

[1] PEV Research & Development Inc. ("PEV") filed a claim against the Municipality of the District of Guysborough ("MODG") for compensation resulting from the expropriation of its interest in land at Goldboro, Nova Scotia with the Nova Scotia Utility and Review Board ("Board").

[2] The claim was filed on October 1, 2009, and ultimately the hearing took place over the period of October 21-22, 2015, November 12,13,16-20, 24-27, 2015, and December 10, 2015. The claim was initially in excess of $47 million but, by the time of the hearing, reduced to $8,986,000 plus interest and costs. MODG had determined the value of PEV's interest to be $47,000. In its May 30, 2016, decision (2016 NSUARB 88), the Board awarded PEV the sum of $149,500 as total compensation, against which the payment already made by the MODG pursuant to s. 16(2) of the *Expropriation Act,* R.S.N.S. 1989, c. 156, as amended, ("*Act*") was to be set off.

[3] In its decision, the Board reserved jurisdiction to hear an application regarding costs to be awarded to PEV if the parties were unable to agree. By letter dated November 29, 2016, Robert G. Grant, Q.C., Counsel for MODG advised the Board that he and Counsel for PEV, Victor J. Goldberg, Q.C., had been unable to agree on costs. He said both parties requested the Board to determine what costs should be paid to PEV pursuant to s. 52(2) of the *Act*.

[4] The Board held a preliminary hearing on December 14, 2016, and set out a timetable for the filing of submissions and a date for the hearing of the application. The Claimant filed: an Affidavit of Paul Vandall, a principal of PEV; an Affidavit of Larry Farmer; its Bill of Costs; and, written submissions on February 15, 2017. The Respondent filed:

an Affidavit of Michael MacIsaac; a Compendium of Evidence; and, its written submissions on March 9, 2017. The Claimant filed a Reply submission on March 23, 2017.

[5] The Board held a hearing on March 30, 2017, when both Counsel made submissions, following which it reserved its decision.

II ISSUES

[6] The issue before the Board is the amount it should order the MODG to pay to PEV pursuant to s. 52(2) of the *Act*. This involves an examination of the elements of the Bill of Costs submitted by the Claimant, which are discussed more fully below. The total amount claimed on the Bill of Costs is $581,043.28.

[7] After considering the evidence and submissions, the Board has disallowed certain elements of the claim and applied discounts to some elements. The Board finds that the reasonable and necessary costs payable total $303,912.17, made up of the following:

Legal Fees	$168,697.34
Disbursements	$6,849.59
HST	Nil
Self-represented costs	$13,337.05
Appraisal costs – Altus Group	$88,140.27
Expert fees – Jim Lewis/LNG Expertise	$6,623.76
Interest	$12,764.16
Costs of this hearing	$7,500.00
TOTAL	$303,912.17

III EVIDENCE

Claimant

[8] The Claimant filed its Bill of Costs which consisted of:

Legal fees, disbursements, taxes and interest, including for this hearing	$370,336.88
PEV's costs of self-representation plus interest	$26,125.00
Altus Group – appraisal fees and interest	$171,693.55
Jim Lewis – expert report fees and interest (with calculated USD exchange)	$12,877.85

claiming a total of $581,043.28 [sic], which it seeks from MODG. The Board corrects the calculation of this total to be $581,033.28

[9] To support its claim for legal fees, the Claimant filed a detailed narrative of the 912.2 hours spent from November 4, 2014, to June 8, 2016, by various persons at the law firm of its Counsel. Included were Michelle Kelly and Mr. Goldberg, both partners in the firm; an associate; two paralegals; two articled clerks; and a student. By far, the greatest number of hours were spent by Ms. Kelly and Mr. Goldberg.

[10] The narrative bill showed details of the number of hours posted for the described activities as well as the respective hourly rates of the individuals involved.

[11] The disbursements included two categories: witness fees; and, what might be described as general or office disbursements. The witness fees total $7,026.81, and include travel and accommodations for three witnesses (Mr. Dosunmu, Mr. Crissman, and Mr. Lewis) from the United States and an attendance fee for Mr. Lewis. Exchange for US dollar expenditures was added.

[12] The general disbursements were for items described as: colour copies; library research; long distance telephone; overtime; photocopies; in-house printing; delivery and courier; lunch and meals for "witness prep"; and parking.

[13] Legal fees in connection with this hearing were supported by a narrative pre-billing for the period from June 8, 2016, to February 14, 2017, totalling 49.5 hours.

This amount was attributed to Ms. Kelly, one associate, one articled clerk and two students. While disbursements for this hearing were claimed at $500.00, a smaller amount appears on the summary.

[14] The Claimant included a letter to Counsel for the MODG, dated June 17, 2016, in which it stated the amount of its costs. The Claimant uses this letter as the basis for a claim of interest at 6% for nine months on all elements of its claim.

[15] The self-represented fee for service is addressed in an Affidavit of Paul Vandall, a principal of PEV. He deposes that PEV was self-represented from October 16, 2012, to November 26, 2014. Mr. Vandall provided a log of the time he and James Ferguson, another principal of PEV, spent during this period, totalling 209 hours. Mr. Vandall then went on to calculate PEV's self-representation fees at $94,050 in US dollars, based on lost opportunity costs in connection with other transactions it was working on during the period.

[16] The basis for the amount claimed appears to be offered through the Affidavit of Larry Farmer, which speaks of the other projects that PEV had to "put on hold" while it was engaged in its self-representation in this matter.

[17] The actual amount claimed ($25,000) is considerably less than Mr. Vandall calculated.

[18] Charles Hardy of Altus Group, prepared an expert report and testified on behalf of the Claimant at the hearing on the merits. Three invoices from Altus Group were included in Tab F of the Bill of Costs and total $164,300.05, including disbursements and taxes.

[19] While the Altus Group invoices do not include a detailed narrative, they do indicate, by the Board's calculation, the number of hours spent by Charles Hardy (525.5 hours), James Hardy (98.5 hours) and Greg Hunt (83 hours). Each entry is accompanied by an activity code which is described at the end of the invoices.

[20] The final category of costs claimed was for Mr. Lewis's report. The May 5, 2015, invoice from LNG Expertise is for 48.25 hours at a rate of $195.00 in US currency, and includes no further details and no disbursements.

Respondent

[21] The Respondent filed an Affidavit of Michael MacIsaac which attached correspondence relating to the accounts of the firm which had previously represented PEV in a preliminary hearing before the Board, as well as the accounts of the Respondent's experts. Those two experts' accounts totalled $67,246.92 including disbursements and taxes.

[22] Also attached to Mr. MacIsaac's Affidavit were the results of an online search he had undertaken regarding the cost of hotel accommodations in Halifax.

[23] Mr. MacIsaac described the dates of a series of offers and counter-offers made between the parties regarding costs.

[24] The Respondent also filed a Compendium of Evidence starting in March, 2013, up to May, 2015, which included various items of correspondence from Mr. Vandall to the Board, and from Mr. Grant to the Board, as well as correspondence from the Board to the parties or their Counsel.

IV SUBMISSIONS

Claimant

[25] Mr. Goldberg said s. 52(2) of the *Act* provides that an owner of an interest in land which is expropriated is "…entitled to be paid the reasonable costs necessarily incurred…for the purpose of asserting a claim for compensation." In both his written and oral submissions, he emphasized that the costs are for asserting a claim. Therefore, he argued the approach should not be, as he described that of MODG, *ex post facto*. The reasonableness of the costs should be viewed by taking into account what was needed to establish the theory of the Claimant's case.

