LAW SCHOOL

The So-Called Reserves: a Case Brief

Reserve creation, Crown title, and land already given.

The issue

Can land inside the six-mile Tract be a reserve within the Indian Act, which requires the legal title to be in the Crown, when the Crown granted the Tract in 1784 to the class and its posterity; and does a band by-law bind a member of the class on that land?

The instruments

Instrument	Date	What it does
Haldimand Proclamation	25 Oct 1784	The Tract to the class “for ever”
Committee minute	24 Dec 1791	The faith of Government pledged for the two tracts
Simcoe Patent	14 Jan 1793	Taken up by the Six Nations; refused by the class
Indian Act	1876	A reserve: Crown title, set apart for a band
Reserve limits	NRCan v. 2.189	About 44,160 acres inside, 1,420 outside

The statutes

Indian Act, RSC 1985, c I-5, ss 2(1) (“reserve”), 18, 81.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, ss 91(24), 109.

The cases

Ross River Dena Council Band v Canada, 2002 SCC 54

How a reserve is created: the Crown must intend to create it and take steps that show that intention.

Wewaykum Indian Band v Canada, 2002 SCC 79

Reserve creation, and the Crown’s duties before and after it.

Isaac v Davey, (1974), 5 OR (2d) 610 (CA)

The Grand River lands read as a reserve under the Indian Act.

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.

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The arguments

	For the Crown and the band	For the class
Crown title	The Crown holds title to the reserve	The Crown gave the Tract in 1784; it cannot set apart what it gave
Creation	Intention and steps (Ross River)	No intention can create a reserve on land the Crown does not hold
The class	Part of the band	Not a band (the Act requires one); outside the Act
By-laws	Bind all on the reserve (s 81)	Cannot bind the class on land inside the Tract

Weak points to test

For the class: the long recognition of the reserve (Isaac v Davey); the Simcoe Patent as the Crown's title; s 91(24). For the Crown: Ross River's requirement of Crown title; the 1791 minute; the Act's own words, "any particular band".

Briefing note

A band asks whether its zoning by-law can be enforced against a member of the class living inside the six-mile line. In 150 to 200 words, advise the band: the Indian Act's definition, the 1784 grant, and the risks of enforcement. Write it as a briefing note: purpose, background, considerations, recommendation.

Moot problem

A member of the class charged under a band by-law for building on land inside the six miles applies for a declaration that the land is not a reserve within the Indian Act as against the class, and that the by-law does not bind her there.

For the applicant: the definition's Crown-title requirement, the 1784 grant, s 109. **For the band and the Crown:** Ross River, Isaac v Davey, s 81. **For both:** whether land can be a reserve and the class's interest at once.

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A worked outline: IRAC

Step	For the applicant
Issue	Is the land a reserve as against the class, and does the by-law bind her?
Rule	The Indian Act’s definition; Ross River; the 1784 grant; s 109.
Application	The Crown granted the Tract in 1784 and could not hold it to set apart; the applicant is of the class, not a band member acting as such.
Conclusion	A declaration that the by-law does not bind her on that land.

The respondents’ 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 applicant or the respondents, 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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The So-Called Reserves: 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	Indian law (reserve creation, by-laws), and constitutional law (ss 91(24), 109).
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 band; a moot on a declaration.
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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