Dalhousie Journal of Legal Studies

Volume 30 Article 2

7-29-2021

Remedies Matter: Evaluating the Efficacy of Remedies in Public Law Litigation for Executive Action

Joanne Cave

REMEDIES MATTER: EVALUATING THE EFFICACY OF REMEDIES IN PUBLIC LAW LITIGATION FOR EXECUTIVE ACTION

Joanne Cave[*]

ABSTRACT

This paper explores the concept of meaningful remedies for individual and classes of litigants in lawsuits against the Crown. Using two case studies, this paper discusses how litigants can ensure that remedies obtained against the Crown promote accountability and enforceability, behaviour change and systemic change. These case studies include *Kanthasamy v Canada (Citizenship and Immigration)*, which considered the scope of humanitarian & compassionate considerations for children seeking refugee protection in Canada, and *First Nations Child and Family Caring Society v Canada (Attorney General)*, which addressed the implementation of Jordan's Principle for First Nations children. The author uses these case studies to analyze the challenges of implementing meaningful remedies in practice and concludes with three key observations of how Crown executive actors tend to respond to remedies ordered by courts and administrative tribunals: (1) they are largely distrusting of remedies ordered by administrative tribunals; (2) they are largely motivated by political opportunism; and (3) they often opt to introduce systemic changes through soft law rather than legally binding measures.

Citation: (2021) 30 Dal J Leg Stud 1

---

[*] Joanne Cave recently completed a Juris Doctor (with Distinction) from the University of Alberta Faculty of Law. Prior to attending law school, she completed a MSc in Comparative Social Policy and a MPP from the University of Oxford as a Rhodes Scholar. Ms. Cave also holds a B.A. (Hons.) in Sociology and Women and Gender Studies from the University of Toronto. She is grateful for the guidance and mentorship of Professor Jennifer Raso, who supervised Ms. Cave's independent research course at the University of Alberta that resulted in the first iteration of this paper. Ms. Cave's views in this paper are hers alone and not representative of any employer, academic institution or organization.

"*Justice includes meaningful remedies*."[1]

I. INTRODUCTION

In the 2018 decision *First Nations Child and Family Caring Society v Canada (Attorney General)*, the Canadian Human Rights Tribunal (CHRT) used the above statement to reinforce the importance of the Government of Canada complying with the short- and long-term human rights remedies awarded to First Nations children for the wilful underfunding of on-reserve child welfare services.[2] The Tribunal ordered numerous policy changes to address systemic discrimination and $40,000 in compensation (the Tribunal maximum) for each of the estimated 54,000 First Nations children and parents impacted by the proceeding—totaling two billion dollars.[3] While the Government of Canada has introduced a First Nations Child and Family Services Compensation Process, there have been significant barriers to the implementation and enforcement of this compensation scheme to date.[4] The Latin legal maxim *ubi jus, ibi remedium* provides that there is no right without a remedy in law.[5] However, the maxim provides no guarantee that a remedy will be meaningful, effective, or enforceable. Cases such as *First Nations Child and Family Caring Society* illustrate that while remedies may be available in public law litigation, it is their implementation and enforcement that can prove to be exceptionally challenging for courts, tribunals, and litigants.

---

[1] *First Nations Child and Family Caring Society v Canada (Attorney General)*, 2018 CHRT 4 at para 387 [2018 FNCFCS Decision].
[2] *Ibid.*
[3] Mia Rabson, "First Nations given max compensation for Ottawa's child-welfare discrimination" *The National Post* (6 September 2019), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/first-nations-given-maximum-compensation-for-ottawas-child-welfare-discrimination>.
[4] For recent examples of these challenges, see *First Nations Child and Family Caring Society v Canada (Attorney General)*, 2019 CHRT 39 [2019 FNCFCS Decision] and *First Nations Child and Family Caring Society v Canada (Attorney General)*, 2020 CHRT 7 [2020 FNCFCS Decision]. See also Government of Canada, "First Nations Child Services Compensation Process", online: <www.fnchildcompensation.ca>.
[5] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25 [*Doucet-Boudreau*].

Meaningful remedies in public law litigation look very different when compared to disputes between private parties. Public law issues often affect the interests of many people— who may constitute a class—with the judge's "continuing involvement in [the] administration and implementation" of complex remedies that often intersect with the government's policy-making function.[6] One of the most important distinguishing features of public law litigation is the potential for remedies to modify future behaviour rather than provide redress for previous wrongs.[7] These future-oriented remedies can be individual or systemic in nature, and often function as a tool "to bring about the reversal of entrenched patterns of discrimination and inequality that are the product of institutional, societal and governmental structures and inertia."[8]

Evaluating whether these types of remedies are meaningful rests on an important philosophical distinction: whether our conception of law is instrumentalist (intended to influence human behaviour or improve societal conditions) or non-instrumentalist (intended to realize principles and values of justice).[9] In this paper I focus on instrumentalism, recognizing that creating lasting change at both an individual and systemic level is one of the more practical functions of our justice system, rather than merely providing corrective justice or compensatory relief to parties that have been wronged.[10]

I consider the role of remedies in public law litigation that focuses on executive action, drawing on jurisprudence and secondary sources in law, sociolegal studies, political science, and public administration. Meaningful remedies in the Crown's exercise of legislative power have been discussed in

---

[6] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281 at 1281, 1284.
[7] *Ibid* at 1298.
[8] Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 3 at 4.
[9] Peter Cane, "Understanding Judicial Review and Its Impact" in Marc Hertogh and Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 15 at 16.
[10] Stephen M Johnson, "From Climate Change and Hurricanes to Ecological Nuisances: Common Law Remedies for Public Law Failures" (2011) 27:3 Ga St U L Rev 565 at 572.

detail, particularly in the context of the *Charter of Rights and Freedoms*.[11] However, few Canadian legal scholars have focused on how courts provide remedies in the Crown's exercise of executive power, and it remains a widely misunderstood area in Canadian public and administrative law. I use case studies as a methodology to explore this issue further, appreciating that a meaningful discussion about remedies requires depth and context. In this paper, I discuss executive action in both its political and administrative context, referring to public officials and institutions (e.g., the Prime Minister of Canada, members of Cabinet and their senior ministerial staff, administrative tribunals appointed by Cabinet) that oversee the implementation and enforcement of laws.[12] In some circumstances, such as the *First Nations Child and Family Caring Society* case study, courts are asked to oversee how administrative tribunals, exercising an executive function, succeed or fail in holding other executive actors accountable. Depending on the nature of the legal claim, a variety of remedies can be available, including monetary damages, injunctive relief, or prerogative writ remedies upon judicial review.

In this paper, I make three key observations about how executive actors responded to tribunal or court-ordered remedies in two case studies: (1) they are largely distrusting of remedies ordered by administrative tribunals; (2) they are often motivated by political opportunism; and (3) they often opt to introduce systemic changes through soft law rather than legally binding measures. After exploring the importance of remedies for executive action in Part II, I develop an analytical framework to consider whether a remedy is meaningful in the context of executive action in Part III. This analytical framework draws on law professors Peter Cane and Maurice Sunkin's research to articulate three key indicia: accountability and enforceability, behaviour change (both individual and institutional), and systemic change. In Part IV, I apply this analytical framework to discuss two case studies of litigation against the federal Crown for executive action: the 2015 Supreme Court of Canada decision *Kanthasamy v Canada (Citizenship & Immigration)*[13] and the series of Canadian Human Rights Tribunal

---

[11] See Kent Roach, *Constitutional remedies in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 2019) (loose-leaf edition updated 2019, release 34).
[12] Craig Forcese et al, eds, *Public Law: Cases, Commentary and Analysis* (Toronto: Emond Montgomery Publications, 2015) at 297.
[13] 2015 SCC 61 [*Kanthasamy*].

decisions from 2011–2021 in *First Nations Child and Family Caring Society v Canada (Attorney General)*.[14] I use these case studies to illustrate how executive actors can respond differently to tribunal or court-ordered remedies to address a similar issue (the welfare of marginalized or disadvantaged children).

