

Reclaiming the Spirit of Jordan's Principle: Lessons from a Canadian Human Rights Tribunal Ruling

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Abstract

Jordan's Principle is a child-first principle designed to ensure First Nation children do not experience delays, denials, or disruptions of services ordinarily available to other children in Canada. It was envisioned as a human rights principle tailored to address the unique risks of inequitable treatment arising from the complex structure of public services for First Nations. In 2016, the Canadian Human Rights Tribunal (CHRT) found the federal government's failure to implement Jordan's Principle constitutes discrimination on the basis of race and/or national or ethnic origin, and ordered the federal government to cease this discrimination. In response, the First Nations Child and Family Caring Society, one of the complainants in the case and a primary champion of Jordan's Principle, called on the federal government to implement the principle immediately in keeping with the conclusions laid out in a 2015 report by the Jordan's Principle Working Group (JPWG, 2015). This article provides an overview of the research presented and conclusions drawn in the report, integrating analysis of the initial CHRT rulings on Jordan's Principle and of access to information documents received in the year following release of the report. Focusing on the rulings that the CHRT issued between January and September of 2016, we highlight requirements that the CHRT ruled the federal government must fulfill, as well as additional considerations that should be taken into account in implementing Jordan's Principle.

Keywords: First Nations; Indigenous; children's rights; Jordan's Principle; substantive equality; public services; Canadian Human Rights Tribunal; CHRT

Résumé

Le principe de Jordan est un principe de l'enfant d'abord qui vise à assurer que tous les enfants des Premières Nations reçoivent, sans délai, refus ou perturbation, les services qui seraient habituellement à la disposition des autres enfants au Canada. Il s'agissait d'un principe des droits de la personne conçu pour remédier aux risques uniques d'un traitement inéquitable découlant de la structure complexe des services publics pour les Premières Nations. Le Tribunal canadien des droits de la personne (TCDP) a récemment conclu que la non-application du principe de Jordan par le gouvernement fédéral constituait une discrimination fondée sur la race et/ou l'origine nationale ou ethnique et a ordonné au gouvernement fédéral de mettre fin à cette discrimination. En réponse, la Société de soutien à l'enfance et à la famille des Premières Nations du Canada, l'un des plaignants dans l'affaire et l'un des principaux défenseurs du principe de Jordan, a fait appel au gouvernement fédéral afin de mettre en œuvre ce principe immédiatement, conformément aux conclusions du rapport de 2015 du groupe de travail sur le principe de Jordan. Cet article donne un aperçu des recherches présentées et des conclusions du rapport, en intégrant l'analyse des décisions du TCDP sur le principe de Jordan et les documents d'accès récemment reçus. En nous concentrant sur les décisions rendues par le TCDP entre janvier et septembre 2016, nous soulignons les exigences que le TCDP a imposées au gouvernement fédéral, ainsi que des considérations supplémentaires à prendre en compte lors de la mise en œuvre du principe de Jordan.

Mots clés: Premières Nations; autochtones; droits de l'enfant; principe de Jordan; égalité réelle; fonction publique; Tribunal canadien des droits de la personne; TCDP

Introduction

Jordan's Principle is a child-first principle designed to ensure that First Nation children do not experience delays, denials, or disruptions of services ordinarily available to other children in Canada.¹ The principle states that, when a First Nation child requests services ordinarily available to other children, the government/department to which the request is made should pay for and/or provide the needed services without delay. Jordan's Principle was envisioned as a human rights principle tailored to address the unique risks of inequitable treatment arising from the complex structure of public service provision for First Nation children. This structure leaves First Nation children more vulnerable than other children to service gaps, disparities in services, and other jurisdictional disputes regarding responsibility and funding.

A 2016 Canadian Human Rights Tribunal (CHRT) decision found the federal government's failure to implement Jordan's Principle constituted discrimination on the basis of race and/or ethnic or national origin, and ordered the federal government to cease this discriminatory action (*First Nations Child and Family Caring Society et al. v. Attorney General of Canada (Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 2 [*Caring Society v. Canada*]). The decision adds force to many years of advocacy and to calls for the implementation of Jordan's Principle by First Nations and child rights groups that have argued it is an essential tool for protecting the human rights of First Nation children given the unique structural barriers they face in accessing equitable services.

The CHRT decision reinforced the conclusions of a 2015 report released by the Jordan's Principle Working Group² (JPWG) and published by the Assembly of First Nations (JPWG, 2015). The report provides a systematic account of Jordan's Principle history, drawing on a review of over 300 Jordan's Principle-related documents, a scoping literature review on health and child welfare services for First Nation children, and exploratory interviews with 17 health professionals and 10 child welfare professionals from six provinces (see Table 1). The CHRT ordered Indigenous and Northern Affairs Canada (INAC)³ "to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle" (*Caring Society v. Canada*, para 481). In response, the First Nations Child and Family Caring Society of Canada (Caring Society), one of the complainants in the case and a primary advocate for Jordan's Principle, called on the federal government to

¹ Some articulations of the principle have specified that it applies also to Inuit children (e.g. First Nations Child and Family Caring Society, 2011).

² A full list of Jordan's Principle Working Group (JPWG) members is in appendix.

³ INAC is the name of the relevant federal department at the time of the CHRT's decision in early 2016. In the last couple decades has gone by other names such as Aboriginal Affairs and Northern Development Canada (AANDC), and Indian and Northern Affairs Canada (INAC). It has recently split into two departments, with Indigenous Services Canada (ISC) now being the relevant federal department. In this article we use INAC throughout the text, and use time-appropriate acronyms in references.

immediately implement Jordan’s Principle in keeping with the conclusions laid out in the JPWG report.

