An Overview of the Expropriation Process

Steps of Expropriation Process - Frank Sperduti

Introduction

An expropriation in Ontario is defined as “the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers...” It is hard to imagine an exercise of governmental authority that can have a more direct impact on an owner’s property rights than the taking of an owner’s land without the owner’s consent.

As professional real estate appraisers, you are often consulted by both landowners and government authorities in expropriation matters. Often, the valuation issues that arise in expropriation claims are complex given the technical requirements of the Expropriations Act, R.S.O. 1990 c. E.26, as amended (the “Expropriations Act”). An understanding of the expropriation process can be of considerable assistance to the appraiser, already faced with a substantial task.

This presentation is intended to provide the professional real estate appraiser with a general overview and understanding of the expropriation process from start to finish. Understandably, the process of expropriation is highly technical and specialized, and for both landowners and expropriating authorities, expert advice on critical strategic issues with an understanding of the process can make the difference between a fair and equitable result and disaster. I hope that by providing you with a background and understanding of the expropriation process, you will be better equipped to provide strategic advice and input.

Pre-Expropriation Procedures

Typically, the decision to expropriate a property usually follows a period of study that can take many months, and even years, to complete. Before the actual expropriation process is engaged, the expropriating authority will more than likely be required to complete a study pursuant to the Environmental Assessment Act, R.S.O. 1990 c. E.18. Part of that study process is directed toward identifying the need and justification for the proposed project, as well as defining the extent of the anticipated property requirements necessary to complete the project. Further, consideration must be given to alternatives that could accomplish the same objective, and there is a public consultation process that must be followed.

Often, the first notice to a landowner that his or her property may be needed for a new public project comes through the consultation process required by the Environmental Assessment Act. A well advised landowner will use the opportunity, before the expropriating authority’s property requirements are established, to influence the selection of the “preferred” alternative so as to minimize the impact of the eventual expropriation on his or her particular property. This can be accomplished through discussions with experts retained by the authority to conduct the investigation, or through the use of the “bump up” or appeal process set out in the Environmental Assessment Act. An appraiser who understands the process will appreciate that this is an opportunity that ought not to be ignored by an owner.

Once the property limits are defined and the “preferred” alternative recommended in the Environmental Study Report is approved, most expropriating authorities engage property agents who will approach impacted property owners with a view to purchasing the required lands. An owner is, of course, free to sell a portion of his or her property to an expropriating authority, and expropriating authorities generally press for a negotiated resolution early on, even before expropriation. What some appraisers may not know is that the Expropriations Act provides a mechanism by which an owner may agree to transfer a portion of his property to an expropriating authority for an advance payment, while maintaining the right to seek further full compensation for losses and damages caused by the expropriation. This right is
provided in Section 30 of the *Expropriations Act*, and the agreements which are sometimes negotiated pursuant to that section of the Act are referred to as “Section 30 Agreements”. Section 30 of the *Expropriations Act* provides as follows:

1. Notwithstanding anything in this Act, the owner may consent to the acquisition of land by an expropriating authority subject to the condition that compensation for the land shall be determined by the Board.

2. The consent of an owner to the acquisition of land pursuant to subsection (1) shall be evidenced by an express agreement in writing between the owner and the expropriating authority stating
   1. that the owner consents to the acquisition,
   2. that compensation shall be determined by the Board, and
   3. the date fixed for possession of the land,

and the owner shall thereupon execute the necessary conveyance of the land to the expropriating authority.

3. At any time following execution of the document under subsection (2), either the expropriating authority or the owner may apply to the Board to determine the compensation.

4. Where an application is made under subsection (3), the Board shall determine the compensation as if the land were expropriated and the provisions of this Act and the regulations respecting the determination of compensation, hearings and procedures, including interest, costs and appeals, apply to the determination in the same manner as if the land had in fact been expropriated.

5. Unless otherwise agreed by the parties, compensation is to be determined as of the date of the document conveying the land from the owner to the expropriating authority.

The purpose of Section 30 of the Act is to allow an expropriating authority to acquire the land that is needed for the proposed public project without having to comply with the formal requirements of the *Expropriations Act*, while providing a landowner with all of the rights and protections, including cost protections, set out in the Act. While the terms of a Section 30 Agreement will be very technical and ought not to be attempted without the advice of a lawyer, the use of a Section 30 Agreement can be an effective and efficient manner of proceeding.