II. WHY DO MEANINGFUL REMEDIES FOR EXECUTIVE ACTION MATTER?

Meaningful judicial remedies for executive action are critical to maintain the integrity of the rule of law. In Canada, political executive actors (e.g., the Prime Minister and Cabinet) can have "significant control over the legislative agenda"[15] when they exercise their statutory or prerogative powers to implement or enforce laws. When administrative executive actors such as public officials or administrative decision-making bodies perform governmental functions, they often exercise significant discretion when interpreting and applying legislative or judicial direction on a particular legal or policy issue. Cases such as *Roncarelli v Duplessis* have demonstrated the consequences of arbitrary exercises of executive power and the role of judicial remedies in preventing "absolute and untrammeled 'discretion'"[16] from undermining the rule of law and eroding public trust in government institutions and officials. Despite the broad scope of authority and discretion afforded to executive actors, courts are often reluctant to impose substantive remedies for fear of disrupting the separation of powers doctrine.[17]

However, in a rising tide of populism and mistrust in judicial decision-making, it is increasingly important that judicial remedies serve as an effective

---

[14] See *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General),* 2016 CHRT 2 [2016 FNCFCS Decision]; 2018 FNCFCS Decision, *supra* note 1 and 2019 FNCFCS Decision, *supra* note 4.
[15] Forcese et al, *supra* note 12 at 299.
[16] [1959] SCR 121 at 140.
[17] This is particularly true when exercises of Crown prerogative power are in question. See Philippe Lagasse, "Parliamentary and judicial ambivalence towards executive prerogative powers" (2012) 55:2 Canadian Public Administration 157 at 159.

safeguard against illegal or arbitrary exercises of executive power.[18] The relationship between the executive branches at both the provincial and federal level—and their respective relationships with courts—has become increasingly adversarial, with more political leaders demonstrating an increased willingness to engage the notwithstanding clause if their decisions face a *Charter* challenge.[19] While some may argue that this type of adversarialism between executive actors and courts is "dialogue theory" in action, it risks conflicting with the first principle of the rule of law articulated by the Supreme Court of Canada—that the law is supreme over both private individuals and government officials, the latter of whom must exercise their authority in a non-arbitrary way.[20]

Courts also have an important role in ensuring executive actors respond "promptly and in good faith" to judicial remedies, even if those remedies are not consistent with the executive's political interests.[21] There are numerous examples of Canadian cases that resulted in overt executive inaction in response to judicial remedies.[22] In *Canada (Prime Minister) v Khadr*, the Supreme Court of Canada declared that Canada contributed to Mr. Khadr's ongoing detention, depriving him of his right to liberty and security of person under section 7 of the *Charter*.[23] While the Court hesitated to exercise further remedial discretion due to the nature of the prerogative powers exercised, the Crown decided not to remedy the *Charter* breach because they had "no political motive to do anything that might benefit, or even appear to benefit, Omar Khadr."[24] However, cases such as *Canada*

---

[18] Kent Roach, "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon, eds, *Constitutional dialogue: rights, democracy, institutions* (Cambridge: Cambridge University Press, 2019) 267 at 307 [Roach, "Dialogue in Canada"].

[19] *Ibid* at 294. Recent examples of adversarialism include Quebec's use of the notwithstanding clause to pass Bill 21 (which restricts public servants from wearing religious symbols in the workplace) and Ontario's threatened use of the notwithstanding clause to defend their decision to reduce the size of Toronto City Council.

[20] *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867*, [1985] 1 SCR 721 at para 59 [*Manitoba Language Rights Reference*].

[21] Roach, "Dialogue in Canada" *supra* note 18 at 304.

[22] See *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [*Khadr*]; *Little Sisters v Canada*, [2007] 2 SCR 28.

[23] *Khadr, supra* note 22 at para 48.

[24] Audrey Macklin, "Comment on *Canada (Prime Minister) v Khadr* (2010)" (2010) 51 SCLR 295 at 327; see also Roach, "Dialogue in Canada" *supra* note 18 at 305.

(Attorney General) v PHS Community Services Society do demonstrate that very explicit judicial remedies, such as the order of mandamus to exempt the safe-injection facility Insite from the *Controlled Drugs and Substances Act*, can facilitate an expedient government response despite political or ideological opposition.[25] When courts can impose meaningful judicial remedies for executive action—and ensure that those remedies are acted upon—the integrity of the rule of law can be preserved effectively.

III. INDICIA OF MEANINGFUL REMEDIES FOR EXECUTIVE ACTION

In public law litigation, the dispute is often a grievance about "the operation of public policy"[26] rather than a private transaction or relationship. As a result, courts must apply different considerations to ensure that a remedy for executive action provides meaningful redress for affected individuals and the general public. In the absence of a clear analytical framework, Canadian courts have often considered remedies in an ad hoc, context-specific manner, without the benefit of explicit indicia to provide clarity and predictability in such a complex area of administrative law. As a starting point, Cane has proposed two potential indicia of meaningful remedies: (a) whether the remedy can be used to hold public bodies accountable and enforce compliance; and (b) whether the remedy can effectively change bureaucratic behaviour at a systemic level.[27] However, Cane's indicia fail

---

[25] 2011 SCC 44; Kirk Makin, Sunny Dhillon and Ingrid Peritz, "Supreme Court ruling opens doors to drug injection clinics across Canada", *Globe and Mail* (2011), online: <www.theglobeandmail.com/news/british-columbia/supreme-court-ruling-opens-doors-to-drug-injection-clinics-across-canada/article4182250>.

[26] Chayes, *supra* note 6 at 1302.

[27] Peter Cane, "Administrative Law as Regulation" in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite, eds, *Regulating Law* (Oxford: Oxford University Press, 2004) 207 at 221. Cane's discussion of behaviour change focuses on the procedural dimensions of public decision-making (e.g., whether decisions were made fairly, openly, and transparently and whether bureaucratic discretion is appropriately exercised), noting that many empirical researchers have failed to establish a causal connection between judicial review remedies and changes in bureaucratic behaviour. For the purposes of this paper, I distinguish between procedural fairness and behaviour modification in public officials.

to explore whether public law remedies may, in certain circumstances, have an important role in influencing the "frameworks, structures and system design" that inform executive action—what I describe as "systemic change".[28] Systemic change is about how remedies improve future exercises of executive power. In this section, I incorporate Sunkin's concept of systemic change with Cane's framework to develop three key indicia of meaningful remedies for executive action: (1) accountability and enforceability; (2) behaviour change (both individual and institutional); and (3) systemic change. These indicia are complementary and mutually reinforcing, rather than mutually exclusive: remedies that hold executive actors accountable can be a tool to prompt longer-term behaviour and systemic change and enforcement mechanisms may be required to facilitate this process. In many cases, changing individual and institutional behaviour is integral to achieve broader systemic change.

These indicia should not be interpreted as a definitive or closed list. They are intended to provide a framework to explore the potential and scope of remedial discretion for exercises of executive power within the bounds of judicial legitimacy. In some cases, awarding monetary damages or remitting a decision back to an administrative tribunal for re-hearing may be sufficient to rectify the wrongdoing and systemic changes may not be required. In other cases, a meaningful remedy may be one that facilitates expedient action from public officials due to the time sensitivity of the matter (e.g., refugee protection claims or habeas corpus applications). However, much of the public law litigation that focuses on executive action exposes broader systemic issues about how public power is "allocated, exercised and controlled."[29] As a result, courts may be required to identify remedies for executive action that are more systemic in nature to address the power imbalance between citizens and the state.