This article provides an overview of the research presented and the conclusions drawn in the report, integrating analysis of the first three CHRT rulings in the *Caring Society v. Canada* case – the initial ruling in January 2016, a follow-up ruling in April 2016, and a compliance order issued in September 2016 – as well as access to information documents received in the year after publication of the JPWG report. Subsequent to the completion of the analyses presented here (of materials up until 2016), the CHRT issued additional rulings that have further clarified and refined the contours and scope of Jordan’s Principle, but consideration of these rulings is outside the scope of this article. In keeping with the CHRT case, the focus of this paper is access to public services for First Nation children in Canada; however, the CHRT ruling and federal actions around Jordan’s Principle may also have important implications for other Indigenous children (i.e. Inuit and Métis), who should be the focus of additional research.

Table 1: Data Sources and Retrieval Methods

	Method of Identification	Types of Data Identified
Systematic literature review on “Jordan’s Principle”	Systematic search in academic, legislative, and web databases; Access to information requests and requests directly to government departments; Other retrieval methods	Academic articles, published non-governmental organization reports, and publically available government reports; Jordan’s Principle agreements; Non-governmental organization reports, internal government memos/reports, publically available government reports
Scoping review of services for First Nations children	Targeted web searches related to health and child welfare services for First Nations children; Examination of the references lists of previously retrieved documents; Review of documents and testimony made public through the Canadian Human Rights Tribunal	Academic articles, published non-governmental organization reports, and publically available government reports; Internal government memos/reports
Key informant interviews	Primary recruitment through a Canadian Association of Paediatric Health Centres webinar and through research team and Jordan’s Principle Working Group member contacts; Secondary recruitment through snowball sampling	10 child welfare workers/administrators, from 7 child welfare agencies in 4 provinces/territories; 17 health care professionals, from 7 organizations in 4 provinces/territories
Targeted follow-up	Access to information requests on the 2013 Federal Court decision in <i>Pictou Landing Band Council v. Canada</i> and on AANDC’s Assisted Living Program, as well as targeted journal article searches	Internal government communications, memos, and reports; peer-reviewed journal articles

Jordan’s Principle: A Consistent Vision

Jordan’s Principle is named in honour of Jordan River Anderson, a young boy from Norway House Cree First Nation in Manitoba. Jordan was born with a rare neuromuscular disease and had to spend the first years of his life in a hospital in Winnipeg, far from his

community and family home. When Jordan was about two years old, his medical team recommended that he be discharged from hospital to live in a medical foster home. A jurisdictional dispute developed between Health Canada, INAC, and the province of Manitoba over whose responsibility it was to cover the cost of the supports Jordan needed to move to a home environment. The dispute dragged on for years. Meanwhile, Jordan was kept in the hospital despite his medical team's recommendation that he be discharged with required supports. In early February 2005, Jordan River Anderson passed away at the age of 5, having never had the opportunity to live in a home environment (First Nations Child & Family Caring Society of Canada, 2014; *Caring Society v. Canada*).

The Structure of Services for First Nation People

Jordan's Principle was created in response to evidence that Jordan's experience was not an isolated incident but rather one tragic example of the systematic denials, delays, and disruptions of services that result from the complex structure of service provision (including funding) for First Nation people (Blackstock, Prakash, Loxley, & Wien, 2005; McDonald & Ladd, 2000). This structure is shaped, in part, by the constitutional status of First Nation peoples and their unique historical relationship with the Crown. The result is federal involvement in the funding and provision of services to First Nation people living on reserve and federal funding of supplementary health benefits to First Nation people regardless of reserve residency status. The federal government has been involved in service provision to First Nation people for over 100 years (MacIntosh, 2011), primarily through two departments: INAC and Health Canada. Problems associated with the lack of coordination between federal departments regarding health and social services for First Nation people was noted at least as far back as the 1940s (Waldram et al., 1995). In addition to undertaking direct service provision, these departments have often played the role of funder, contracting with provinces/territories and increasingly with First Nation communities/agencies, to provide on-reserve services (Rae, 2009; Sinha & Kozlowski, 2013; Douglas, 2013).

First Nation advocates and legal scholars have argued that federal responsibility for service provision and/or funding is grounded in treaties between First Nations and the Crown/Canada (Boyer, 2003; Health Canada & Assembly of First Nations, 2012; Romanow, 2002). The Federal Court has suggested that the "medicine chest clause" of Treaty 6 "may well require a full range of contemporary medical services" to be provided by Canada (*Wuskwi Sipihk Cree Nation v. Canada (Minister of National Health and Welfare)* [1999] F.C.J. No. 82, para 14) to registered status Indian members of Treaty 6 First Nations (AANDC, 2008), and a similar clause was included in other numbered treaties (Boyer, 2014; Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, 1993). The federal government, however, has long maintained that it carries no legal obligation to fund/provide health or social services to First Nations (e.g. Health Canada & Assembly of First Nations, 2012; Indian and Northern Affairs Canada, 2005).

The *Constitution Act (1867)* designates “Indians and lands reserved for the Indians” as an area of federal jurisdiction (s. 91(24)).⁴ The significance of this Constitutional provision was emphasized by the CHRT in its rejection of a federal government argument that federal involvement in health and social service provision to First Nations is simply a matter of policy choice (*Caring Society v. Canada*, para 78).

The framework for service provision to First Nations people is further complicated by the fact that the constitutional responsibility for health and social services rests primarily with the provinces (Bélanger, 2001; MacIntosh, 2011). Each province has its own health and social services legislation, programs, and administration. Section 88 of the federal *Indian Act* extends provincial laws of general application to First Nation people living on reserve.

While non-First Nation and non-Inuit Canadians generally only need to navigate provincial bureaucracy in order to obtain public services, First Nation individuals who live on reserve and/or hold Indian status may have to deal with First Nations, federal, and/or provincial governments to access public services. For example, a First Nation family requiring child welfare services may be served by a provincial/territorial agency or by an agency operated by a First Nation government/community. Furthermore, navigating health care can be at least as complicated because the structure of health services varies from community to community (Lavoie et al., 2005).

