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03-U-253768CM 3
~~95-ET-21521CA~~

Court File No.

**SUPERIOR COURT OF JUSTICE
(ONTARIO)**

BETWEEN:

THE CHIPPEWAS OF SAUGEEEN FIRST NATION

Plaintiff

- and -

**THE CORPORATION OF THE TOWNSHIP OF AMABEL,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE ATTORNEY GENERAL OF CANADA, BARBARA
TWINING, LARRY TWINING, DAVID DOBSON,
ALBERTA LEMON, SAUBLE BEACH DEVELOPMENT
CORPORATION, ESTATE OF WILLIAM ELDRIDGE
AND ESTATE OF CHARLES ALBERT RICHARDS,
ATTORNEY GENERAL OF ONTARIO**

Defendants

MOTION RECORD

Date: 5 SEPTEMBER 2002

DEREK T. GROUND
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Toronto, Ontario
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E-mail: dtg@istar.ca
Solicitor for the Plaintiff

**SUPERIOR COURT OF JUSTICE
(ONTARIO)**

BETWEEN:

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Plaintiff

- - and -

**THE CORPORATION OF THE TOWNSHIP OF AMABEL,
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CORPORATION, ESTATE OF WILLIAM ELDRIDGE
AND ESTATE OF CHARLES ALBERT RICHARDS,
ATTORNEY GENERAL OF ONTARIO**

Defendants

AFFIDAVIT OF WILLIAM B. HENDERSON

**I, WILLIAM B. HENDERSON, Barrister & Solicitor, of the City of Toronto, MAKE
OATH AND SAY AS FOLLOWS:**

- I am the solicitor of record for the Saugeen First Nation (the "SFN"), the plaintiffs in this action. I have been on the record since April 2000, and as such I have knowledge of the matters to which I herein depose.

2. I swore a previous affidavit in this matter on 25 January 2002. That affidavit was for the purpose of transferring the matter herein from London (Southwest Region) to Toronto, and much of the information therein is relevant to this motion. As such, I would ask that the Affidavit of 25 January 2002, filed, be incorporated and reviewed in support of this motion as well.

3. Of particular import to this motion are the following paragraphs of the 25 January 2002 Affidavit:

Paragraphs 13 – 16, 19, 30, 33-37

4. As all parties believe that the nature of this proceeding is most appropriate for a judge, the parties have consented to a request for an order under section 77.09.1(1) of the Rules of Civil Procedure appointing judge to manage this proceeding in accordance with the Rules.

5. The parties are of the view that this is a reasonably detailed piece of litigation, and that if there are to be meditative aspects to case management and a prospect of settling some or all matters outstanding in the litigation, then the process needs to engage the authority of a judge.

6. Rule 77.09 (5) (a) – (j) sets out the criteria for assigning a judge to manage a proceeding.

A. The Purpose of Case Management

As I understand it, the purpose of case management is to expedite litigation, narrow and/or resolve the issues and guide counsel. Given what follows, I believe that this case is an ideal candidate for such a system.

B. The Complexity of the Issues of Fact or Law

This is a claim involving Aboriginal and Treaty rights to a disputed strip of beach-front land that abuts a significant Southern Ontario resort town and which is occupied by seasonal businesses. The relevant historical evidence dates back at least to 1836. There is also an issue of a disputed survey.

A similar case involving a disputed survey and beach front land, *Gibbs et al. v. Corporation of the Village of Grand Bend* (1989) 71 O.R. (2d) 70 (OHCJ), took approximately 70 days of trial time, even without an Aboriginal aspect to the case.

As the court is no doubt aware, Aboriginal and treaty rights cases are among the most notoriously complex cases to litigate.

C. The Importance to the Public of the Issues of Fact or Law

This case is of significant importance to both the Aboriginal and non-Aboriginal members of the public in the effected claim area, and may have some implications for similar cases throughout Ontario.

D. The number of Parties or Prospective Parties

There are five defendants to this matter, two of whom are government parties.

