

ISSUE DATE:

**February 05, 2014**



LC130028

Ontario  
Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

Shant and Aline Ghazarian (Claimants) have made an application to the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1990, c. E. 26, as amended, for determination by this Board of the compensation to be paid by the Regional Municipality of York (Respondent) for land known as Parts 1, 2 and 3 on Plan of Expropriation No. YR1369395 in the York Region Land Registry Office (No. 65) as well as Part 1 on Plan of Expropriation No. YR1886309 in the York Region Land Registry Office (No. 65)

OMB Case No.: LC130028

OMB File No.: LC130028

The Regional Municipality of York (Respondent) has made an application to the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1990, c. E. 26, as amended, for determination by this Board of the compensation to be paid to Mars Tire (Newmarket) Inc. (Claimant) for land described legally as Part of Lot 96, Concession 1, East of Yonge Street, as in Deed No. R616083 save and except Part 1 on Expropriation Plan No. YR1369305 (formerly Township of East Gwillimbury), in the Regional Municipality of York

OMB Case No.: LC140001

OMB File No.: LC140001

The Regional Municipality of York (Respondent) has brought a motion before the Ontario Municipal Board under Rule 34 of the Board's *Rules of Practice and Procedure* to seek an Order consolidating the claim of Shant and Aline Ghazarian (the Landowners under OMB Case No. LC130028) and Mars Tire (Newmarket) Inc. (the Tenant under OMB Case No. LC140001)

OMB Case Nos.: LC130028 & LC140001

**APPEARANCES:**

**Parties**

Shant Ghazarian  
Mars Tire (Newmarket) Inc.

Regional Municipality of York

**Counsel**

Shane Rayman  
David Barbaree

Frank Sperduti  
Ajay Gajaria

**DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD**

[1] The Regional Municipality of York (“York Region”) seeks an Order of the Ontario Municipal Board (“Board”) declaring that the claim of Shant and Aline Ghazarian (“Landowners”) be consolidated with the claim of Mars Tire (Newmarket) Inc. (“Tenant”); or in the alternative, that the claims of the Landowners and the Tenant be heard one after another by the same Board Member or Panel; or in the further alternative, the claim of the Landowners be held in abeyance until such a time as the Tenant is prepared to have its matter heard. The Landowners oppose such consolidation.

[2] The Board has referenced the parties’ positions through inclusion of the relevant excerpts from each side’s factum as provided in evidence.

[3] The Landowners are the registered owners of the subject property known municipally as 135 Davis Drive (“subject property”) in the Town of Newmarket. The subject property is home to a one-storey commercial building that serves as a Goodyear Tire franchise operated by the Tenant, of which the Landowners are also the principals. Beyond this, the facts of the expropriation matters along with the chronology of activities and history of this case have been well established and objectively stated in both parties’ Motion Records and in oral arguments. They do not bear resuscitation and restatement in this Order other than to provide the following short summary for context purposes.

[4] York Region acquired a significant portion of the Landowners’ property for the purpose of implementing road and intersection improvements along Davis Drive in September 2009 (a fee simple interest, a permanent easement and a temporary easement, which ran from September 2009 to August 2012). In September 2012, the Region extended the temporary easement for a twenty-month term. In August 2013, the Region extended the temporary easement a third time and works on the Landowners’ site are not scheduled to be completed until October 2015. The Board heard that this date is a target only. The Landowners served and filed a Notice of Arbitration and Statement of Claim in May 2013. The Region served and filed its Reply in July 2013.

## **YORK REGION'S POSITION**

[5] There is a non-arm's length relationship between the Landowners and the Tenant. Specifically, the identical facts give rise to the claim for damages and thus the overlap in facts, evidence, witnesses and expert evidence that the Board will hear to assess the related claims (of the Landowners and their Tenant business) and the fact that both are represented by the same counsel, is evidence that the Board should consolidate the proceedings or hear the matters together in the interest of Board resources as well as to ensure consistency of findings. Both the Landowners' claim and the Tenant's claim are currently before the Board at the time of the hearing of today's motion (see assigned Board file numbers above).

