LAW SCHOOL

Outside the Act: a Case Brief

The grant of 1784, the Indian Act, and ss. 88, 109 and 52.

The issue

Does the interest granted by the Haldimand Proclamation of 25 October 1784 to “some of the Mohawks” of three villages “and their posterity” subsist today as an interest preserved by s. 109 of the Constitution Act, 1867, outside the Indian Act and beyond the reach of s. 88; or was it merged into the Six Nations’ reserve and surrendered in part by the instruments of 1798, 1841 and after?

The instruments

Instrument	Date	What it does
Haldimand Pledge	7 Apr 1779	Ratifies the promise to restore “some of the Mohawks” of three villages
Haldimand Proclamation	25 Oct 1784	Grants six miles from each side of the Grand, “to enjoy for ever”, to the Mohawk and their posterity
Order in Council (Dorchester)	9 Nov 1789	Registry and the mark U.E.; the promise owed “without any diminution”
Committee minute (Collins)	24 Dec 1791	“The faith of Government is pledged to the Mohawk chiefs for the two tracts”; an Act or a grant under the Great Seal proposed (Series Q, vol. 329, p. 12)
Simcoe Patent (Treaty No. 4)	14 Jan 1793	Letters patent to the Six Nations as a body; sale bound to the Crown; signed by the Crown alone
Simcoe Proclamation	6 Apr 1796	The U.E. registry before the magistrates, on oath

The statutes

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, ss 91(24), 109, reprinted in RSC 1985, App II, No 5.

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

Indian Act, RSC 1985, c I-5, ss 2 (“reserve”), 37–39 (surrender and designation), 88.

United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14.

The cases

St Catharines Milling and Lumber Co v R, (1888), 14 App Cas 46 (PC)
The Indian interest under the Royal Proclamation is a burden on the Crown’s title, lifted by surrender; on Confederation the Province took its lands subject to it under s. 109.

Ontario Mining Co v Seybold, [1903] AC 73 (PC)
Once the interest is surrendered, the Province’s title under s. 109 is freed of it: the surrender is the trigger.

Sero v Gault, (1921), 50 OLR 27 (HC)
A Mohawk of the Bay of Quinte argued his people were allies, not subjects; held, they were British subjects bound by the fishery laws.

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Logan v Styres, (1959), 20 DLR (2d) 416 (Ont HC)
Six Nations people who settled under the Crown's grant and accepted its protection were held British subjects; the Indian Act and the 1924 Order in Council applied.

Isaac v Davey, (1974), 5 OR (2d) 610 (CA), aff'd on other grounds *Davey v Isaac*, [1977] 2 SCR 897
The Patent read as a personal and usufructuary right, title in the Crown: the lands a reserve, the Six Nations a band; the Supreme Court decided on other grounds and left the title undecided.

Guerin v R, [1984] 2 SCR 335
The Indian interest in reserve land is sui generis, and the Crown owes a fiduciary duty in dealing with it on surrender.

Reference re Manitoba Language Rights, [1985] 1 SCR 721
A law made without a requirement the Constitution imposes is of no force: s. 52 is mandatory, not directory.

R v Van der Peet, [1996] 2 SCR 507; *R v Powley*, 2003 SCC 43
The tests for s. 35 rights: integral practices of a community; a historic rights-bearing community, with self-identification, ancestral connection and community acceptance.

The arguments

	For the Crown	For the Mohawk class
Grantee	The Proclamation names "the Mohawk Nation and such others of the Six Nation Indians": one people, later the Six Nations band	The Pledge and the Proclamation's own reason single out "the Mohawk Indians"; others came in under them
Nature of the interest	A sui generis Indian interest held for a collective (Guerin), within s. 91(24)	A Crown-derived interest by deed of gift; s. 109's "Interest other than that of the Province", not a trust
The 1793 Patent	Restated the grant; read as a usufruct (Isaac v. Davey)	Refused by the class; cannot bind persons who never took it
Surrender	Made by the Six Nations through their chiefs and council	No surrender by the class; the posterity includes the unborn (Seybold: surrender is the trigger)
Membership	Band membership under the Act, or Powley's community test	The U.E. registry of 1789 and 1796: descent proved on oath
Provincial law	Applies through s. 88	s. 88 reaches neither a non-band nor a non-trust interest; s. 52 governs

