



**Without denial, delay, or disruption:**

**Ensuring First Nations children's  
access to equitable services through  
Jordan's Principle**



# The Jordan's Principle

## Working Group

Stephanie O'Brien  
Assembly of First Nations

Doug Maynard  
Canadian Association of  
Paediatric Health Centres

Elizabeth Moreau  
Canadian Paediatric Society

Marvin Bernstein  
UNICEF Canada

Lisa Wolff  
UNICEF Canada

### Research Team Members

Vandna Sinha  
McGill University

Molly Churchill  
McGill University

Anne Blumenthal  
University of Michigan

Lucyna Lach  
McGill University

Josée G. Lavoie  
University of Manitoba

Nico Trocmé  
McGill University

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# Acknowledgements

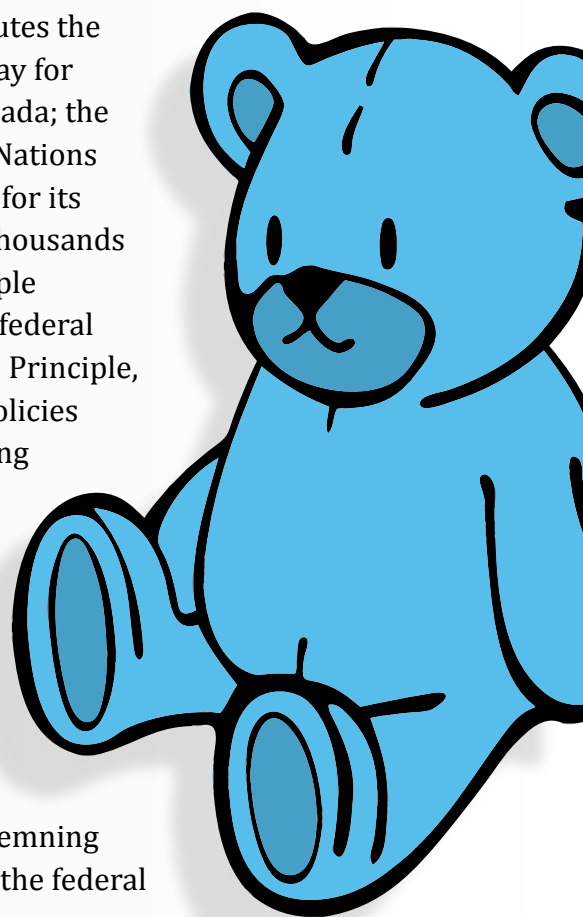
This is a report focused primarily on describing and analyzing government policies and administrative processes. However, the motivation for this policy work comes from the real stories of First Nations children, the injustices they have faced, and the extraordinary courage that they, their families, and their communities have displayed in response. We wish to acknowledge Jordan River Anderson and the Anderson family, Maurina Beadle and Jeremy Meawasige, Dewey and Harriet Sumner-Pruden, and all other First Nations children and families whose struggles to access services have been made public. The publicly accessible reports of these cases shine light on the ways in which First Nations children are systematically disadvantaged by the current structure of services, and by the current governmental response to Jordan's Principle. We also wish to acknowledge the many unnamed children, families, communities, and service providers whose stories are touched on in this report. It is our hope that, by linking these stories together, and to existing evidence about the inequities in services for First Nations children, we can draw additional attention to the need for policies that better ensure First Nations children have access to equitable services. We are deeply indebted to the health and child welfare professionals who shared their time and expertise by participating in the interviews that inform this report. We are also grateful to the representatives of multiple First Nations and provincial/territorial organizations who assisted us in accessing documents, recruiting interview participants, and verifying policy information. This report is a product of a multi-year collaboration and, in addition to the listed authors, Lauren Kolyn, Anna Kozlowski, and Ashleigh Delaye have assisted with the research and writing process. Multiple reviewers gave helpful feedback on drafts of the report, or on preparatory work leading up to the report; they included anonymous reviewers for the *International Indigenous Policy Journal* and the *First Peoples Child & Family Review*, as well as members of the First Nations Inuit and Métis Health Committee of the Canadian Paediatric Society. The research presented in this report has been financially supported by the Social Science and Humanities Research Council funded project, "Building research capacity with First Nations and mainstream youth services in Quebec".

# Executive Summary

Jordan's Principle is a child-first principle intended to ensure that First Nations children do not experience denials, delays, or disruptions of services ordinarily available to other children due to jurisdictional disputes. It is named in honour of Jordan River Anderson, a young boy from Norway House Cree Nation in Manitoba. He encountered tragic delays in services due to governmental jurisdictional disputes that denied him an opportunity to live outside of a hospital setting before his death in 2005. Jordan's Principle responds to complex systems for funding and delivering services, which treat Status First Nations children differently than other children in Canada. Responsibility for services to First Nations children is often shared by federal, provincial/territorial and First Nations governments; in contrast, funding and delivery of these same services to most other children in Canada falls solely under provincial/territorial jurisdiction. Accordingly, First Nations children face unique challenges in accessing services, and Jordan's Principle is an essential mechanism for ensuring their human, constitutional, and treaty rights.

Jordan's Principle states that in cases involving jurisdictional disputes the government or government department first approached should pay for services that would ordinarily be available to other children in Canada; the dispute over payment for services can be settled afterwards. First Nations advocates developed Jordan's Principle and have led the campaign for its implementation; Jordan's Principle is now formally supported by thousands of stakeholders and observers. A motion endorsing Jordan's Principle was unanimously adopted by the House of Commons in 2007. The federal government subsequently led a governmental response to Jordan's Principle, facilitating the development of federal and provincial/territorial policies and procedures for identifying Jordan's Principle cases and resolving jurisdictional disputes over payment or provision of services to individual First Nations children.

There is growing recognition that the governmental response to Jordan's Principle does not reflect the vision advanced by First Nations and endorsed by the House of Commons. Reviews by the Canadian Paediatric Society and UNICEF Canada have highlighted shortcomings in the governmental response to Jordan's Principle. The Assembly of First Nations passed a consensus resolution condemning the narrow operational definition of Jordan's Principle adopted by the federal





government, and the federal government itself has acknowledged widespread discontent with its response to Jordan's Principle. A 2013 Federal Court ruling criticized the federal government's narrow interpretation and implementation of the principle, offering a precedent setting standard: that Jordan's Principle should be implemented in a way that ensures First Nations children receive services in accordance with normative provincial/territorial practices that are in compliance with legislated standards. In addition, development and implementation of a governmental response which reflects the vision of Jordan's Principle is among the remedies requested in *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada*. A Human Rights Tribunal ruling on this case is expected in 2015.

While observations that the current governmental response to Jordan's Principle does not reflect the vision advanced by First Nations and endorsed by the House of Commons are widespread, details of this response have been elusive. The development and implementation of a governmental response to Jordan's Principle have been treated as internal government processes; even basic details about the response have been missing from the public domain. As a result, there has been little systematic research to guide policy changes that reflect the vision of Jordan's Principle. This report seeks to address that gap. It is the result of ongoing work by the Jordan's Principle Working Group, a collaboration between the Assembly of First Nations, the Canadian Paediatric Society, UNICEF Canada, and a team of researchers based at McGill University, the University of Michigan, and the University of Manitoba.

This report presents the results of two studies conducted by the research team participating in the Jordan's Principle Working Group. The first reviewed over 300 Jordan's Principle related documents to describe the governmental response to Jordan's Principle. This research demonstrates that the current governmental response falls far short of realizing the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons. It details the ways in which the current governmental response has limited the population and range of jurisdictional disputes to which Jordan's Principle is applied; instituted barriers to the

timely application of Jordan's Principle; and severely restricted accountability, transparency, and stakeholder participation. Finally, it identifies major features of the response that must be amended to better ensure that First Nations children receive equitable services without denials, delays, or disruptions.

The second study involved 25 exploratory interviews with professionals in health and child welfare services from across Canada, and embedded the interview data in a scoping review of the existing literature on health and child welfare services for First Nations children. This research describes the widespread jurisdictional ambiguities and underfunding that can give rise to Jordan's Principle cases, explores the pathways of cases involving jurisdictional disputes under the current governmental response, and describes the systemic issues that must be addressed to ensure equitable services for First Nations children. It demonstrates the necessity of a governmental response which reflects the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons, one that prevents the denial, delay, or disruption of services in individual Jordan's Principle cases. It also demonstrates the need for additional measures to systematically remedy the jurisdictional ambiguities and underfunding which give rise to these cases.

Based on review of the evidence presented by these studies, **the Assembly of First Nations, the Canadian Paediatric Society, and UNICEF Canada call on federal, provincial, and territorial governments to work with First Nations, without delay, in order to:**

- 1 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.**
- 2 Systematically identify and address the jurisdictional ambiguities and underfunding that give rise to each Jordan's Principle case.** By 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. Accordingly, they can better assume the responsibilities to ensure equitable treatment of First Nations children outlined in the *Convention on the Rights of the Child*, the *United Nations Declaration on the Rights of Indigenous Peoples*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* and other federal, provincial/territorial, and First Nations legislation and agreements.