As a general rule, services for First Nation people living *off* reserve are funded and legislated by the provincial government; and while provincial standards apply *on* reserve, often federal funding is inadequate so that these standards are not achieved (Sinha & Kozlowski, 2013). Provinces fund and provide insured physician and hospital services to all provincial residents, funded in part by a federal transfer. Most on-reserve health services, however, are either directly provided by the federal government or federally funded through contribution and contract arrangements with First Nations (Aboriginal Affairs and Northern Development Canada, 2008). Furthermore, a combination of formal policies and informal interpretation/implementation of policies results in situations where extended health benefits provided through provincial programs often are not extended to First Nation people with Indian status; these individuals must turn instead to federal programs (Marchildon et al., 2015; Quiñonez & Lavoie, 2009).

The Expression of Jordan’s Principle

The complex structure for funding and provision of services to First Nation people is rife with jurisdictional ambiguity – lack of clarity over responsibility for funding specific services to

⁴ The term “Indian” in s. 91(24) of the *Constitution Act, 1867* encompasses First Nations – regardless of *Indian Act* status – as well as the Inuit and the Métis. In 1939, the Supreme Court ruled that the term “Indian” in s. 91(24) includes the Inuit (*Reference whether “Indians” includes “Eskimo”*, [1939] SCR 104). In 2016, the Supreme Court upheld a Federal Court ruling in favour of issuing a declaration that “Métis and non-status Indians are ‘Indians’ within the meaning of the *Constitution Act, 1867*, s 91(24)” (*Daniels v. Canada*, 2013 FC 6, at para 619, upheld in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12).

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certain groups (e.g. Cairns et al., 1967; Department of National Health and Welfare, 1969; MacDonald & Ladd, 2002; Blackstock et al, 2005; Indian and Northern Affairs Canada, 2005; First Nations of Quebec and Labrador Health and Social Services Commission, 2006; KTA, 2008) – and with underfunding emerging from the disconnect between federal decision-making processes and provincial standards of best practice (Sinha et al., 2015b; *Caring Society v. Canada*). Jordan’s Principle emerged as a human rights tool *and* as a First Nation social policy instrument designed to ensure First Nation children do not experience denials, delays, or disruptions of services ordinarily available to other children as a result of this complex structure. While the vision of Jordan’s Principle has remained consistent over time, the *expression* of the principle (as a First Nation social policy instrument or as a human rights tool) has adapted in accordance with the fora within which it has been advanced.

Jordan’s Principle is a mechanism for ensuring greater adherence to the principles outlined in the Convention on the Rights of the Child (CRC), the *Canadian Charter of Rights and Freedoms* (the *Charter*), the *Canadian Human Rights Act* (CHRA), and other provincial/territorial and federal legislation. Expressions of Jordan’s Principle *as a First Nation social policy instrument* focus on the existence of a “jurisdictional dispute” between governments or governmental departments as a defining feature, distinguishing situations such as Jordan’s from other human rights violations. However, expressions of Jordan’s Principle *as a human rights instrument* de-emphasize the existence of a jurisdictional dispute, instead focusing on Jordan’s Principle as a tool for ensuring the equitable treatment of First Nation children relative to other Canadian children (MacDonald & Walman, 2005): the goal is to ensure First Nation children can “access public services on the same terms as other children” (*Caring Society (Counsel)*, 2014, pp. 170, 216; *Caring Society*, 2014).

The 2016 CHRT rulings and a 2013 Federal Court ruling reinforced a consistent vision of Jordan’s Principle and suggested an interpretation of the term “jurisdictional dispute” (never explicitly defined) that reconciles the First Nation social policy expressions of Jordan’s Principle with the human rights expressions of the principle. In the *Pictou Landing Band Council* (PLBC) decision, the Federal Court used Jordan’s Principle as a First Nation policy instrument against which to judge the reasonableness of federal bureaucrats’ decisions (*Pictou Landing Band Council & Maurina Beadle v. Attorney General of Canada*, 2013 F.C. 342 [*PLBC v. Canada*]). Justice Mandamin of the Federal Court found that in the context of Jordan’s Principle, the operational definition of “jurisdictional dispute” cannot be limited to the existence of a formal payment dispute between two levels of government since they might “maintain an erroneous position on what is available to persons in need” (*PLBC v. Canada*, para 86). Accordingly, the concept of “jurisdictional dispute” must include situations in which funding by the federal government is insufficient to enable services for First Nation children to meet requirements set out in provincial/territorial legislation and standards (Sinha et al., 2015a).

In *Caring Society v. Canada*, the CHRT recognized Jordan’s Principle as a human rights tool. The CHRT ruling endorses a standard of “substantive equality” in line with Canadian and