[26] According to Mr. Goldberg, the Claimant is entitled to be fully compensated since the *Act* should be broadly and liberally construed in favour of a person whose interest in land has been expropriated.

[27] Mr. Goldberg cited, in support of this interpretation, the decision of the Supreme Court of Canada in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.,* [1997] 1 SCR 32. Applying this to costs, he cited the Board's decision in *Re Bishop*, 2010 NSUARB 231 and *Re Superior Propane,* 2005 NSUARB 4, as support.

[28] Mr. Goldberg cited the decision of the Board in *Bishop*, which said that while s. 52(8) of the *Act* sets out factors to be considered, it does not direct how much weight should be given to each factor. Rather, he said what is reasonable depends on the facts of the case. He further submitted that what is important is that the factors are taken into account.

[29] Mr. Goldberg went on to address the submissions of the MODG regarding settlement. In his Reply submission, he said:

> ...it should be noted that the Municipality made no formal offer to settle before the hearing. Within the Municipality's framework that factor would auger in favour of full compensation to PEV since the Municipality did not use reasonable efforts to settle with PEV to avoid the hearing. Under the Municipality's framework, its refusal to make a realistic offer of compensation forced PEV to pursue its claim for compensation before this Board.
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> [Claimant's Reply submission, March 22, 2017, p. 2]

[30] Mr. Goldberg said the only offer to settle as defined in s. 52(1) of the *Act*, was the offer of $47,000, which was the amount Mr. Telford, one of the Respondent's expert witnesses, opined as the value of the Claimant's interest. He noted this was about one-third of the Board's award.

[31] In Mr. Goldberg's view, this offer did nothing to create an incentive for PEV to settle its claim, as contemplated under s. 52(5) of the *Act.*

[32] Each of the factors set out in s. 52(8)(a) to (g) was reviewed by Mr. Goldberg, as more fully set out below.

a) Number and Complexity of the Issues

[33] The Claimant said that this was a complex matter with a complicated history. Counsel referred to the Board decision on the merits, at paragraph 259, which described Mr. Hardy's task as "unique and complex." He also noted the number of motions and preliminary hearings and decisions prior to his retainer which had to be reviewed.

[34] Mr. Goldberg opined that Counsel could not "gear up" for the hearing "in a vacuum" and certainly could not do so in the limited time suggested by Mr. Grant.

b) Conduct Tending to Shorten or Unnecessarily Lengthen the Duration of the Proceeding

[35] Counsel submitted that PEV's claim moved forward as expeditiously as possible once he was retained. He considered that any prior delays were as much the responsibility of the MODG as the Claimant.

[36] Counsel argued it was unfair to suggest that PEV had made a simple matter complex. He justified the time spent by members of his firm to organize a very large volume of material, noting that they used paralegals, clerks, and more junior lawyers where appropriate to be cost-effective. Further, he submitted that duplication of effort of the two lead counsel was minimized, as seen in the detailed narrative.

c) Any Step that was Improper, Vexatious, Prolix or Unnecessary

[37] Counsel submitted, again, that the steps taken by PEV were no more unnecessary than those taken by MODG.

[38] He argued it was necessary for PEV to retain counsel to put forward its claim. Prior to his retainer, PEV had encountered difficulties in retaining counsel and an appraiser. He said PEV could not have been expected to proceed without them.

[39] Contrary to the position taken by the MODG, Mr. Goldberg submitted that the evidence of Mr. Dosunmu, Mr. Crissman, and Mr. Lewis was necessary for the presentation of PEV's case regarding the Development Agreement and PEV's plan. Consequently, the disbursements relating to their travel to, and accommodations in, Halifax, were necessarily incurred, and in Counsel's submission, reasonable. The fact that their evidence did not persuade the Board is not relevant, he said, because their evidence was key to the assertion of the claim regarding the value of the agreement.

d) Reasonableness, Relevance, and Cost of Appraisal and Other Expert Reports

[40] Counsel said that the Board found in *Bishop* that the relevance of an expert's report is to be considered with regard to the "claims asserted… and not the ultimate outcome." Further, the Board had distinguished the decision of Justice MacIntosh on the taxation of costs in *O'Hearn v. City of Dartmouth* (1981), 22 L.C.R. 174 (NSSC TD) on the grounds that in *O'Hearn,* the Court had rejected the cost of the appraisal because it had been "condemned", by what was then the Expropriations Compensation Board, as irrelevant.

[41] In this case, Mr. Goldberg said the three invoices from Mr. Hardy's firm relate to three phases of his work: the first phase was for determining that there was merit to the claim; the second was for the preparation of his report; and, the final phase was for attendance at the hearing. Mr. Goldberg said that, in addition to giving his own evidence, it was necessary for Mr. Hardy not only to be present for the testimony of Mr. Telford and Mr. Ingram on behalf of the MODG, but also for that of Mr. Vandall and Mr. Ferguson, the principals of PEV. Mr. Goldberg had requested his presence for their evidence.

[42] Regardless of the Board's findings that Mr. Hardy had taken too narrow an approach, Mr. Goldberg submitted Mr. Hardy had conducted the only "real appraisal" before the Board. He argued that it was not unreasonable for Mr. Hardy to examine the liquid natural gas ("LNG") industry. Further, he said Mr. Hardy's methodology was chosen in the context of his many years of experience as an appraiser.

[43] Mr. Goldberg also noted that Mr. Hardy has discounted his usual hourly rate by 20% "…recognizing the complexity of the project…and the time he would need to spend researching matters…". He claimed Mr. Hardy's account was reasonable and should be paid in full.

[44] In addition, the Claimant asks that Mr. Lewis's account be paid in full. Mr. Goldberg submitted his hourly rate was reasonable and his *curriculum vitae* is "impressive." Mr. Lewis had been asked to give evidence, as well as review and comment on the report of Mr. Knoll, a witness for the MODG.

[45] The Claimant said that the account for Mr. Lewis's report (in US dollars) had not been paid, and asked for the exchange rate to be added. Further, the Claimant sought reimbursement for Mr. Lewis's travel and accommodation expenses and cost of attending the hearing, which had been paid and claimed as a disbursement on the legal account.

e) Skill, Labour and Responsibility Involved

[46] Mr. Goldberg said "…the delegation of tasks within a law firm to those with the appropriate level of training and experience is a reasonable and well-accepted practice of managing legal costs." Certain research work was conducted by articled clerks, but their attendance at the hearing was not charged on the Bill of Costs. Managing documentation was performed by paralegals at lower rates.

[47] The Claimant submitted it was efficient to use the skills of Ms. Kelly to do much of the work required to prepare its case. She has a lower hourly rate than Mr. Goldberg. To suggest that a more junior counsel could have been used, was in Mr. Goldberg's view, "micro-managing."

[48] Further, the Claimant said, its Counsel had divided the labour, particularly in the preparation for, and conduct of, the hearing. This was, Mr. Goldberg said, similar to what the MODG had done.

[49] Additionally, he said they were "…very diligent in ensuring that two lawyers were not being charged out to do the same thing."

[50] He submitted this matter can be distinguished from *Superior Propane* and *Re Johnson* (2006 NSUARB 109) where the Board found there was duplication in the legal services provided, resulting in reductions in the amount of costs claimed.