E. The Number of Proceedings Involving the Same or Similar Parties or Causes of Action

There is one related action currently before the courts, *The Attorney General of Canada v. The Corporation of the Township of Amabel*. The Court File of the Related Action is 44874/90. The genesis of the related action is outlined in my affidavit of 25 January 2002.

F. The Amount of Intervention by the Case Management Judge that the Proceeding is Likely to Require

Although all parties have been co-operative and constructive thus far, we are of the view that judicial intervention and guidance will be required with some frequency, and will assist the parties in assisting to resolve or narrow the issues.

G. The Time Required For Discovery, if Applicable, and for the Preparation for Trial or Hearing

Given the volume of historical evidence, the number of parties and the nature of some of the expert evidence, this will be significant.

H. The Number of Expert Witnesses and Other Witnesses

There likely will be several expert witnesses from at least three of the Parties (Saugeen First Nation, Canada and Ontario). Those experts may include historians, hydrologists, real estate appraisers, loss of use experts and survey experts.

I. The Time Required for the Trial or Hearing

As noted above, the *Gibbs* case required 70 days even without and Aboriginal aspect. Beyond simply noting that there are some significant differences between that case and this that are both more and less complicating, it would be irresponsible to comment further.

J. Other Factors

The most significant other factor in my view is that all parties believe that case management by a judge is the most effective way to move this litigation along and resolve or narrow some of the issues involved. In a case of this nature with this number of parties, it is my belief that this is a very significant factor.


7. I make this affidavit in support of a motion to have this matter transferred to case management and to have a judge assigned to the matter, and for no other or improper purpose.

Sworn before me at the City of Toronto)

in the Province of Ontario)

this 9th day of July 2002)


DEREK T. GROUND, A Commissioner, etc.)


WILLIAM B. HENDERSON

**SUPERIOR COURT OF JUSTICE
(ONTARIO)**

BETWEEN:

THE CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiff

- and -

**THE CORPORATION OF THE TOWNSHIP OF AMABEL,
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CORPORATION, ESTATE OF WILLIAM ELDRIDGE
AND ESTATE OF CHARLES ALBERT RICHARDS,
ATTORNEY GENERAL OF ONTARIO**

Defendants

AFFIDAVIT OF WILLIAM B. HENDERSON

**I, WILLIAM B. HENDERSON, Barrister & Solicitor, of the City of Toronto, MAKE
OATH AND SAY AS FOLLOWS:**

- 1. I am the solicitor of record for the Saugeen First Nation (the "SFN"), the plaintiffs in this action. I have been on the record since April 2000, and as such I have knowledge of the matters to which I herein depose.

HISTORY OF THE FILE

2. I have had previous involvement with this file, as I was solicitor for the SFN in this matter at the time of the commencement of a related action (the "Related Action"), as outlined below.
3. This present Action was commenced by issuance of a Statement of Claim on 18 October 1995. Counsel for the SFN at that time was Brian Daly, then of the law firm Harrison Elwood in London, Ontario. While the SFN is located in Bruce County, the county seat of which is Walkerton, this action was commenced in London. At the time, Mr Daly was the only counsel on the matter practising in London.
4. The Related Action was commenced by the Attorney General of Canada (the "AG Canada") by issuance of a Statement of Claim dated 18 January 1990 in *The Attorney General of Canada v. The Corporation of the Township of Amabel*. The Court File of the Related Action is 44874/90. It was proposed in the Statement of Claim that the Related Action be tried at Toronto. The Related Action was brought by the AG Canada against the Corporation of the Township of Amabel only.
5. The AG Canada brought the Related Action pursuant to section 5 of the *Department of Justice Act*. In the Related Action, the AG Canada claims, in part,

A declaration that that portion of Sauble Beach, in the Saugeen Peninsula, which is now from time to time used by the Corporation of the Township of Amabel ... is held in trust by Her Majesty the Queen in Right of Canada for the sole use and benefit of the Saugeen band, and that the Corporation of the Township of Amabel has no interest in such lands.

In essence, the AG Canada was purporting to act on behalf of the SFN's interest in bringing this action.

