genealogy

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Essay

Clash Actions: Indigenous Peoples' Human Rights and Class Actions

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Abstract

As many face significant financial costs and legal barriers to accessing justice to remedy systemic human rights violations rooted in colonialism, they are increasingly turning to class action litigation for recognition of harms and to safeguard others. Drawing on Canadian examples, including a class action involving First Nations children, this article examines the complex and sometimes conflicting relationship between class actions and human rights remedies. The paper highlights the risks of class actions displacing human rights awards, the ethical challenges in relationships between class counsel and Indigenous victims, and the limited effectiveness of settlements in preventing recurring injustices. The article concludes by calling for stronger regulation of class action lawyers and tethering such proceedings to the United Nations Declaration on the Rights of Indigenous Peoples and other human rights standards, including the United Nations Convention on the Rights of the Child.

Keywords: Indigenous; Aboriginal; First Nations; children; racism; discrimination; human rights; justice; law; class actions

Received: 8 February 2025
Revised: 17 September 2025
Accepted: 15 October 2025
Published: 3 November 2025

Citation: Blackstock, Cindy, and Pamela Palmater. 2025. Clash Actions: Indigenous Peoples' Human Rights and Class Actions. *Genealogy* 9: 122. https://doi.org/10.3390/genealogy9040122

1. Introduction

When Indigenous peoples' human rights are systemically violated, victims primarily seek legal relief to protect others from harm and achieve some measure of justice for themselves. Theoretically, Canada's human rights legislation and class actions both contribute to these goals. Still, the reality is that class actions dominate because there are access to justice barriers for federal human rights remedies and significant incentives for class actions, which, in practice, are largely unmoored from the United Nations Declaration on the Rights of Indigenous Peoples (United Nations Declaration on the Rights of Indigenous Peoples 2007).[1] This paper argues that these factors have created a federal landscape where Indigenous peoples' human rights and class actions often clash, and Indigenous victims are often left with a compensation cheque without substantive change to the system. Possible remedies are discussed.

Indigenous peoples have tried to achieve justice for systemic breaches of their human rights through Canada's court systems. We know from numerous justice reports, inquiries, and commissions that an inherently racist justice system compounds the injustice they experience (Aboriginal Justice Implementation Commission 1999; Wright 2004). While federal human rights remedies in Canada are well-tailored to address systemic human rights abuses, they are plagued by significant access to justice barriers (Blackstock 2016), including a Supreme Court of Canada decision barring litigation cost awards (Canada v.

Canada 2011). These barriers, coupled with the significant power and resource imbalances between Indigenous peoples and well-resourced respondents, often lead Indigenous peoples to turn to class actions to seek justice in a system stacked against them. But even class actions have risks for those seeking justice (Joe 2023; Mainville et al. 2024).

Canada has long been admired by other countries for its stated commitments to multiculturalism, diversity, equality, and human rights, as well as its relatively high standard of living (Elliott 2015; United Nations Development Programme 2024; United Nations Human Rights Council 2023).[2] However, these rankings overlook the crisis-level, impoverished socio-economic conditions of Indigenous peoples and the cycle of harms perpetrated by the Canadian government and other actors (United Nations Human Rights Council 2023, para. 86–87). Canada's egregious conduct towards First Nations children is a prime example. Canada controlled and operated residential schools, akin to re-education camps, intended to forcibly assimilate First Nations, Métis, and Inuit children from the 1870s to 1996, resulting in thousands of deaths and multi-generational trauma from widespread physical and sexual abuse (Truth and Reconciliation Commission of Canada 2015b, Final Report). As Canada began slowly closing residential schools in the 1940s, they began ramping up a system of mass removals of Indigenous children and placing them in non-Indigenous families; this is known as the 60s scoop. As victims of residential schools and, later, victims of the 60s scoop, clamoured for justice and the cessation of harms using class actions, Canada was perpetrating what the Canadian Human Rights Tribunal called "wilful and reckless" discrimination towards First Nations children of the worst kind by underfunding child welfare and other essential services, resulting in the continuation of large-scale child removals. Stacks of reports documenting human rights violations and remedies (Government of Nova Scotia 1989; Royal Commission on Aboriginal Peoples 1996), coupled with the courage of residential school (Truth and Reconciliation Commission of Canada 2015b, *Final Report*) and 60s scoop survivors (Neel et al. 1997) sharing their truths through their tears, were sadly not enough to force Canada to end its cycle of discrimination and violence towards First Nations children. It took, and is taking, multiple legally binding human rights rulings, achieved with substantial assistance of pro-bono legal counsel, to force real change (Metallic 2018).