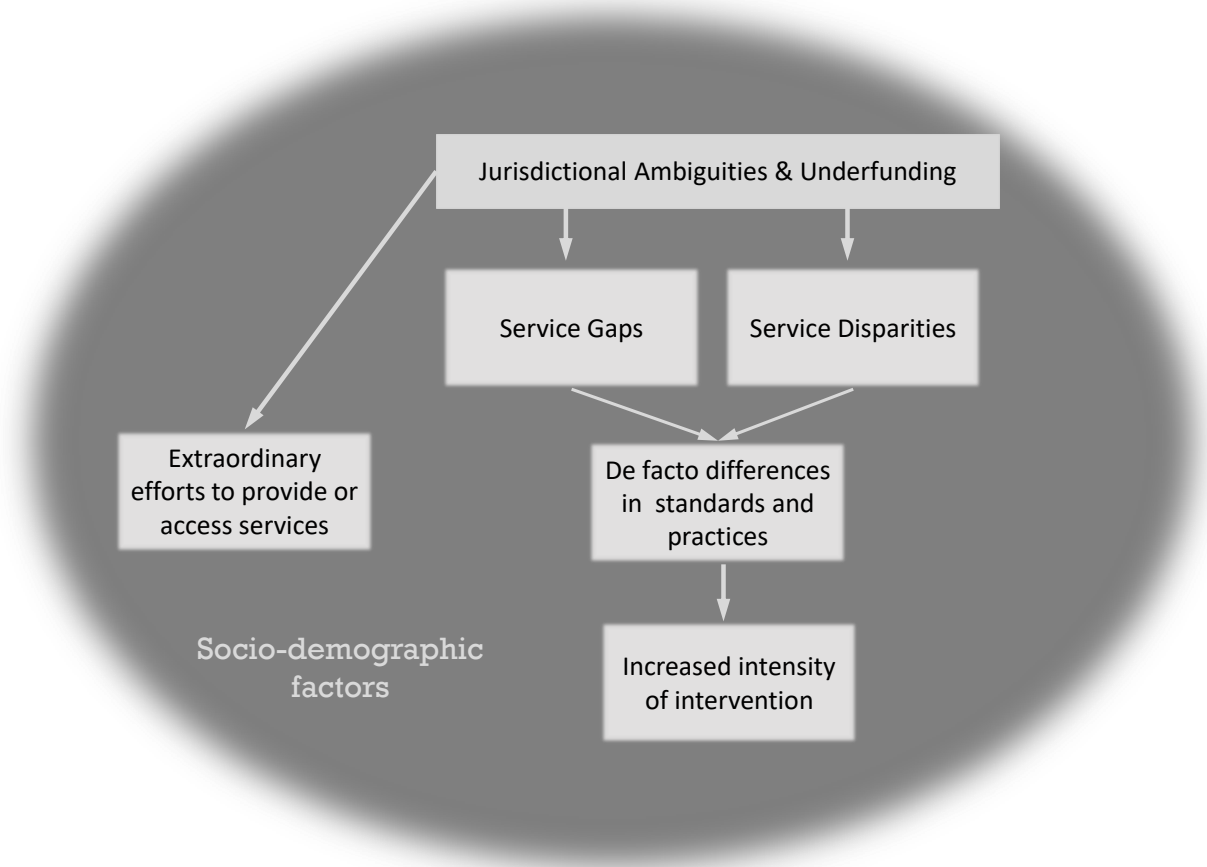
international equality jurisprudence. Applying this standard, which requires an analysis that takes into account the full social, political, and legal context, the CHRT found that the federal government's interpretation of Jordan's Principle amounted to discrimination. The CHRT found this discriminatory interpretation failed to respond to the way jurisdictional disputes arise in provision of many federal services required for the well-being of First Nation children and families. The CHRT specified that "[s]uch an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve" (*Caring Society v. Canada*, para 381). The CHRT thus found that the federal government's narrow conceptualization of Jordan's Principle and of "jurisdictional dispute" amounted to discrimination as it failed to ensure substantive equality.

Taken together, the Federal Court and CHRT decisions suggest that a robust human rights-informed conception of "jurisdictional dispute" encompasses not only areas of jurisdictional ambiguity, but also gaps and disparities in the services that the federal government funds and/or provides on reserve compared to what provinces generally fund and/or provide off-reserve.

The Need for Jordan's Principle

Underfunding and jurisdictional ambiguity in service provision to First Nation people are factors that lead to First Nation children experiencing service gaps (absence of services) and disparities (services that are fewer in quantity or lesser in quality than other children in Canada). This in turn may result in later-stage and more intrusive intervention. Overcoming the barriers to accessing services (summarized in Figure 1) can require extraordinary efforts on the part of service providers, communities, and families. This is particularly true in contexts shaped by challenging socio-economic conditions that arise from long histories of discrimination, colonialism, and systemic discrimination that continue to this day (Czyzewski, 2011; Reading & Wien, 2013). Examples of such challenging socio-economic conditions include high rates of overcrowded housing and unsafe drinking water (Assembly of First Nations, 2013) and a childhood poverty rate almost three times higher (at around 50%) than that found in the Canadian population as a whole (at around 17%) (MacDonald & Wilson, 2013, p. 6). Canadian colonial practices have included "the banning of expressions of indigenous culture and religious ceremonies; excluding First Nation people from voting, jury duty, and access to lawyers and Canadian courts for any grievances relating to land; the imposition, at times forcibly, of governance institutions; and policies of forced assimilation through the removal of children from indigenous communities" (Anaya 2014, p. 4).

Figure 1: Jurisdictional Ambiguities and Underfunding



Underfunding

Existing research highlights severe underfunding of both health and child welfare services for on-reserve First Nation children. Underfunding has been identified in all three of the major federal models used to determine funding for on-reserve child welfare services (e.g. see Johnston, 2012; McDonald & Ladd, 2000; *Caring Society v. Canada*; Murphy, 2012). A 2012 analysis by INAC recommended an additional \$420.6 million over five years and \$99.8 million per year on an ongoing basis for funding of on-reserve child welfare services (Murphy, 2012). Similarly, numerous reports document the underfunding of health and health-related services on reserve. These include findings that the mechanism used by the federal government to determine funding under the Health Transfer Policy led to entrenched inequities amongst First Nations, and that the funding provided to First Nations was not sufficient to meet needs because the funding mechanism failed to take into account services delivered, population size, or health needs (Lavoie et al., 2005). Further, evaluations of Health Canada’s Home and Community Care

program and INAC's Assisted Living program found they provided no funding for "[r]ehabilitation, social and recreational activities, and specialized education services for children and youth with special needs" (KTA, 2008, p. 12), and that up to \$441 million was needed as of 2008 to close some of the most serious service gaps in on-reserve continuing care services (KTA, 2008, p. 22).