---

[28] Maurice Sunkin, "Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies" in Marc Hertogh and Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 43 at 60.

[29] Peter Cane, "Executive Primacy, Populism and Public Law" (2019) 28:2 Pac Rim L & Pol'y J 527 at 527.

Accountability and Enforceability

Meaningful judicial remedies serve to uphold the rule of law and prevent abuses of power. This is done by providing a measure of accountability and enforceability in dispute resolution that is otherwise unavailable through political processes.[30] On its own, political constitutionalism provides "imperfect accountability" because governments can exercise their political power to advantage or disadvantage particular groups, provided that those policy choices align with the majority of their electorate.[31] In contrast, judicial remedies can provide accountability by focusing the court's attention on a set of particular circumstances, applying a process of principled reasoning based on pre-existing standards and providing an established level of competence in rule interpretation and procedural fairness.[32] Moreover, the public nature of judicial decision-making—with the opportunity to hear from all affected parties and third party interveners—provides an important formal exercise of accountability.[33] Courts and tribunals also have a duty to give reasons, providing a transparent public record of whether the Crown's action in dispute fell within the bounds of its legal authority.

Depending on the nature of the dispute and the scope of the adjudicator's jurisdiction, supervisory orders can be used in Canada as a remedial tool to hold executive actors accountable.[34] While administrative tribunals "have stronger theoretical justifications for remaining seized of a case over a longer period of time" [35] due to the nature of their polycentric decision-making, courts can also act in a supervisory capacity to ensure that a remedy is granted. In the *Manitoba*

---

[30] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) at 60.
[31] Forcese et al, *supra* note 12 at 12.
[32] King, *supra* note 30 at 60-61.
[33] *Ibid* at 61-62.
[34] Some legal scholars have argued that suspended declarations of invalidity are more consistent with the separation of powers doctrine (see Janet E Minor & James S F Wilson, "Reflections of a Supervisory Order Sceptic: Ten Years after *Doucet-Boudreau*" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009) 303 at 303.
[35] Cristie Ford, "Remedies in Canadian Administrative Law: A Roadmap to a Parallel Legal Universe" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 43 at 49.

Language Rights Reference, the Supreme Court of Canada ordered special hearings to be arranged at the request of the Attorneys General of Canada or Manitoba to monitor the translation, re-enactment, printing, and publishing of Manitoban statutes.[36] As a result, the Supreme Court of Canada retained jurisdiction of the matter for nearly a decade, issuing new follow-up judgments about the timing and extent of the translation process.[37]

While accountability focuses on supervising the implementation of judicial remedies, enforcement focuses on mandating the implementation of judicial remedies and applying penalties for non-compliance. In both cases, the implementation of the required action (e.g., payment of damages or policy change) remains squarely within the scope of the legislative and executive branch. Administrative tribunals are limited to the scope of enforcement power that is identified in their enabling statute, provided that such power is constitutionally valid.[38] Tribunals often seek enforcement of their orders via court application, which allows the tribunal to use judicial enforcement mechanisms (e.g., holding a party in contempt or pursuing quasi-criminal prosecution).[39]

Enforcing mandatory actions as a remedy against the Crown can be very challenging for litigants due to the limitations of Crown liability legislation, regardless of whether the judgment was issued by an administrative tribunal or a court.[40] Parties generally cannot seek injunctive relief or specific performance against the Crown; the federal *Crown Liability and Proceedings Act* requires courts to order declaratory relief against the Crown in lieu of injunctions or specific performance in an effort to preserve the separation of powers.[41] However,

---

[36] *Manitoba Language Rights Reference*, *supra* note 20 at para 152.
[37] Kent Roach & Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005) 122 South African LJ 325 at 340. See *Doucet-Boudreau*, *supra* note 5 for another example of courts acting in a supervisory function.
[38] Ford, *supra* note 35 at 56.
[39] *Ibid* at 57.
[40] In this section, I use the federal *Crown Liability and Proceedings Act* as an example (recognizing that provincial Crown liability legislation also exists for actions against the provincial Crown).
[41] *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 22(1) [*Crown Liability and Proceedings Act*]; Robert Sharpe, *Injunctions and specific performance* (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2018, release 27) at para 3.1040.

injunctive relief can typically be awarded against Ministers or Crown servants unlawfully exercising statutory powers.[42] The Crown can be held liable for court-ordered damages, and if a litigant receives a certificate of judgment against the Crown, the Minister of Finance is directed to authorize the payment out of the Consolidated Revenue Fund.[43] While the statutory language for the payment of judgments is a directive on the Minister of Finance, parties cannot execute on the judgment against the Crown as a judgment creditor if the Crown does not comply.[44] Parties typically cannot hold the Crown itself in contempt, unless the order was made against an officer or servant of the Crown.[45] These limitations illustrate that while tribunals and courts can hold executive actors accountable, it can be difficult to enforce for non-compliance.

Behaviour Change

Judicial remedies may also be needed to change individual and institutional behaviours, guiding how executive power is exercised in the future. In this section, I draw a distinction between individual and institutional behaviour change and explore how various remedies might achieve different types of outcomes. Individual and institutional behaviour change are related concepts; individuals can shape the culture of their organization through their conduct or change their behaviour as a result of new policies or practices implemented at the institutional level. Unfortunately, there is limited research in Canada on how different types of remedies directly influence behaviour change among public officials and the institutions in which they operate. Often, this is a question of attribution—whether we can attribute institutional behaviour change to the

---

[42] Sharpe, *supra* note 41 at para 3.1050. The Crown servant's act must give rise to personal liability to proceed (*Crown Liability and Proceedings Act*, *supra* note 41, s 10).
[43] *Crown Liability and Proceedings Act*, *supra* note 41 at s 30(1).
[44] *Ibid* at ss 3, 29. See *Hughes v Canada (Human Rights Commission)*, 2019 FC 53 for a recent discussion of the limitations on executing judgments against the Crown.
[45] Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters Canada, 2011) at 82-83.

judicial remedy itself, the policy/legislation that results from the judicial decision, or the implementation efforts of public officials.[46]

The potential for a judicial remedy to change individual or institutional behaviour is often influenced by a litigant's choice of procedure and the nature of the claim. From a procedural perspective, class action lawsuits (compared to individual lawsuits) are one of the most established routes for prompting behaviour change in public law litigation because the remedies are awarded to the class a whole, forcing governments to internalize the costs of the harm they created on a larger scale.[47] Litigants can also influence behaviour change by pursuing claims against the Crown with either a procedural or substantive nature. Behaviour change at a procedural level focuses on changing how public officials and institutions exercise discretion when administering processes by ensuring they act reasonably, fairly, and transparently. In contrast, changing behaviour at a substantive level focuses on ensuring public officials and institutions make appropriate decisions that are within the scope of their legal authority.