[51] Mr. Goldberg disagreed with the MODG's submissions that the hearing could have been much shorter and the evidence, including experts, submissions and arguments could have been substantially reduced.

f) Amount of the Award or Settlement

[52] The Claimant acknowledged that the costs claimed significantly exceed the award. However, Mr. Goldberg said "The test is whether the costs incurred were in connection with a reasonable assertion of the claim."

[53] In his view, the complexity of the case demanded the time expended, and PEV should not be penalized by a reduction of its costs.

[54] Counsel referred to the decision of the Federal Court in *Atlantic Warehouses Ltd. v. Canada,* [1987] F.C.J. No. 63. This case was a taxation of costs arising out of an expropriation by the Federal Crown. The Court noted a passage from the decision of the Alberta Land Compensation Board in *Abasand Holdings Ltd. et al. v. Minister of Transportation* (1981), 24 L.C.R. 251 at p. 255:

> The spirit and intention of the Act is that an owner should not be out of pocket for the costs and expenses which he incurs in asserting and exercising the rights and remedies which the Act affords to him where he is expropriated or under the threat of expropriation. The two general limitations placed upon such right if recovery of costs are that the costs must have been reasonably incurred and that the amounts claimed are reasonable in the circumstances.

[55] Mr. Goldberg submitted that PEV's claim was advanced reasonably, even though the award was much smaller than it sought. He decried the emphasis which the MODG placed on the amount of the award. He urged the Board to consider it as only

one factor; if it were to be given too much weight, it would, in his words, send "a chilling message" to owners. He submitted it should perhaps not even be given equal weight with other factors due to the unique and complex nature of this case.

[56] Counsel submitted that the Board had recognized in *Bishop* that costs will, in some cases, exceed the amount of compensation. Further, there the Board had declined to find a threshold percentage to limit costs. Mr. Goldberg said that a cap on the costs, which an owner could recover, would remove any incentive for an offer to settle.

g) Any Other Matter Relevant to Costs

[57] The Claimant submitted that the onus is on the expropriating authority, under s. 52(1) of the *Act,* to make an offer to settle. Thus, he rejected the position of the MODG that "This case never approached the realm of settlement…entirely because of PEV." The MODG said that PEV had taken unreasonable positions throughout the matter, which caused it [MODG] significant time and expense.

Self-Represented Costs

[58] Mr. Goldberg submitted that the discounted amount of $25,000 claimed by PEV was an attempt to be reasonable. While this was work which a lawyer would normally have done, the rate is not necessarily what a lawyer would charge. He said that the principals of PEV suffered loss because of the time they had to necessarily expend while they were not represented by counsel. This prevented them from pursuing other work which they expected to be lucrative.

[59] Mr. Goldberg cited a passage from the decision of the Ontario Court of Appeal in *Fong v. Chan,* 1999 CanLII 2052, which supported the compensation of self-

represented "lay" litigants. He also noted a decision cited by the Respondent, *Bishop v. Purdy*, 2015 NSSC 365, which reviewed a number of observations made by the Court in *Fong* and other cases. In particular, he referred to three of those observations:

> s. The quality of the self-represented litigant's work and documentation must be considered, and its impact on hearing time and trial results. The emphasis must be on the value of the work done. This encompasses both the value of the work to the Court and the value of the time spent to the litigant who performed the work, or who hired a lawyer to perform it.
> …
> u. But if the self-represented litigant demonstrates he/she did the work ordinarily done by a lawyer, then they will have justified receiving an award of costs - including time spent on communications, drafting documents and correspondence, preparation and compensation for time spent arguing their case.
>
> v. Self-represented litigants may be held to the standards of civility expected of lawyers and a proper reprimand for failure to do so is an award of costs on a substantial indemnity basis. Where either a litigant or his/her lawyer acts unreasonably, by incivility or otherwise, it is a factor that may result in discounting the costs that should otherwise be awarded. This discounting is a necessary part of quantifying costs and is consistent with the overall purpose of costs awards in improving the efficiency of the administration of justice.

[60] Mr. Goldberg rejected the MODG position that PEV had caused delays, as well as made prolix submissions as a result of which they should not receive self-represented costs. Instead, he said, PEV could not retain a lawyer because it had no funds and should be compensated because it did what was necessary to bring its claim forward.

Harmonized Sales Tax ("HST")

[61] Mr. Goldberg said that in *Bishop, Superior Propane,* and *Johnson* all awards of cost included HST. To disallow it would not amount to the full indemnity to which an owner is entitled.

[62] Regardless of whether PEV, as a corporation, would be entitled to an input tax credit, it should be reimbursed for HST.

Interest

[63] Counsel relied on the provisions of s. 52(9) of the *Act*, which state:

> The expropriating authority shall pay interest on an unpaid account for costs payable pursuant to this Section at the rate of six per cent per year or such rate as determined by the Governor in Council, from the date the account is served on the expropriating authority by the owner.

[64] The relevant date is June 17, 2016, the date of the letter to Mr. Grant, filed as Tab D of the Bill of Costs. In the Bill of Costs, Mr. Goldberg calculated interest on each category of costs claimed at 6% for a period of nine months. Mr. Goldberg said that the Board in *Johnson,* which was decided under now amended provisions of the *Act*, said that interest on costs accrues from the date of the presentation of the accounts to the expropriating authority. He noted PEV has received no payment for any costs.

Costs of this Hearing

[65] Mr. Goldberg submitted that the authorities on which the Claimant relies all support costs being allowed for the hearing. He suggested that these costs range from $5,000 to $10,000 plus disbursements.

[66] He said there had been communications between the parties in efforts to settle the matter of costs, the time for which was not recorded. Further, the time simply for preparing the written submissions represented an account exceeding $10,000; the preparation for, and the attendance at the hearing, was not included in that amount.

[67] Mr. Goldberg argued that, as a result, his firm had already, in effect, discounted its fees and the amount claimed was reasonable, in light of the Board's cost decision in *Johnson* where a similar amount was awarded.

[68] He acknowledged that there had been some delay in responding to the MODG offers on costs, but attributed that to the fact that the offers were "all-inclusive." However, he said it should be unnecessary for the parties to have to return to the Board on this issue.

Respondent

[69] The MODG submitted that:

> …the purpose of s. 52 of the *Act* is to encourage settlement. In keeping with the Legislature's intention, costs should be assessed based on what was necessary to present a reasonable claim. Section 52(8) of the *Act* requires that the reasonableness and necessity of costs be assessed against a variety of factors, including the size of the award. The assessment of costs must be proportional to the award of compensation.
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> [Municipality's Submission, March 8, 2017, p. 1]

[70] The MODG said that PEV spent more time than was necessary by trying to prove its development plans would succeed, and that the value of the lands in which it had an interest exceeded $10 million. Mr. Grant submitted the hearing should have taken a much shorter time. He submitted that legal costs at $97,500 and $40,000 for appraisal costs would be appropriate amounts for the Board to allow.

[71] Citing the Board's decision in *Bishop* for support, Counsel said that a bill rendered to PEV is not "the end of the matter"; the amount must be found to be reasonable and necessarily incurred, which Counsel said must be the subject of a "highly fact specific" inquiry.

[72] Mr. Grant submitted that because s. 52 of the *Act* is intended to encourage settlement "…there must be a reasonable proportionality between the actions of a Claimant and the costs awarded." In his view, PEV had over-valued its claim, and thus no reasonable settlement could be achieved.