**The Notice of Application for Approval to Expropriate and the Owner’s Right to Request a Hearing of Necessity**

The first step in the formal expropriation process is for the expropriating authority to serve upon the registered owners of lands a Notice of Application for Approval to Expropriate Land. A registered owner is an owner of land whose interest in the land is defined and whose name is specified in an instrument in the Land Registry Office or Sheriff’s Office, and includes a person shown as a tenant of land on the last revised assessment roll. The approving authority, to which application for approval to expropriate is made, is generally speaking the Minister responsible for the administration of the Act in which the power to expropriate is granted. An expropriating authority cannot expropriate land without the approval of the approving authority. Further, the expropriating authority is required to publish the Notice of Application for Approval to Expropriate once a week for three consecutive weeks in a newspaper having general circulation in the locality in which the lands are as situate.
Once an owner is served with the Notice of Application for Approval to Expropriate Land, an owner has 30 days to request what is commonly referred to as a “hearing of necessity”. The hearing of necessity process is governed by Section 7 of the *Expropriations Act*, which indicates that, if an owner has requested a hearing in writing, the approving authority shall refer the matter to the Chief Inquiry Officer who must appoint an inquiry officer to hear the matter. At the hearing of necessity, the expropriating authority must demonstrate, to the satisfaction of the inquiry officer, that the proposed expropriation is “fair, sound and reasonably necessary in the achievement in the objectives of the expropriating authority”.

The purpose of a hearing of necessity is not to determine what compensation is payable to an owner, or whether an expropriating authority has made an adequate offer of compensation. Rather, the inquiry is directed toward the question of whether the proposed expropriation is “reasonably defensible” in the circumstances.

The hearing of necessity process imposes a number of hurdles which create significant disincentives to an owner to request a hearing of necessity. Those hurdles include the facts that:

a. the hearing officer has no power to make binding decisions, but rather only the power to make non-binding recommendations to the approving authority;

b. there is a limited scope for disclosure of documentation in the hearing of necessity process;

c. the expropriating authority defines the objectives of the expropriation, and it is beyond the scope of the inquiry to challenge the expropriating authority’s definition of the objectives in respect of which it must be demonstrated that the proposed expropriation is fair, sound and reasonably necessary;

d. an owner’s ability to recover the costs of a hearing of necessity is very limited, since an inquiry officer can only recommend that an approving authority pay costs not to exceed $200.00.

Notwithstanding the difficulties outlined above, the hearing of necessity process has been used by many landowners to have a substantive impact on the proposed expropriation. For example, the hearing of necessity process has been used to reduce the scope of a proposed acquisition from fee takings to easement takings, expand an expropriation from a partial fee taking to a total fee taking, and to amend the plans for the construction of proposed interchanges along a controlled access highway.

If no hearing of necessity is requested, or where a hearing is held and the inquiry officer has delivered a written recommendation to the expropriating authority, the expropriating authority will then proceed to consider the inquiry officer’s recommendations and approve or not approve the proposed expropriation with such modifications as the approving authority considers proper. The approving authority must give written reasons for its decision and must serve the decision of the inquiry officer as well as the expropriating authority’s reasons on all parties within 90 days after the date on which the approving authority receives the report of the inquiry officer. Once approved, an approving authority must certify its approval in a form prescribed by the legislation.

**Registration of the Plan of Expropriation, and Service of the Notices of Expropriation, Election and Possession**

Once an expropriation is approved, the expropriating authority has 3 months to register a Plan of Expropriation signed by an expropriating authority and by a land surveyor in the Registry Office. The registration of the Plan of Expropriation is significant in a number of respects. First, upon registration of the plan, legal title to those lands expropriated by the plan vests with the expropriating authority. While an owner may remain in possession of the
land for a time after the registration of a Plan of Expropriation, that owner is no longer the legal owner of the lands specified in the Expropriation Plan.12 Secondly, the date for the registration of the plan triggers a number of time requirements for the accomplishment of further steps by the expropriating authority in effecting the expropriation.