2. Overview of Federal Human Rights Remedies and Indigenous Peoples in Canada

The Canadian government's Indian Act (1985) regulates "Indians" and lands reserved for "Indians" (reserves); thus, a large majority of human rights affecting First Nations[3] peoples fall within federal human rights jurisdiction. Canada's human rights regime is embedded in the Canadian Charter of Rights and Freedoms (Canadian Charter of Rights and Freedoms 1982), which forms Part I of the Constitution Act (1982). The Charter protects fundamental rights and freedoms, including equality rights, which are, in part, given effect in federal jurisdiction through the Canadian Human Rights Act (CHRA). Indigenous peoples have sought relief from systemic human rights abuses under the Charter and have, on occasion, received financial support through the Court Challenges programme (Supporting the Advancement of Constitutional Rights in Canada n.d.). However, Charter litigation on complex cases can often exceed the maximum amount available under the programme, leaving victims scrambling to find pro-bono or deeply discounted legal representation. Even when Charter cases are successful, enforcement can be difficult, given the intersection of laws in a federalist system, the lack of political will and other factors.

Enforcement of the Charter is also challenged by Section 33, known as the "notwithstanding clause," which enables provinces and territories to pre-emptively exempt legislation from judicial review, except on grounds such as language and disability (Sandilands

and Bennett 2022). While the constitutional protection for Aboriginal Rights in Section 35 is outside the Charter, and thus exempt from the notwithstanding clause, the non-discrimination provisions are squarely within the Charter. This creates a situation whereby the notwithstanding clause can be used to collaterally attack the human rights of Indigenous peoples. Taken together, hard-fought and favourable Supreme Court of Canada Charter decisions respecting Indigenous human rights often leave Indigenous peoples as litigation victors without real impact on the ground.

Enacted in 1977, the CHRA exempted discrimination claims related to the Indian Act until Parliament repealed that provision in 2008 (Aboriginal and Northern Affairs Canada 2014). This opened the doors for First Nations peoples affected by the Indian Act to bring human rights claims; however, in that same year, the Supreme Court of Canada ruled that claims for costs are not permissible under the CHRA (Canada v. Canada 2011). The Indian Act engages litigation with the well-resourced federal government that has an entire department of lawyers paid for by the public purse, so the prohibition against cost awards for successful human rights claims was a significant setback for access to justice for First Nations peoples, many of whom live in poverty (Statistics Canada 2021).

Despite these barriers, First Nations have successfully brought some CHRA claims, including the landmark First Nations Child and Family Caring Society et al. v. Attorney General of Canada T1340/7008 substantiating Canada's wilful and reckless discriminatory conduct in First Nations child and family services and Jordan's Principle. This case will be discussed later in this paper, but suffice to say, extensive pro bono legal counsel and private funding were required to shepherd this case through the litany of Canada's procedural and jurisdictional challenges and a subsequent challenge caused by a class action case infringing on human rights compensation.