6. I have been practising law in the field of Aboriginal rights for almost 20 years, and am aware of only one other instance in Ontario in which the AG Canada has brought an action on behalf of an Indian Band or First Nation. It is, to say the least, unusual in Canadian jurisprudence.
7. The unusual nature of the Related Action ultimately lead to the SFN retaining its own counsel in 1990 for the purpose of monitoring the file and ensuring that the interests of the SFN were being addressed. At the time, I was retained as counsel to the SFN through the law firm of Blaney McMurtry in Toronto, where I was then practising.
8. As the Related Action proceeded, to the extent that it did, it became increasingly clear - at least to the SFN - that the AG Canada was in a conflict of interest situation, as it was arguing positions that were at odds with at least two other claims it was then defending in Ontario. One of those files is still active.
9. In 1991, I was seconded from the law firm of Blaney McMurtry to serve as Counsel to the Federal Indian Specific Claims Commission. That move ended my involvement with the file until April of 2000.
10. The file moved through one other solicitor before it went to Mr Daly. In 1995, Mr Daly commenced the present action on behalf of SFN. I am informed by Chief and Council of the SFN, and do verily believe, that at the point SFN commenced its own litigation in this present action, they had reached the

determination in concert with counsel that the interests of the AG Canada and the SFN were so divergent as to result in a direct conflict of interest.

11. A review of the file from 1995 - 1999 indicates that there were several efforts made among all counsel to settle this matter.
12. In late 1999 the SFN determined that it wished to proceed in this matter with different counsel. In April 2000, I was asked to be lead counsel with my colleague Derek Ground as co-counsel.

CURRENT STATUS OF THE FILE

13. Since Mr Ground and I took over the litigation, we have had several Status Review Hearings by conference call with the Honourable Madam Justice Leitch. These hearings have in turn led to several meetings among counsel in Toronto. The thrust of both the Status Review Hearings and the meetings among counsel have been that counsel and the clients wish to explore ways to resolve the outstanding issues other than by litigation.
14. At a meeting of counsel in Toronto in August 2001, counsel were presented with and suggested changes to a Draft Mediation Plan (the Draft Plan). The Draft Plan essentially narrowed the issues. All counsel were asked to get instructions from their clients to proceed with this. Both the AG Canada and counsel for the SFN were and are still agreed that for mediation to be successful and palatable to our clients, it would have to be conducted by a Justice of the Superior Court of Justice (Ontario). Counsel came to call this "judicial mediation".

15. The Draft Plan was sent to Madam Justice Leitch by facsimile with a covering letter outlining developments in advance of the Status Review Hearing scheduled for 5 September 2001. The letter presented the Draft Plan and requested that she mediate.
16. At the Status Review Hearing of 5 September 2001, Madam Justice Leitch stated that she was not going to endorse the Draft Plan until all clients had agreed on proceeding that way. Further, she wished to see a more detailed plan with timetables. She also suggested that we approach the Hon Regional Senior Justice D.R. McDermid to request judicial mediation.
17. By letter dated 2 October 2001 from Mr Ground, on behalf of all counsel, to the Hon Mr Justice McDermid, we requested judicial mediation. A true copy of Mr Ground's letter is attached hereto as "Schedule A" to this my affidavit. His Honour's response by letter of 5 October 2001 indicated that he was "uncertain" what the phrase judicial mediation "means" and that, pursuant to Rule 77 of the Rules of Civil Procedure, there was no ability in the Southwest Region to Case Manage this action in any event. His Honour did, however, make some suggestions as to alternative ways of proceeding. Mr Justice McDermid's letter of 5 October 2001 is attached hereto as "Schedule B" to this my affidavit.
18. Mr Justice McDermid's letter of 5 October 2001 to Mr Ground was circulated among all counsel for suggestions as to how to proceed. The suggestions made by Mr Justice McDermid were not felt to be satisfactory to counsel under the circumstances.

19. After some exchanges of correspondence and telephone calls among counsel in light of Mr Justice McDermid's letter, the consensus that developed was that the action should be transferred to Toronto in order that it can be case-managed.