Once a Plan of Expropriation is registered, the expropriating authority has 30 days to serve upon a registered owner Notices of Expropriation and Election. The Notice of Expropriation simply notifies the owner that the land has been expropriated and legal title has vested with the expropriating authority. The Notice of Election provides an owner with the opportunity to elect the valuation date for the purposes of the determination of compensation. The possible dates which are set forward in the Notice of Election are:

a. where there has been an inquiry, the date the Notice of Hearing was served;
b. the date of the registration of the Expropriation Plan; or
c. the date on which the owner was served with the Notice of Expropriation.

An owner has 30 days from the date of service of the Notice of Election to make an election, and if an election is not made within 30 days, then the owner is deemed to have elected to have the compensation assessed as of the date of the registration of the plan.13

Typically, an expropriating authority will deliver a Notice of Possession at the same time as the Notices of Expropriation and Election are served. The Notice of Possession must specify a date for possession that is at least 3 months after the date of the service of the Notice of Possession, and in any event only an offer of compensation for the expropriation has been made by the expropriating authority pursuant to Section 25 of the Expropriations Act.14 In partial takings, a common approach to measure the impact of the expropriation on the value of the remaining lands is to compare the value of the property with and without the expropriation. Since the registration of the Plan of Expropriation marks a significant milestone in the expropriation process, and does in the majority of cases become the valuation date, an owner is well advised to retain the services of both a professional appraiser and an expropriations lawyer as early on in the process as possible. This will ensure that the state of the property as of the valuation date, and before possession of the expropriated lands is surrendered, is properly documented for comparison purposes.

In addition, once the Notice of Expropriation has been served, an expropriating authority will be moving rather quickly to complete an appraisal report to be furnished to the owner along with an offer of compensation pursuant to Section 25 of the Expropriations Act, as will be discussed below. Once the Notice of Expropriation has been served, the Expropriations Act provides that an expropriating authority may enter on the expropriated lands for the purposes of viewing for appraisal. If the owner’s consent to the entry is refused, the expropriating authority has the power to apply to the Ontario Municipal Board for an Order permitting access to the property for the purposes of appraisal, which may include the power to conduct environmental testing.15 Again, it is recommended that an owner retain the services of an appraiser and a lawyer to ensure that their rights are properly protected at this point in the process.

The Statutory Offer of Compensation - Section 25 of the Act17

Where no agreement as to compensation has been made with an owner, an expropriating authority must, within 3 months after the registration of a Plan of Expropriation and before taking possession of the expropriated land, serve upon the registered owner an offer of compensation. In effect, Section 25 of the Expropriations Act requires the offer of compensation to be broken down into two parts. First, the offer under 25(1)(a) requires an offer of an amount in full compensation for the registered owner’s interest; Section 25(1)(b) requires an offer to the owner of immediate payment of 100% of the amount of the market value of the owner’s land as estimated by the expropriating authority.
The difference between offer a) and offer b) under Section 25 of the *Expropriations Act* is fundamental. If an owner accepts the offer under subsection 25(1)(a), his or her rights to claim additional compensation are arguably extinguished. If the offer is accepted under Section 25(l)(b), the owner is without prejudice to make an application for the determination of full compensation, including business losses and other damages, in accordance with the *Expropriations Act*.

The *Expropriations Act* requires the expropriating authority to base its offer of compensation pursuant to Section 25 on an appraisal report appraising the market value of the lands being taken and damages for injurious affection. The expropriating authority is required to furnish the appraisal report to the owner along with the Section 25 offer.

In most cases, I recommend acceptance of the offer made under Section 25(1)(b) of the *Expropriations Act*, which may be accepted without prejudice to the owner’s rights to make further claims for additional compensation. Obviously, the advice a landowner receives will vary in the circumstances, and an owner is well advised to obtain the advice of an appraiser and a lawyer before accepting any offer of compensation made by an expropriating authority.

### The Requirement to Deliver Written Notice of Particulars of a Claim for Injurious Affection - Section 22 Notice

Perhaps one of the most important limitation periods imposed by the *Expropriations Act* is the requirement of an owner to notify the expropriating authority, in writing, of the particulars of a claim for injurious affection within one year after the damage was sustained or after it became known to the person. If the written notification of particulars of a claim for injurious affection is not delivered within the prescribed time, the *Expropriations Act* provides that the right to make a claim for injurious affection is forever barred.\(^\text{16}\)

Much of the case law which has arisen from disputes about Section 22 of the *Expropriations Act* has to do with the determination of the time for the commencement of the limitation period. When does an owner become aware of a claim for injurious affection?