3. Class Actions and Indigenous Peoples in Canada

A class action is a form of civil litigation where an individual or small group of plaintiffs can join together and sue a corporation or government on behalf of a larger group of people who have suffered similar harms (Kalajdzic 2018; Watson 2001). The Supreme Court of Canada sets out three major advantages of class actions over individual cases when victims have experienced minimal harm: (1) judicial economy, (2) distribution of legal fees over a larger group, reducing individual costs, and (3) holding wrongdoers to public account (Western Canadian Shopping Centres Inc. v. Dutton 2001, para. 27–29). The high cost of lawyers, researchers, expert witnesses, process servers, and court filing fees is prohibitive for most Indigenous peoples seeking justice through legal means. However, with class actions, a lawyer or law firm usually assumes the upfront litigation costs in exchange for a percentage of the monetary settlement, should they be successful (Law Commission of Ontario 2019, July). This is often called a contingency fee arrangement. Indigenous peoples can use class actions as a means of getting compensation for harms inflicted by government laws, policies, and practices, as well as injunctive relief to prevent governments from continuing the harmful behaviour (What Kinds of Damages Can Be Sought in a Class Action Lawsuit? n.d.). The majority of class actions are settled before going to trial through a negotiated settlement that can include additional remedial measures like legislative amendments, policy changes, structural reforms, public education, and/or government funding commitments.

Despite the potential benefits of class actions, this option only works if the team of lawyers or law firms involved act according to the highest professional standards and legal ethics, and if they put the needs of their Indigenous clients, who often experience profound harms that may be better addressed by individual or human rights litigation, ahead of their own. That is not to say that lawyers should not be compensated but it does mean

that lawyers must be very careful not to abuse their position of power or act in their own interests, and they must work to ensure that victim compensation is proportionate to the harm.

There have been many examples of lawyers and law firms who have stepped up to advocate strenuously for their Indigenous clients and have supported them throughout the process. Some lawyers have even taken on Indigenous clients pro bono to ensure they can pursue remedies for grave human rights violations. Unfortunately, there has been questionable conduct by some lawyers involved in class action lawsuits addressing harms to Indigenous clients. In one high-profile case, more than 50 lawyers had their fees reduced by an adjudicator in the Independent Adjudication Process in the residential school survivor class action settlement (Galloway 2015). In 2023, class action lawyers in the First Nations child welfare and Jordan's Principle case saw their legal fees reduced from $80 million dollars to $55 million; both the federal government and advocates thought the original fees were too high, given that the class action rode atop human rights compensation already awarded to a significant number of class members in a separate CHRA proceeding that awarded a minimum value of $40,000 per person (Stefanovich 2023).

While Indigenous law firms are generally less likely to exploit Indigenous peoples seeking justice through class actions, the Ontario Superior Court recently ordered a reassessment of an Indigenous firm's gobsmacking $500 million in legal fees from a First Nations class action valued at $10 billion (Nootchtai v. Nahwegahbow Corbiere Genoodmagejig 2024). The Court held that the only opinion provided to the affected First Nations on the reasonableness of the fees was given by the very lawyers who stood to benefit, and the fees would reduce the amounts payable to the First Nations that experienced the injustice (Ibid, para. 89). Lawyers defend charging exorbitant legal fees by arguing that there is an inherent risk in assuming cases on contingency, as they only get paid when the class gets paid. While true, that risk is marginal, given that most cases settle (Reynolds et al. n.d.). Moreover, studies have shown that the key variable determining the amount of legal fees is the amount payable to the victims for the harm, not the level of risk (Eisenberg and Miller 2010). This is important, as the more egregious the harm, the more lawyers are paid; however, as the Supreme Court suggests in Western Canadian Shopping Centres Inc. v. Dutton (2001), class actions are suited to minor harms, and most of the harms experienced by Indigenous peoples in Canada have been severe and longstanding.

Additional legal fees charged to pay class action lawyers for the settlement governance add to profit lines and raise the spectre of conflict of interest. While settlement committees are subject to some court oversight, the courts are not equipped to provide the level of scrutiny that victims and the public deserve. With large amounts of money on the line, much more regulation of class action lawyers and legal firms is required. Significant class action contingency fees, which are only payable to class counsel if the class action is approved by the Federal Court, risk incentivizing law firms to encourage Indigenous peoples to use class actions instead of human rights cases or individual torts that may be better suited to their needs and litigation goals. Lawyers who do take human rights or individual tort cases often have to do so pro bono, or at a deep discount, creating a practical problem for counsel who are responsible for generating revenue. They may be incentivized to provide lower quality services and spend less time with Indigenous clients pursuing justice through human rights or individual tort cases, despite their fiduciary obligations to act in their client's best interests (National Centre for Truth and Reconciliation 2020). The high level of class action payoffs give rise to entrepreneurial activity by lawyers who seek out representative plaintiffs without providing them with a choice to seek independent paid legal advice to survey their range of options.