Weak points to test

For the class: the text "such others of the Six Nation Indians"; the long practice of dealing with the Six Nations as one body; whether a deed of gift to an unascertained posterity is a known form of grant. For the Crown: whether a collective can surrender for persons it does not hold; whether s. 109's second burden can be read as a trust; whether Powley can find a right held person by person.

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Outside the Act: a Case Brief

Moot problem

A descendant of a Loyalist Mohawk of Canajoharie, entered on the Mohawk Nation of Grand River's Register and holding no status under the Indian Act, is charged under a provincial statute for building on unpatented land within six miles of the Grand, outside the Six Nations reserve. She pleads that the land is subject to the class's interest under s. 109 and that the statute, as applied, is of no force under s. 52.

For the applicant: establish the grantee, the nature of the interest and the absence of surrender. **For the Crown:** establish the merger in the Six Nations and the effect of the surrenders. **For both:** address s. 88, the s. 109 wording, and the standing of the U.E. registry as proof of membership.

Briefing note

A municipal planning officer receives an application for a building permit on land within six miles of the Grand River, outside the Six Nations reserve. A member of the Register has written to say the land is subject to the class's interest. In 150 to 200 words, advise the officer how to approach the question: what to ask, what to record, what authority decides, and what risk follows from each course. Write it as a briefing note: purpose, background, considerations, recommendation.

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Outside the Act: a Case Brief

A worked outline: IRAC

Step	For the applicant
Issue	Is the land subject to an interest preserved by s 109, and is the provincial statute, as applied, of no force under s 52?
Rule	Section 109's "Interest other than that of the Province"; St Catharines and Seybold on surrender as the only release; s 52 and the Manitoba Language Reference; the Proclamation's grant to the Mohawk and their posterity.
Application	The applicant proves descent on oath through the U.E. registry; the land lies within six miles of the bank; no surrender by the class is shown; she is not a band member, so s 88 does not reach her.
Conclusion	The statute cannot be applied to her on that land; a declaration and a stay of the charge.

The Crown's outline runs the same four steps the other way: the grant to one people, merged in the Six Nations; the Patent and Isaac v Davey; the surrenders; s 88 and Powley. Students draft it themselves.

Written assignment: memorandum of argument

The task

Write the memorandum of argument for one side of the moot on this sheet: the applicant or the Crown, 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.

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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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Outside the Act: a Case Brief

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	Law schools to teach Aboriginal people and the law: this brief covers the history of Aboriginal–Crown relations (the 1779–1796 instruments), treaties and Aboriginal rights (s 35, Van der Peet, Powley), Indian law (the Indian Act, ss 2, 37–39, 88), and the UN Declaration (art 26; SC 2021, c 14).
National Requirement	Federation of Law Societies of Canada: problem-solving (the issue and the IRAC outline), legal research (the instruments and the reports), and oral and written legal communication (the moot), within the required knowledge of constitutional law.
Citation	Canadian Guide to Uniform Legal Citation (the McGill Guide) for statutes and cases. Pinpoint citations are left for students to supply from the reports.
Method	IRAC for the written outline; a structured moot for oral argument.
Balance	The arguments both ways, and the weak points of each side, are set out; the brief names its own position.
Time	One class of 90 minutes, with the moot as a separate session of about two hours.

Marking guide: the moot

	Outstanding	Strong	Competent	Weak
Law	Every authority on point, accurately stated and pinpointed	Main authorities correct	Some authorities missed or loosely stated	Authorities 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 the Crown's, for study and argument. The case summaries are for teaching: read the reports. It is not legal advice.

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