Studies in both health and child welfare (e.g. McDonald & Ladd, 2000; Blackstock et al., 2005; Auditor General of Canada, 2008; Auditor General of Canada, 2011; Aboriginal Affairs and Northern Development Canada, 2012a; Health Canada, 2010) have consistently recommended that funding must:

- systematically incorporate cost escalators to account for inflation;
- be based on actual needs and services provided rather than population estimates;
- be regularly updated to reflect changes in provincial/territorial law/standards;
- include enhanced operations funding for small and geographically remote agencies;
- include allocations for development of data collection/research capacity and for infrastructure maintenance and improvement.

Jurisdictional Ambiguity

The complex structure of services for First Nation children results in areas of jurisdictional ambiguity (Cairns et al., 1967; MacDonald & Ladd, 2002; Blackstock et al., 2005). Confusion regarding responsibility for "Indian health and health-related services" were flagged at least as far back as 1969 (Department of National Health and Welfare, 1969). In the mid-2000s, a study of twelve First Nation child welfare agencies identified 393 jurisdictional disputes reported in a single year, the most common type being disputes between federal departments (Blackstock et al., 2005).

JPWG interviewees specified further areas of jurisdictional ambiguity around "status-eligible" children – who *could* obtain Indian status, but for whom papers have not been processed – in both health and child welfare. The federal government funds services to status-eligible children up until their first birthday; subsequently neither the federal nor the provincial government takes responsibility for either service funding or service provision (Sinha et al., 2015b). Interviewees also noted ambiguity around responsibility for services to First Nation people temporarily living on or off reserve. For example, First Nation families who temporarily move off reserve to access health services may be told they are ineligible for both provincial/territorial and federally-funded income, housing, and other programs (Sinha et al., 2015b). While current INAC policy states that individuals relocating off reserve to access services should be considered "ordinarily resident on reserve" (Aboriginal Affairs and Northern Development Canada, 2012b), this policy has not been fully implemented (Lavoie et al., 2015). Studies in Manitoba and Saskatchewan identify ambiguity in several areas including the

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following: off-reserve optometry services and crisis counselling for status First Nation individuals, on-reserve respite services, on-reserve speech and language therapy, and respiratory equipment and supplies for First Nation individuals both on and off reserve (Allec, 2005; Federation of Saskatchewan Indian Nations, 2008).

Service Gaps & Service Disparities

Both Jordan's Principle Working Group (JPWG) interviewees and existing literature identified specific gaps and disparities in health and child welfare services. Evaluations at the national and provincial levels note broad gaps and generalized disparities in child welfare funding for First Nation children (e.g. Auditor General of Canada, 2008; Auditor General of Canada, 2011; Blackstock et al., 2005; Murphy, 2012; Richard et al., 2010). The CHRT found these funding gaps and disparities discriminatory (*Caring Society v. Canada*). Examples of such discrimination noted by JPKG health interviewees included instances of on-reserve First Nation children being denied coverage for medical drugs covered for off-reserve residents, a lack of access to respite services, and limitations in rehabilitative services (Sinha et al., 2015b). These examples are consistent with existing literature that identifies gaps and disparities in a broad range of services including weekend in-home respite care, medical respite for children with complex needs, physiotherapy, occupational therapy, and speech language pathology services (Lucarz-Simpson, cited in Health Canada, 2010).

Differences in Standards and Practices

Service gaps and disparities shape health and child welfare expectations for families and for service providers. For example, limited access to diagnostic and preventative services may yield normative clinical standards focused on later-stage intervention. The impact on family expectations was reflected in JPKG interviewees' statements that on-reserve families do not even bother to request respite services because they have no hope that such services will be provided. Instead, on-reserve respite services are provided informally by family members (Sinha et al., 2015b). Further, both health and child welfare interviewees pointed out that on-reserve children and families have less frequent access to specialists than off-reserve counterparts, and on-reserve specialists are not required to have as many qualifications as off-reserve specialists. Examples included the rarity of nurse practitioner inclusion in on-reserve health care teams, disruptions in care linked to the high turnover of temporary and/or contract nurses, and the frequency with which on-reserve child welfare workers do not meet off-reserve educational and/or credential requirements (Sinha et al., 2015b). Interviewees and existing literature link some of these disparities to significant wage disparities on reserve as compared to off reserve (Lavoie et al., 2005; Indian and Northern Affairs Canada, 2009; Auditor General of Canada, 2008).

Increased Intensity of Intervention

There is mounting evidence supporting the importance and efficacy of early intervention to promote childhood and lifelong well-being (Center on the Developing Child at Harvard University, 2007; Mercy & Saul, 2009). Service gaps and disparities resulting in different service standards for First Nation children may result in First Nation children's needs going unmet until they reach an acute clinical level requiring intensive intervention. The most striking example of such an intervention discussed by JPWG interviewees was the reliance on institutionalization and the child welfare system in order for First Nation children to access necessary medical and other services (Sinha et al., 2015b). This pattern is also identified in the literature (Manitoba Terms of Reference Working Group (TORWG), 2009; Lucarz-Simpson, 2007, quoted in Health Canada, 2010; Johnson Research Inc., Donna Cona, 2011).

Extraordinary Efforts to Access Services

Some First Nation children encountering service gaps and disparities may be spared more intensive forms of health or child welfare intervention because families, communities, or service providers take extraordinary measures to ensure access to needed services. For First Nation communities this may mean accepting unfunded mandates such as First Nation child welfare agency provision of prevention and support services. These services are mandated by provincial legislation but, at least as of 2016, are severely underfunded by the federal government (Johnston, 2012; Aboriginal Affairs and Northern Development Canada, 2013; Murphy, 2012). Another example is community provision of assisted living services for on-reserve First Nation children, in the absence of funds allocated for services to children through the Assisted Living Program (Indian and Northern Affairs Canada, 2009; KTA, 2008). Several examples of extraordinary efforts by service providers were recently revealed before the Canadian Human Rights Tribunal. These included the following:

- a case worker negotiated with a manufacturer to provide free samples of a required nutritional supplement (Aboriginal Affairs and Northern Development Canada, n.d.),
- a physician negotiated a manufacturer discount on equipment required by a child with permanent hearing loss (Aboriginal Affairs and Northern Development Canada, n.d), and
- First Nation child welfare agency staff fundraised to purchase a wheelchair for a paraplegic child in out-of-home care (Caring Society (Counsel), 2014).