[73] The MODG argued that both the reasonableness and necessity of the costs must be tested on a standard of "objective rationality." It submitted that seeking costs exceeding $580,000 on an award of $149,500 cannot be considered reasonable. Counsel said that all that was necessary was to value the interest of PEV under its agreement with Mr. Warner, the landowner; it was not necessary to delve into "…the merits of PEV's extra-ordinary assumptions…" in Mr. Hardy's report.

[74] Just as Counsel for PEV had done, Mr. Grant addressed the factors set out in s. 52(8) of the *Act,* which is set out more fully below.

a) Number and Complexity of the Issues

[75] Mr. Grant agreed that the hearing was complex, but said that PEV had made it more complex than necessary because of its approach to valuing its claim. He submitted that the MODG should not be required to pay PEV's cost for the complexity. This factor weighs in favour of reduced costs.

b) Conduct Tending to Shorten or Unnecessarily Lengthen the Duration of the Proceeding

[76] Mr. Grant submitted that the proceeding is not limited to the hearing. In written submissions at pp. 3-8, he described the timeline from the expropriation in February, 2006, to the negotiations over costs, which ended in November, 2016. While acknowledging a period of delay which resulted from the MODG summary judgment application and appeal of the Board's decision, and one request for adjournment by the MODG, Mr. Grant laid all the delay at the feet of PEV. He noted a number of requests

for adjournment, some attributable to PEV's attempts to retain counsel and others regarding expert retention and report preparation.

[77] Again, Mr. Grant argued that this is a factor weighing in favour of reduced costs.

c) Any Step that was Improper, Vexatious, Prolix or Unnecessary

[78] In particular, Mr. Grant pointed to the numerous submissions by PEV during the self-represented period, which he said focussed on "…repeated requests for larger interim payments and for more time to retain legal counsel or an appraiser." He described them as "verbose and unnecessary" and said they should result in a reduction of costs.

d) Reasonableness, Relevance and Costs of Appraisal and Other Expert Reports

[79] Taking into account the value of the fee simple decided in Mr. Warner's claim, Mr. Grant said that should have been a strong indication of the value of PEV's claim.

[80] Mr. Grant submitted that, in its decision on the merits, the Board criticized the evidence of both Mr. Hardy and Mr. Lewis. He said both reports lacked a proper foundation and were irrelevant to the compensation award made by the Board.

[81] Mr. Grant submitted that Mr. Hardy's account should be reduced to an amount to produce a report which "…reasonably valued PEV's interest and was of use to the Board." He contended Mr. Hardy's report did neither of these things.

[82] He said in *Johnson* the Board had not awarded payment for certain experts' accounts because the work did not impact the compensation awarded. Mr. Grant said that accounts for experts' reports should be scrutinized on the same basis as legal costs.

[83] Since the Board had valued PEV's claim on the basis of its right of first refusal, likened to an option, Mr. Hardy's report was of no use to the Board.

[84] Further, Mr. Grant submitted it is not reasonable to pay an amount for the report which exceeds the award of compensation by nearly $20,000.

[85] Additionally, Mr. Grant objected to the MODG being required to pay for Mr. Hardy's attendance at the hearing for days on which he did not testify, saying it was unnecessary for him to be there.

[86] Finally, Mr. Grant challenged whether it was reasonable for Mr. Hardy and his colleagues to expend the amount of time they did on preparing their report, which he compared to the time PEV's counsel had expended overall.

[87] Comparing Mr. Hardy's work to the expert witnesses for the MODG, Mr. Grant submitted $40,000 would be a reasonable amount for "objectively necessary" appraisal costs.

[88] As a result, he submitted this factor weighs in favour of reducing costs. The issue is not what the expert should charge his client, but what the expropriating authority should pay.

e) Skill, Labour, and Responsibility Involved

[89] While Mr. Grant did not dispute that a high level of skill was required to present PEV's claim, he argued that the Board should only allow costs for "one senior counsel and one mid-level associate", which is what the MODG used. He did not consider it was necessary for both partners to participate.

f) Amount of the Award or Settlement

[90] Mr. Grant described PEV as having ambitious and inflated assessments of the value of its claim, without success.

[91] The MODG took the position that the award of costs must be proportional to the compensation awarded. Counsel referred to the Board's decision on costs in *Johnson,* saying that it is relevant even though decided under the earlier legislative provisions, noting the Board said at paragraph 27:

> [27] . . . a claimant's entitlement to reasonable costs for legal or experts' fees will also depend, in addition to the factors enumerated above, on whether such services assisted the Board in reaching a decision on the determination of compensation. The rejection of a claim does not necessarily preclude reasonable costs related to legal or experts' fees, provided the conduct of the hearing or the expert's testimony assisted the Board (or, in this case, the Court of Appeal) in reaching its ultimate determination. . . . However, where a party is not ultimately successful in presenting its claim, or where an expert's testimony is rejected, such that it was not reasonable for counsel or the expert to pursue all or a portion of the claim, such factors may also be considered in the context of all other criteria which the Board must canvass in determining reasonable costs under s. 52(1) of the Act . ...

[92] Mr. Grant said the amount of the award would not be a separate factor if the Board did not have to take it into account. A failure to account for it would allow "all possible claims" to be put forward.

[93] In *Johnson,* the Board awarded $85,000 in legal costs, which Mr. Grant said equated to about one-half of the award of compensation and about 35% of the legal costs sought.

[94] Mr. Grant said that in *Bishop* the owner received about one-third of the compensation amount for legal costs, and in *Superior Propane* about one-quarter of the compensation amount. Thus, he claimed the amount he suggested ($97,500) in this matter, amounting to about two-thirds of the compensation award is generous.

[95] Mr. Grant also noted that in *Atlantic Warehouses,* the Taxing Officer noted the discrepancy between the offer made of about $1,000 compared to an award of

$400,000. This was contrasted with the present case, in which PEV was awarded less than 2% of its claim at the hearing and even more substantially less than its original claim.

[96] The MODG submitted this "strongly weighs" in favour of reducing the award of costs.

g) Any Other Matter Relevant to Costs

[97] Mr. Grant said that PEV had taken unreasonable positions and required the MODG to deal with "numerous extraneous issues" because it had over-valued its claim. He concluded that "…the extreme facts of this case warrant an extreme reduction in the costs sought by PEV."

Deductions from Legal Fees

[98] The MODG suggested that if the Board does not accept its quantifications of appropriate legal costs, there should be a reduction in a number of items:

- Paralegal time should only be reimbursed where the work would otherwise be done by a lawyer. Anything else is a part of overhead. However, Mr. Grant did not support the use of litigation software as something MODG should pay for.
- Two partners were not required; Ms. Kelly's time should be assessed at the lower hourly rate of a mid-level associate.
- Duplicated effort which Mr. Grant outlined in Appendix A to his submissions should be deducted, by a suggested rate of a 15% discount, following *Superior Propane*.

- A further deduction should be made to recognize the disproportionality of the costs claimed and limited success.

Deductions from Disbursements

[99] The MODG submitted that none of the following disbursements should be allowed: printing and photocopying; meals; parking; taxis; long distance; overtime; and library research. It submitted that these were either unnecessary or should be treated as part of overhead.

Witness Fees

[100] The MODG said that it was unnecessary for Mr. Crissman and Mr. Dosunmu to attend to give evidence as their testimony related to the viability of PEV's plan. If the Board did consider that it was necessary and reasonable for them to attend, the expenses should be discounted as they are unreasonable.