# Chapter 1:

## A Call to Action from the Jordan's Principle Working Group

Stephanie O'Brien  
**Assembly of First Nations**

Doug Maynard  
**Canadian Association of  
Paediatric Health Centres**

Elizabeth Moreau  
**Canadian Paediatric Society**

Marvin Bernstein  
**UNICEF Canada**

Lisa Wolff  
**UNICEF Canada**

### Research Team Members

Vandna Sinha  
McGill University

Molly Churchill  
McGill University

Anne Blumenthal  
University of Michigan

Lucyna Lach  
McGill University

Josée G. Lavoie  
University of Manitoba

Nico Trocmé  
McGill University

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*Where a jurisdictional dispute arises between two government parties (provincial/territorial or federal) or between two departments or ministries of the same government, regarding payment for services for a Status Indian child which are otherwise available to other Canadian children, the government or ministry/department of first contact must pay for the services without delay or disruption. The paying government party can then refer the matter to jurisdictional dispute mechanisms. In this way, the needs of the child get met first while still allowing for the jurisdictional dispute to be resolved.*

First Nations Child & Family Caring Society of Canada (2011)

*The government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.*

Unanimous Private Member's Motion (M-296)  
Canadian House of Commons (2007)

Jordan's Principle is a child-first principle intended to ensure that First Nations children do not experience service denials, delays, or disruptions because of jurisdictional disputes over the provision of or payment for services. It is named in honour of Jordan River Anderson, a young boy from Norway House Cree Nation in Manitoba. He encountered tragic delays in services which would have allowed him to experience life outside of a hospital setting before his death in 2005. Jordan's Principle responds to complex systems for funding and delivering services that treat Status First Nations children differently than other children in Canada. While provincial/territorial governments both fund and directly provide health and social services for most other children in Canada, services for Status First Nations children living on reserve are generally funded by the federal government but regulated by provincial/territorial legislation and standards, and can be provided by provincial/territorial, federal, or First Nations service systems. In addition, the federal government funds some health services for off-reserve, Status First Nations children. As a result, First Nations children face unique challenges in accessing services; services may be denied, delayed, or disrupted because of disputes between governments or government departments over

responsibility for funding and providing services. Accordingly, Jordan's Principle is an essential mechanism for ensuring the human, constitutional, and treaty rights of First Nations children.

A motion endorsing Jordan's Principle was unanimously adopted by the House of Commons in 2007 and has been formally supported by thousands of First Nations, provincial/territorial, national, and international stakeholders and observers. As of December 2014, over 8,800 individuals and organizations had signed on as supporters of the Jordan's Principles campaign led by the First Nations Child and Family Caring Society of Canada.<sup>1</sup> Supporters of Jordan's Principle include First Nations, Members of Parliament, the Canadian Medical Association, child and family services agencies, the Aboriginal Nurses Association of Canada, university professors from across the country, child welfare agencies, the Canadian Council of Child and Youth Advocates, faith-based groups such as KAIROS Canada, the International Forum for Child Welfare, and non-profit organizations including the Native Women's Association of Canada and the Canadian Red Cross.<sup>2</sup> Following the adoption of the House of Commons motion, the federal government took the lead in developing a governmental response to Jordan's Principle. It facilitated the development of federal and provincial/territorial policies and procedures for identifying Jordan's Principle cases and resolving jurisdictional disputes over payment or provision of services to individual First Nations children.

Jordan's Principle is named in honour of Jordan River Anderson, a First Nations child from Norway House Cree Nation, in Manitoba, who was born with a rare neuromuscular disease. Because his complex medical needs could not be treated on-reserve, Jordan was transferred to a hospital in Winnipeg, far from his community and family home. In 2001, a hospital-based team decided that Jordan's needs would best be met in a specialized foster home closer to his home community. However, federal and provincial governments disagreed regarding financial responsibility for Jordan's proposed in-home services. The disputes ranged from disagreements over funding of foster care to conflicts over payment for smaller items such as a showerhead. During these conflicts, Jordan remained in hospital for more than two years, even though it was not medically necessary for him to be there. In 2005, Jordan died in hospital, at the age of five, never having had the opportunity to live in a family home.

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## The Mandate for a Governmental Response that Reflects the Vision of Jordan's Principle

Despite the unanimous adoption of the 2007 House of Commons motion and the broad support from stakeholders and advocates, there is growing recognition that the governmental response to Jordan's Principle does not reflect the vision of Jordan's Principle which has been advanced by First Nations and endorsed by the House of Commons.

- A 2013 Federal Court decision, *Pictou Landing Band Council & Maurina Beadle v. Attorney General of Canada (PLBC v. Canada)*, demonstrated some of the shortcomings in the current governmental response to Jordan's Principle. The case concerned the provision of respite services for a resident of a First Nations community in Nova Scotia. An April 2013 ruling defined the instances in which consideration under Jordan's Principle should be engaged, and provided a precedent setting standard: the governmental response to Jordan's Principle must ensure that First Nations children receive services that are in accordance with provincial/territorial practice norms and in compliance with legislated standards.<sup>3</sup> Canada initially appealed the ruling on broad grounds, but discontinued the appeal in July of 2014.<sup>4</sup>
- A second legal challenge, in *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada (Caring Society v. Canada)*, is currently before the Canadian Human Rights Tribunal, and has important implications for Jordan's Principle. Filed in 2007, the complaint alleges that the federal government's failure to implement Jordan's Principle and its flawed and inequitable approach to the First Nations child welfare program are discriminatory on the basis of race and national ethnic origin under the *Canadian Human Rights Act*. Should the Tribunal decide the complaint is founded, it could require the federal government to develop and implement a governmental response to Jordan's Principle, as it was "conceived of as a means to prevent First Nations children from being denied essential public services."<sup>5</sup> A decision in this case is expected in 2015.<sup>6</sup>

Many observers and stakeholders have criticized the current governmental response to Jordan's Principle and called for full implementation of the principle:

- In 2008, an Assembly of First Nations (AFN) Special Chiefs' Assembly passed, by consensus, a resolution condemning the narrow operational definition of Jordan's Principle adopted by the federal government.<sup>7</sup>
- Full implementation of Jordan's Principle, by all levels of government, was also one of the 15 recommendations made in a 2009 review of on-reserve programming for Aboriginal maternal and infant health published by the Prairie Women's Health Centre of Excellence and the British Columbia Centre of Excellence for Women's Health.<sup>8</sup>

Dewey Pruden, of Pinaymootang First Nation in Manitoba, was born with a congenital condition that causes seizures, as well as partial paralysis, autism and glaucoma. He had to undergo brain surgery to prevent him from having seizures. Dewey requires 24-hour care and is diaper-dependent. His parents have been his only caregivers. In April 2010, his mother, Harriet Sumner-Pruden, filed a complaint with the Canadian Human Rights Commission on the basis that her son was not able to access the same professional support as non-Aboriginal children off-reserve are able to access. Because of a cap on federal funding for a special needs assistant that Dewey needs in school, he is only able to attend school for two-and-a-half hours a day, according to Ms. Sumner-Pruden. In addition to not being able to access required education services, any needed physiotherapy, occupational therapy, or speech therapy services are provided by Dewey's mother, rather than a professional. Around Christmas 2013, Harriet Sumner-Pruden received a letter from David Langtry, Acting Chief Commissioner at the Canadian Human Rights Commission, indicating that the Commission deemed that further inquiry was merited to determine whether discrimination occurred. In the letter, Mr. Langtry wrote the following: "The information appears to show that children with disabilities living on-reserve are being denied or treated differently with respect to the provision of services on the basis of race. [T]hese types of services for children with disabilities living on-reserve are not being provided in a manner that is reasonably comparable to those provided by the provinces." The Canadian Human Rights Tribunal, which is mandated to determine whether human rights violations occurred, now has jurisdiction over Dewey's case.

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- Reviews published by the Canadian Paediatric Society (CPS) in 2009 and 2012 found poor implementation of Jordan's Principle in the majority of provinces/territories, and concluded that First Nations children continue to be the victims of administrative impasses.<sup>9</sup> CPS has identified full implementation of Jordan's Principle as an essential mechanism for ensuring the health, safety, and well-being of children and youth.<sup>10</sup>
- In 2011, The Canadian Council of Child and Youth Advocates called for "full implementation and monitoring" of Jordan's Principle as a means for ensuring "equality in funding" in areas such as child welfare, health, and education services."<sup>11</sup>
- In its 2012 concluding observations to Canada, the UN Committee on the Rights of the Child expressed concern about both "[t]he lack of action following the Auditor General's finding that child welfare services for Aboriginal children are provided with less financial resources than those for non-Aboriginal children" and "[t]he significant overrepresentation

of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care.”<sup>12</sup> The Committee then went on to recommend that Canada “[t]ake immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination,” and that Canada also “[t]ake urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care.”<sup>13</sup>

- A 2012 review by UNICEF Canada highlighted missing elements in the governmental response to Jordan’s Principle and concerns about the scope of this response, calling for full implementation of Jordan’s Principle.<sup>14</sup>
- In its 2014 recommendations on child welfare, the Assembly of First Nations called on “[a]ll Premiers to support a tripartite process that directly involves First Nations representatives to: establish a fair and transparent process to truly implement Jordan’s Principle.”<sup>15</sup>

A First Nations infant who was not breastfeeding was diagnosed with allergies to bovine and soya-based protein. Because the infant could not tolerate standard infant formula he/she required a special infant formula for dietary management. The family was informed that Health Canada would not cover the cost of the formula, since its policy specifies that it will not cover supplements that are considered “food.” Desperate to ensure the family could provide its infant with the nutrients it needed to be healthy, the nutritionist involved in the case contacted the formula manufacturer and was able to secure free samples of the formula. While the documentation on this case that was submitted to the Canadian Human Rights Tribunal does not include information about the timeline for the case, the formula that the infant required is included in a list of medications currently covered by provincial health insurance in the jurisdiction in which the case occurred.