At the individual level, behaviour change is reflected in the behaviour or conduct of public officials. Unlike private individuals or private firms, public officials are less likely to respond as rational economic actors with the intent of maximizing wealth.[48] Public officials can also effectively externalize remedial costs through delay by taking advantage of the short-term nature of electoral cycles.[49] When monetary damages are awarded to plaintiffs, it is taxpayers— not public officials—who ultimately internalize the cost of wrongdoing.[50] When courts issue decisions or orders, it can be challenging for public officials to translate that judicial guidance to the level of front-line discretionary decision-making.[51] Often, judicial guidance is translated into soft law (e.g., policy or

---

[46] Bradley C Canon & Charles A Johnson, *Judicial Policies: Implementation and Impact* (Washington D.C.: CQ Press, 1999) at 190.
[47] Craig Jones & Angela Baxter, "The Class Action and Public Authority Liability: Preferability Re-examined" (2007) 57 UNBLJ 27 at 33.
[48] *Ibid* at 33-34.
[49] *Ibid* at 36.
[50] *Ibid* at 37-38.
[51] Lorne Sossin, "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" in Marc Hertogh & Simon Halliday, eds, *Judicial*

procedure manuals) to influence how front-line public officials exercise their discretion.[52] Sossin observed in several Canadian judicial review case studies that judicial decision-making can have a significant impact on how front-line public officials exercise their discretion, but that impact occurs "not as quickly, as comprehensively or as coherently as litigants and the courts would wish."[53] Judicial guidance may also inadvertently instruct frontline officials how to describe their reasons in a manner that is compliant with the court's approach to avoid future judicial review but fails to address the underlying bias or discrimination that may exist.[54]

Institutional behaviour change is reflected in the policies and practices of the organization's operations, influencing the conduct of individual public officials. At the institutional level, behaviour change is influenced by several key factors: (1) policy tensions between the judicial order and the agency's core mandate or function; (2) inertia; (3) political factors; and (4) community pressure.[55] Political science professor Bradley Canon noted that the extent of institutional "behavioural adjustment" that occurs after a judicial decision has been issued largely depends on the "acceptance decision" of the agency leader—a psychological reaction that perceives the decision to be positive, negative, or neutral.[56] If the agency's leader reacts strongly to the judicial decision (positive or negative), it is more likely that the leader will maximize the institution's efforts to implement the decision or minimize their effort to comply.[57] In some cases, remedies that facilitate institutional behaviour change may overlap with systemic changes, discussed below.

Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2004) 129 at 130.

[52] *Ibid* at 159.

[53] *Ibid.*

[54] *Ibid* at 151.

[55] Bradley C Canon, "Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches" in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 76 at 95-96. While Bradley Canon's research focuses on the American perspective, his observations are also relevant to the Canadian context.

[56] *Ibid* at 80.

[57] *Ibid* at 81.

Systemic Change

Accountability, enforceability, and behaviour change may demonstrate that a judicial remedy provides meaningful redress for individual plaintiffs or classes of plaintiffs, but they do not necessarily reflect whether a judicial remedy can achieve longer-term systemic change. Human rights scholars Gwen Brodsky, Shelagh Day, and Frances Kelly note some examples of systemic change that could be achieved through judicial remedies. This includes mandating reporting requirements as part of a supervisory order, providing training for frontline staff, or requiring governments to review all relevant legislation within a particular timeframe to ensure it is human rights compliant.[58] While some administrative bodies have the inherent authority to grant systemic remedies based on their governing statutes,[59] courts often have to address systemic policy/legislative change more indirectly through judicial review remedies or monetary damages.[60] Kent Roach argued that the executive and legislative branches of government are likely to expedite the process of developing systemic remedies if they are subject to significant public pressure or the individual remedies awarded by courts are particularly costly.[61]

At the administrative tribunal level, the nature of systemic remedies can vary significantly based on the scope of authority articulated in their enabling legislation. In many cases, administrative tribunals have a broader mandate than courts and can leverage a broader range of remedial tools to adjudicate disputes.[62] However, in *Moore v British Columbia (Education)*, the Supreme Court of Canada clarified that while administrative bodies can provide remedies for individual claimants that have a systemic impact, they cannot award systemic remedies that are too remote from the scope of the complaint (e.g., ordering specific

---

[58] Brodsky, Day & Kelly, *supra* note 8 at 45-46.
[59] See *ibid* at 29.
[60] In individual or class actions, monetary damages may serve to "attract media attention and the attention of defendant governments" (Lorne Sossin, "Class Actions against the Crown: A Substitution for Judicial Review on Administrative Law Grounds" (2007) 57 UNBLJ 9 at 16). However, increased attention may not always translate into meaningful legislative or policy change.
[61] Kent Roach, "Dialogic remedies" (2019) 17:3 Int'l J Constitutional L 860 at 873.
[62] Ford, *supra* note 35 at 49.

government funding allocations).[63] Courts are often more constrained than administrative tribunals in their remedial discretion and more reticent to award systemic remedies due to the separation of powers doctrine. Courts are highly respectful of institutional roles. Remedies that affect budgetary priorities or policy choices are typically the exception, not the rule.[64]

The Ontario Human Rights Board of Inquiry decision *McKinnon v Ontario (Correctional Services)* demonstrates some of these challenges when enforcing systemic remedies.[65] In *McKinnon*, the Board of Inquiry held that Mr. McKinnon experienced discrimination and harassment on the basis of his Aboriginal ancestry. The Board of Inquiry awarded monetary damages, an order for public notices, and a human rights training program for staff.[66] When the Government of Ontario employer failed to implement the remedies, additional systemic remedies were ordered, including training for ministry and facility management and the appointment of a third-party consultant.[67] In 2011, after numerous decisions and 13 years after the initial Board of Inquiry decision, the Tribunal argued in the Ontario Divisional Court that the Deputy Minister should be held in contempt.[68] After the settlement, the Ontario Human Rights Commission and relevant ministries in the Government of Ontario signed a three-year Human Rights Project with clear mechanisms for accountability.[69] *McKinnon* is an extraordinary example of the challenges administrative tribunals can face when seeking to implement systemic remedies.

---

[63] 2012 SCC 61 at paras 57, 63, 64.
[64] Roach, *Constitutional remedies*, *supra* note 11 at 3.790.
[65] [1998] OHRBID No 10 [1998 *McKinnon* Decision]. The Ontario Human Rights Board of Inquiry is now called the Ontario Human Rights Tribunal.
[66] *Ibid* at para 360.
[67] *McKinnon v Ontario (Correctional Services)*, [2002] OHRBID No 22 at para 311.
[68] *McKinnon v Ontario (Correctional Services),* 2011 HRTO 263 [2011 *McKinnon* Decision].
[69] Ford, *supra* note 35 at 54.

IV. CASE STUDIES OF REMEDIES FOR EXECUTIVE ACTION

It is unlikely that tribunal or court-ordered remedies for executive action will fulfill all three indicia outlined by Cane and Sunkin. In this section, I develop two case studies to illustrate the challenges of implementing meaningful remedies in practice. After discussing the history of the litigation using tribunal/court decisions and various secondary sources, I evaluate the remedies based on the three indicia discussed: (1) accountability and enforceability; (2) behaviour change (both individual and institutional); and (3) systemic change. In *Kanthasamy*, these principles are explored in the context of litigation between an individual plaintiff and administrative executive actors (immigration officers in Citizenship and Immigration Canada) as a judicial review application. In *First Nations Child and Family Caring Society*, these principles are applied to litigation between a class of plaintiffs and a political executive body (the Minister of Indigenous Services Canada)[70] before a human rights tribunal. Both cases expose important tensions between courts, tribunals, and the Crown in how judicial remedies are ordered and enforced.

The legal issues and remedial outcomes in both case studies differ significantly, but they share several key similarities. Both cases focus on providing just outcomes and equitable treatment for marginalized children experiencing discrimination using domestic or international human rights frameworks. Both cases discuss the human rights principle of "best interests of the child." *First Nations Child and Family Caring Society* does so from a domestic perspective by focusing on Jordan's Principle and the majority in *Kanthasamy* explores the concept using the *United Nations Convention on the Rights of the Child* and non-binding child asylum guidelines from the United Nations High Commissioner for

[70] This name reflects the department's current name, which has changed numerous times since the start of the litigation. Throughout this case study, I refer to the department based on its name at the time the decision was issued.