[101] As for Mr. Lewis, Mr. Grant said no costs should be permitted for his report or his attendance. His evidence was not accepted by the Board, and was, for the same reasons as Messrs. Crissman and Dosunmu, unnecessary and unreasonable. Further, Mr. Grant said that there was insufficient documentation to support this expense claim. He also disputed the exchange rate for US dollars.

Self-Represented Costs

[102] Mr. Grant characterized this aspect of PEV's claim as "…a claim for the loss of the opportunity to earn income in a thin disguise." He submitted that costs for a self-

represented party should reasonably value the worth of the efforts. In PEV's case, Mr. Grant ascribed little to no value to the time spent by PEV. While a lawyer might have done this work, Mr. Grant said there were too many instances of work cited by PEV.

[103] Citing a number of observations as quoted by the Nova Scotia Supreme Court in *Bishop v. Purdy*, Mr. Grant submitted that no costs should be awarded on this element of the Bill of Costs.

Harmonized Sales Tax

[104] Mr. Grant said that no amount of HST should be allowed because PEV is a corporation providing services. As such, it is either registered, or could be, to be eligible to claim input tax credits.

[105] He said it had not been demonstrated to be an out of pocket expense.

Interest

[106] Mr. Grant submitted that PEV had delayed in addressing the matter of costs and calculated that the amount of time for which interest accrued should be shortened by 55 days, i.e., to January 2, 2017, from the time it presented its Bill of Costs.

Costs of this Hearing

[107] Mr. Grant submitted that the Board should reserve its decision on the costs of this hearing "so that the reasonableness of the costs awarded may be measured against what are currently privileged offers of settlement."

V ANALYSIS AND FINDINGS

[108] In the view of the Board, the onus is on the Claimant to demonstrate, on a balance of probabilities, what are the reasonable and necessary costs incurred for which it should be reimbursed/paid by the MODG.

[109] The *Act* provides:

> 52(2) Subject to subsection (5), an owner whose interest in land is expropriated or injuriously affected is entitled to be paid the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation. [Emphasis added]

[110] As the Claimant was awarded an amount more than the amount offered by the MODG as compensation, s. 52(4) is triggered.

[111] The *Act* sets out in s. 52(8) a list of factors which it is to consider in determining the costs payable:

> 52(8) In a determination of costs pursuant to subsection (2), (3), (4) or (5), the following shall be taken into account:
> (a) the number and complexity of the issues;
> (b) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (c) any step in the proceeding that was improper, vexatious, prolix or unnecessary;
> (d) the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;
> (e) the skill, labour and responsibility involved;
> (f) the amount of the award or settlement;
> (g) any other matter relevant to the question of costs. [Emphasis added]

[112] The Board observes, however, that the overarching principles are the reasonableness and necessity of the costs for asserting the claim. The Board agrees with the passage from *Abasand* cited by Mr. Goldberg, which said:

> The spirit and intention of the Act is that an owner should not be out of pocket for the costs and expenses which he incurs in asserting and exercising the rights and remedies which the Act affords to him where he is expropriated or under the threat of expropriation. The two general limitations placed upon such right if recovery of costs are that the costs must have been reasonably incurred and that the amounts claimed are reasonable in the circumstances. [Emphasis added]

[Abasand Holdings Ltd. et al. v. Minister of Transportation (1981), 24 L.C.R. 251 at p. 255]

[113] The Board considers that this interpretation is consistent with the broad and liberal interpretation of the *Act* as described in *Dell Holdings* and with the Board's interpretation as it relates to costs (see, for example, *Superior Propane* and *Johnson*). The Board concludes this does not necessarily mean complete or full indemnity; nor does it mean that what a lawyer or an expert charges a client is what the expropriating authority is ultimately required to pay as compensation.

[114] The question then becomes whether it was reasonable and necessary for PEV to incur the costs claimed in the Bill of Costs.

[115] The Board is mindful that the original claim was for more than $47 million, and by the time of the hearing, was reduced to slightly less than $9 million. Further, the Board notes that the MODG's expert valued the interest of PEV at $47,000, and the Board awarded $149,500 as compensation.

[116] The Claimant says that the MODG should have made "a more realistic offer" to settle the claim, and the MODG says the claim "…never approached the realm of settlement." The Board does not know what the Claimant would have considered "more realistic", but observes that, with the parties' positions so vastly apart, it is not surprising that no settlement was reached.

[117] The Board's finding on the "summary judgment" application by the MODG that PEV had a compensable interest was upheld by the Court of Appeal (2012 NSCA 87). Thus, a claim for compensation by PEV could not be described as "frivolous" or "doomed to failure" (see Orkin, The Law of Costs, 2nd ed., p. 2-241). However, considering the Claimant's very limited success (an award of $149,500), and the basis of

that success (the right of first refusal under the agreement with Mr. Warner), the reasonableness of the quantum of the claim might well be called into question.

Legal Fees and Experts' Accounts

[118] Mr. Goldberg emphasized the "assertion" of the claim, and not its success. In his view, all that was done was necessary and reasonable to assert the claim; that it was, in the main, unsuccessful should not matter. The Claimant had a theory of its case, which was ultimately not accepted by the Board. However, Mr. Goldberg said the evidence tendered including Mr. Hardy's report, the witnesses called, and the work performed by the Claimant's legal representatives was necessary and should not be discounted. He claimed PEV should be fully indemnified.

[119] The Board understands the thrust of Mr. Grant's submissions is that the theory of the case propounded by the Claimant was flawed; therefore, it was unnecessary and unreasonable to pursue it. He reminded the Board that PEV's rights flowed from the agreement with Mr. Warner, the owner of the fee simple of the land, and that the value of Mr. Warner's interest had already been determined by the Board.

[120] Mr. Grant argued that the hearing should have been much shorter, with less legal expense, without the necessity of hearing from Messrs. Dosunmu, Crissman and Lewis, and without the need for Mr. Hardy to do extensive research on LNG and LNG sites in the preparation of his report.

[121] The Board now turns to an examination of the factors set out in s. 52(8) of the *Act.* The Board notes that the decision in *Bishop* said that there is no indication in the

Act of the degree of weight to be given to each factor; instead, the weight given will depend on the facts and circumstances of each case.

[122] Mr. Goldberg submitted that the *ex post facto*, or results-oriented view taken by the MODG was "improper." Orkin, citing an Ontario decision, *Apotex v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Gen. Div.), said:

> In determining whether a given service was reasonably necessary one should not apply the test of hindsight; the time to view the decision to commit services to the project is before the hearing or trial and not afterwards.
>
> [Orkin, The Law of Costs, 2nd ed., p. 1-12]

[123] The Board agrees that a hindsight view may not be the most appropriate test of what is reasonably necessary; however, from a practical perspective, the Board considers that, as it is not possible to prove a claim for costs at the hearing on the merits, the Board should not be blind to the history of the claim and results achieved.

[124] The Board also acknowledges that as was noted in *Bishop*, there may be circumstances where an award of costs may properly be greater than the award of compensation. This was recognized by Orkin, citing two Ontario cases (see Orkin, *op. cit.,* at p. 2-339).

[125] While agreeing that the Board in *Bishop* "…recognized that there could be such cases, particularly in cases with land owners 'of lower value properties'…", Mr. Grant stressed the need for proportionality in awarding costs in this matter. The Board considers this is not inconsistent with the principle that the costs must be both reasonable and necessary.