In addition, JPWG interviewees shared examples of families paying for services out-of-pocket, conducting fundraising campaigns, and temporarily relocating to access services (Sinha et al., 2015b).

Response to Jordan's Principle: Defining Away the Problem

The federal government endorsed Jordan's Principle in 2007 in the unanimous passage of a motion in the House of Commons (*Private Member's Motion M-296*, 2007). Attempts to

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specify effective implementation of a child-first principle through bills, resolutions, and motions of endorsement were made at the federal level (House of Commons Private Member's Bill C-563, 2008) and in the Yukon (Notice of Motion (Motion 700), 2006), Manitoba (Private Member's Bill 203, 2008; Resolution No. 8, 4 June 2015), and New Brunswick (Motion 68, 2010). Of these, New Brunswick was the only motion to mandate a tripartite partnership to develop an agreement in support of Jordan's Principle (Motion 68, 2010). A recent Manitoba motion urging the provincial government "to formally support Jordan's Principle and its implementation" was also adopted (Manitoba Legislative Assembly, 2015).

Thus, at least up until early 2016, the response to Jordan's Principle developed through non-legislative agreements. A JPWG review of these agreements and related documents indicates that the federal government imposed a narrow approach to implementing Jordan's Principle, overriding concerns expressed by First Nations, child rights advocates, and even provincial and territorial representatives (e.g. First Nations Chiefs of New Brunswick et al, 2011; Manitoba TORWG, 2009; Government of British Columbia & Government of Canada, 2011; Government of Canada & Government of Nova Scotia, 2010; Lerat, 2012; Canadian Council of Child and Youth Advocates, 2011; Canadian Paediatric Society, 2012; Assembly of First Nations, 2014).

The vision of Jordan's Principle advanced by First Nations is based on the principle that all First Nation children must receive services ordinarily available to other Canadians without denial, delay, or disruption. In contrast, the federal government's long-standing guidelines for applying the principle extended only to those cases which met the following criteria (JPWG, 2015):

1. The child is status First Nations or is eligible to have status. This excludes non-status First Nation children.
2. The child is ordinarily resident on reserve. This excludes off-reserve children and those whose ordinary residence is ambiguous because, for example, they have temporarily moved off reserve to access services.
3. The child has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple providers. This excludes First Nation children who do not have multiple disabilities, have not had their disabilities professionally diagnosed, and/or do not require services from multiple providers.
4. A jurisdictional dispute exists between the federal and provincial governments. This excludes disputes between two departments of the same government, such as INAC and Health Canada, which have previously been shown to be common (Blackstock et al, 2005). It also excludes disputes involving First Nation governments.
5. The jurisdictional dispute occurs within a restricted set of service domains. The federal government argued before the CHRT that Jordan's Principle was not relevant to the broader child welfare case being advanced, and elsewhere has excluded the services of

education (except special education), recreation, and housing from the scope of Jordan's Principle (Government of Canada & Government of Nova Scotia, 2010).

6. A "payment dispute" has been formally declared by the assistant deputy ministers from two governments. The declaration of a formal dispute can only be made after:
 - case conferencing occurs at a local level,
 - the case is referred to a Jordan's Principle "focal point" (no list of these focal points is publicly available),
 - a second case conferencing process is completed,
 - one assistant deputy minister decides to declare a jurisdictional dispute and informs the other of this in writing, and
 - a second assistant deputy minister responds by accepting to enter into a dispute resolution process.

Thus, the long-standing governmental response to Jordan's Principle excluded most First Nation children, introduced service delays (*Caring Society v. Canada*), allowed the possibility of governmental collusion to dismiss Jordan's Principle cases (*PLBC v. Canada*) and excluded even well-known and governmentally-recognized service gaps and disparities from being redressed through Jordan's Principle (Manitoba TORWG, 2009). Under the long-standing response, unless governments agreed that they disagreed, a Jordan's Principle case could not exist. In combination, these criteria made it possible for the federal government to claim that there are no Jordan's Principle cases in Canada (Government of Canada, 2012; Webber, 2015).

Furthermore, the development and implementation of the federal response to Jordan's Principle systematically excluded and disempowered First Nation communities and families from the administrative and dispute resolution processes (Sinha et al., 2015a). Processes pursuant to the long-standing federal position on Jordan's Principle failed to specify a consistent mechanism for repayment of costs incurred by the government/agency providing services during case conferencing and dispute resolution processes. The potential for repayment was particularly tenuous for First Nation service providers. In *PLBC v. Canada*, the federal government argued that no reimbursement was owed and the community's proper recourse was to renegotiate its funding agreements. This argument was rejected by the Federal Court in 2013 (*PLBC v. Canada*). Citing concerns about the impact of the *PLBC v. Canada* ruling, both Health Canada and INAC subsequently undertook reviews to determine the "risk" associated with clauses in First Nation funding agreements allowing for extra funding in "exceptional" or "unforeseen" circumstances (Aboriginal Affairs and Northern Development Canada, 2013; Nosé, M, 2013).

Additionally, the JPWG review of the administrative response to Jordan's Principle indicated that transparency of Jordan's Principle processes and outcomes was severely lacking at the individual case level (Sinha et al., 2015a). The process for pursuing a Jordan's Principle case was unclear; neither families nor First Nations were systematically engaged in case conferencing; and the only mechanism for appeal was the judicial system. There was also a lack

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of transparency and accountability mechanisms at the systemic level. The bi/trilateral agreements on Jordan's Principle were not publicly available, and the basic information required to support the independent assessment of Jordan's Principle processes, required to ensure that they function in accordance with Canada's national and international obligations, was unavailable (UNICEF Canada, 2012).