Refugees.[71] Both cases also identify critical flaws in how government systems (First Nations child welfare and immigration/refugee protection) operate and, in doing so, shifted public discourse about the role of administrative tribunals and courts in addressing systemic inequality.

Kanthasamy v Canada (Attorney General)

Kanthasamy v Canada (Attorney General) is a case about the scope of humanitarian and compassionate (H&C) considerations for children seeking refugee protection in Canada. At the time of trial, Mr. Kanthasamy was a 16-year-old adolescent from Sri Lanka who was denied refugee protection from Citizenship and Immigration Canada on the basis that Sri Lankan authorities had taken steps to address the persecution facing Tamils and Mr. Kanthasamy himself was not immediately at risk.[72] At the time of Mr. Kanthasamy's refugee protection application, the Refugee Appeal Division of the Immigration and Refugee Board was not yet established; therefore, Mr. Kanthasamy was required to apply directly for judicial review.[73] Mr. Kanthasamy's judicial review application for a reassessment on H&C grounds was denied on the basis that his return to Sri Lanka would not result in "hardship that was unusual and undeserved or disproportionate."[74] However, the Federal Court certified the question of how the nature of "risk" should be assessed under section 25 of the *Immigration and Refugee Protection Act*.[75] On appeal, the Federal Court of Appeal dismissed Mr. Kanthasamy's appeal and held that the immigration officer's interpretation of section 25 was reasonable in the circumstances.[76]

---

[71] 2016 FNCFCS Decision, *supra* note 14 at para 346; *Kanthasamy*, *supra* note 13 at paras 37-39. See also Dan Moore, "Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture" (2017) 49:1 Ottawa L Rev 131 at 147.
[72] 2013 FC 802 at para 1 [*Kanthasamy* Trial Decision].
[73] Immigration and Refugee Board of Canada, "Refugee appeals" (15 March 2019), online: <irb-cisr.gc.ca/en/refugee-appeals/Pages/index.aspx>; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 72(1).
[74] *Kanthasamy* Trial Decision, *supra* note 72 at para 3.
[75] *Ibid* at paras 67-74.
[76] *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 4 [*Kanthasamy* FCA Decision].

The Supreme Court of Canada heard Mr. Kanthasamy's case in 2015, finding the immigration officer's decision unreasonable.[77] Justice Abella, writing for the majority, held that the immigration officer failed to make a holistic determination of Mr. Kanthasamy's H&C grounds by cumulatively assessing the hardship factors.[78] Justice Abella held that immigration officers should not treat the soft law Ministerial Guidelines as mandatory requirements and the "unusual and undeserved or disproportionate" hardship requirement as a set of distinct legal thresholds.[79] Immigration officers are also required to consider the "best interests of the child" principle in accordance with the *United Nations Convention on the Rights of the Child*.[80] The majority set aside the immigration officer's decision and remitted the matter back to Citizenship and Immigration Canada for consideration.[81] Unfortunately, Citizenship and Immigration Canada's post-*Kanthasamy* decision is not publicly available and Mr. Kanthasamy's immigration status is currently unknown.

Accountability and Enforceability

By remitting the issue back to Citizenship and Immigration Canada for re-consideration, the Supreme Court of Canada opted not to introduce oversight or enforcement mechanisms as part of their remedy in *Kanthasamy*. Consistent with the principles of administrative law, the Supreme Court of Canada deferred to the authority of the executive actor (immigration officers) to revisit Mr. Kanthasamy's case using the common law principles articulated by the Court. While this principle is based in the separation of powers doctrine, it can create underwhelming results for plaintiffs if the administrative decision-maker repeats their actions or fails to account for the judicial direction provided by the Court.[82] Unfortunately, without Citizenship and Immigration's reconsidered decision, it is difficult to evaluate whether the Board effectively adopted the Supreme Court of

---

[77] *Kanthasamy*, *supra* note 13 at para 61.
[78] *Ibid* at para 28.
[79] *Ibid* at paras 32, 60.
[80] *Ibid* at paras 34, 37.
[81] *Kanthasamy*, *supra* note 13 at para 64. If Kanthasamy's case was reheard by the Immigration and Refugee Board, the subsequent decision is not publicly available.
[82] Forcese et al, *supra* note 12 at 564.

Canada's direction for how to interpret the best interests of the child in Mr. Kanthasamy's application.

Behaviour Change

Despite the lack of accountability or enforcement mechanisms, *Kanthasamy* is an important example of how courts can provide a strong signal—without being overly prescriptive—that institutional behaviour change is needed. Similar to *Baker v Canada (Minister of Citizenship and Immigration),* the Supreme Court of Canada in *Kanthasamy* provided judicial guidance for how to interpret and apply the Ministry's non-binding soft law guidelines when exercising discretion, but did not direct specific amendments to binding legislation or policy.[83] In addition to informing the soft law guidelines, the Supreme Court of Canada also provided a clear analytical framework for immigration officers to apply when reviewing H&C decisions that engage the best interests of the child.[84] Shortly after the decision was released, some immigration lawyers described evidence of behavioural change at the institutional level. This included observations of how Citizenship and Immigration Canada and the Immigration and Refugee Board dealt with H&C cases from a procedural perspective, noting that "pending judicial review applications [were] consented to [and] refused humanitarian applications [were] re-opened."[85] These institutional changes demonstrate that *Kanthasamy* may have had a positive impact on executive action, at least in the short term.

However, post-*Kanthasamy* the actions of individual immigration officers in judicial review decisions have not consistently reflected these observations about institutional behaviour change. In the years following the release of the *Kanthasamy* decision, the Federal Court judicially reviewed numerous Citizenship and Immigration decisions where immigration officers failed to comply with the

---

[83] See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[84] See *Lu v Canada (Citizenship and Immigration)*, 2016 FC 175; *Cerezo v Canada (Citizenship and Immigration)*, 2016 FC 1224; *Li v Canada (Public Safety and Emergency Preparedness*), 2016 FC 451.
[85] Ron Poulton, "Kanthasamy and the spring cleaning of immigration law" *Canadian Lawyer* (2016), online: <www.canadianlawyermag.com/news/opinion/kanthasamy-and-the-spring-cleaning-of-immigration-law/270057>.

best interests of the child framework.[86] In several cases, the Federal Court described the reasons provided by immigration officers as "run[ning] afoul of the teachings from *Kanthasamy*"[87] or "fail[ing] … to show any compassionate consideration that goes beyond the strict hardship lens."[88] It may be unreasonable to expect that the *Kanthasamy* principles would be adopted and reasonably considered by immigration officers in all cases. However, the number of recent decisions that disregard the best interests of children framework indicates that *Kanthasamy* may not have resulted in the individual behaviour change that was intended.

Systemic Change

As a judicial review application, the Federal Court, Federal Court of Appeal, and Supreme Court of Canada were limited in their ability to impose systemic remedies. However, Mr. Kanthasamy's case has indirectly impacted how immigration officers evaluate H&C grounds and incorporate the best interests of children when reviewing refugee protection cases. The judicial direction in *Kanthasamy* resulted in updated policies for Citizenship and Immigration Canada when assessing H&C applications. These updates included considering hardship in the context of H&C applications, applying the H&C threshold of proof, incorporating best interests of the child, and balancing consistency and discretion.[89] These policy changes are soft law and therefore not legally binding.