REASONS FOR TRANSFER TO TORONTO

(a) Geography

20. Rule 46.03(2)(a) of the Rules of Civil Procedure reads as follows:

46.03 (2) In any other case, the court on motion by any party may order that the trial can be held at a place other than that named in the statement of claim where the court is satisfied that,

- (a) the balance of convenience substantially favours the holding of the trial at another place; ...

21. Here, all parties agree that the balance of convenience does indeed favour the transfer of the matter to Toronto.
22. As noted above, the trial was originally proposed to be held at London because, I can only infer, that was where the plaintiff's lawyer was located. Other than that, the case has no connection with the City of London or its surrounding county(ies).
23. The case does, however, have a connection through counsel with Toronto.
24. Both Mr Ground and I practice in Toronto.

25. Counsel of record for both the AG Canada and the Attorney General of Ontario both practice in Toronto. From our discussions among counsel, all parties agree that the success of the proposed mediation or any other resolution to the matter is largely dependant on the AG Canada and the SFN.
26. For Mr Basciano, counsel of record for the Sauble Beach Development Corporation, London and Toronto are at least temporally equidistant from Hamilton, where he practices.
27. The two counsel who might be most inconvenienced by the move to Toronto, Mr Murphy (for the corporation of the Township of Amabel) in Goderich and Mr Barrie (for certain private landowners) in Owen Sound are in favour of the transfer, as indeed are all counsel, as their consent to this motion evinces.
28. The fact that the trial is in London has been referred to as a "balance of inconvenience" for all counsel.
29. The meetings among counsel have been taking place in Toronto.

(b) Case Management

30. As previously indicated, all counsel are of the view that the suggestions of the Hon. Mr Justice McDermid as outlined in his letter to Mr Ground of 5 October 2001 will not accomplish what we wish to accomplish. In order to do that, all counsel are of the view that the action needs to be case-managed
31. As Mr Justice McDermid points out in his letter, Case Management is not available in the Southwest Region.

32. A Status Review Hearing, which commenced in April 2000, has been adjourned on several occasions as counsel develop consensus on certain issues and procedures. Throughout, counsel have been co-operating and have been making some progress in terms of their clients' positions.
33. All counsel agree that we have now reached the stage where mediation would be very helpful in helping us to further narrow and resolve certain issues.
34. Case Management allows us and the Court system the flexibility to properly attempt to accomplish this. All counsel are also of the view that this represents a "balance of convenience" for the Court system as well.
35. We are proposing to attempt mediation in an Aboriginal land claims dispute involving, *inter alia*, a disputed survey. These cases are often highly contentious, and can involve weeks of trial time. As noted in Mr Ground's letter to the Hon. Mr Justice McDermid, counsel estimate that the trial in this case could easily take six weeks. Similar issues in the case of *Gibbs et al. v. Corporation of the Village of Grand Bend* (1989) 71 O.R. (2d) 70 (OHcj) took approximately 70 days of trial time, even without an Aboriginal aspect to the case.
36. There has been a general trend in jurisprudence, and in particular in jurisprudence concerning Aboriginal land rights, to encourage alternatives to litigation. The courts are, in particular, actively encouraging negotiation in cases of Aboriginal land rights.
37. We believe that Case Management that would involve a mediation aspect would be of immense benefit to all parties concerned and to the administration of justice. Even if the mediation aspect is ultimately unsuccessful, case

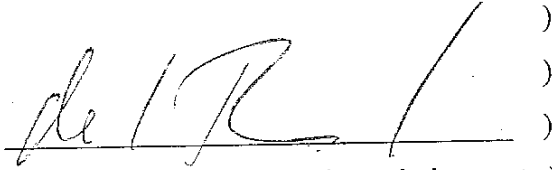
management will serve to streamline the litigation and to move it along faster, which is the second choice of each counsel and client involved.

38. I make this affidavit in support of a motion to transfer these proceedings to the Toronto Region and for no other or improper purpose.

Sworn before me at the City of Toronto)

in the Province of Ontario)

this 25th day of January 2002)



DEREK T. GROUND, A Commissioner, etc.)