Towards full implementation of Jordan's Principle

Based on a review of the implementation of Jordan's Principle and the *PLBC v. Canada* legal challenge, the JPWG report included two calls to action and specified nine key conclusions about the implementation of Jordan's Principle. These were largely reinforced by the CHRT's decision in *Caring Society v. Canada*.

The Assembly of First Nations (AFN), the Canadian Paediatric Society (CPS), and UNICEF Canada (all of which are members of the JPWG) called on "federal, provincial, and territorial governments to work with First Nations, without delay, in order to [...]develop and implement a governmental response that is consistent with the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons" (JPWG, 2015, p. 21). The CHRT ruling reinforced this call with the finding that "[t]he narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nation children" adversely impacts First Nation children (*Caring Society v. Canada*, para 458). The CHRT issued a legally binding order that INAC "cease applying its narrow definition of Jordan's Principle" and that it "take measures to immediately implement the full meaning and scope of Jordan's [P]rinciple" (*Caring Society v. Canada*, para 481, emphasis in original).

The AFN, CPS, and UNICEF Canada also called for "federal, provincial, and territorial governments to work with First Nations, without delay, in order to [...]systematically identify and address the jurisdictional ambiguities and underfunding that give rise to each Jordan's Principle case" (JPWG, 2015, p. 21). The rationale for this call is that "[b]y clarifying jurisdictional responsibilities and eliminating the underfunding identified in individual cases, governments can *prevent* denials, delays, and disruptions in services for other children in similar circumstances" (JPWG, 2015, 21). This points to the fact that a Jordan's Principle case signals either (i) an area of jurisdictional ambiguity which, once resolved in one case, should set a precedent for across-the-board policy changes to eliminate the ambiguity; or (ii) an area of underfunding – where funds provided are insufficient to provide services that meet provincial norms and/or legislated standards – which, once remedied in an individual case, should be addressed at a program funding level. In the current context of significant underfunding in several programs (see subsection above on underfunding for examples), program overhauls such as the CHRT-ordered changes in child welfare (*Caring Society v. Canada*, paras 481-482) are required in other service domains as well.

The JPWG also made several specific recommendations concerning the implementation of Jordan's Principle, which are reconciled with the CHRT ruling below:

1. Jordan's Principle must apply to "all First Nation children," (*Caring Society v. Canada*, para 382). The CHRT ruling potentially expands beyond interpretations grounded in a First Nation social policy approach (including that articulated by the JPWG), which have tended to focus on status and status-eligible children.
2. Jordan's Principle must apply to all service domains. While the federal government asserted that Jordan's Principle was not relevant to a human rights complaint regarding child welfare, the human and constitutional rights of First Nation children are not limited to specific service domains. These rights extend, but are not limited to, education, health, and child welfare. The CHRT found that the Principle is "relevant and often intertwined with the provision of child and family services to First Nations" (*Caring Society*, para 362).
3. A Jordan's Principle case should be deemed to exist whenever a First Nation child does not have access to the same standard of services (including speed of access) as other provincial/territorial residents in similar circumstances. Here, the CHRT ruling, using a human rights framework, distances Jordan's Principle from any technical definition of jurisdictional dispute. Accordingly, any reference to "jurisdictional dispute" in relation to Jordan's Principle can be understood to refer to jurisdictional ambiguity and/or to gaps and disparities across federal-provincial jurisdictions and/or across First Nation-provincial jurisdictions.
4. Jordan's Principle must operate as a true child-first principle. The federal government must prioritize the best interests of the child by ensuring that services are delivered without delay or disruption, and implement processes for subsequently settling disputes over funding for services. The CHRT ruling further specified that the Jordan's Principle process must not include delays resulting from elements such as "a review of policy and programs, case conferencing, or approval from the Assistant Deputy Minister, before interim funding is even provided" (*Caring Society v. Canada*, para 379).

In addition to these key areas of concordance between the JPWG report and the CHRT decision, the JPWG drew several conclusions about Jordan's Principle processes which were not addressed in the CHRT ruling. The JPWG (2015, pp. 18-19) found the following (reproduced verbatim):

5. There must be clear and consistent standards and procedures for compensating all service providers, including First Nation providers, for the costs incurred during all Jordan's Principle related processes.
6. First Nations must be included as true partners in all stages of development and implementation of a response to Jordan's Principle in every province and territory. For example, the development of a governmental response to Jordan's Principle should be based on tripartite agreements (between federal, provincial/territorial and First Nation governments), involve First Nations in processes such as the selection and training of

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staff assigned to oversee Jordan’s Principle cases, and involve First Nations in ongoing processes to oversee and evaluate the governmental response to Jordan’s Principle.

7. Measures of accountability and transparency must be incorporated at the case level. Individual families and their service providers must be given the information that enables them to access and navigate Jordan’s Principle processes, and have access to an efficient mechanism for appealing decisions in Jordan’s Principle cases.
8. Measures of accountability and transparency must be incorporated at the broader level of implementation in order to ensure compliance with responsibilities to First Nation children under international, national, provincial, territorial, and First Nation law and agreements. These measures include clear documentation of, widespread education about, and independent oversight of Jordan’s Principle policies and procedures. They also include public reporting of results from ongoing evaluation and monitoring of case management and outcomes.

The CHRT indicated that it had questions that had to be resolved in order to specify further remedies in the case, leaving open the possibility that the Tribunal would address these process-focused criteria in a subsequent ruling. In response to the January 2016 ruling, the Caring Society suggested that INAC should use the criteria outlined in the JPWG report for guidance for the full implementation of Jordan’s Principle (First Nations Child & Family Caring Society, 2016a).