[126] The Board is mindful of the fact that, in an expropriation, there should be a broad and liberal interpretation given to the legislation, as set out in *Dell Holdings*. The Board has kept this in mind, as it has considered the factors set out in s. 52(8) of the *Act.*

[127] The Board agrees that the matter was relatively complex, and certainly unique in the Board's experience, as far as the interest being valued was concerned. The Board finds that the theory of the case espoused by the Claimant made it necessary for the evidence from the principals of PEV, as well as the evidence of Mr. Dosunmu, and to a much lesser extent, Mr. Crissman, to be given, even though the Board ultimately dismissed that theory. Indeed, to some extent, hearing from those witnesses was important in enabling the Board to reach its decision that, in fact, the only basis for any compensation was found in the right of first refusal contained in the agreement with Mr. Warner, and not the development plans of PEV.

[128] The Board sees merit in Mr. Grant's submission that PEV made the matter more complex than it needed to be. The Board considers that is particularly the case with the evidence of Mr. Hardy. Because he accepted the PEV's premise that the highest and best use of the Warner property was for LNG development, the Board considers that Mr. Hardy spent more time than was warranted on the research and preparation of his report, with that focus. He was "over prepared." While the Board found useful information in Mr. Hardy's report, it generally found it did not help PEV's case. His testimony at the hearing established for the Board that he had made an extraordinary assumption which, in the Board's view, undermined the reliability of his evidence as a whole.

[129] As for Mr. Lewis's report and evidence at the hearing, for the reasons stated in the decision on the merits, the Board preferred Mr. Knoll's report. Mr. Lewis's evidence did not help PEV either.

[130] Thus, the Board finds that the factors in s. 58(2)(a) and (d), i.e., the number and complexity of the issues, and reasonableness, relevance and costs of appraisal and

other expert reports, weigh against PEV. They weigh not only against the legal costs and disbursements, but also against the costs of the experts' reports. The Board sets out its adjustments in Paragraph [186] of this Decision.

[131] The fact that the amount of the award or settlement is a separate factor listed in s. 52(8)(f) of the *Act* leads the Board to conclude that it must be given appropriate weight. Mr. Goldberg urged the Board to be cautious in giving weight to this factor; Mr. Grant's submissions were, in the Board's view, underscored throughout by this factor. As noted earlier in this Decision, the compensation awarded was less than 2% of the amount of the claim, although it was three times more than the MODG's appraiser opined. To that degree, PEV achieved some success, but in the Board's view, that was not a result of its theory of the case.

[132] The amount of costs sought by PEV significantly exceeds the compensation award, and the Board concludes that this is a case where the costs will exceed the compensation award. Indeed, the amount which Mr. Grant submits is appropriate totals $97,500 for legal fees and $40,000 for appraisal costs, and is only just over $10,000 less than the award. However, the Board considers that it must view this factor considering the claim and the very limited success of PEV. Again, this is a factor which weighs against the Claimant. The Board has considered the reasonableness, necessity, and proportionality of the amounts claimed. The Board therefore has made an adjustment in the costs claimed as described in Paragraph [186] below.

[133] With respect to the factors in s. 52(8)(b), (c), and (e), the Board notes first that the involvement of the current counsel of PEV went a long way to improve the

efficiency of the proceeding. Prior to that time, the Board was for many months dealing with a self-represented litigant.

[134] While several preliminary hearings were instigated by the Board in attempts to move the matter along to a hearing, the Board considers that the principals of PEV did not help the process. There were numerous requests for adjournment in their efforts to find counsel to represent them, and to obtain appraisal reports. As Mr. Grant noted in his submissions, there were lengthy letters to the Board on matters relating to these issues, as well as repeated requests for interim costs, which the Board had clearly stated on many occasions it had no authority to order. In some letters, PEV indicated that other matters were occupying their time and they had not been able to pursue their efforts to obtain counsel.

[135] The Board accepts that self-represented costs are allowable, considering the principles set out in *Bishop v. Purdy.* However, the Board considers that while a self-represented party should be entitled to recover for work which a lawyer would normally do, the principles of reasonableness and necessity must apply to the value of the work done. The Board is also persuaded that there must be an element of proportionality in the award.

[136] Having reviewed the log attached as Exhibit A to Mr. Vandall's Affidavit, the Board finds that the hours on various entries are unreasonable or were not necessary. As examples, the Board notes entries for "Legal research on Municipal Government Act, the Planning Process and Land-Use amendments", and "Legal research on common good and public vs. pivate [sic] interest and Municipal Government Act" each at eight hours, five hours for preparation of a "First Draft of Response to Pineo March 12, 2013

Letter", and a further 10.5 hours to complete the response including "Typing, graphics & tables."

[137] Further, the Board does not accept the basis on which PEV has sought such costs. In the Board's view, the basis was "opportunity costs" of other projects. This is inconsistent with PEV being at times unable to respond to matters due to their engagement in other projects (see for example Tab 11, letter of May 22, 2014, in the MODG Compendium of Evidence). The Board has thus adjusted the self-represented costs as set out in Paragraph [186] below with respect to these matters.

[138] Further, the Board has considered the submissions of the MODG with respect to the attendance of the experts at the hearing as they relate to disbursements, and in the case of Mr. Lewis and Mr. Hardy, their attendance fees. In the view of the Board, it was not necessary for Mr. Hardy to be in attendance on all the dates of the hearing noted. The Board agrees that it was appropriate for him to attend for the evidence of the MODG's appraiser, Mr. Telford, and for Mr. Ingram's testimony. However, if Mr. Goldberg chose to have Mr. Hardy attend for the several days of testimony of Mr. Vandall and Mr. Ferguson, the Board considers that neither reasonable nor necessary. Adjustments are made accordingly in his fees, as well as his disbursements, as indicated in Paragraph [186] below.

[139] Mr. Grant submitted that the Claimant could have presented its case with one senior counsel and one mid-level or junior associate. While that may be true, the Board finds that the involvement of Ms. Kelly brought an appropriate level of skill, given the complexity of the theory of the Claimant's case. The Board observes there has been some duplication, as noted in Appendix A of the MODG's submissions. The Board

accepts that counsel for PEV tried to avoid unnecessary duplication, and attempted to ensure that work was done by the most acceptable and lowest cost level of competency for the task. However, the Board has made a reduction to account for the duplication which the Board considers should have been avoided. This is set out in Paragraph [186] below.

[140] The legal fees included in the Bill of Costs show a total of 54.7 hours for two paralegals and a student, and at the respective hourly rates, the charges are $7,152.51. The Board considers that paralegal work is recoverable if the work done is work that would normally be done by a lawyer, based on having work undertaken by the least expensive competent person.

[141] In written submissions, Mr. Grant submitted that of this amount, $6,527.50 appears to be for "…the use of a piece of litigation software for document management", which in his view is not work that would be done by lawyers and required no legal training. The Board notes that Mr. Goldberg identified the use of paralegals "…for document production" in his written submissions. This leads the Board to conclude that it should reduce the legal fees by that amount, which it considers should be part of overhead.

Disbursements

[142] The Board will address the disbursements claimed in two categories: the first is "office related disbursements"; and the second, "witness related disbursements".

[143] Under the heading of office related disbursements, the Board identifies the following from the Bill of Costs:

Printing – in house	$1,028.25
Colour copies	$200.00
Library research	$200.00
Long distance telephone charges	$48.25
Overtime	$404.96
Photocopies	$400.00
Delivery and courier	$266.51
Lunch for witness prep	$74.75
Meals for witness prep	$489.43
Parking (NSUARB)	$27.82

[144] Additionally, PEV claimed disbursements of $500 relating to the taxation of costs. The Board discusses this aspect of the claim in Paragraph [183] below.