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## Background and Goals of the Jordan’s Principle Working Group

While observations that the current governmental response to Jordan’s Principle does not reflect the vision advanced by First Nations and endorsed by the House of Commons are widespread, details of this response have been elusive. Federal officials testifying before the Canadian Human Rights Tribunal confirmed that the development and implementation of the federal response to Jordan’s Principle were internal federal government processes with no consultation with outside experts or groups.<sup>16</sup> Though there has been discussion of evaluating the implementation of the federal response to Jordan’s Principle in some provinces, there is no publicly available indication



that these evaluations have taken place.<sup>17</sup> While the federal government has asserted that there it knows of no Jordan's Principle cases in Canada,<sup>18</sup> evidentiary documents filed in *Caring Society v. Canada* included federal documentation of 27 "Jordan's Principle related" cases. However, this documentation excluded key information about the administrative approach to these cases, such as the timing, duration, and (for some cases) the outcome of case conferencing processes.<sup>19</sup> No other information about the federal government's response to individual Jordan's Principle cases has been identified. The lack of transparency in the governmental response has complicated efforts to describe the governmental response to Jordan's Principle and to provide clear and comprehensive recommendations about the specific policy changes required in order to realize the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons.

The Jordan's Principle Working Group sought to address this gap. The working group is a collaboration between the Assembly of First Nations, the Canadian Paediatric Society, UNICEF Canada, and a team of researchers based at McGill University, the University of Michigan, and the University of Manitoba. (See Appendix 1 for brief descriptions of the organizations represented in the working group). Its initial goal was to understand how the federal government could claim that there were no known Jordan's Principle cases in Canada, when anecdotal evidence encountered in our collective experience suggested that such cases were numerous and commonplace. The quest to unravel the complex governmental response to Jordan's Principle led the research team to conduct two studies<sup>20</sup> which informed the consensus conclusions and calls to action presented in this chapter. Our efforts are intended to provide First Nations, policymakers, service providers, advocates, and other stakeholders with clearer evidence about the current governmental response to Jordan's Principle, and to identify means of achieving a response that better protects vulnerable First Nations children from denials, delays, and disruptions of services.

Approaches to Jordan's Principle and the provision of equitable services for First Nations children are moving targets; they will continue to evolve and require sustained monitoring and evaluation. Accordingly, the conclusions and recommendations offered here will need to be revisited as policies change and new information becomes available. In particular, it will be important to review the conclusions and recommendations presented in this report once the Canadian Human Rights Tribunal releases its decision in the *Caring Society v. Canada* case.

## The Research that Informs the Jordan's Principle Working Group's Call to Action

The conclusions and recommendations presented here are informed by two studies that were conducted by the research team participating in the Jordan's Principle Working Group.<sup>21</sup>

A young First Nations child living on reserve was diagnosed with neurological disorders and mobility issues. Her paediatric team recommended an enclosed hospital crib for her to sleep in at home. Health Canada would not cover the cost of the bed through Non-Insured Health Benefits, and the band did not have a funding source to cover the \$9000+ bed. The director of Child and Family Services in the community was aware of Jordan's Principle and raised the case as a Jordan's Principle case. A case conference occurred, at which time the provincial Department of Health advised that they would provide the bed for a child living off-reserve. Provincial health officials demanded that federal officials make a firm commitment to funding during the conference call. Federal officials indicated that this commitment could not be made without Assistant Deputy Minister approval. Deeming it unacceptable to delay service while federal departments attempted to access funding, the provincial government provided the bed, but noted that they did not view this as a provincial funding responsibility.

4

## The Current Governmental Response to Jordan's Principle

The first study conducted by research team members was an in-depth analysis of the current governmental response to Jordan's Principle, based on review of documentation and information that was available prior to October of 2014.<sup>22</sup> Research team members reviewed over 300 documents in order to describe the current governmental response and compare it to the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons. The documents reviewed included submissions and rulings from *PLBC v. Canada* and *Caring Society v. Canada*, as well as Jordan's Principle related documents which were publicly available or obtained through access to information requests.

The research team found that the current governmental response falls far short of realizing the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons. It limits the population eligible for Jordan's Principle protections to on-reserve, Status or Status-eligible children who have been professionally diagnosed as having multiple disabilities requiring multiple service providers. It also narrows the operational definition of jurisdictional disputes to exclude intra-governmental disputes, such as those between two federal governmental departments, thus further limiting the cases to be considered under Jordan's Principle. In addition, because it treats the existence of a formal payment dispute as the primary indicator of a jurisdictional dispute, the current governmental response excludes even those cases that involve clearly identified and widely acknowledged service gaps and disparities from consideration under Jordan's Principle.

The family of a First Nations child diagnosed with permanent hearing loss consulted a physician, who recommended a wireless system to improve the child's hearing. The equipment was not registered as a benefit under the federal government's pre-approved medical supply and equipment list. Because the child lived on-reserve, the family was not eligible to receive provincial program funding that could help cover the cost of the equipment. Advocating on behalf of the family to ensure her patient received the needed medical equipment, the physician involved in case contacted the manufacturer directly and secured a reduction in cost from the manufacturer.

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Findings from the study indicate that, under the current governmental response, there are many barriers to the application of Jordan's Principle. The family of a First Nations child must know, or at least suspect, that they are being denied services that would normally be available to other children in Canada. The family must persevere through a local case conferencing process and have the situation brought to the attention of a government employee appointed to oversee Jordan's Principle cases. The family must then navigate a multi-step, potentially lengthy, formal case conferencing process. Only once normative provincial/territorial standards have been assessed and a jurisdictional dispute has been formally declared by both federal and provincial/territorial governments, would the costs of services be covered. In the meantime, the child may go without needed services. On a systemic level, the current governmental response lacks a consistent mechanism for repayment of costs incurred by organizations providing interim services in Jordan's Principles case. The *PLBC v. Canada* case demonstrated that the absence of a consistent repayment mechanism is particularly problematic for First Nations service providers that cover the costs of services during case conferencing and dispute resolution processes.

In testimony before the Human Rights Tribunal, the director of a First Nations child welfare agency recalled a case in which agency staff conducted a community fundraising campaign to finance the purchase of a wheelchair for a paraplegic child in out-of-home care. Health Canada denied the request for funds to purchase the wheelchair. As appealing this decision could be a lengthy process involving three levels of review, the agency deemed that fundraising was the only feasible option to provide the child with what he required.

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Finally, the research team documented severe limitations in accountability, transparency, and stakeholder participation, all of which are widely recognized as integral elements of democratic governance and protection of human rights.<sup>23</sup> First Nations have been fully excluded from the development and implementation of the governmental response to Jordan's Principle in several jurisdictions, and serious questions have been raised about the extent of inclusion in other jurisdictions. The means for individuals to access Jordan's Principle processes have been poorly publicized and there is no mechanism, other than going to court, for appealing decisions made in Jordan's Principle cases. On the systemic level, documentation of Jordan's Principle agreements and procedures is not publicly accessible and there is no system for public reporting on Jordan's Principle processes or outcomes.

Maurina Beadle, a resident of the Pictou Landing Mi'kmaq community in Nova Scotia, is single mother and the primary caregiver for her son, Jeremy Meawasige. Jeremy has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature, and autism. He has high care needs, and can be self-abusive when separated from his mother. In May 2010, Ms. Beadle suffered a stroke and was hospitalized; she subsequently required assistance with her own care and could no longer care for Jeremy at the level that he required. The federally funded Pictou Landing First Nation Health Centre provided home care assistance and, in accordance with Jordan's Principle, requested the federal government cover the cost of these services. A recent Nova Scotia Supreme Court ruling mandated that these services be made available. Still, the federal government refused to cover the cost of Jeremy's home care, noting that they could cover the more costly option of institutional care. The Pictou Landing First Nation Health Centre continued to provide respite care, but Ms. Beadle and the band council had to engage in a three year long court battle to ensure federal payment for the cost of this care.