WILLIAM B. HENDERSON

(#) 21

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Tel: (416) 604-3434 Fax: (416) 604-3596
E-mail: dtg@istar.ca

BY FAX TO: 1-519-660-2294

2 OCTOBER 2001

The Hon. Mr Justice D.R. McDermid
Regional Senior Justice
Court House
80 Dundas Street
15th Floor, Unit G
London, Ontario
N6A 6B3

THIS IS "SCHEDULE A"
TO THE AFFIDAVIT OF
WILLIAM A. HENDERSON
SWORN 25 SEPTEMBER 2002
Derek T. Ground
A Commissioner, etc.

Dear Sir:

RE: CHIPPEWAS OF SAUGEEN FIRST NATION v. CORPORATION OF THE TOWNSHIP OF AMABEL ET. AL. Court File No.21521/95

I write on behalf of all counsel in this matter at the suggestion of The Honourable Madam Justice Leitch to inform you of a recent request for judicial mediation in this matter.

Counsel in this matter held a meeting in Toronto on 29 August 2001 wherein it was agreed in principle (subject to final instructions from clients) that this matter is one that is appropriate for mediation.

By letter to Madam Justice Leitch in advance of a Status Review Hearing held by teleconference on 5 September we requested that she mediate the matter, as she has been the Case management judge on the file. With the letter we attached a Draft Mediation Plan

For a variety of reasons, Madam Justice Leitch was not at the time prepared to mediate the matter. Among other things, she wanted to see a more detailed mediation plan, complete with timetables, and to have the client instructions confirmed.

Our preliminary conversations with Madam Justice Leitch indicated that she is willing to be considered to mediate this matter, but does have some concerns about her availability. I understood from our conversations with her that she would be content to inform you of the nature of the dispute in this matter.

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DEREK T. GROUND, Barrister & Solicitor

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We are currently working on a detailed Draft Mediation Plan to be circulated among all counsel. It is hoped that the draft plan will have every party's input, and be finalized within the next two or so weeks. We anticipate, at this stage, that we may be looking at 18 months to resolve the issues. We do not, however, anticipate that the workload for the mediation judge would be as significant as that might indicate, but rather that there may be meetings with the judge on a set timetable, perhaps every six weeks or so or approximately 10 days or part days. Either a draft or the final draft of the plan will be forwarded in due course, so that you might have some idea what counsel thinks will be involved.

In the meantime, the status review hearing has been adjourned until 9 November 2001, at which time we hope to be on our way to mediation.

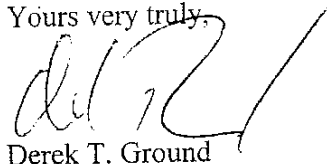
It was hoped that by alerting you of this development, you might be able to consider which of your judges may be available to do this. Our preference would be Madam Justice Leitch, if her availability permits it, as she is aware of the issues.

All counsel believe that mediation is preferable at this stage to avoid the necessity of a very long trial. At this point we would estimate six weeks of trial, although we note that similar issues in the Grand Bend case took 70 days or so.

Please contact me with any questions or concerns.

I thank you in advance for your consideration of our request, and look forward to hearing from you.

Yours very truly,



Derek T. Ground
Co-Counsel, Saugeen First Nation

c.: The Hon. Madam Justice Lynne Leitch
Bill Henderson – co-counsel, Saugeen First Nation
Jim Leising – counsel, Department of Justice Canada
Robert Ratcliffe – counsel, Attorney General for Ontario
Dan Murphy – counsel, Township of Amabel
Brian Barrie – counsel, Private Landowners
Tom Basciano – counsel, Sauble Beach Development Corporation

THE HONOURABLE MR. JUSTICE D. R. McDERMID
REGIONAL SENIOR JUSTICE
SUPERIOR COURT OF JUSTICE



16 23
L'HONORABLE JUGE D. R. McDERMID
JUSTICE PRINCIPAL RÉGIONAL
COUR SUPÉRIEURE DE JUSTICE

COURT HOUSE
80 DUNDAS STREET, 15th FLOOR, UNIT 1G
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(519) 660-2291
FAX (519) 660-2294

October 5, 2001

Mr. Derek T. Ground
Barrister and Solicitor
296 Durie Street
Toronto, ON M6S 3G3

Dear Mr. Ground:

Re: *Chippewas of Saugeen First Nation v. Corporation
of the Township of Amabel et al* – Court File No.: 21521/95

I have your letter of October 12, 2001, but am unable to meet your request for "judicial mediation." Firstly, I am uncertain what that phrase means because even under the proposed mandatory mediation system outlined by the Attorney General of Ontario, judges will not conduct the actual mediation. Moreover, Rule 77 does not apply in this Region, so there is no ability to "case manage" the action yet either.

