LAW SCHOOL

The Posterity: a Case Brief

Certainty of a class, an unperformed duty, and its cure.

The issue

Is a grant to a class and its posterity certain enough to be given effect when the Crown never ascertained its members; can the Crown rely on its own failure; and what order would cure it?

The instruments

Instrument	Date	What it does
Haldimand Proclamation	25 Oct 1784	To the class “and their posterity … for ever”
Dorchester’s Order	9 Nov 1789	A registry, and the mark, to tell the posterity apart
Simcoe’s Proclamation	6 Apr 1796	Each to be ascertained on oath; the benefit lost by neglect
Gazette No. 63	2026	The Nation asks for mandamus

The statutes

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

Rules of Civil Procedure, RRO 1990, Reg 194, r 10.01.

Judicial Review Procedure Act, RSO 1990, c J.1, s 2.

The cases

McPhail v Doulton, [1971] AC 424 (HL)

A class is certain enough if it can be said of any given person that they are or are not a member, even if the whole class cannot be listed.

Manitoba Metis Federation Inc v Canada (AG), 2013 SCC 14

The honour of the Crown requires diligent fulfilment of solemn promises; persistent inattention breaches it.

Apotex Inc v Canada (AG), [1994] 1 FC 742 (CA), aff’d [1994] 3 SCR 1100

The conditions for mandamus.

St Catharines Milling and Lumber Co v R, (1888), 14 App Cas 46 (PC)

The Province takes subject to an interest other than its own.

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The arguments

	For the Crown	For the class
Certainty	A class never listed is too uncertain to enforce	Certain on the “is or is not” test: any person can be tested against the line and the oath
The Crown’s failure	The benefit was lost by neglect, as the Proclamation says	The neglect was the Crown’s; it cannot rely on its own failure (MMF)
Remedy	No public duty survives	Mandamus (Apotex), or a declaration (MMF)
Effect on titles	Registered titles are secure	The interest is preserved by s 109; recording it overturns no one

Weak points to test

For the class: McPhail is a trust case, and the Nation rejects the trust framing; the Proclamation’s own forfeiture words. For the Crown: whether a class can forfeit for the Crown’s failure to provide the procedure; MMF’s reach.

Briefing note

A land registrar is asked whether a member’s certificate of ascertainment from the Register can be noted against titles within the Tract. In 150 to 200 words, advise the registrar: what the certificate proves, what noting it would and would not do, and the risks. Write it as a briefing note: purpose, background, considerations, recommendation.

Moot problem

Members of the Register seek a declaration that the class is certain and ascertainable, that the Crown’s duty of 1796 subsists, and an order of mandamus that a justice of the peace receive their oaths and that they be recorded where titles are searched.

For the applicants: the instruments, McPhail’s test by analogy, MMF and Apotex. **For the Crown:** forfeiture by neglect, the lapse of time, and no present duty. **For both:** whether the Crown may rely on its own failure.

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A worked outline: IRAC

Step	For the applicants
Issue	Is the class certain, does the duty subsist, and should mandamus issue?
Rule	The instruments; the “is or is not” test (McPhail) by analogy; MMF; Apotex; s 109.
Application	Any person can be tested against the line and the oath; the Crown never provided the procedure; it cannot invoke the forfeiture it caused.
Conclusion	A declaration, and mandamus.

The Crown’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 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.

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	The history of Aboriginal–Crown relations, the honour of the Crown (MMF), and remedies (Apotex).
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 land registrar; a moot on declaration and mandamus.
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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