[145] Mr. Grant's submissions said that of these disbursements, no amount should be allowed for printing and copying; no amounts should be allowed for meals, parking, taxis, and long distance. He said that overtime should be included in overhead, as should library or computer research. That would leave only delivery and courier to be recovered.

[146] Mr. Grant cited the *Practice Memorandum No. 10* under the *Civil Procedure Rules*, suggesting that 10 cents per page for copies for adverse parties, the Court, and witnesses is all that is permissible, and said that there was no evidence of the volume of copying, the cost, the purpose and the recipient.

[147] The Board notes that the pre-bill summary dated January 20, 2016, in Tab B of the Bill of Costs shows the amounts claimed for these items were reduced, and some items not included in the Bill of Costs were apparently not charged to PEV. The reductions were to rounded amounts so it is not possible to determine what the amounts were for.

[148] The Board considers it reasonable to allow some amount for printing and copies, including colour copies, since copies were required for the Board and witnesses, as well as the MODG, and fixes the amount of $800 in total for this purpose.

[149] There is no indication in the pre-bill summary of the persons for whom taxis, meals (lunch and dinner) for "witness prep" or parking were incurred. The summary of the Bill of Costs indicates taxis were for witnesses, although the Board notes that Mr. Crissman included a charge for a taxi in his expense claim in Tab C of the Bill of Costs. As a result, the Board is unable to determine whether these amounts were necessary to advance the claim, and thus it is not prepared to allow those amounts.

[150] The Board notes an amount of $404.96 for overtime, and finds that this is a cost which should be included in overhead, and therefore does not allow it.

[151] The Board is prepared to allow the charges for long distance calls since two of the witnesses were out of province. The Board considers it was reasonable and necessary to communicate with them by telephone.

[152] The Board also allows the charges for delivery and courier to which Mr. Grant did not appear to specifically object, as it considers them necessary and reasonable.

[153] With respect to the "witness related disbursements", the Board notes the Claimant has included the following in the Bill of Costs:

Mr. Dosunmu's flight from the US	$633.96
Mr. Dosunmu's accommodations in Halifax	$298.00
Mr. Crissman's expense claim in US dollars	$1,160.80
Mr. Lewis's expenses and attendance fees for hearing in US dollars	$3,000.00

[154] The Claimant also seeks an amount of $1,699.27 in Canadian funds to cover the exchange rate for US dollar payments.

[155] The Board considers that the expenses related to Mr. Dosunmu were necessary for the Claimant to assert its claim and, in the Board's view, they are not unreasonable.

[156] Tab C of the Bill of Costs includes Mr. Crissman's expense claim form with supporting documentation. Mr. Grant objected to the number of nights and the rate for accommodation for Mr. Crissman, the baggage charges, and, the Board assumes, his meal charges over the period, although these were not specifically singled out.

[157] The Board notes that Mr. Crissman travelled to Halifax from Florida. His testimony was heard on November 19, 2015, after Mr. Ferguson's testimony was completed. He claimed for hotel accommodations on the nights of November 18, 19, and 20, 2015. The Board expects that the Claimant was in the best position to schedule its witnesses, knowing its theory of the case, but acknowledges that there may have been some uncertainty about when he might have been required to testify.

[158] Given Mr. Crissman's detailed expense claim and supporting documentation, the Board is prepared to accept this amount as reasonable and necessary for the Claimant to assert its theory of the case.

[159] Unlike Mr. Crissman's expenses, Mr. Lewis's expenses are expressed as a lump sum in US dollars. Thus, the Board is left to compare his expenses with those of the other two US witnesses, Mr. Dosunmu and Mr. Crissman.

[160] Mr. Lewis's testimony was also concluded in less than a day, although the Board is aware that he attended in the gallery of the hearing room for a longer period.

The Board is also aware that Mr. Lewis travelled from Texas to Halifax. Therefore, the Board expects his travel costs may have been somewhat higher than the other two travellers. His hotel costs were likely similar to theirs, and, based on the hourly rate shown in his account for preparation of his report ($195.00 US), the Board expects he sought reimbursement for his attendance to testify.

[161] In the circumstances, and notwithstanding the fact that the Board preferred the evidence of Mr. Knoll to that of Mr. Lewis, the Board is not prepared to entirely disallow this element of the claim. In the absence of any itemization, the Board reduces Mr. Lewis's expenses to $2,250.00 in US dollars.

[162] With respect to the US dollar exchange, the Board understands that this was charged to the legal account on January 20, 2016. The Board is prepared to allow an amount for US dollar exchange, provided that was the rate applicable at that time. Based on the Bill of Costs, the Board has calculated the rate at $1.408. Any change in the rate since that time is to be disregarded.

[163] In Paragraph [186] below, the Board summarizes its findings regarding disbursements.

Harmonized Sales Tax ("HST")

[164] Mr. Goldberg argued that in *Superior Propane*, *Johnson* and *Bishop*, the costs awards included HST. Mr. Grant said that as an incorporated entity providing services, PEV either is, or ought to be, registered for HST under the *Excise Tax Act*, and therefore, eligible for input tax credits. The Board understands Mr. Grant's concern is

that allowing HST would result in an over-recovery. He suggested that if PEV is not "out of pocket" for HST, then it should not recover it.

[165] There was no evidence before the Board to confirm PEV's status with respect to HST.

[166] The Board notes that of the three cases referred to by Mr. Goldberg, only *Superior Propane* involved a corporation. Further, the Board notes that while HST was included in the costs awards in all three cases, it does not appear that the entitlement to HST was in issue. Rather, it appears to have been accepted as a matter of course.

[167] Three of the Nova Scotia cases cited by Orkin (see Orkin, *op.cit.,* p. 2-64.15) found HST (or previously Goods and Services Tax) was not payable on award of costs; however, one case allowed it. In *Eaton v. Manning*, 2003 NSSC 91(CanLII), the Court allowed HST on an amount of costs assessed under a tariff. These cases relate to party-and-party costs, and do not involve corporate plaintiffs or claimants.

[168] In the absence of any evidence from the Claimant as to whether it has paid HST on any of the costs claimed, or is entitled to any input tax credits, the Board is not persuaded, on a balance of probabilities, that it should include HST in the costs award in this matter.

Interest

[169] The provisions of s. 52(9) of the *Act* are clear:

> (9) The expropriating authority shall pay interest on an unpaid account for costs payable pursuant to this Section at the rate of six per cent per year or such rate as determined by the Governor in Council, from the date the account is served on the expropriating authority by the owner. [Emphasis added]

[170] While Mr. Grant urged the Board to deduct a period of 55 days from the award of interest on costs due to delays in PEV responding to costs offers, there is no evidence before the Board to suggest that the offers from MODG were time limited. Mr. Grant said that allowing interest for the full period would only encourage parties to delay in responding to extract more interest from the "public purse" of the expropriating authority.

[171] Mr. Goldberg submitted that, because the offers were "all-inclusive", it was necessary to have "tripartite discussions on costs each time an offer was received." Given the entities involved, the delays can thus be understood.

[172] In the circumstances of this proceeding, the Board does not consider it reasonable to assume that PEV would have deliberately delayed. In any event, the language of this provision does not, in the Board's view, permit it to suspend the time in which interest accrues.