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## The Context of Jordan's Principle Cases

Research team members also examined the broader context of Jordan's Principle cases,<sup>24</sup> focusing specifically on health and child welfare services, two domains in which Jordan's Principle has been widely discussed. They conducted 25 exploratory interviews with professionals in health and child welfare services and completed a scoping review of the existing literature on health and child welfare services for First Nations children. The research took as a starting point a definition of jurisdictional disputes that emerged from analysis of the current governmental response to

Jordan's Principle. A jurisdictional dispute exists in any situation in which ambiguity regarding responsibility for service funding/provision results in denial, delay or disruption of services; it also exists whenever the resources provided by one government/department are insufficient to enable another government/department to provide services in accordance with normative practices that are consistent with legislated standards.

Building on this definition, they drew on interview data and existing literature to describe the jurisdictional ambiguities and underfunding that give rise to jurisdictional disputes, explore the challenges that emerge when jurisdictional disputes are not identified as Jordan's Principle cases, and describe the systemic issues that must be addressed in order to ensure equitable services for First Nations children. The findings from this study suggest that the potential for jurisdictional ambiguities and underfunding, which can result in jurisdictional disputes, is intrinsic to the complex structure of health and child welfare services for First Nations children. The literature review and interviews point to widespread and well documented underfunding and jurisdictional ambiguities in health and child welfare services for First Nations children, and to a continuous potential for new jurisdictional ambiguities and issues of underfunding to emerge in response to policy reforms and external factors.

The research findings indicate that under the current governmental response, jurisdictional disputes can result in a First Nations child being offered services that are more restricted in range, poorer in quality, or less timely than those available to other children (a service disparity). Jurisdictional disputes may also manifest as a complete absence of services (a service gap) that are ordinarily available to other children. Differences in standards/practices emerge in response to service gaps and disparities, and First Nations children who are denied equitable services may ultimately be subject to more intensive intervention by the health or child welfare systems. Families, communities and service providers sometimes take extraordinary efforts to ensure that individual First Nations children receive services; these efforts impose additional burdens on families and communities seeking to care for their children and on service providers that may already be experiencing significant strain on resources.

This research on the context of Jordan's Principle cases indicates that First Nations families face challenges above and beyond those faced by other families in accessing services. Accordingly, it demonstrates the necessity of a governmental response which reflects the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons, one which eliminates denials, delays, and disruptions of services that result from jurisdictional disputes in individual cases. It also demonstrates the challenges to fully realizing this vision and the need for systemic measures to address the underlying jurisdictional ambiguities and underfunding that give rise to Jordan's Principle cases.

## Conclusions

Based on review of the evidence presented in the studies summarized above, the Jordan's Principle Working Group concludes that nine conditions must be satisfied in order for a governmental response to reflect the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons, and to achieve the goals of Jordan's Principle:

- 1. Jordan's Principle must apply to all Status and Status-eligible First Nations children.** The current governmental response limits its application to those children who have been diagnosed as having multiple disabilities and requiring services from multiple service providers.
- 2. Jordan's Principle must apply to all inter- and intra-governmental disputes.** This includes disputes between federal, provincial/territorial and/or First Nations governments; it also includes disputes between departments of a single government. The current governmental response limits application of Jordan's Principle to disputes between federal and provincial/territorial governments.
- 3. Jordan's Principle must apply to all service domains.** The federal government asserts that Jordan's Principle does not apply to child welfare, but the human and constitutional rights of First Nations children are not limited to specific service domains; they extend to education, health, child welfare, and other domains.
- 4. The criteria for identifying Jordan's Principle cases should centre on the existence of jurisdictional ambiguity or underfunding that prevents a First Nations child from receiving services in accordance with provincial/territorial practice norms and legislated standards.** The current governmental response requires federal and provincial/territorial governments to formally declare a dispute over payment of services in order for a Jordan's Principle case to be identified.
- 5. Jordan's Principle must operate as a true child-first principle.** The governmental response 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 current governmental response introduces multiple administrative steps and long delays *prior* to provision of and/or payment for services.
- 6. There must be clear and consistent standards and procedures for compensating all service providers, including First Nations providers, for the costs incurred during all Jordan's Principle related processes.** The federal government currently asserts that

repayment of costs covered by First Nations service providers requires renegotiation of existing funding arrangements.

7. **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/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 Nations governments), involve First Nations in processes such as the selection and training of 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. First Nations have been excluded from processes of developing and implementing the current governmental response.
8. **Measures of accountability and transparency must be incorporated at the case level.** Individual families, and their service providers, must be provided the information that enables them to access and navigate Jordan's Principle processes; they must also have access to an efficient mechanism for appealing decisions in Jordan's Principle cases. The current governmental response lacks such measures of accountability and transparency.
9. **Measures of accountability and transparency must be incorporated at the broader level of implementation, in order to ensure compliance with responsibilities to First Nations children under international, national, provincial/territorial, and First Nations 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/monitoring of case management and outcomes. The current governmental response lacks such measures of accountability and transparency.

The Jordan's Principle Working Group further finds that the development and implementation of a governmental response that reflects the vision of Jordan's Principle must be accompanied by systematic measures to remedy the underlying jurisdictional ambiguities and underfunding that give rise to Jordan's Principle cases. We conclude that:

1. **Navigating complex governmental systems in order to secure services for children can be difficult for all families, but First Nations families face challenges above and beyond those faced by other families in Canada.**
2. **The potential for jurisdictional ambiguities and underfunding to occur is intrinsic to the complex systems for funding and delivering services for First Nations children.**

Funding and service delivery policies made by different governments/departments change over time, presenting ongoing possibilities for the emergence of new issues of underfunding and jurisdictional ambiguity.

3. **Implementation of a governmental response which reflects the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons is necessary to ensure that First Nations children do not encounter service gaps, service disparities, or situations requiring service providers, families, and communities to take extraordinary measures to ensure access to services for First Nations children.**
4. **The development and implementation of a governmental response which reflects the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons will eliminate denials, delays, and disruptions of services in individual cases. However, it will not remedy the underlying jurisdictional ambiguities and underfunding which give rise to the jurisdictional disputes in these cases. Accordingly, application of Jordan's Principle in one case will not prevent denials, delays, or disruptions, of services for other children in similar circumstances.**
5. **Given the complexity of the systems for funding and delivering services to First Nations children, it is unlikely that *all* Jordan's Principle cases will be identified in a timely fashion, even with a governmental response that reflects the vision of Jordan's Principle advanced by First Nations and adopted by the House of Commons.**

# Call to Action

The Assembly of First Nations, the Canadian Paediatric Society, and UNICEF Canada call on federal, provincial, and territorial governments to work with First Nations, without delay, in order to:

- 1 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.**
- 2 Systematically identify and address the jurisdictional ambiguities and underfunding that give rise to each Jordan's Principle case.** By 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. Accordingly, they can better assume the responsibilities to ensure equitable treatment of First Nations children outlined in the *Convention on the Rights of the Child*, the *United Nations Declaration on the Rights of Indigenous Peoples*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and other federal, provincial/territorial, and First Nations legislation and agreements.



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# Jordan's Principle Research

## Chapter 2:

### The Current Governmental Response to Jordan's Principle

#### Research Team Members

Vandna Sinha  
McGill University

Anne Blumenthal  
University of Michigan

Molly Churchill  
McGill University

Lucyna Lach  
McGill University

Josée G. Lavoie  
University of Manitoba

Nico Trocmé  
McGill University

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In this chapter, we provide an in-depth examination of the current governmental response to Jordan's Principle. We outline the federally-led governmental effort to develop and implement federal and provincial/territorial policies for identifying and addressing cases involving jurisdictional disputes over provision of, and payment for, services to First Nations children. We also summarize two recent legal challenges to the current governmental response: *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada* (*Caring Society v. Canada*) and *Pictou Landing Band Council and Maurina Beadle v. Canada* (*PLBC v. Canada*). Our analysis maps the ways in which the current governmental response to Jordan's Principle has systematically narrowed the range of children, types of jurisdictional disputes, and service domains which are recognized as being eligible for Jordan's Principle protections. We further outline the way in which the response, and the processes leading to its development, have excluded First Nations and have failed to meet internationally recognized standards of transparency and accountability. Finally, we identify the major conceptual issues that prevent the current response from ensuring that First Nations children can access the services ordinarily available to other children in Canada without experiencing service denials, delays, or disruptions.

## Methods

This chapter presents the results of a descriptive content analysis of over 300 Jordan's Principle-related documents.<sup>1</sup> Documents were retrieved through electronic searches of academic/legislative data bases and websites, access to information requests filed at the federal and provincial levels, direct requests to governmental departments, and a review of documents released through the Canadian Human Rights Tribunal process (See Appendix 2 for a full description of document retrieval methods). The compiled document base included records of the bi/tripartite Jordan's Principle agreements struck in four jurisdictions (New Brunswick, Saskatchewan, Manitoba, and British Columbia), as well as supporting documentation at the provincial and federal levels. Although our search was exhaustive, information about Jordan's Principle was difficult to obtain, and we may have missed some relevant documents in our review. Compilation and analysis of documents was supported by representatives of the Assembly of First Nations (AFN), the Canadian Paediatric Society (CPS), and UNICEF Canada.