There have been many calls to reform the legal profession to address the problem of lawyers "preying" on Indigenous clients or charging exorbitant fees in class actions that are inconsistent with the level of effort put into the case. The Canadian Bar Association has called for rules to regulate the professional conduct of lawyers when working with Indigenous clients (Canadian Bar Association 2022). Given the history of the Indian Act banning "Indians" (First Nations) from hiring lawyers to defend their claims, one would expect the legal profession to embrace their obligations to fully engage in reconciliation with Indigenous peoples; yet, some have actively fought against it (Zapata 2023).

There were four Calls to Action made by the Truth and Reconciliation Commission related to training for the legal profession; however, some lawyers actively reject them (Truth and Reconciliation Commission of Canada 2015a, no. 26–29). In Alberta, more than 800 lawyers voted against having any form of mandatory training in relation to Indigenous peoples (Olijink 2023). This is a shameful example of how much work needs to be done to protect Indigenous clients. Not all lawyers act this way; some lawyers go above and beyond, like the pro bono lawyers who represented the First Nations Child and Family Caring Society in the discrimination case at the Canadian Human Rights Tribunal (First Nations Child and Family Caring Society v. Canada 2016). However, proper training for lawyers and ethical legal representation for Indigenous clients should not be optional. Since Canada enacted a law in 2021 that affirms the application of UNDRIP in Canadian law (United Nations Declaration on the Rights of Indigenous Peoples Act 2021), the legal landscape has changed.

UNDRIP recognizes a set of pre-existing human rights that represent the minimum standards required to maintain the existence, dignity, and wellbeing of Indigenous peoples. These rights include the right to be self-determining and the right to free, prior, and informed consent, which means that they must have meaningful participation, without coercion or manipulation, in actions or decisions that would impact their rights (UNDRIP, articles 3, 4, 18 and 19). In case there was any doubt about whether or not the courts would recognize UNDRIP, the recent Supreme Court of Canada decision upholding the constitutionality of An Act Respecting First Nations, Inuit and Métis Children, Youth and Families (2019), and the ability of First Nations to create their own laws in relation to child welfare, confirmed that Bill C-15, which enacted UNDRIP, is now positive law in Canada (Reference re an Act Respecting First Nations, Inuit and Métis Children, Youth and Families 2024). More than that, the decision also confirmed that Section 35 of the Constitution Act of 1982 includes the right of self-government (Constitution Act 1982, S 35).

This decision is a major legal development that requires Canada to ensure that all of its laws, policies, and practices are consistent with the rights outlined in UNDRIP and may well change the legal landscape for class actions and the legal duties owed by lawyers. The First Nations child welfare class action serves as a glaring example of why the Indigenous right to free, prior, and informed consent is so central to justice for Indigenous peoples, who are often left with relatively minor compensation awards and few, if any, supports for vulnerable beneficiaries and their communities. And although modifying behaviour is a central tenet of class actions, which are designed to prevent repetition of the same injustice in the future, there is a lot of focus on compensation and relatively little on behaviour modification (Good 2009).

In 2023, a large class action on First Nations child welfare and Jordan's Principle commandeered the human rights compensation awarded to First Nations children by the Canadian Human Rights Tribunal (Tribunal) in a manner that disentitled some victims from the $40,000 plus interest in compensation to which they were already legally entitled and reduced compensation for others (Taylor 2022; Stefanovich 2022). Although receipt of human rights compensation does not waive victims' rights to receive additional com-

pensation through other civil procedures, the class action agreement, as originally drafted, would have nullified the Tribunal's compensation orders. The Tribunal rejected this original agreement and sent the class action lawyers back to the table to ensure all entitled Indigenous victims received the compensation they deserved. Although the settlement agreement encroached on the children's human rights compensation, and the class action indemnified Canada from beneficiaries seeking future torts, there is no guarantee that the children will get more than the Tribunal already ordered. Indeed, the $40,000 in human rights compensation per victim ordered by the Tribunal exceeded the base compensation Indigenous residential school and 60s scoop survivors received via class action settlements. This means that even the financial benefits of pursuing a class action over human rights remedies cannot be taken for granted.