[173] The Board finds that PEV is entitled to interest at the statutory rate of 6% from June 17, 2016. The Board has calculated the amount to March 30, 2017, the date of the taxation hearing.

Costs of this hearing

[174] The decisions in both *Superior Propane* and *Johnson* are clear that a claimant is entitled to the costs of the hearing to determine the costs payable under the *Act.* The Board has considered this to be part of the compensation to which a claimant is entitled. In both cases, the Board awarded lower costs than had been sought, expressing concern about the reasonableness and necessity of the time which had

apparently been expended. From this the Board concludes that the same criteria, i.e., reasonableness and necessity, apply to the assessment of taxation hearing costs, as do the factors set out in s. 52(8) of the *Act.*

[175] Here, Mr. Goldberg has submitted that his firm has already discounted its legal fees by not including the time spent in communications in attempts to settle the matter of costs. Yet he seeks $10,000 plus disbursements and HST. The hearing on costs lasted half a day. Both counsel provided written submissions and authorities, and each was obliged to review the material submitted by the other. There were no post-hearing submissions.

[176] The materials for the Bill of Costs would largely have been already in existence, i.e., the pre-billing materials and narrative invoices of the law firm and the invoices of the expert witnesses, which would have been relatively simple to assemble. Perhaps the most significant work would have been the preparation of the Affidavits of Mr. Vandall and Mr. Farmer, intended to justify the self-represented costs.

[177] Mr. Grant asked the Board to withhold any finding on the costs of this hearing, suggesting the matter should be left until "…the reasonableness of the costs awarded may be measured against what are currently privileged offers of settlement."

[178] While the Board understands the position taken by the MODG, the Board considers it would not be an efficient use of resources to leave the matter of the costs of this hearing to another day.

[179] In *Johnson*, a 2006 decision, the Board awarded costs of $7,500 inclusive of HST and disbursements for the taxation costs where there had been a prehearing conference, followed by written submissions, a taxation hearing, undertakings, and final

written submissions. The owner in that case had sought more than $15,000 in costs for the taxation hearing. The costs for the hearing on the merits were approximately $176,500 including experts' reports, HST and disbursements. The compensation awarded was fixed by the Court of Appeal at $167,810.

[180] In *Superior Propane*, a 2005 decision, the Board awarded costs of $5,000 plus disbursements and taxes for the taxation of costs, where there had been a prehearing conference, a hearing and post-hearing submissions. There the owner sought costs of just over $10,000 including disbursements and taxes. The costs for the hearing on the merits were taxed at approximately $139,000 including disbursements and HST, where the compensation awarded was $369,200.

[181] In *Bishop*, a 2010 decision, the Board allowed costs of just over $8,500 for fees and disbursements, and allowed HST as well. The matter involved pre- and post-hearing submissions as well as the taxation hearing. That case involved a settlement of $162,000, inclusive of pre-judgment interest, on a claim more than $200,000.

[182] The Board notes that in the taxation decision of *Atlantic Warehouses*, although the Taxing Officer was dealing with a tariff, the costs of the taxation were reduced from a claim of $3,000 to $2,000.

[183] The Board recognizes that hourly rates are likely to have increased since these decisions were made. However, the Board finds the amount of costs sought by the Claimant for this hearing to be excessive. The Board finds an award of $7,500 inclusive of disbursements, is allowed for the costs hearing. As noted above, the Board does not award any amount for HST on this amount.

VI CONCLUSION AND SUMMARY

[184] The Board was asked by the parties to determine the amount of costs payable by the MODG to PEV with respect to the award of compensation made by the Board after the hearing on the merits. The claim at the hearing on the merits was for $8,986,000 plus interest and costs. The award was $149,500 plus interest and costs.

[185] The Board received a Bill of Costs from the Claimant for a total of $581,043.28 and written submissions from both parties and received further submissions at a hearing on March 30, 2017.

[186] Taking into account all of the foregoing, the Board finds the following amounts, with the explanation of the reductions from the amounts claimed, are the reasonable and necessary costs incurred by PEV for the purpose of asserting its claim for compensation, which are payable by the MODG:

Legal fees for compensation hearing

Claimed (excluding HST and disbursements)	$288,859.52
Less Paralegals	$6,527.50
	$282,332.02
Less duplicated time per Respondent's Appendix A (M. Kelly – 106 hours @ 288.16)	$30,544.96
	$251,787.06
Discounted by 33% based on s. 52(8) factors and proportionality	$83,089.73
Amount Allowed	**$168,697.34**

Disbursements on legal account

Office Disbursements

Copies	$800.00
Long Distance	$48.25
Courier & delivery	$266.51
Amount Allowed	$1,114.76

Witness Disbursements

Dosunmu Flight		$633.96
Dosunmu Accommodations		$298.00
Crissman expenses		(US dollars) $1,160.80
Lewis expenses (discounted per Paragraph 161)		(US dollars) $2,250.00
Conversion re Crissman expenses in US Dollars @ 1.408		$474.07
Conversion re Lewis expenses in US Dollars @ 1.408		$918.00
Amount Allowed		$5734.83
Total Disbursements allowed		**$6,849.59**

Altus Group (Hardy) Account

Claim (including HST and disbursements)		$164,300.05
Less HST on invoices		$21,430.44
		$142,869.61
Less Disbursements disallowed as unreasonable or unnecessary		
James Hardy – working lunch	$102.53	
Charles Hardy – Halifax Marriott	$43.63	
Charles Hardy mileage/parking	$5.26	
Stationery and binding	$126.30	
Charles Hardy – meal	$14.59	
Denise Aucoin – meal	$43.55	
	$335.86	$335.86
		$142,533.75
Less disbursements allowed		$485.00
Professional fees		$142,048.75
Less unnecessary attendance time 51 hrs @ 220.00 (Paragraph 138)		$11,220.00
Reduced professional fees		$130,828.75
Discounted by 33% based on s. 52(8) factors and proportionality		$43,173.48
		$87,655.27
Plus disbursements allowed		$485.00
Amount Allowed		**$88,140.27**

Lewis/LNG Expertise account

Amount claimed in US Dollars	$9,408.75
Discounted by 50% based on s. 52(8) factors and proportionality	$4,704.37
	$4704.37
Plus Conversion US Dollars @1.408	1,919.39
Amount Allowed	**$6,623.76**

PEV Self-represented costs

Claim – 209 hours	$25,000.00
Less Board estimate of excessive or unnecessary time 97.5 hrs @ 119.62 (25,000/209)	$11,662.95
Amount Allowed	**$13,337.05**

Total Amount allowed (excluding costs of taxation hearing)	$283,648.01
Plus interest at 6% for 9 months	$12,764.16
	$296,412.17
Plus costs of this hearing (Paragraph 183)	$7,500.00
TOTAL COSTS ALLOWED	**$303,912.17**

[187] Therefore, the total amount allowed on taxation is $303,912.17

[188] An Order will issue accordingly. The Board will wait for two weeks from the date of issuing this Decision before issuing the Order to allow the parties to check the arithmetic calculations, and to confirm the US dollar exchange rate. The Board retains jurisdiction to correct a calculation error, and to confirm the amount resulting from the exchange rate applied, but will not hear further submissions on these findings. In the absence of any further submissions on the calculations from the parties, an Order will issue two weeks from today.

[189] **DATED** at Halifax, Nova Scotia, this 7th day of June, 2017.

Roberta J. Clarke