My first suggestion is that you may wish to consider bringing a motion before the local administrative judge in London, Mr. Justice Jenkins, to have a judge appointed pursuant to r. 37.15 to hear all the motions in the action, in which case you will have to support the motion with affidavit material in the normal way, on notice to other parties.

My second suggestion is that you may wish to have a pre-trial conference, but only if the matter is sufficiently advanced that it would be a meaningful exercise.

The final alternative, of course, is private mediation.

Yours very truly,

THIS IS
"SCHEDULE B"
TO THE AFFIDAVIT OF
WILLIAM B. HENDERSON
SWORN 25 JANUARY 2002

DEREK T. GROUND,
A COMMISSIONER ETC

CHIPPEWAS OF SAUGEEN FIRST NATION
PLAINTIFF

and TOWNSHIP OF AMABEL et al.
DEFENDANTS

(Short title of proceeding)

Court File No. 21521/95

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SUPERIOR COURT OF JUSTICE
(ONTARIO)

AFFIDAVIT OF WILLIAM B. HENDERSON
(sworn 25th January 2002)

DEREK T. GROUND
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296 Durie Street
Toronto, Ontario M6S 3G3

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Fax (416) 604-3596
E-mail: dtg@istar.ca

Solicitor for the Plaintiff

THIS COURT ORDERS that:

pursuant to Rule 46.03(2)(a) of the Rules of Civil Procedure, the proposed place of trial of this action is changed from London to Toronto.



Judge

ORDER ENTERED
77-72
MAY 09 2002

Court File No.

SUPERIOR COURT OF JUSTICE (ONTARIO)

BETWEEN:

THE CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiff

- and -

**THE CORPORATION OF THE TOWNSHIP OF AMABEL,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE ATTORNEY GENERAL OF CANADA, BARBARA
TWINING, LARRY TWINING, DAVID DOBSON,
ALBERTA LEMON, SAUBLE BEACH DEVELOPMENT
CORPORATION, ESTATE OF WILLIAM ELDRIDGE
AND ESTATE OF CHARLES ALBERT RICHARDS,
ATTORNEY GENERAL OF ONTARIO**

Defendants

CONSENT

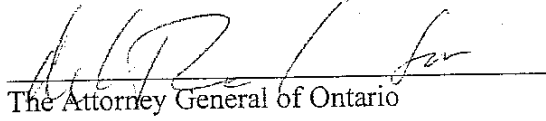
The undersigned defendants hereby consent to an Order placing this matter on the Case Management Track and assigning it to a judge pursuant to the Motion dated 5 September 2002.

Dated at TORONTO

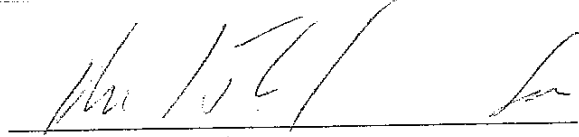
This 5th day of September 2002

[Signature] for

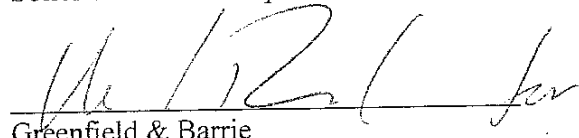
The Attorney General of Canada
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Per: Gary Penner
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Fax: 416-973-0809
Solicitor for Her Majesty the Queen in Right of Canada



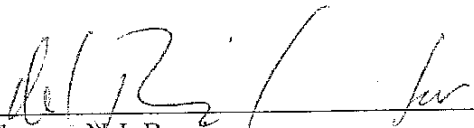
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Solicitors for the Corporation of the Township of Amabel



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