---

[86] See *Lopez Cobo v Canada (Citizenship and Immigration)*, 2019 FC 349; *Babfunmi v Canada (Citizenship and Immigration)*, 2019 FC 151; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2019 FC 133; *Skinner v Canada (Citizenship and Immigration)*, 2019 FC 3; *Cojuhari v Canada (Citizenship and Immigration),* 2018 FC 1009 and *Dowers v Canada (Citizenship and Immigration)*, 2018 FC 889 for a recent sample of IRB decisions that were remitted back to Citizenship and Immigration Canada for reconsideration for failing to follow the Supreme Court's direction in *Kanthasamy*. To draw a reasonable inference about behaviour change, I reviewed Federal Court decisions when the immigration officer's decisions was issued after the *Kanthasamy* decision.

[87] *Skinner v Canada (Citizenship and Immigration)*, 2019 FC 3 at para 53.

[88] *Yanchak v Canada (Citizenship and Immigration)*, 2019 FC 117 at para 17.

[89] Government of Canada, "Program delivery update – March 2, 2016: update to guidance on humanitarian and compassionate consideration" (2016), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/updates/2016-03-02.html>.

Yet, they provide clear direction for immigration officers to change their practices by approaching H&C discretion with greater flexibility and assessing "hardship" holistically by using a broad range of non-exhaustive factors.[90] However, as noted previously, subsequent judicial review of Citizenship and Immigration decisions demonstrated that these policy changes did not always result in behaviour change for frontline immigration officials.

First Nations Child and Family Caring Society v Canada (Attorney General)

In 2011, the First Nations Child and Family Caring Society (FNCFCS) filed a complaint at the Canadian Human Rights Tribunal claiming that 54,000 First Nations children living on-reserve were not receiving adequate child welfare funding compared to their non-Indigenous counterparts.[91] FNCFCS argued that chronic underfunding resulted in culturally inappropriate service delivery and a "systemic discriminatory impact" for First Nations children. They requested a Tribunal order for an annual funding increase of $109 million from Indigenous and Northern Affairs Canada (INAC) to address the funding shortfall.[92] The Tribunal dismissed the complaint on the basis of an inadequate evidentiary record, but re-visited the matter after the Federal Court granted three applications for judicial review and set aside the Tribunal's decision.[93] After numerous motions about procedural issues and allegations of retaliation directed towards FNCFCS advocate Dr. Cindy Blackstock, the matter was finally reheard by the Tribunal in 2013/2014. A decision was rendered in 2016. The Tribunal found that Aboriginal Affairs and Northern Development Canada (AANDC) was discriminating against First Nations on-reserve children.[94] The Tribunal ordered AANDC to cease its discriminatory practices, reform the child welfare funding model, and apply the "full meaning and scope" of Jordan's Principle, according

---

[90] Judith Boer, "H&C Update Following the SCC Kanthasamy Decision" Continuing Legal Education Society of British Columbia (2016), online: </www.cle.bc.ca/practice-point/human-rights/hc-update-following-scc-kanthasamy-decision> at 4.1.3.
[91] 2011 CHRT 4 at para 21 [2011 FNCFCS Decision].
[92] *Ibid* at para 21.
[93] *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2012 CHRT 16 at para 4.
[94] 2016 FNCFCS Decision, *supra* note 14 at para 466.

to which First Nations children are supposed to be able to access the social, health, educational, and other services they need in a timely manner.[95]

Disappointingly, this case was not resolved by the orders outlined in the 2016 decision and the Tribunal continues to maintain its jurisdiction over the matter. The Tribunal issued subsequent orders directing AANDC in its implementation of Jordan's Principle[96] and heard new motions from FNCFCS alleging AANDC's non-compliance with the remedial orders.[97] In its non-compliance decision, the Tribunal noted that it is "not interested in drafting policies, choosing between policies, supervising policy-drafting or unnecessarily embarking on the specifics of reform."[98] The Tribunal then ordered additional remedies to the 2016 decision, requiring AANDC to conduct needs assessments with First Nations agencies, develop alternative funding systems (in recognition that longer-term funding reform was underway), and evaluate its progress (with specific timelines for reporting back to the Tribunal).[99] The Tribunal has since issued decisions providing guidance to AANDC on how to define "essential service," "service gap," "unreasonable delay" and the category of First Nations children eligible for coverage under Jordan's Principle and how to implement the compensation framework.[100]

To enforce the remedies, the Tribunal indicated that it may be required to maintain jurisdiction (similar to *McKinnon*) to facilitate meaningful implementation.[101] In 2019, the Tribunal issued another decision following up on the parties' submissions about compensation. The 2019 decision ordered $20,000 (plus interest) payable to each First Nations child and to each First Nations parent or grandparent of children that were removed from their home between January 1, 2006 and the earliest of when the discrimination has ceased, the date the parties

---

[95] *Ibid* at para 481.
[96] See 2016 CHRT 10, 2017 CHRT 14 and 2017 CHRT 35.
[97] 2018 FNCFCS Decision, *supra* note 1.
[98] *Ibid* at para 48.
[99] *Ibid* at paras 407-450.
[100] See 2020 FNCFCS Decision, *supra* note 4; 2020 CHRT 15; 2020 CHRT 20; 2020 CHRT 36; 2021 CHRT 6; 2021 CHRT 7.
[101] 2018 FNCFCS Decision, *supra* note 1 at para 388.

settle the agreement, or the date the Tribunal ceases to retain jurisdiction.[102] The Attorney General of Canada filed an application for judicial review with the Federal Court and requested a stay of the Tribunal's compensation ruling.[103] The Federal Court denied the Attorney General's application for a stay and denied the FNCFCS's motion to stay the Attorney General's judicial review. The decision concluded that the possibility of a future judicial review may incentivize the parties to negotiate and expedite their discussions.[104]

Accountability and Enforceability

The protracted *First Nations Child and Family Caring Society* case has clearly tested the boundaries of the Canadian Human Rights Tribunal's remedial jurisdiction—particularly on issues of accountability and enforceability. In its 2018 FNCFCS decision, the Tribunal stated that "the rule of law is directly dependent on the ability of the Tribunal to enforce its process and maintain respect for remedial orders otherwise the *CHRA* is meaningless as a tool to eliminate discrimination."[105] The 2019 FNCFCS decision was the Tribunal's eighth non-compliance order, and enforcement issues have continued as the Attorney General of Canada maintains that the decisions should be quashed.[106] The Tribunal has expressed concern that the Attorney General has opted for non-compliance, noting that "no party can unilaterally elect to simply not-comply with

---

[102] 2019 FNCFCS Decision, *supra* note 4 at paras 245, 275. The Tribunal rejected the argument that compensation should not be awarded on the basis that First Nations children may also receive monetary damages through a certified class action in Federal Court or a claim for *Charter* damages (para 205).
[103] *Canada (Attorney General) v First Nations Child and Family Caring Society* (2019), Application for Judicial Review, online: <fncaringsociety.com/sites/default/files/federal_court_document_t-1621-19.pdf> [2019 AG Application for Judicial Review] (the application has been ordered into case management).
[104] *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2019 FC 1529 at paras 32-33 [2019 FNCFCS FC Decision].
[105] 2018 FNCFCS Decision, *supra* note 1 at para 89.
[106] 2019 AG Application for Judicial Review, *supra* note 103.