[6] Failure to consolidate the matters will result in a hearing of the same case twice. The Landowners' claim for injurious affection is predicated in a large part on the anticipated loss of rental income from the Landowners' Tenant business. This predicted loss of revenue arises by virtue of the allegation that the building improvements on the subject property are rendered functionally obsolete as a result of the expropriations. To assess the claim, the Board will hear appraisal and business loss evidence in support of the allegation that the Landowners' remaining lands are less valuable due to the inability to attract market rents (which rents are being paid by the Landowners to themselves through their Tenant corporation).

[7] Without the Tenant claim before the Board concurrently, the Board will have to speculate about the impact of the expropriations on the ability of the Landowners to attract rent without a full record of disclosure from the Tenant and without knowing what the Tenant's real losses are, if any. Furthermore, the Board will be called upon to make findings of fact about whether the Tenant enjoyed a leasehold advantage (i.e. paid less than market rent) and whether the ability of the Landowner to attract rent is in any way impacted by the expropriations.

[8] The Board must have the Tenant's claims and all of the evidence relied upon by the Tenant before it in order to assess this matter fairly, consistently and efficiently. Therefore, a consolidation would substantially reduce what would otherwise be duplicative evidence and will result in a more efficient use of the Board's time and resources, thereby avoiding a hearing of the same case twice.

[9] Without consolidation or hearing together, there is a risk of inconsistent findings of fact, which is not in the interest of justice or in the interest of any party to these proceedings. The Landowners and Tenant claims engage the same factual foundation, relate to the same subject property and arise from the same expropriations. This raises the significant risk of inconsistent findings of fact, should the two matters proceed independently. The interrelationship of the claims requires these files to be consolidated or heard together to ensure consistency in the decisions rendered by the Board. Separate adjudication of the claims of the Landowners and the Tenant may lead to conflicting facts being adduced before the Board, or two decisions being rendered by the Board that are inconsistent with one another.

[10] The speculation required now to assess injurious affection (i.e. loss in value, if any, of lost parking or effectively accessing the building) creates a risk of inconsistent findings if and when the Tenant's claims come forward later with the benefit of hindsight. In assessing leasehold advantage, the Board will need to understand the pattern of actual rent paid by the Landowners to their Tenant corporation. This also requires the claims to be before the Board concurrently.

[11] To support its position, York Region submitted that the Landowners' Claims for compensation might be premature in that the Landowners' claim might not crystalize unless and until the Tenant's net income is impacted, if at all, by the expropriations. In this regard, there is allegedly no prejudice to the Landowners in having to wait for their claims to be determined along with their Tenant corporation claims, if any. The only way for the Board to assess this is to have both the Landowners' Claim and the Tenant's Claim before it concurrently.

[12] A consolidation or hearing together of the claims will not result in any substantial prejudice or unfairness to the Landowners. Both claims may proceed now, or both claims may be held in abeyance to be heard together.

## **LANDOWNERS' POSITION**

[13] The Landowners have brought a claim for compensation based on their losses through the expropriations. An award in the near future would enable them to undertake mitigation efforts to preserve the utility of the subject property. Specifically, the award will permit them to fund the construction needed to modify the site's

improvement and thereby ensure its continued functionality as an auto-service centre. If the Board allows York Region's motion to consolidate this matter with the future claim for business loss of the Tenant, the Landowners' claim will have to be delayed until the works at the site are complete and the Tenant's business loss claim vests. The Tenant's claim is premature in that the Tenant's claims for business loss will likely not vest and be fully ascertainable until two or three years after construction of the works has been completed.

[14] The Landowners oppose York Region's request to consolidate the two proceedings and stay their claim for compensation for the following reasons:

1. The consolidation will substantially delay the determination of compensation for the Landowners for an indeterminate period of time, denying them fair compensation or the ability to mitigate their damages and modify the site to reduce the impact of the works.
2. There is no overlap between the Landowners' claim and the Tenant's claim (based on the Region's own expert evidence), nor is there any inconsistent facts that would prejudice the parties or the Board if these matters proceeded separately.
3. The parties are prepared to agree in a form binding on all parties that there will be no overlap of claims and to be bound by the factual findings of the Board arising from the arbitration of this matter.