Conclusion

The CHRT’s initial ruling on Jordan’s Principle in *Caring Society v. Canada* was made in the context of a case about child welfare. The CHRT ordered the federal government “to cease applying its narrow definition of Jordan’s Principle and to take measures to immediately implement the full meaning and scope of Jordan’s principle” (para 481 [emphasis removed]). The CHRT found that substantive equality requires the federal government to fund First Nation child welfare agencies at a level that allows them to provide services in keeping with “provincial/territorial child and family services legislation and standards... [and] with sound social work practice” (paras 464-465). This means that funding must take into account the actual needs of First Nation children, families, and communities. In the context of child welfare, “sound social work practice” includes recognizing the importance of a child’s connection with family and community and treating the removal of a child from their family as a last-resort option (para 116). As the CHRT explained, “most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child” before a decision can be made to place a child in care (para 119).

Inadequate funding, however, is not the only barrier to sound social work practice in the context of First Nation child welfare; unique socio-historic and cultural specificities must be taken into account. The grounding of child welfare services in a child protection approach is a barrier to sound social work practice. Child development or family service approaches are more

appropriate than protection approaches for the neglect cases that drive the overrepresentation of First Nation children in care (Gilbert, 2012; Sinha et al., 2011). Yet, First Nation child welfare agencies are largely bound to provincial laws and standards (Sinha & Kozlowski, 2013). Additionally, a long series of legal decisions have systematically downplayed the importance of culture and links to community for First Nation children, questioned children's First Nation identity and their caregivers' ability to transmit knowledge of cultural heritage, and assumed a conflict of interest between First Nation children and communities (Walkem, 2013). Ensuring equitable funding is thus a necessary but insufficient step towards achieving service equity for First Nation children. The CHRT ruling recognized this reality in the following statement: "More than just funding, there is a need to refocus the policy of the [First Nations Child and Family Services] program to respect human rights principles and sound social work practice" (*Caring Society v. Canada*, para 482). Child welfare policy and practice continue to be shaped by a colonial framework that continues to inflict great harm on First Nation families and communities. Sound social work practice must be grounded in First Nation knowledge and recognition of First Nations' rights to self-determination in child welfare (Blackstock et al., 2006). Achieving substantive equality will be impossible without such grounding of social work practice.

The CHRT ruling has drawn attention to the damaging and discriminatory effects of the current structure of public service provision and funding to First Nation children in Canada. The CHRT ruling has also put forth a strong legal mandate for changes long called for by First Nation leaders, the Truth and Reconciliation Commission, child advocates, and other stakeholders. However, events since the initial CHRT ruling (and the initial drafting of this article) highlight the ongoing challenges to achieving meaningful change. In April 2016, the CHRT released a second ruling in which it reviewed INAC's compliance with the January 2016 ruling. It noted that INAC had made little progress on implementing Jordan's Principle, and ordered the full implementation of the Principle within two weeks (*First Nations Child and Family Caring Society et al. v. Attorney General of Canada (Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 10, paras 30-34). In July 2016, the federal government announced the allocation of "up to \$382 million" over three years to support the implementation of Jordan's Principle (First Nations Child & Family Caring Society, 2016b; Zimonjic, 2016). Yet a September 2016 compliance order by the CHRT highlighted continued federal attempts to limit the application of Jordan's Principle to children residing on reserve and to those with disabilities (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16). It also noted a lack of clarity about the processes that federal funding would support, and a lack of engagement with First Nations about Jordan's Principle (*Caring Society v. Canada*, 2016 CHRT 16).

The Canadian government under Prime Minister Justin Trudeau committed to renewing its relationship with First Nations and to implementing the United Nations Declaration on the

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Rights of Indigenous Peoples (UNDRIP; United Nations, 2007). The UNDRIP recognizes that “Indigenous individuals [...] have the right to access, without any discrimination, to all social and health services” (article 24), as well as the “right, without discrimination, to the improvement of their [...] health and social security” (article 21). The federal government must work in consultation, cooperation, and good faith to obtain the “free, prior and informed consent [of First Nations] before adopting and implementing legislative or administrative measures that may affect them” (UNDRIP, article 19). Thus, true collaboration around the implementation of Jordan's Principle is an essential step towards realizing the UNDRIP commitments.

The UNDRIP emphasizes Indigenous rights to self-determination and self-government (articles 3 and 4) and the government's obligation to provide financial and technical assistance in furtherance of these rights (article 39). Within this framework, Jordan's Principle is also fully compatible with, and complementary to, increased First Nation control over public services. Additionally, Indigenous Services Canada, in its involvement in service provision, is obligated to implement Jordan's Principle and to not perpetuate historical discrimination and disadvantage including assimilative practices that discount First Nation knowledges and practices (*Caring Society v. Canada*, para 403). Jordan's Principle is also fully compatible with, and complementary to, providing culturally-appropriate services that are based on and responsive to diverse First Nation cultural knowledges, values, and needs.

The CHRT ruling and orders and the UNDRIP provide the federal government with a clear roadmap of its obligations to First Nation children, families, and communities in both substance and process. The moral imperative to properly implement Jordan's Principle is now also unequivocally a legal imperative. While the analysis presented in this article was limited to developments up to the end of 2016, it is important to consider where we are at in 2019, three years after the initial *Caring Society v. Canada* decision and order. The federal government recently allocated three additional years of funding for Jordan's Principle funding (Budget 2019, chapter 3, part 4); the Caring Society continues to note failures to fully implement Jordan's Principle (e.g. Caring Society (Counsel) 2019); and the federal government's response to the CHRT rulings is still evolving as the CHRT further delineates the contours and reach of Jordan's Principle.⁵ Much has changed since 2016, but work is ongoing. Long-term implementation of Jordan's Principle and a systemic response to the CHRT orders can be seen as a litmus test for the Government of Canada's sincerity about renewing and repairing its relationship with First Nations in Canada.

⁵ E.g. see *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 (CanLII).

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