Tribunal orders."[107] The judicial review was heard in Federal Court from June 14-18, 2021.[108]

The CHRT has not yet exercised the full extent of its statutory enforcement powers in this case. Under section 57 of the *Canadian Human Rights Act* (*CHRA*), the Tribunal can file an order with the Federal Court to apply court enforcement remedies.[109] The *CHRA* allows the Tribunal itself to engage the Federal Court's enforcement powers to hold parties in contempt for failing to comply.[110] However, contempt is not available when the non-complying party is the Crown as an executive body (e.g., a ministry or department).[111] As was the case in *McKinnon*, in certain cases it may be possible to attribute institutional responsibility to senior public officials, such as Deputy Ministers, if their actions were contemptuous in nature (e.g., withholding documents).[112] If the Attorney General's application for judicial review is unsuccessful, the Tribunal may be able to exercise its remedial discretion (similar to *McKinnon*) to request the Federal Court hold senior public officials in contempt for their non-compliance.[113]

Behaviour Change

On November 25, 2019, the Attorney General of Canada and the Minister of Indigenous Services made an unexpected announcement: the Government of Canada was committed to "seeking a comprehensive settlement on

---

[107] Letter from Judy Dubois, Registry Officer, Canadian Human Rights Tribunal (27 November 2019), online (pdf): <fncaringsociety.com/sites/default/files/2019.11.27._lt_fc_registry_chrt_deadline_extension.pdf>.
[108] Brett Forester, "Feds submit arguments to overturn 'unreasonable' and 'egregious' CHRT rulings" *APTN* (12 March 2021), online: <www.aptnnews.ca/national-news/feds-argue-discrimination-not-ongoing-chrt>.
[109] *Canadian Human Rights Act*, RSC 1985, c H-6, s 57.
[110] *Warman v Tremaine*, 2011 FCA 297 at para 44; *Federal Court Rules*, SOR/98-106, ss 424(1), 425.
[111] Hogg, Monahan & Wright, *supra* note 45 at 82-83; 2011 *McKinnon* Decision, *supra* note 68 at para 64.
[112] 2011 *McKinnon* Decision, *supra* note 68 at para 168.
[113] *Ibid* at para 186.

compensation" for the underfunding of child welfare services on-reserve.[114] While the announcement cited the advocacy efforts of the FNCFCS and the CHRT decisions, the impetus was another legal proceeding: a six billion dollar class action for First Nations children affected by the on-reserve child welfare system between 1991–2019 with two lead plaintiffs, Jeremy Meawasige and Xavier Moushoom.[115] Meawasige is a representative of the Jordan's Principle class in the proceeding, after the Government of Canada denied funding for him to receive treatment for cerebral palsy, spinal curvature, and autism in Pictou Landing First Nation in Nova Scotia. Moushoom is advancing the class action based on his experience living in 14 foster homes between the ages of 9–18. If the class action results in a settlement, the two proceedings would not be mutually exclusive: First Nations children affected by the on-reserve child welfare system could seek compensation from both the CHRT proceeding and the class action settlement.[116] Shortly thereafter, the Assembly of First Nations also commenced a class action lawsuit seeking $10B in damages on behalf of First Nations children impacted by Jordan's Principle.[117] Both Meawasige and Moushoom's class action and the Assembly of First Nations class action have been certified by the Federal Court.

The behaviour change outcomes between the class actions and the CHRT decisions are markedly different. The scope of the class actions is also broader

---

[114] Indigenous Services Canada, News Release, "Joint Statement by the Minister of Indigenous Services and the Minister of Justice and Attorney General of Canada on compensation for First Nations children" (25 November 2019), online: <www.canada.ca/en/indigenous-services-canada/news/2019/11/joint-statement-by-the-minister-of-indigenous-services-and-the-minister-of-justice-and-attorney-general-of-canada-on-compensation-for-first-nations.html>.

[115] Jorge Barrera, "Ottawa in talks to settle First Nations child welfare class action lawsuit" *CBC News* (4 November 2019), online: <www.cbc.ca/news/indigenous/challenge-child-welfare-lawsuit-1.5343818> [Barrera, "Ottawa in talks"].

[116] *Ibid.*

[117] Assembly of First Nations, "AFN National Chief Bellegarde welcomes Canada's consent to certification of national class action involving First Nations child and family services, and agreement to proceed to mediation" (3 September 2020), online: <www.afn.ca/afn-national-chief-bellegarde-welcomes-canadas-consent-to-certification-of-national-class-action-involving-first-nations-child-and-family-services-and-agreement-to-proceed-to-mediation>.

than the human rights complaint, with the potential to compensate First Nations children affected from 1991 onwards (compared to the Tribunal's compensation order, from 2006 onwards).[118] The Government of Canada emphasized that the CHRT compensation order "does not properly address all issues around appropriate compensation"[119] and the $40,000 block compensation regardless of the recipient's circumstances could result in unfairness.[120] Canon's framework provides two possible explanations for why institutional behaviour change has occurred faster in the class actions: (1) political factors; and (2) community pressure.[121] Underfunding on-reserve child welfare became a 2019 federal election issue, and the Liberal government faced extensive criticism for its failure to comply with the CHRT's order.[122] The Liberal government also received significant criticism from various Indigenous stakeholders about its failure to comply with the CHRT's order.[123] It is possible that community pressure reached a "tipping point" and the Minister of Justice preferred a politically opportune private settlement process over public litigation.

Systemic Change

In its 2019 decision, the Tribunal emphasized that the evidence supported individual remedies (compensation for children and their families) and systemic remedies (policy and funding formula changes), both of which fall within the Tribunal's remedial jurisdiction under the *CHRA*.[124] On the underlying remedial objective, the Tribunal noted that this case was about "justice" and "real and measurable change."[125]

Real and measurable change can only be achieved if the CHRT can successfully "grant remedial orders that can be an effective counter to the full

---

[118] *Ibid.*
[119] Indigenous Services Canada, *supra* note 114.
[120] Barrera, "Ottawa in talks", *supra* note 115.
[121] Canon, *supra* note 55 at 95-96.
[122] Teresa Wright, "Trudeau government appeals ruling on compensation to First Nations children" *Global News* (4 October 2019), online: <globalnews.ca/news/5991248/appeal-indigenous-children-welfare>.
[123] *Ibid.*
[124] FNCFCS 2019 Decision, *supra* note 4 at para 13.
[125] 2018 FNCFCS Decision, *supra* note 1 at para 451 [emphasis original].

extent of the proven discrimination, and penetrate known institutional barriers to change."[126] While the Attorney General has signalled the desire to implement the systemic orders and change Canada's child welfare funding formulas,[127] the act of filing for judicial review over the issue of monetary compensation—after almost a decade of protracted litigation—appears hypocritical and contrary to the Government of Canada's commitment to reconciliation.[128]

In the 2016 FNCFCS decision, the Tribunal ordered AANDC to reform the First Nations Child & Family Services Program and *1965 Agreement* (a cost-sharing agreement between the Government of Ontario and Government of Canada), cease applying discriminatory funding formulas for First Nations child welfare, and apply the full meaning and scope of Jordan's Principle.[129] Indigenous Services Canada cited several key policy developments as evidence of systemic changes that complied with the CHRT decisions: reforms to on-reserve child welfare funding principles, the introduction of Bill C-92 to reform the administration of First Nations child welfare, and a more liberal interpretation of Jordan's Principle (resulting in the fulfillment of 478,000 requests for funding for products, services, and supports).[130] Indigenous Services Canada has also changed the funding formula, allowing First Nations child and family service agencies to bill Indigenous Services Canada at actual cost, both for future service delivery and retroactively back to January 26, 2016.[131] Modernizing the *1965 Agreement* has