The Ontario Municipal Board and the Courts have been rather generous in their interpretation of the requirements in Section 22 of the *Expropriations Act*, to prevent the use of this section to defeat a *bona fide* claim for injurious affection.\(^\text{17}\) As a practical note, it is always advisable, on every partial taking, to give written notice of injurious affection promptly after the fact of an expropriation is known. The particulars of the claim may not be known at the time the notice is given, but they can be supplied later. The objective is to preserve the limitation period.

### Compensation Claims Pursuant to the *Expropriations Act*

The general categories of compensation to which an owner is entitled are detailed in Section 13(2) of the *Expropriations Act*. They include:

- a. the market value of the land;
- b. the damages attributable to disturbance;
- c. damages for injurious affection; and
- d. any special difficulties in relocation.

While market value and injurious affection are terms defined in the Act, there is no definition of “disturbance” or specificity in the definition of “special difficulties in relocation”. To be certain, there have been many cases fought on the issue of the proper classification of claims into one of the four heads of damage outlined in Section 13(2) of the Act. Some of this is undoubtedly driven by the entitlement to interest stipulated in the *Expropriations Act*, which requires an expropriating authority to pay interest on the portion of the market value of...
the land expropriated and any allowance for injurious affection to which an owner is entitled. In effect, while the market value of the land expropriated and any damages awarded for injurious affection attract interest from the date that the owner ceases to reside on or make productive use of the lands (usually the date of the registration of the Expropriation Plan), disturbance damages will only attract interest from the date they are awarded until the date they are paid. In some cases, categorization of damages as disturbance damages could result in the denial of many years interest to the owner.

In addition to the difficulties owners and expropriating authorities have had in categorizing the claims for damages, the Expropriations Act provides further rights of compensation that must not be ignored. They include the following:

a. the right to claim an additional amount of compensation as, in the opinion of the Board, is necessary to enable an owner to relocate his or her residence in accommodations that is at least equivalent to the accommodation expropriated;

b. the right to claim damages for such reasonable costs as are the natural and reasonable consequences of the expropriation, including:
   i. in the case of a residential property, an allowance for inconvenience and the cost of finding another residence of 5% of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes;
   ii. an allowance for improvements the value of which is not reflected in the market value of the land;
   iii. where the premises taken do not include an owner’s residence, the owner’s cost of finding premises to replace those expropriated;
   iv. relocation costs, including moving costs, legal, survey and other non-recoverable expenditures incurred in acquiring other premises;

c. tenant allowances for disturbance;

d. compensation for business loss resulting from the relocation of a business made necessary by an expropriation;

e. where it is not feasible for an owner to relocate a business, an amount not exceeding the value of the goodwill of a business.

How these claims are categorized, and what evidence must be called to support them, will be the subject of considerable expert advice from planners, engineers, appraisers, and lawyers. Obviously, an owner will require advice from these experts prior to initiating a claim for compensation under the Expropriations Act.

The Claim Process Before the Ontario Municipal Board

Pursuant to the Expropriations Act, the Ontario Municipal Board is charged with the responsibility to adjudicate expropriation compensation claims. Given the backlogs and delays in the Civil Court system in Ontario, the fact that expropriation claims are governed by the Ontario Municipal Board in the first instance will help provide a more expeditious resolution of the issues involved.

Before the Ontario Municipal Board can open a new expropriation compensation matter, the expropriating authority and the owner must have either gone through a proceeding before a specialized tribunal known as the Board of Negotiation, or else have waived the requirement to proceed before a Board of Negotiation. The Board of Negotiation is intended to provide an informal form for landowners and expropriating authorities to have an opportunity to mediate or resolve outstanding claims for compensation without having to incur the cost of
compliance with the procedural requirements of the Ontario Municipal Board. In many cases, Board of Negotiation proceedings are helpful, in the sense that they assist the parties in narrowing and defining the issues. On the other hand, since a Board of Negotiation proceeding must be completed (or alternatively waived) before the claim process before the Ontario Municipal Board begins, there is often a lack of information available to the parties to resolve the compensation claims. Experience dictates that, while helpful, it is not common for the Board of Negotiation process to yield a resolution.