[15] There is no prejudice or harm to York Region in having the Landowners' claim proceed in the near future. This consolidation is sought by York Region in order to force the Claimants to settle with it in order to get the basic compensation required to preserve the functionality of the site and its improvements before York Region's works are completed. An order to consolidate this proceeding and delay the Landowners' claim will create substantial prejudice and irreparable harm to them.

[16] York Region's construction in front of the subject property has been delayed repeatedly although the evidence suggests that construction will commence in the spring of 2014 with anticipatory completion by the end of October 2015. However, as stated, it could be several years after construct is completed (and as discussed below,

the Board finds the timing for such completion to be anticipatory at best) before the Tenant's claims for business loss will vest. Consequently, the Tenant is unable to fully assess or meaningfully estimate the impact of York Region's works and how it will affect the business until all impacts from these works have occurred. There might be a further delay before the impact of the works on the business can be fully determined. Thus, the claim for business loss may not be ready to proceed forward until 2018.

[17] York Region's appraisal report does not allege leasehold advantage and the Tenant has not asserted a claim for a leasehold advantage in the subject property. The Landowners have not claimed any business loss with respect to the automotive centre or any costs or losses associated with the business operated at the subject property. The Landowners do not consider these two claims to overlap but they sought to address York Region's concern by the Tenant's agreement to the following points: it will not seek compensation for leasehold advantage or leasehold interest in the property; it will not seek compensation for improvements to the property, for which the Landowners are claiming; and it will be bound by the Board's findings relating to the Landowners' claims so as to avoid an inconsistent decision or duplication of evidence.

## **THE BOARD'S FINDINGS**

[18] The Board has carefully considered all of the materials, each party's factum and brief of authorities as well as the submissions of all counsels. The Board determined that it was furnished with sufficient materials to render its decision in this matter. The pertinent rules and regulations vesting the Board with the authority to consider these matters are established and these were referenced by both parties. Citation of these passages is unnecessary and the Board's authority to determine this matter is not in dispute.

[19] While the Board embraces the general direction that Rule 6.01 of the *Rules of Civil Procedure* provides in addressing the consolidation of civil actions (such as determining whether one or more of what the counsels called the "gateway" criteria have been met to order consolidation), this rule is not prescriptive in the Board's view as it does not automatically obligate the Board to order consolidation. Indeed, the language employed in this rule is instructive of the flexibility given to the Board in determining such matters: "...the court may order (emphasis added)..." and "...the

court may give such directions as are just to avoid unnecessary costs or delay (emphasis added).....” There is no requirement for the Board to consolidate matters even where one or more of these gateway criteria have been satisfied. The Board must look to these criteria of course in its deliberations, but it must also weigh the totality of the evidence and arguments to determine when consolidation of matters is appropriate in the circumstances.

[20] Further, even finding that York Region has satisfied the first two of the gateway criteria enunciated in the above-cited rule such that consolidation can be considered, the Board reviewed the language of Rule 60 of the Board’s *Rules of Practice and Procedure* and took guidance from the interpretation it provides for Rule 57 whereby the Board is entitled to separate consolidated proceedings for a number of reasons including if the Board determines that a party is unduly prejudiced. While the subject matters are not currently consolidated, the language is supportive of the Board’s decision not to order consolidation of these claims.

[21] In *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 CarswellOnt 4183, 2010 ONSC 3306, 190 A.C.W.S. (3d) 37 (“Master Dash”), the Court set out 17 criteria to be considered in assessing whether matters will be heard together. Like the aforementioned rules, this decision is of value to the Board in the case at hand as it too provides context for determining among other factors whether to consolidate these matters. In doing so, the Board acknowledges that, while the facts of the Landowners’ and Tenant claims would appear to establish a *prima facie* degree of commonality such that a determination to consolidate the matters would be supportable, a closer examination of these matters and the submissions of the Landowners’ counsels reveal greater differences than similarities and a basis for not consolidating these matters. Examples are warranted.