The First Nations child welfare and Jordan's Principle class action clashed with the human rights compensation order and could have completely disentitled some victims from the compensation they were already awarded, without their knowledge or consent. This would have violated their rights to free, prior, and informed consent and, arguably, would have created a terrible precedent of class actions being able to undo human rights awards, instead of adding to them. The fact that Indigenous lawyers were involved in a class action that initially proposed to exclude compensation for some victims, means that their involvement does not necessarily translate into protection for Indigenous children and families. Left unchecked, class actions could become a contemporary form of resource extraction, i.e., harvesting legal fees from colonial injustices to the detriment of vulnerable Indigenous peoples. Moving forward, legal reform must be applied to Indigenous and non-Indigenous lawyers alike.

4. Recommendations for Reform

The clash of the First Nations child welfare class action and the Canadian Human Rights Tribunal case is a prime example of why increased regulation of class actions is required to ensure the protection of Indigenous peoples, especially Indigenous children. Such regulation would have to be designed by First Nations, Métis and Inuit peoples consistent with UNDRIP and other domestic and international human rights instruments, including the United Nations (1990). The goal of reconciliation with Indigenous peoples and the protection of their rights should be central to any overhaul of legal regulations in relation to class actions. UNDRIP must also be central to any and all Indigenous rights cases moving forward and be fully considered by any tribunal or court, with a renewed focus on the fiduciary duty of the Crown and the lawyers involved in any case. Consideration ought to be given to ensuring mandatory independent legal advice for potential representative plaintiffs, particularly those who have suffered serious harms. Not all claims should be handled by way of class action, and Indigenous clients should be able to explore options with free, prior, and informed consent before, during, and after any claim.

Other class action reform measures could include independent auditing of legal fees and disbursements, mandatory training on Indigenous peoples for class counsel and the judiciary, and public accountability and reporting on the justice outcomes for class members and the efficacy of deterrent measures. Legal fees should be proportionate to the real level of risk in the litigation and to the amount received by individual class members. The commandeering of decisions/orders made by the human rights tribunal by class actions ought to be prohibited, and support plans for vulnerable class members should be subject to independent professional and public review. Given the large contingency fees made by lawyers on these class action cases, they could set aside funds to help finance systemic human rights cases to stop discrimination and support individual torts for persons with serious harms related to government breaches of their rights.

Removing access to justice barriers to federal human rights remedies is vital to ensuring justice for Indigenous peoples. Human rights expert Anne Levesque argues that public funds ought to be available for systemic human rights breaches pursuant to the CHRA, particularly when well-resourced government respondents are involved (Levesque 2020). In previous work, Blackstock has argued for reining in the procedural tactics governments use to avoid accountability under human rights regimes. She has also argued for effective injunctive measures to respond to retaliation, ensuring welcoming judicial processes and spaces for Indigenous peoples, and ensuring human rights mechanisms specifically provide for all children to participate in matters affecting them (Blackstock 2016).

Fundamentally, reform needs to support Indigenous peoples to make free, prior, and informed decisions about the types of human rights remedies and damages that are most meaningful to them. The current system incentivizes class actions at the expense of effective remedies to prevent future harms. Too often, it provides a cheque without change.

Funding: This research received no external funding.

Data Availability Statement: No new data were created in this article. The original contributions presented by the authors are included in the article. All external sources have been cited. Further inquiries can be directed to the corresponding authors.

Conflicts of Interest: The authors declare no conflict of interest. Cindy Blackstock is the head of the First Nations Child and Family Caring Society which led the human rights complaint against Canada referenced in this article.

Notes

1 The *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021 c. 14 implements the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 (A/RES/61/295).

2 The Reputation Institute cited in Elliot measures countries according to factors like effective governments, absence of corruption, and welfare support systems.

3 The Indian Act only applies to First Nations. It does not apply to other Indigenous Peoples in Canada.

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