## Need for a Child-First Principle

Jordan's Principle is a child-first principle named in Jordan River Anderson's memory. The goal of Jordan's Principle is to ensure that Status First Nations children are not subjected to service denials, delays, or disruption due to disputes between governments or government departments.<sup>2</sup> In Jordan's case, tragic delays in service resulted from a jurisdictional dispute; provincial and federal government departments disagreed on who should bear financial responsibility for

Jordan's in-home care. A jurisdictional dispute of this kind could potentially arise in any situation involving unclear delineation of the jurisdictional authorities of two or more governments or government departments. Status First Nations individuals, especially those who are ordinarily resident in reserve communities, are particularly vulnerable to jurisdictional disputes over services. While provincial and territorial governments both fund and directly provide health and social services for most other children in Canada, services for Status First Nations people living on reserve are generally funded by the federal government, but regulated by provincial/territorial legislation and standards, and can be delivered through federal, provincial/territorial, or First Nations service systems.<sup>3</sup> In addition, the federal government funds some health services for off-reserve First Nations children. Thus, the systems for funding and delivering services for First Nations children are more complex than those for other children in Canada. As a consequence, First Nations children are at enhanced risk of experiencing jurisdictional disputes over services.

The potential for jurisdictional disputes in service provision, and the need for a clear dispute resolution process, were well established prior to the dispute around funding of in-home services for Jordan. Documented concerns about jurisdictional disputes in services for First Nations peoples date at least back to the 1967 Hawthorn Report.<sup>4</sup> More recently, in an exhaustive review of First Nations Child and Family Services funding, the Joint National Policy Review found that jurisdictional disputes were common.<sup>5</sup> The review found that "case-by-case" dispute resolution mechanisms were the norm, but that First Nations Child and Family Service Agencies reported the need for a formal, tribunal-like dispute resolution process.<sup>6</sup> Following up on the work of the Joint National Policy Review, the First Nations Child and Family Caring Society (the Caring Society) undertook in-depth research regarding the funding of services for First Nations children on reserve.<sup>7</sup> This project included a survey of 12 First Nations Child and Family Service agencies, which reported experiencing 393 jurisdictional disputes in the prior year. On average, each dispute took 54 person hours to resolve, imposing a heavy human resource burden on agencies. The jurisdictional disputes reported by agencies included those between federal government departments (36%), provincial government departments (27%), and federal and provincial departments (14%).<sup>8</sup>

## Development of Jordan's Principle

Building on this evidence suggesting the widespread existence of jurisdictional disputes, First Nations organizations began to advocate for a child-first principle to promote their efficient resolution.<sup>9</sup> Advocacy around Jordan's Principle started with Jordan's family and was extended by Trudy Lavallee, a child advocate with the Assembly of Manitoba Chiefs.<sup>10</sup> Cindy Blackstock, Executive Director of the Caring Society, continued the advocacy work with leaders from Norway House Cree Nation, the Assembly of Manitoba Chiefs, and the Assembly of First Nations (AFN).<sup>11</sup> One of the first appearances of the term "Jordan's Principle" in print was in the 2005 report entitled *Wen:de: We Are Coming to the Light of Day*:

In keeping with the United Nations Convention on the Rights of the Child, we recommend that a child first principle be adopted in the resolution of inter-governmental jurisdictional disputes. Under this procedure the government (provincial or federal) that first receives a request to pay for services for a Status Indian child where that service is available to other children, [...] will pay for the service without delay or disruption. The paying party then has the option to refer the matter to a jurisdictional dispute resolution table. In this way the rights of the child come first whilst still allowing for the resolution of jurisdictional issues. In honor and memory of Jordan we recommend the child first principle to resolving jurisdictional disputes be termed Jordan's principle [sic] and be implemented without delay.<sup>12</sup>

The *Wen:de* report also explicitly referenced the need for a mechanism preventing denials, delays and disruptions of services due to disputes within governments (intra-governmental disputes between departments).<sup>13</sup> Subsequent renditions of Jordan's Principle explicitly include situations in which "a jurisdictional dispute arises between two government parties (provincial/territorial or federal) or between two departments or ministries of the same government" for services that are normally available to all other children.<sup>14</sup>

## Jordan's Principle as a Human Rights Principle

Early advocacy and support for Jordan's Principle reflected more than a simple need to resolve jurisdictional disputes; a fundamental goal was to achieve more equitable treatment of First Nations children relative to other Canadian children.<sup>15</sup> Jordan's Principle was formulated as 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*, and other provincial/territorial and federal legislation. The CRC is an international agreement affirming the civil, social, political, cultural, and economic rights of children; Canada ratified the convention in 1991 and it came into force in 1992.<sup>16</sup> Article 23(1) speaks directly to the specific details of Jordan's case, stating that governments recognize a disabled child "should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community." Article 23(3) further specifies that a disabled child should have access to services "in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development."

At a more general level, article 2(1) stipulates that the CRC must be applied to each child "without discrimination of any kind, irrespective of the child's [...] ethnic or social origin." Article 6 provides that every child has the right to life, survival and development, which encompasses the notion of

optimal physical, emotional, and spiritual development. Article 30 of the CRC further guarantees to every Indigenous child the right to receive services in a manner that allows for the enjoyment of “his or her own culture” and “to use his or her own language.” Article 3(1) of the CRC is also relevant and establishes a governmental obligation to ensure that the “best interests of the child” are a primary consideration in all services to children. The application of the CRC with respect to Indigenous children is further detailed in the Committee on the Rights of the Child Comment 11,<sup>17</sup> and the rights of Indigenous children are described in more detail in the *United Nations Declaration on the Rights of Indigenous People*.<sup>18</sup>

These international obligations towards children are echoed in domestic legislation. Article 3(1) of the CRC is paralleled by child welfare legislation in each Canadian province and territory, which specifies the need to act in the best interest of the child.<sup>19</sup> Additionally, Article 2(1) is mirrored in subsection 15(1) of the *Charter*, which declares that every individual “is equal before and under the law and has the right to the equal protection and equal benefit of the law, without discrimination.” Section 5 of the *Canadian Human Rights Act* (1985) links the prohibition on discrimination directly to the provision of services, identifying it as “discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public” to “deny, or to deny access to, any such good, service, facility or accommodation to any individual”, or “to differentiate adversely in relation to any individual”, on the basis of “a prohibited ground of discrimination.” Finally, Jordan’s Principle may facilitate compliance with First Nations’ understanding of treaty rights related to the “Medicine Chest clause” included in Treaty Six (and negotiated by First Nations signatories of Treaties 8 and 11, although the clause was not included in the final text of these treaties<sup>20</sup>). First Nations interpret this clause as requiring “a full range of contemporary medical services” be provided, free of charge, to First Nations<sup>21</sup>; the ruling in a 1999 court case seems to support this interpretation.<sup>22</sup>

## Support for Jordan’s Principle

Jordan’s Principle has received support from numerous governments and national/international organizations. The Assembly of First Nations called for a child-first principle to be implemented without delay in December 2005 (Resolution 67), and renewed support in 2007 (Resolution 36). Federal government endorsement came in the form of unanimous House of Commons passage of a Private Member’s Motion (M-296), introduced by Member of Parliament (MP) Jean Crowder, in 2007. The motion (M-296) stated that “the government should immediately adopt a child-first principle, based on Jordan’s Principle, to resolve jurisdictional disputes involving the care of First Nations children.” It was adopted unanimously. Debate on the principle considered its applicability in broad terms. MP Steven Blaney expressed the government’s support of Jordan’s Principle this way:

In other words, when a problem arises in a community regarding a child, we



must ensure that the necessary services are provided and only afterwards should we worry about who will foot the bill. Thus, the first government or department to receive a bill for services is responsible for paying, without disruption or delay. That government or department can then submit the matter for review to an independent organization, once the appropriate care has been given, in order to have the bill paid. I support this motion, as does the government.<sup>23</sup>

In his description of Jordan's Principle, MP Blaney further described the principle as applying to "two governments, two departments or organizations,"<sup>24</sup> thus clearly reflecting a vision of Jordan's Principle as applying to both inter- and intra-governmental disputes. Shortly after the adoption of the House of Commons motion on Jordan's Principle, the Federal Minister of Health, the Minister of Indian Affairs and Northern Development, and the Federal Interlocutor for Métis and Non-Status Indians affirmed their support for Jordan's Principle, stating, "This Government believes that the health and safety of all children must always triumph over any issues of jurisdiction."<sup>25</sup> As of December 2014, more than 8,800 individuals and organizations had signed on as supporters of the Jordan's Principle campaign spearheaded by the First Nations Child and Family Caring Society.<sup>26</sup>

## The Development of a Governmental Response to Jordan's Principle

### Efforts to Define and Operationalize Jordan's Principle

The denotation of Jordan's Principle in the *Wen:de* report, and the endorsement of Jordan's Principle by the House of Commons were intended to provide the foundation for a child-first principle. Subsequently, several legislative efforts attempted to specify the measures needed for effective implementation of a child-first principle for services to First Nations children. Legislation related to Jordan's principle was advanced at the federal level, and also in Manitoba, the Yukon, and New Brunswick. However, with the exception of a New Brunswick motion mandating a tripartite partnership to develop an agreement around Jordan's Principle, these measures were not adopted.<sup>27</sup>

Thus, the response to Jordan's Principle has developed largely through non-legislative agreements. The Minister of Health and the Minister of Aboriginal Affairs and Northern Development (AANDC)<sup>i</sup> invited provincial/territorial governments "to work together to implement a child first

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i Aboriginal Affairs and Northern Development Canada (AANDC) is the current name of the federal department responsible for the funding of child welfare, education and other social services to Status First Nations children living on reserve. This Department was previously known as Indian and Northern Affairs Canada (INAC); for consistency, we use AANDC throughout the text of this report.