---

[126] Brodsky, Day & Kelly, *supra* note 8 at 4.
[127] 2018 FNCFCS Decision, *supra* note 1 at para 449.
[128] Olivia Stefanovich, "Trudeau government seeks judicial review of tribunal decision to compensate First Nations kids", *CBC News* (2019), online: <www.cbc.ca/news/politics/human-rights-tribunal-liberal-child-welfare-appeal-1.5308897>.
[129] 2016 FNCFCS Decision, *supra* note 14 at para 481.
[130] Indigenous Services Canada, *supra* note 114; Indigenous and Northern Affairs Canada, "Contributions to provide women, children and families with protection and prevention services" (1 April 2019), online: <www.aadnc-aandc.gc.ca/eng/1386520802043/1386520921574>.
[131] First Nations Child and Family Caring Society, "First Nations Child and Family Service Agency Funding Changes per the Canadian Human Rights Tribunal" (2 January 2019), online: <fncaringsociety.com/sites/default/files/fncfsa_funding_changes_0.pdf>.

required extensive federal-provincial negotiations, and appears to remain an ongoing initiative for Indigenous Services Canada.[132]

V. DISCUSSION & IMPLICATIONS

These case studies provide three key observations about how Crown executive actors respond to tribunal or court-ordered remedies: (1) they are largely distrusting of remedies ordered by administrative tribunals; (2) they are often motivated by political opportunism; and (3) they often opt to introduce systemic changes through soft law rather than legally binding measures. These observations are not intended to reflect universal truths in public law litigation; undoubtedly, there are numerous examples of court-ordered remedies achieving meaningful change for Crown executive actors and other affected parties. Instead, these observations about two specific case studies provide a starting point to explore the issue of remedies in public law litigation further.

While the *Kanthasamy* decision was not heard before an administrative tribunal prior to its judicial review application, the Attorney General's conduct throughout the *First Nations Child and Family Caring Society* proceedings has demonstrated significant distrust. In the Federal Court hearing to stay the CHRT's compensation ruling, Department of Justice lawyer Robert Frater argued that the CHRT compensation ruling was an "unnecessarily invasive piece of surgery by the wrong doctors."[133] In the CHRT compensation hearing, the Attorney General vigorously argued that individual compensation orders were out of the scope of the CHRT's remedial jurisdiction for an issue of systemic discrimination.[134] The CHRT found the Attorney General's consistent failure to comply with the Tribunal's previous orders to be wilful and reckless, as public

---

[132] Jorge Barrera, "50-year-old Ontario First Nation child welfare agreement blamed for Sixties Scoop under review" *CBC News* (1 February 2018), online: <www.cbc.ca/news/indigenous/child-welfare-agreement-ontario-first-nations-under-review-1.4515321>.

[133] The Canadian Press, "First Nations child welfare advocate accuses feds of 'shopping around' courts" *CTV News* (26 November 2019), online: <www.ctvnews.ca/politics/first-nations-child-welfare-advocate-accuses-feds-of-shopping-around-courts-1.4703078>.

[134] 2019 FNCFCS Decision, *supra* note 4 at paras 50-52.

officials continued to act with full awareness of the adverse consequences for First Nations children and their families.[135] The Attorney General's relentless non-compliance with the CHRT's previous enforcement orders reflects a culture of distrust and a reluctance to defer to the Tribunal's authority.

In these cases, political opportunism also has a significant influence on how executive actors responded to court and tribunal-ordered remedies. The *Kanthasamy* decision was issued shortly after the Liberal majority government took office in 2015. At the time, the government's stance on immigration signalled a significant shift in Canada's immigration policy by committing to accept 25,000 Syrian refugees.[136] The photograph of the deceased 3-year-old Turkish refugee child Alan Kurdi also had a significant galvanizing effect on Canadian officials to respond to the worldwide refugee crisis, with a particular emphasis on expediting files for child asylum seekers.[137] While Citizenship and Immigration Canada's soft law changes were not directly attributed to this policy announcement, it may have been politically convenient for Citizenship and Immigration Canada to apply a more "compassionate" interpretation of H&C factors in their review of asylum applications at this time. Similarly, in *First Nations Child and Family Caring Society* the Government of Canada opted to issue a public statement about compensating First Nations children affected by on-reserve child welfare after the issue became highly politicized in the 2019 federal election.

The executive actors in these cases also favoured soft law as a remedial measure, potentially due to its lack of legally binding authority. In *Kanthasamy*, the soft law policy changes introduced by Citizenship and Immigration Canada did not impose any new legal requirements on immigration officers under the *Immigration and Refugee Protection Act* or *Immigration and Refugee Protection Regulations* (e.g., codifying the best interests of the child principle in statute). Since

---

[135] *Ibid* at paras 234-35.
[136] CBC News, "Justin Trudeau's promise to take 25,000 Syrian refugees this year 'problematic'" *CBC News* (28 October 2015), online: <www.cbc.ca/news/politics/trudeau-syria-refugees-settlement-groups-1.3291959>.
[137] Ian Austen, "Aylan Kurdi's Death Resonates in Canadian Election Campaign" *New York Times* (3 September 2015), online: <www.nytimes.com/2015/09/04/world/americas/aylan-kurdis-death-raises-resonates-in-canadian-election-campaign.html>.

Citizenship and Immigration Canada kept the best interests of the child principle wholly discretionary for immigration officers, the principle is repeatedly re-litigated in the Federal Court. In *First Nations Child and Family Caring Society*, the only legally binding remedial measure was the introduction of Bill C-92. However, Bill C-92 does not contain any legally binding commitments and "provides little protection for the hard-won gains at the CHRT nor does it include Jordan's Principle."[138]

VI. CONCLUSION

Former Chief Justice Beverley McLachlin once observed that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[139] The case studies of *Kanthasamy* and *First Nations Child and Family Caring Society* provide two examples of underwhelming outcomes in public law litigation for executive action where the remedies were unenforceable or offered limited recourse. By quashing the immigration officer's decision and providing guidance for the interpretation and application of ministerial guidelines in *Kanthasamy*, the Supreme Court of Canada created significant, substantial policy changes in immigration law. However, there appear to be ongoing challenges with individual behaviour change to ensure that immigration officers comply with the best interests of the child principle. In *First Nations Child and Family Caring Society*, the CHRT faced significant challenges enforcing individual and systemic orders against Indigenous Services Canada. The litigation at the CHRT and Federal Court has spanned nearly a decade, and the CHRT continues to oversee the two billion dollar compensation order for 54,000 First Nations children affected by the decision. In contrast, the six billion dollar class action lawsuit launched by Meawasige and Moushoom in 2019 has already secured a public commitment

---

[138] First Nations Child and Family Caring Society, "Preliminary Briefing Sheet: Bill C-92 - An Act respecting First Nations, Métis and Inuit children, youth and families" (9 March 2019), online: <fncaringsociety.com/sites/default/files/legislation_bn_march_9_2019.pdf>.

[139] *R v 974649 Ontario Inc.*, 2001 SCC 81 at para 20.

from the Government of Canada to participate in settlement proceedings to compensate a larger class of First Nations children.[140]

These observations underscore the importance of strategic litigation when parties sue the Crown for executive action, recognizing that the remedial outcomes can be incremental at best. The litigants' choice of decision-making body, plaintiff, procedure, and legal issue can significantly impact the scope of available remedies and the timeliness of the relief. While administrative tribunals typically have a broader scope of systemic remedies available to them, the *First Nations Child and Family Caring Society* litigation has demonstrated that the enforcement of those remedies—particularly if they are politically contested—can be a challenging time and resource-intensive process. This paper has provided a preliminary framework to evaluate remedies against the Crown for executive action, but in the absence of further empirical research it is difficult to make more substantive claims about the most effective strategies for Canadian public law litigation. It would be beneficial for future research to trace the implementation and enforcement of tribunal and court-ordered remedies over a longer period of time and identify additional variables that influence whether meaningful social change is achieved.

---

[140] Indigenous Services Canada, *supra* note 114.