Once the Board of Negotiation process has been completed, or alternatively waived by the parties, the next step in the claim process is for one party to the proceeding to issue a Notice of Arbitration. The Notice of Arbitration simply puts the other party on notice that they require that the compensation payable as a result of the expropriation be arbitrated by the Ontario Municipal Board. While a Notice of Arbitration is commonly combined with a Statement of Claim by an owner, it is possible for an expropriating authority to issue a Notice of Arbitration. Once a Notice of Arbitration has been issued, it is incumbent upon the landowner to then issue a Statement of Claim. The Statement of Claim will detail the claims to be arbitrated by the Ontario Municipal Board, as well as the amount claimed for each item of compensation identified in the document. The Rules of the Ontario Municipal Board require that the Notice of Arbitration and Statement of Claim be served upon the other party, and then filed with the Board.

Upon being served with a Notice of Arbitration and Statement of Claim, an expropriating authority has 20 days to serve a Reply pleading upon the Claimant. In the vast majority of cases, if an expropriating authority has not already retained a lawyer to respond to the claim, it will do so once served with a Notice of Arbitration and Statement of Claim. The Reply is meant to outline the position of the expropriating authority in response to each of the claims advanced by the Claimant.

One useful procedure which the Ontario Municipal Board has in place is the opportunity for the Board to issue a Procedural Order to govern the progress of the matter toward a hearing. The Civil Courts, through their new case management initiative, have begun imposing timelines in much the same way as the parties before the Ontario Municipal Board have been doing for years. The Procedural Order, which is often negotiated by the parties and submitted to the Ontario Municipal Board on consent, will contain timelines and deadlines for completing various pre-hearing procedures, such as documentary production, examinations for discovery, completion of motions, service of expert reports and reply reports, and the date for the commencement of the hearing itself. Each and every step of the way, strategic decisions are made about the nature of the claims advanced, the type of evidence that will be relied upon in support of the claims, and the conduct of the hearing. Given the highly specialized nature of an expropriation proceeding, both landowners and expropriating authorities will benefit from retaining experienced professionals to guide them through the process.

**Interest**

The *Expropriations Act* provides that an owner of lands expropriated is entitled to be paid interest on the portion of the market value of the owner’s interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled. The interest is calculated at the rate of 6% per year from the date the owner ceases to reside on or make productive use of the lands.²⁶

It is important to note that the date on which an owner ceases to reside on or make productive use of the lands is not necessarily the date on which possession is surrendered. For example, in *Boyd v. Ontario Ministry of Transportation* [1995] O.M.B.D. No. 783, the Claimant purchased vacant land for redevelopment. When the Claimant learned of the Ministry of Transportation’s intention to expropriate the property, the land was still vacant.
The Board found that productive use of the property ceased when the expropriation was approved by the Ministry and all hope for redevelopment was lost. Thus, interest pursuant to Section 33(1) of the Expropriations Act can be awarded from a date that predates the actual registration of an Expropriation Plan or the surrender of possession.

Another important fact to bear in mind is that interest pursuant to Section 33(1) of the Expropriations Act is awarded only on the market value of the land expropriated and any allowance for injurious affection. Disturbance damages appear to have been deliberately omitted from this section. Accordingly, disturbance damages will only attract interest from the date of the Ontario Municipal Board’s award of these damages forward.

**Costs**

What many landowners and appraisers may not appreciate is that the Expropriations Act contains specific provisions directed toward reimbursing an owner for the reasonable legal, appraisal and other costs incurred by the owner for the purposes of determining the compensation payable to the owner upon an expropriation or claim for injurious affection. To be clear, Section 32(1) of the Expropriations Act provides as follows:

32(1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44(d).

In most cases, the “amount offered” by the statutory authority has been taken to mean the amount offered pursuant to Section 25 of the Expropriations Act. In one case, Bellwood v. Clearview (Town) (1994), 54 L.C.R. 185 (O.M.B.), the Board held that it was entitled to look to a subsequent, and more substantial, offer of compensation made by an expropriating authority in determining whether to award the Claimants their costs. The rationale of the Board’s decision in Bellwood is arguably inconsistent with the positive statutory obligation of the authority to determine its opinion of market value pursuant to Section 25 of the Act, and could potentially discourage a settlement. Whether Bellwood will survive the test of time remains to be seen.