**Table 1. Timeline of Responses to Jordan's Principle (JP)**

	Federal	AFN/Regional First Nations Associations	Provincial
2005		Resolution 67 calls for child-first principle to be implemented without delay	
2006			<b>YK:</b> Notice of Motion 700 to address jurisdictional disputes and inequities
2007	M-296 unanimously passed in House of Commons	Resolution 36 renews support for child-first principle	
2008	First readings of Bills C-563 and C-249	Resolution 63 calls for implementation of Jordan's Principle	<b>BC:</b> Premier Campbell confirms full support of JP, tripartite group formed
	Letters to provincial ministers request collaboration on JP		<b>MB:</b> First readings of Bills 233 and 203
	\$11M fund established to cover costs of care during dispute		<b>MB:</b> Bipartite agreement reportedly reached
2009			<b>MB:</b> First reading of Bill 214
			<b>MB:</b> Bipartite working group publishes document outlining definition of JP
			<b>ON:</b> Government confirms commitment to JP, no plan to implement announced
			<b>SK:</b> Tripartite Interim Implementation Plan agreement developed
2010	States there are "no cases" involving a dispute		<b>NB:</b> Motion 68 endorsed, requiring JP implementation agreement
2011		Resolution Jan-11.03 carries in MB, advocating for full implementation of JP	<b>BC:</b> Bipartite agreement for the continued implementation of JP signed
			<b>NB:</b> Final tripartite agreement on the implementation of JP published
			<b>NS:</b> Request for JP dispute resolution by PLBC health director
			<b>NB:</b> PLBC and Maurina Beadle file application in federal court
2012	States there are "no cases" involving disputes; reserve fund eliminated	Resolution 1(n)/2012 passes in BC, opposing bipartite JP implementation process in BC	<b>SK:</b> FSIN temporarily suspends negotiations on JP implementation
			<b>SK:</b> Bi-partite final dispute resolution protocol agreement signed
2013			<b>NS:</b> Federal court rules in favour of PLBC, Canada appeals
2014	Experts testify at Human Rights Tribunal on JP		<b>NS:</b> Federal government drops its appeal in the <i>PLBC v. Canada</i> case

N.B.: No province-specific information on JP implementation was found for Alberta, Newfoundland and Labrador, Prince Edward Island or Quebec.

principle to resolve jurisdictional disputes involving the care of First Nations children.”<sup>28</sup> The government of Manitoba reached a bilateral agreement-in-principle with the federal government, to implement a jurisdictional dispute resolution process for First Nations children,<sup>29</sup> in 2008. A tripartite agreement was reached in Nova Scotia between the federal government, the provincial government, and Mi’kmaw Family and Children’s Services in 2009.<sup>30</sup> The federal government, the government of Saskatchewan, and the Federation of Saskatchewan Indian Nations (FSIN) reached a preliminary, trilateral agreement in 2009.<sup>31</sup> In 2012, the FSIN temporarily suspended negotiations on implementation due to the narrow construction of the federal government’s approach to Jordan’s Principle.<sup>32</sup> The provincial and federal governments announced a bilateral agreement shortly thereafter.<sup>33</sup> In British Columbia, a tripartite Jordan’s Principle working group, including representatives of the provincial and federal governments, as well as members of First Nations organizations, was formed in 2008.<sup>34</sup> Three years later, while the work of this tripartite group was ongoing, the British Columbia and federal governments reached a bilateral working agreement to implement Jordan’s Principle. In New Brunswick, AANDC, the government of New Brunswick, and First Nations Chiefs in New Brunswick reached a tripartite agreement in 2011.<sup>35</sup>

We were unable to obtain documentation of Jordan’s Principle agreements reached in other provinces/territories. In 2010, an internal federal government document described Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and Quebec as uninterested in engaging with the federal government to establish formal dispute resolution processes.<sup>36</sup> This same document describes the province of Ontario as wanting a Jordan’s Principle agreement. In statements to the Legislative Assembly of Ontario in 2009, the Ontario government announced support for Jordan’s Principle.<sup>37</sup> By 2012, the federal government stated that all provinces “have been engaged in discussions and have put joint processes in place” (Government of Canada, 2012, p. 17).<sup>38</sup> However, the nature, extent, and quality of these joint processes remain unclear.

The Canadian Paediatric Society rated the implementation of Jordan’s Principle in all provinces and territories in 2009 and 2011<sup>39</sup>; CPS assessed whether provinces/territories reported adopting and implementing a child-first principle for resolving jurisdictional disputes, but did not examine the operational definitions or collaborative processes underlying implementation. There were no changes in the ratings of implementation between 2009 and 2011. Eight provinces/territories were rated as “poor,” and four provinces were rated as “fair.” Nova Scotia was the only jurisdiction to receive a “good” rating; shortcomings in the Nova Scotia process are detailed, below, in the discussion of the *PLBC v. Canada* legal challenge.<sup>40</sup>



Maurina Beadle, a resident of the Pictou Landing Mi'kmaq community in Nova Scotia, is single mother and the primary caregiver for her son, Jeremy Meawasige, who has high care needs. In 2010, Ms. Beadle suffered a stroke and could no longer care for Jeremy at the level that he required. The Pictou Landing Band Council (PLBC) began funding in-home care; they estimated the cost to be around \$8,200 a month. This amounted to nearly 80% of PLBC's monthly budget for home care services. In 2011, the Pictou Landing Health Director requested case conferencing, indicating that she thought Jordan's Principle was applicable, and a trilateral case conferencing process began. The provincial representative involved in the case conference explained that an off-reserve child requiring similar care would receive a maximum of \$2,200 per month for in-home respite services. The representative stated the province would not provide home care exceeding this limit, but that provincial standards would cover the full cost of institutional care, which was subsequently estimated to be 130% of the cost of Jeremy's in-home expenses.

Around the time of this case conferencing process, the Nova Scotia Supreme Court decided a similar issue of in-home care services, raised in *Nova Scotia (Community Services) v. Boudreau*. Brian Boudreau was a Nova Scotia off-reserve resident who required 24 hour care and had his in-home care service payments limited to \$2,200 per month. *NSCS v. Boudreau* charged that this monthly cap violated legislation allowing for in-home care funding exceeding the standard maximum in "exceptional circumstances." In March of 2011, the Nova Scotia Supreme Court ruled that the Nova Scotia Department of Community Services was obligated to provide additional in-home care funding for Brian, finding that "exceptional circumstances" included those situations where "a single care giver has sole responsibility for supporting the family member with a disability," or "an individual has extraordinary support needs to the extent that they are reliant on others for all aspects of their support." The decision further noted legislation requiring the province to "furnish assistance to all persons in need" and to provide "home care" services, ruling that departmental discretionary regulations and policies do not take precedence over relevant legislation. The PLBC Health Director attached a copy of the *NSCS v. Boudreau* ruling to another request for federal authorities to provide funding for Jeremy's in-home care. The focal point responded that Jordan's Principle did not apply because provincial and federal governments were still in agreement that funding should not exceed \$2,200 per month.

In June 2011, the Pictou Landing Band Council and Maurina Beadle asked the Federal Court to quash the focal point's decision in Jeremy's case, and to declare that the federal government's actions in the case violated the Nova Scotia *Social Assistance Act*, Jordan's Principle, and the *Charter*. Canada argued that Jordan's Principle was not engaged in this case, suggesting that because the province and federal government agreed, there was no jurisdictional dispute. They further argued that the very recent Supreme Court ruling in *NSCS v. Boudreau* had not yet resulted in a change in provincial practice, and the \$2,200 per month cap remained the normative provincial standard. Finally, they argued that PLBC was not entitled to reimbursement for the cost of Jeremy's care, suggesting that if PLBC could not cover these costs with the current funding, then they should renegotiate the funding agreement.

In 2013 the Federal Court ruled in favour of PLBC and Maurina Beadle, finding that the federal government's interpretation and application of Jordan's Principle was inadequate. The federal government appealed the decision on broad grounds in 2013, but formally discontinued the appeal in July of 2014.