[22] The Board finds persuasive York Region’s position that the Landowners and Tenant are essentially the same parties. The Board determines that the Landowners and Tenant are interwoven entities and there is a non-arm’s length relationship: Mr. Ghazarian is the sole director of the Tenant as well as President and Secretary and he remains in these roles; and as the counsels for York Region have shown, “the directing mind of the Tenant is the Landowner, Shant Ghazarian”. However, this status is not enough to consolidate these matters. The Board also finds that, while they are in the

same parties, the Landowners and Tenant differ and operate as distinct legal entities because they seek and involve different forms of damage. The expropriations are the basis for their appeals but the Landowners seek compensation for the loss in market value of the subject property and injurious affection whereas the Tenant will seek compensation at some future point for any business losses incurred as a result of the takings. The Board finds there is no overlap in parties from the perspective of damages sought and consolidation is not appropriate.

[23] The Board accepts that there will be some overlap of evidence and/or witnesses among these separate actions as they invariably derive from the same expropriations, but this degree of overlap is not significant. The counsels for York Region have not persuaded the Board that the failure to consolidate these matters will result in duplicate hearings either. The submission of Mr. Rayman bears out this finding. As he submitted, the background facts of the expropriations are where the similarity ends. Beyond this, the two claims will involve different legal entities and will require different experts for different cases and different information in support of different claims will be presented.

[24] The Board is not persuaded that there is a risk of inconsistent findings or judgment if the actions are not joined, particularly in light of the Tenant's undertaking not to seek compensation for leasehold advantage or leasehold interest in the property; it will not seek compensation for improvements to the property which the Landowners will claim; and it agrees to be bound by the Board's findings relating to the Landowners' claim so as to avoid an inconsistent decision and duplication of evidence. This offer, to which the Tenant is hereby held through this Order, satisfies the Board that the risk of inconsistent findings or judgment by not joining the actions is negligible. The Board is also satisfied that the Tenant's preparedness to make such commitments alleviate any fears of potential prejudice that York Region might have.

[25] Moreover, there is merit to assigning where practicable the same Board Member or Panel to the later hearing of the Tenant claim who will also hear the earlier Landowners' claim, an administrative act that recognizes the similarities in claims only insofar as the parties, the subject property and the takings are involved. Even where such assignments are not possible, however, the Board's decision and evidence

referenced in the Landowners' hearing can be made available for the future Tenant hearing such that the possibility for inconsistency in decisions is highly diminished.

[26] These aforementioned examples of criteria in the Master Dash case show why the Landowners' and Tenant claims should not be consolidated. The Board is also supported in this finding by noting the status of the Landowners who are ready to proceed with their claim. However, the Tenant claim is not ready and as Mr. Rayman explained, it will not be ready until years after the construction on the site is complete. As evidenced, the Tenant claim will be based on the business loss, which has not yet occurred.

[27] The Landowners are prepared to proceed with their claim whereas the real impact of the takings on the Tenant cannot be fully known until some years after completion of the construction. York Region has not made a case for tying the Landowners' claim to the Tenant claim. It is known that the Landowners would either have to undertake mitigation efforts for their building at great expense (estimated figures provided on file) without knowing the full impact on the Tenant business (and there are no guarantees that the Tenant will continue to operate, relocate or shut down altogether) or it has to wait until the Tenant claim is concluded to establish or make plain the precise costs to them in respect of the Tenant claim. Consolidation would only serve to delay the Landowners' claim in the Board's view, thereby creating prejudice. The Landowners are ready to proceed and should not be delayed in executing the modifications that the subject property requires. Consolidation would arrest their capacity to proceed with the timely resolution of their claim, which was created in the first instance by York Region's expropriations. Counsels for York Region argue that, in consolidating the claims, the Landowners can seek and obtain financial assistance to undertake the work if necessary (non-finalized cost estimates were presented to the Board as part of the motion materials) and the Landowners are willing to address York Region's concerns. The Board is not persuaded that the Landowners should be so prejudiced through the consolidation of these claims.

[28] The Board considered York Region's argument that the Board might have to speculate at the Landowners' hearing as to the impact of the expropriations on the Landowners' ability to attract rent without a full record of disclosure from the Tenant and without knowing what the Tenant's real losses are, if any. The Landowners have stated

persuasively that this information cannot be known for some time to come. The Board is disinclined to require the Landowners to speculate at this early stage; yet, it finds merit in allowing the Landowners to pursue their claim independent of the Tenant claim. There are no good reasons to hold off on the Landowners' claim when they seek to be compensated for the subject property and when they have established persuasively the prejudice in being forced to wait for the Tenant claim. In terms of litigation status then, the Board will not entertain consolidation of these claims.

