LAW SCHOOL

Who Stands in Your Place? A Case Brief

Representation, release, and the unborn and unascertained.

The issue

May a band or other collective settle or release the interest granted in 1784 to the class and its posterity, binding holders who did not consent and persons unborn or unascertained; and how should a court protect them?

The instruments

Instrument	Date	What it does
Haldimand Proclamation	25 Oct 1784	To “them and their posterity … for ever”
Dorchester’s Order	9 Nov 1789	Posterity to be “discriminated from future settlers”; a registry
Simcoe’s Proclamation	6 Apr 1796	Each to be ascertained on oath before the magistrates
Indian Act, s 10	1985	Bands may set their own membership rules

The statutes

Indian Act, RSC 1985, c I-5, ss 10, 37–39.

Rules of Civil Procedure, RRO 1990, Reg 194, r 10.01 (representation of persons unborn or unascertained).

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

The cases

Guerin v R, [1984] 2 SCR 335
The Crown’s dealing with surrendered land is bound by a fiduciary obligation to those whose land it was.

Wewaykum Indian Band v Canada, 2002 SCC 79
The Crown’s duties toward a band in relation to reserve land, and the limits of those duties.

Behn v Moulton Contracting Ltd, 2013 SCC 26
Collective rights are generally asserted by the collective; individuals may not assert them without its authorization.

Chippewas of Sarnia Band v Canada (AG), (2000), 51 OR (3d) 641 (CA)
A surrender not made in the required way is invalid, though equitable relief may still be refused.

The arguments

	For the Crown and the band	For the class
Who holds	The collective (Behn); the band speaks for it	Persons and their posterity; the grant names no collective
Who may release	The band, by vote, accepted by the Crown	No one in another’s place; consent is personal
The unborn	Bound through the collective	Must be represented separately (r 10.01) and cannot be bound by a release
The standard	The band list	Simcoe’s: ascertained on oath, recorded

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Weak points to test

For the class: Behn on who asserts collective rights; the long practice of dealing with the band. For the Crown: whether the grant is collective at all; r 10.01's purpose; Guerin's fiduciary standard where holders are excluded.

Briefing note

Crown counsel is asked to approve a release drafted in the name of the band, covering all interests in the Tract. In 150 to 200 words, advise counsel: whom the release can bind, whom it cannot, and what must be done for the unborn and unascertained. Write it as a briefing note: purpose, background, considerations, recommendation.

Moot problem

A settlement of claims to the Tract is before the court for approval. Members of the Register move under r 10.01 for an order appointing a representative of the class's unborn and unascertained members, and for a declaration that the settlement cannot release the class's interest.

For the moving parties: the grant to persons and posterity, r 10.01, and the 1796 standard. **For the band and the Crown:** Behn, the band as the proper party, and finality. **For both:** what a release by a collective can and cannot do.

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A worked outline: IRAC

Step	For the moving parties
Issue	Can the settlement release the class's interest, and must the unborn and unascertained be separately represented?
Rule	The grant; s 109; r 10.01; Guerin; the 1796 standard of ascertainment.
Application	The interest runs to persons and their posterity; the band is not its holder; the unborn cannot consent and are not represented.
Conclusion	A representation order, and a declaration that the settlement does not release the class's interest.

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 moving parties 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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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 (band membership, surrenders), fiduciary duty (Guerin, Wewaykum), and civil procedure for the unborn.
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 Crown counsel; a moot on a representation order.
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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