Even if an owner is not awarded at least 85% of the amount offered by the statutory authority, Section 32(2) of the Expropriations Act leaves it in the Board’s discretion to order the payment of an owner’s reasonable legal, appraisal and other costs. Whether the Board will exercise this discretion depends on a number of factors, not the least of which is the Claimant’s conduct. In circumstances where a Claimant has had expert advice and has conducted itself fairly and without undue delay, it is unlikely that the Board would refuse a Claimant reimbursement for their reasonable legal, appraisal and other costs.

The Expropriations Act provides that an owner is entitled to be reimbursed for their “reasonable” costs. Unfortunately, “reasonable” is not defined in the Act. Thus, it has been for the Board and Court appointed assessment officers to decide what is “reasonable”. Unreasonable costs have been held to include duplication of time, unnecessary disbursements and fees, the cost incurred for experts whose reports were not served or relied upon in the conduct of the hearing, and inefficient conduct of a case. Again, an owner who retains experienced advisors will minimize the risk of having their reimbursement for costs significantly reduced on an assessment.

**Conclusion**
As with any area of the law, the process of expropriation can be daunting and confusing for those who have never had to look inside the expropriation “box”. The intention of this paper has been to provide you with a brief look inside the box, so that you will be better equipped to address the substantial task of valuing the loss arising from an expropriation.

For those of you who are interested, and wish to learn more about the expropriation process, I encourage you to review the Ontario Chapter of The New Law of Expropriation (Toronto: Carswell, 1986+), the leading text on expropriations in Canada. I recently completed an update of the Ontario Chapter, and our lawyers at Borden Ladner Gervais LLP keep the textbook current with regular updates. The text will provide the expropriation profession with a much more detailed discussion of the issues outlined only briefly above.

1Expropriations Act, R.S.O. 1990 c. E.26, Section 1(1).
2 See Section 1(1) of the Act.
3 This is subject to some notable exceptions, as provided in Sections 5(1), 4, 5, and 6 of the Act.
4 See Section 4(1) of the Act.
5 See Section 7(5) of the Act.
9 York (Regional Municipality) v. Gill (unreported, heard April 3 and 4, 1985, inquiry officer Goldkind).
10 Crozier v. Ontario (Ministry of Transportation), an unreported decision of inquiry officer Freidin, heard December 4, 5 and 7, 2000.
11 See Section 8(1)(2) and (3) of the Act.
12 In cases of partial takings, an owner may be well advised to notify the property taxing authorities to ensure that an appropriate adjustment is made in the current value assessment to reflect the loss of a portion of the land.
13 See Section 10(2) of the Expropriations Act.
14 See Expropriations Act, Section 39(1).
16 See Section 22(1) of the Expropriations Act.
18 See Section 15 of the Expropriations Act.
19 See Section 18(1)(a)(i) of the Expropriations Act.
20 See Section 18(1)(a)(ii) of the Expropriations Act.
21 See Section 18(1)(b) of the Expropriations Act.
22 See Section 18(1)(c) of the Expropriations Act.
23 See Section 18(2) of the Expropriations Act.
24 See Section 19(1) of the Expropriations Act.
25 See Section 19(2) of the Expropriations Act.
26 See Section 33(1) of the *Expropriations Act*.

**AUTHORS**

Frank Sperduti  
T 416.367.6243  
FSperduti@blg.com
### BLG OFFICES

**Calgary**
- Centennial Place, East Tower
  - 1900, 520 - 3rd Avenue S.W.
  - Calgary, Alberta, Canada
  - T2P 0R3
  - T 403.232.9500
  - F 403.266.1395

**Montreal**
- 1000 De La Gauchetière Street West
  - Suite 900
  - Montréal, Québec, Canada
  - H3B 5H4
  - T 514-954-2555
  - F 514-879-9015

**Toronto**
- Scotia Plaza
  - 40 King Street West
  - Toronto, Ontario, Canada
  - M5H 3Y4
  - T 416.367.6000
  - F 416.367.6749

**Vancouver**
- 1200 Waterfront Centre
  - 200 Burrard Street
  - Vancouver, British Columbia, Canada
  - V7X 1T2
  - T 604.687.5744
  - F 604.687.1415

**Ottawa**
- World Exchange Plaza
  - 100 Queen Street
  - Ottawa, Ontario, Canada
  - K1P 1J9
  - T 613.237.5160
  - F 613.230.8842

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