[29] The Region has repeatedly delayed construction in front of the subject property. The practical reality of incomplete road works and the full impact of the expropriations on the Tenant business not being known for several years hence should not supersede the right of the Landowners to advance their claim now despite not knowing every element of the impacts to be caused on the Tenant claim by the takings. The Board will entertain the Tenant claim at a future hearing at a time if, when and once the Tenant can establish a complete and quantifiable record of the extent and degree of impacts caused by the expropriations on the business.

[30] York Region initiated the expropriations and it is the Landowners and the Tenant who must adjust to the takings and in the course of time, submit their compensation claims. As much as York Region would like to compartmentalize the Landowners and Tenant matters into a single hearing process, almost formulaically as the Board observes, the facts as they pertain to this property and these claims do not so easily lend themselves to the convenience of a Board-ordered consolidation. York Region's counsels argued that the Landowners waited four years before filing their claim so for that reason (among others already identified) the Tenant claim should be consolidated with their claim. However, York Region has had its own administrative and construction timing issues. Through its correspondence to the Landowners (on file), York Region has twice extended the term of temporary easement expropriated since the 2009 takings from the Landowners: once for expiry in September 2012 and again in August 2013 for a period ending October 31, 2015. In 2012, road improvements were supposed to have been completed by the spring of 2014. As of last August, construction is supposed to be completed by October 2015.

[31] York Region also provided itself with more flexibility with dates in respect of wording in both letters to the Landowners: "Further notice of the construction schedule

will be provided at a later date.” Clearly, this wording leaves room for York Region to rely on additional time to complete its road improvements as needed. In the same vein, the Board determines that such flexibility regarding the way forward should be afforded to the Landowners in a manner they deem suitable to their purposes and as long as the aforementioned rules and regulations are not offended, which the Board determines they are not. As the Landowners are prepared to proceed with their claim now and they are unprepared to advance the Tenant claim at this time, this approach should be allowed.

[32] Given these facts and delays, the Landowners’ decision to wait until 2013 to file their claim is not unreasonable as they are able, despite York Region’s work delays, to quantify the amount of compensation sought so that mitigation efforts can be undertaken to preserve the subject property’s utility. However, the Tenant claim is arguably premature and will require significantly more time to ascertain the level of compensation to be sought as stated. The Board is also not persuaded through this evidence that York Region can commit with certainty to the latest forecasted completion of construction works given the previous delays. Despite the above-cited correspondence confirming anew the commencement of construction, it is reasonable that completion of this work is a target only and anticipatory at best. Such delays should not prevent the Landowners from proceeding separate from the Tenant claim.

[33] The Board assigns little weight to York Region’s argument that the specific amounts the Tenant claims will crystallize once road work commences and impacts on the business can be measured. There is no persuasive evidence that this is true or that the Tenant claim is not premature. The latter should proceed independently of the Landowners’ claim (which should proceed now) and not until such time as the Tenant claim can articulate the precise impacts on it that the expropriations will cause. As Mr. Rayman submitted, the claims of the Landowners and the Tenant differ such that consolidation is not warranted.

[34] Consolidation is a discretionary remedy. The Board accepts that the Landowners have a separate and somewhat distinct claim from that of the Tenant as identified in these reasons. The Board finds persuasive that the Landowners cannot yet know the nature and extent of impacts on the Tenant business despite York Region’s desire to move these matters forward together. Accordingly, there are no good grounds

to order consolidation of the claims. To consolidate these matters given the specifics of this case would unfairly prejudice the Landowners for the reasons stated.

**ORDER**

[35] The Board orders that for all of these reasons, York Region's motion to consolidate is dismissed.

[36] York Region and the Landowners are directed to submit jointly to the Board a Procedural Order (Exhibit 2, Tab 2 and with dates revised in accordance with the date of the hearing into the Landowners' claim once set) within 15 days of receipt of the Board's Order.

"R. Rossi"

R. ROSSI  
MEMBER