LAW SCHOOL

Exclusive Use and Enjoyment: a Case Brief

Section 109's second clause, persons not a collective, and the duty to observe.

The issue

Is the interest granted in 1784 an "interest other than that of the Province" under s. 109, held by persons and their posterity rather than a collective, such that the Crown must observe it, not merely consult, and may not license public use of the Tract without a surrender by the class?

The instruments

Instrument	Date	What it does
Haldimand Pledge	7 Apr 1779	Ratifies the promise to "some of the Mohawks" of three villages
Haldimand Proclamation	25 Oct 1784	Land "to enjoy for ever"
Committee minute	24 Dec 1791	"the faith of Government is pledged"
Constitution Act, 1867, s 109	1867	Provincial lands subject to "any Interest other than that of the Province"
Constitution Act, 1982, s 52	1982	The supreme law; inconsistent law of no force

The statutes

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 109.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 35, 52.

Criminal Code, RSC 1985, c C-46, s 122 (breach of trust by a public officer).

The cases

St Catharines Milling and Lumber Co v R, (1888), 14 App Cas 46 (PC)
Under s 109 the Province takes its lands subject to an interest other than its own, lifted only by surrender.

Ontario Mining Co v Seybold, [1903] AC 73 (PC)
A valid surrender frees the Province's title.

Doe d Jackson v Wilkes, (1835), 4 UCKB (OS) 142
The Six Nations on the Grand River were held not to be a body politic capable of holding the land as a corporation.

Delgamuukw v British Columbia, [1997] 3 SCR 1010
Aboriginal title is proved by exclusive occupation at sovereignty, and may be infringed if justified.

R v Boulanger, 2006 SCC 32
The elements of breach of trust by a public officer: a serious and marked departure from the standards of the office, with a dishonest, partial or corrupt purpose.

Reference re Manitoba Language Rights, [1985] 1 SCR 721
Laws made without meeting a constitutional requirement are invalid; deemed valid only for a time while put right.

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The arguments

	For the Crown	For the class
The right	An Aboriginal or treaty right of the Six Nations, under s 35	A Crown grant to persons, an interest other than the Province's under s 109
The holder	A collective (the band)	Persons and their posterity; not a body politic (Doe d Jackson v Wilkes)
The duty	Consult, and justify any infringement	Observe; a burden on title (St Catharines) lifted only by surrender (Seybold)
Public use	Licensed under provincial law	Licensing public use without a surrender is inconsistent with s 109; s 52 governs
Remedy	Compensation	Observance: the class licenses the use and takes the rent

Weak points to test

For the class: the courts' long treatment of the Grand River under s 35; whether s 109's second clause reaches an interest that was never a federal–provincial question; Doe d Jackson v Wilkes cuts both ways. For the Crown: why an interest granted by the Crown's own instrument should be measured by occupation; whether any surrender by the class exists.

Briefing note

A provincial ministry asks whether it may issue a permit for a pipeline crossing land within six miles of the Grand, after consulting the band. In 150 to 200 words, advise the ministry: the s 109 question, the difference between consulting and observing, and what it should do before issuing. Write it as a briefing note: purpose, background, considerations, recommendation.

Moot problem

Members of the Register apply for a declaration that the class's interest is an interest other than the Province's under s 109, and for an order prohibiting a ministry from licensing a pipeline across the Tract without the class's licence. The ministry relies on its consultation with the band.

For the applicants: the instruments, St Catharines, Seybold, s 52. **For the ministry:** s 35, consultation, and the band as the rights-holder. **For both:** whether a duty to observe is different in kind from a duty to consult.

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A worked outline: IRAC

Step	For the applicants
Issue	Must the ministry observe the class's s 109 interest before licensing public use of the Tract?
Rule	s 109; St Catharines; Seybold; s 52; the Manitoba Language Reference.
Application	The interest is Crown-granted, held by persons, never surrendered; consultation with a band does not meet a duty owed to the class.
Conclusion	A declaration, and an order prohibiting the licence without the class's.

The ministry's outline runs the same four steps the other way. Students draft it themselves.

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Written assignment: memorandum of argument

The task

Write the memorandum of argument for one side of the moot on this sheet: the applicants or the ministry, as your instructor assigns. Then argue it.

Requirements

- 2,500 words, not counting the list of authorities.
- Every authority cited in McGill Guide form, with pinpoints.
- At least six authorities, including at least two not on this sheet.
- Meet the other side’s best argument in Part III, not just your own case.
- Only facts set out in the moot problem; no new facts.

Structure

- Part I, the facts: a neutral statement, no more than two pages.
- Part II, the issues: each as a single question.
- Part III, the law and argument: issue by issue, the rule, its application, and the other side’s answer met.
- Part IV, the order sought: precisely worded.
- Part V, the list of authorities: statutes, then cases, then secondary sources.

Timeline

- Week 1: research; a one-page outline of your issues and authorities.
- Week 2: the full memorandum, exchanged with the other side.
- Week 3: oral argument.

Oral argument

Fifteen minutes a side, two minutes’ reply for the applicant. Expect questions from the bench from the first minute; the marking guide on the instructor’s page applies.

Integrity

Your memorandum must be your own. If you use an AI tool for research or drafting, verify every authority against the reports and say so in a note; an invented citation fails the assignment.

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For the instructor: standards met

Universal competencies	Identify key facts and claims; Understand perspective and point of view; Analyse and evaluate evidence; Apply: what does this mean for us?. The same everywhere, whatever the curriculum.
TRC Call to Action 28	Constitutional law (s 109, s 52, s 35), and the history of Aboriginal–Crown relations.
National Requirement	Problem-solving, legal research, and oral and written communication.
Citation	The McGill Guide; pinpoints left for students to supply.
Method	IRAC; a briefing note to a ministry; a moot on a declaration and prohibition.
Balance	The arguments both ways and their weak points; the brief names its own position.
Time	One class of 90 minutes; the moot as a separate session.

Marking guide: the moot

	Outstanding	Strong	Competent	Weak
Law	Every authority on point, accurately stated and pinpointed	Main authorities correct	Some missed or loose	Wrong or absent
Analysis	Applies the law to the facts and meets the other side's best point	Applies the law clearly	Applies it in part	States law without applying it
Structure	A clear road map, followed throughout	Clear and mostly followed	Some drift	Hard to follow
Advocacy	Answers the bench directly and returns to the theory	Answers well	Answers with difficulty	Avoids the questions

This brief sets out the Mohawk Nation of Grand River's position beside others, for study and argument. The case summaries are for teaching: read the reports. It is not legal advice.

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