## Case Conferencing and Dispute Resolution Processes

Little information about the nature of the current governmental response to Jordan's Principle has been publicly available. AANDC has offered some details about the way in which Jordan's Principle has been operationalized, stating that the principle applies only in cases that meet the following five criteria:

1. A First Nations child who has Status or is eligible to have Status is involved;
2. The child is ordinarily a resident on reserve;
3. The child has been assessed by health and social service professionals and been found to have multiple disabilities requiring services from multiple providers;
4. The dispute is between the federal and provincial government; and
5. The assessment is made based on normative standards of care provided to similar children in a similar geographic location.<sup>41</sup>

In addition, AANDC has indicated that the governmental response to Jordan's Principle involves a case-by-case, conferencing approach, emphasizing the idea that most cases should informally be resolved at the local level, and that progress to a formal case conferencing procedure should happen in exceptional circumstances only. The formal case conferencing process is facilitated by government appointed "focal points"; federal or provincial administrators designated as responsible for gathering necessary information and determining a resolution proposed through a formal case conferencing process.<sup>42</sup>

Further description of the case conferencing process and the process for resolving jurisdictional disputes was provided in documents describing the implementation of Jordan's Principle in New Brunswick; Table 2 summarizes the steps involved in these processes. Once notified of a potential Jordan's Principle case, a focal point must convene a case conference within 10 days of receiving an assessment of the child from a health or social service professional, information on current and proposed service plans for the child, a report of the issue/reason for referral to the focal point, and a summary of steps taken to resolve the issue. The focal point must complete case conferencing within 45 subsequent working days. The case conferencing process involves (1) verification of a child's diagnosis, (2) review of goods/services recommended and currently provided, (3) identification of unmet goods/service needs, (4) clarification of mandates for provision of required goods/services, and (5) "examination of provincial normative standards of care to understand comparable services available to children with multiple disabilities (special needs) living off reserve in a similar geographic location."<sup>43</sup>

**Table 2. Case Conferencing and Dispute Resolution Processes Outlined in the New Brunswick Jordan's Principle Agreement**

CASE CONFERENCING		
Step Number	Step in Process	Time Frame Specified
1	Resolution reached through case conferencing at the local level	No time frame specified
2	Referral to focal point if not resolved at local level	No time frame specified
3	Focal point will hold an initial case conference meeting with focal points from other parties	Within 10 work days of receiving necessary information
4	Resolution at focal point level	Within an additional 45 work days
5	If not resolved at the focal point level, relevant Asst. Deputy Minister decides whether to declare a jurisdictional dispute	No time frame specified
6	Relevant asst. deputy minister notifies responsible counterpart in fed/prov ministry, in writing, of a jurisdictional dispute and requests to enter into dispute resolution process	No time frame specified
7	Counterpart Asst. Deputy Minister responds to request to enter into dispute process from primary asst. deputy minister. If accepted, Jordan's Principle jurisdictional dispute is declared.	Within a reasonable time frame
8	Once a Jordan's Principle dispute is declared, and the service is deemed by the province as a provincial/territorial normative standard, then the department of first contact covers the cost of services	Until matter is resolved
DISPUTE RESOLUTION		
Step Number	Step in Process	Time Frame Specified*
9	Resolution attempt at the Asst. Deputy Minister level	Within 30 days
10	Selection of a professional mediator if no resolution	Within 20 days
11	Mediation facilitation and mediator's report	Within 30 days
12	If mediator's recommendations are not accepted, dispute referred to Deputy Ministers of responsible departments to agree to a resolution	Within 60 days

\*All timeframes in the dispute resolution process outlined are extendable by mutual agreement

If a resolution is not reached through case conferencing, a provincial-federal jurisdictional dispute must be formally declared. A dispute is considered to exist once declared (in writing) by a provincial or federal Assistant Deputy Minister,<sup>44</sup> and accepted by the corresponding provincial or federal Assistant Deputy Minister.<sup>45</sup> Once a Jordan's Principle dispute is declared, and the disputed service is deemed by the province to be in keeping with provincial normative standard, the cost of services will be paid by "the current service provider" or "in the absence of a current service provider, the agency of first contact" until the jurisdictional dispute is resolved.<sup>46</sup> Thus, it is at this time that the agency of first contact/current service provider is required to begin covering the cost of services. The case conferencing process is followed by a dispute resolution process that includes

four steps; the timeline for each step may be extended if agreed upon by the parties (see Table 2). First, a dispute resolution attempt is made at the Assistant Deputy Minister level between the representatives of the federal and provincial governments within 30 days. If there is no dispute resolution at this level, the parties then have 20 days to agree upon a professional mediator, who has 30 days to facilitate dispute resolution and submit a recommendations report. If the parties refuse the recommendations, the Deputy Ministers have an additional 60 days to agree to an alternate resolution.<sup>47</sup>

## Key Shortcomings in the Current Governmental Response to Jordan's Principle

The current governmental response to Jordan's Principle has evolved in an iterative fashion. Variations of the response emerged from negotiations between the federal government and individual provincial/territorial governments; these variations have been further clarified in response to challenges like the *PLBC v. Canada* case. Our review of Jordan's Principle documents and of *PLBC v. Canada* suggests that, in its current form, this response fails to reflect the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons. The current response:

1. Limits the population eligible under Jordan's Principle, thereby creating disparities in the protections available to different groups of First Nations children.
2. Narrows the operational definition of jurisdictional disputes to include only inter-governmental disputes between federal and provincial/territorial governments, thus further limiting the cases to be considered under Jordan's Principle.
3. Narrows the service domains to be considered under Jordan's Principle.
4. Treats the existence of a formal payment dispute to be the indicator of a jurisdictional dispute, thereby excluding cases involving known service gaps/disparities from consideration under Jordan's Principle.
5. Institutionalizes a lengthy case conferencing process as a precursor to declaration of a jurisdictional dispute, thus introducing possible service delays.
6. Fails to specify a consistent mechanism for repayment of costs incurred by the government/agency providing services during case conferencing and dispute resolution processes.
7. Excludes First Nations from administrative and dispute resolution processes.
8. Lacks mechanisms for transparency and accountability, at both the individual case and systemic levels, which are essential to the protection of human rights.

Each of these points is discussed in more detail below.

## *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada*

The governmental response to Jordan's Principle also lies at the heart of an ongoing Canadian Human Rights Tribunal case. This case is based on a complaint, first filed in 2007, which alleged that federal government underfunding of on-reserve child welfare services amounted to discrimination on the basis of race/ethnicity. The complainants argued that the failure to provide First Nations children and families ordinarily resident on-reserve with child welfare funding and benefits comparable to those received by all other children and families contravened the *Canadian Human Rights Act* and Jordan's Principle. They asked for an order mandating that federal authorities apply Jordan's Principle to federal programs affecting children and that plans for implementation of Jordan's Principle be approved by the Canadian Human Rights Commission. The federal government made concerted efforts to have the case dismissed, but was ultimately unsuccessful. The Canadian Human Rights Tribunal began hearing evidence in this case on February 25, 2013; the final witness testified in May of 2014. In closing submissions, the complainants provided evidence on the federal government's response to Jordan's Principle, and argued that a full and properly scoped implementation of Jordan's Principle, as it was "conceived of as a means to prevent First Nations children from being denied essential public services" is required. A ruling in the case is expected in 2015.

2

### Limitations on Eligibility

Jordan's Principle, as advanced by First Nations and endorsed by the House of Commons, applies to all Status First Nations children. In contrast, under the operational definition put forward by the federal government and agreed to by multiple provinces, child-first protections apply only to Status/Status-eligible children **who are ordinarily a resident on reserve, have been assessed by health and social service professionals, and have been found to have multiple disabilities requiring services from multiple providers.**<sup>48</sup> This operational definition prevents Jordan's Principle application in cases involving First Nations children who have multiple disabilities which have not been professionally diagnosed, or do not require services from multiple providers. Moreover, it excludes all First Nations children who do not have multiple disabilities from Jordan's Principle protections. Accordingly, the federal operationalization potentially creates new disparities in access to services for First Nations children. An AFN Special Chiefs' Assembly passed a consensus resolution that condemned the narrow operational definition of Jordan's Principle adopted by the federal government as unreflective of the intent of the House and discriminatory.<sup>49</sup>

Definitional differences between federal, provincial and First Nations authorities, in terms of the scope of Jordan's Principle, were evident in the documents reviewed from British Columbia, New Brunswick, and Saskatchewan.<sup>50</sup> Indeed, evidence presented in the *Caring Society v. Canada* human rights case indicates that officials from Saskatchewan, British Columbia, Prince Edward Island and the Northwest Territories formally expressed concerns about the narrow federal operational definition in letters to federal ministers; a British Columbia representative also expressed these



concerns to the Standing Committee on Aboriginal Affairs and Northern Development.<sup>51</sup> AANDC itself has acknowledged discontent with the narrow operationalization, stating that:

Advocacy groups, First Nation leadership and provinces continue to be critical of the federal government for perceived lack of progress in implementing Jordan's Principle and its narrow focus on First Nations children with multiple disabilities and federal/provincial disputes. Generally, these groups would like Jordan's Principle to apply to all First Nation children and address gaps in services between all levels of government.<sup>52</sup>

The most pointed justification for narrowing the scope of eligibility provided in the documents we reviewed came in a 2011 statement before the Standing Committee on the Status of Women. A senior analyst from AANDC explained the narrow operationalization, stating, "The focus is on those who were like Jordan—those who are the most vulnerable, those who have multiple disabilities and require multiple services from across jurisdictions."<sup>53</sup> Additional explanations have also emphasized the vulnerability to jurisdictional disputes of children with multiple disabilities requiring multiple service providers.<sup>54</sup>

## Narrowing of the Types of Jurisdictional Disputes Addressed

The concept of a jurisdictional dispute is central to Jordan's Principle, and the existence of a jurisdictional dispute has been emphasized in all versions of Jordan's Principle we reviewed. Federal funding of health and social services for on-reserve, Status First Nations people (which are largely funded, provided, and regulated by provinces/territories off reserve) is a core justification for a child-first principle that focuses specifically on First Nations children. Indeed, the potential for jurisdictional disputes around specific services for First Nations children in care, children with medical needs, and children with disabilities has been clearly outlined in some jurisdictions.<sup>55</sup> Thus, the presence of a jurisdictional dispute can be seen as a defining characteristic of a Jordan's Principle case, one that distinguishes it from other human rights cases in which a child is denied the equitable treatment and protections guaranteed by provincial/territorial, federal, and international laws and agreements.

Despite the centrality of jurisdictional disputes for Jordan's Principle, this concept has never been clearly defined. Existing scholarship documents the occurrence of jurisdictional disputes in areas of jurisdictional overlap, like the one inherent to the divided responsibility for on-reserve services,<sup>56</sup> but does not offer a clear standard for assessing whether a jurisdictional dispute exists. While no explicit definition of a jurisdictional dispute was presented in the Jordan's Principle documents we reviewed, a *de facto* definition was evident. Collectively, the reviewed documents indicate that, under the current governmental response, the operational definition of a "jurisdictional dispute" is a case in which:

1. There is disagreement between the federal and provincial governments;
2. Case conferencing occurred at the local level but did not lead to case resolution;
3. An AANDC focal point made an assessment of unequal services, based on a comparison of normative standards of care provided to similar children in a similar geographic location;
4. An AANDC focal point determined that there is a formal payment dispute between provincial/territorial and federal governments even after case conferencing has occurred; and,
5. Assistant Deputy Ministers within both provincial and federal government departments, formally declare a jurisdictional dispute.

The federal operationalization has a narrow focus on disputes between provincial/territorial and federal governments. This stands in contrast to broader operationalizations—such as those outlined in discussions leading to the House of Commons endorsement of Jordan’s Principle,<sup>57</sup> and in descriptions of the principle by First Nations groups—which include disputes between departments of a single government. The limited available evidence suggests that restricting Jordan’s Principle application to those cases in which there is a dispute between federal and provincial/territorial governments may exclude consideration of many situations in which First Nations children experience denials, delays, or disruptions of service. The *Wen:de* report indicated that disputes between federal government departments were the most common form of jurisdictional dispute; the number of inter-departmental disputes at the federal level that were reported by 12 sampled agencies was more than two times the number of federal-provincial disputes.<sup>58</sup> Federal inter-departmental disputes are also specific to Status First Nations children; they do not occur around the provincially/territorially funded services provided to other children. These disputes, however, are not captured within the federal government’s narrow operationalization of Jordan’s Principle.

Indeed, in addition to explicit inclusion of intra-governmental disputes, there is an argument to be made that the governmental response to Jordan’s Principle should explicitly acknowledge the potential for First Nations governments/service providers to be implicated in jurisdictional disputes. With the broad-scale devolution of responsibility for on-reserve services to First Nations in domains such as health,<sup>59</sup> child welfare,<sup>60</sup> and education,<sup>61</sup> First Nations governments and service providers are increasingly responsible for delivery of services to First Nations children. As demonstrated in the *PLBC v. Canada* case, First Nations are directly implicated in the identification and resolution of jurisdictional disputes. Accordingly, Jordan’s Principle processes have strong impacts on the budgets and functioning of First Nations governments and service providers.

## Narrowing of the Service Domains to be Considered under Jordan’s Principle

Canada’s final submission to the Canadian Human Rights Tribunal in *Caring Society v. Canada*

reveals restrictions on the federal government's interpretation of the service domains in which Jordan's Principle applies. The submission states that, "Jordan's Principle would only be applicable in the child welfare context if there was a dispute between the federal and provincial government over who was responsible for paying for a service, and the child involved was a child in care."<sup>62</sup> The basis for asserting that Jordan's Principle would only apply to a child in care is not clarified, and we do not find any precedent for this limitation in any of the other documentation that we reviewed. Indeed, this assertion seems to contradict a previous statement, in the same document, that "Jordan's Principle does not apply solely to children in care, but to all First Nations children on reserve."<sup>63</sup> The submission further asserts that "Jordan's Principle is not a child welfare concept and is not part of the FNCFS [First Nations Child and Family Services] Program."<sup>64</sup> Thus, in this document, the federal government has introduced an argument that the application of Jordan's Principle is limited to specific service domains, and that child welfare is not one of the domains to which it applies. In the initial description presented in the *Wen:de* report, Jordan's Principle was not introduced as a child welfare concept, nor as a health concept or an education concept. Rather, it was presented as a child-first principle intended to help ensure that First Nations children receive equitable services in accordance with their human and constitutional rights; these rights are not limited to specific service domains.<sup>65</sup>

## Declaration of a Formal Payment Dispute as the Indicator of a Jurisdictional Dispute

The current governmental response to Jordan's Principle treats the formal declaration of a payment dispute as the indicator of a jurisdictional dispute. The potential for this narrow operational definition to exclude cases involving First Nations children from Jordan's Principle application was made clear in the *PLBC v. Canada* ruling. Reflecting on the provincial-federal agreement that the \$2,200 per month limit for in-home care services applied to Jeremy Meawasige's situation, the court noted that the absence of a monetary dispute was not a valid indicator of the absence of a jurisdictional dispute if both levels of government "maintain an erroneous position on what is available to persons in need."<sup>66</sup> Thus, the ruling highlighted the potential for erroneous interpretation and for subsequent declaration that a jurisdictional dispute does not exist, which is implicit to the federal government's operational definition of a jurisdictional dispute. Under the current governmental response, cases in which First Nations children experience denials, delays, or disruptions of services normally available to other children can be excluded from Jordan's Principle application if federal and provincial governments simply decline to formally declare a jurisdictional dispute.

The systemic implications of the potential for erroneous interpretation and/or collusion were evident in the federal-provincial working group report on Jordan's Principle implementation in Manitoba.<sup>67</sup> The report enumerated a number of "service disparities," or situations in which the on-reserve services funded by the federal government were not equal to the provincially funded



services provided off reserve.<sup>68</sup> Examples included on-reserve provision of only one new assistive device (e.g. a lift or wheelchair) every five years with no installation assistance, while off-reserve funding covered multiple devices and installation; and the limitation of physiotherapy for First Nations children to hospital settings, while off-reserve children could access free physiotherapy at home or in health care centres.<sup>69</sup> The report also suggested that out-of-home placement through the child welfare system would be one way for on-reserve children to “more easily” access services in keeping with normative provincial standards.<sup>70</sup> However, the report, authored by a working group which included federal representatives, stressed that “these examples of service disparities are not the result of a dispute between the Federal and Provincial jurisdictions over responsibility for the provision or funding of services. As such, these differences do not relate to Jordan’s Principle, as there is no jurisdictional dispute.”<sup>71</sup> Thus, by limiting its understanding of jurisdictional disputes to include only those situations in which there is a formal payment dispute, the current governmental response burdens the families, communities, and service providers of First Nations children with responsibility for transforming even those service gaps/disparities which have been jointly acknowledged by federal and provincial/territorial governments into situations in which Jordan’s Principle will be applied.

The narrow definition of jurisdictional dispute and the consequent limitations on the scope of Jordan’s Principle application under the current governmental response were over-ruled by the Federal Court in its *PLBC v. Canada* ruling.<sup>72</sup> In that case, the Federal Court found that a jurisdictional dispute existed because the federal funding provided was insufficient to allow PLBC to provide services in compliance with provincial legislation. Accordingly, the ruling suggests that the concept of “jurisdictional dispute” cannot be limited to situations in which a formal payment dispute exists. Rather, the concept must also encompass situations in which the services/resources provided are insufficient to meet the requirements set forth by existing provincial/territorial legislation and standards. From this perspective, the existence of a service disparity or service gap itself can be the trigger for application of Jordan’s Principle; there is no need for declaration of a payment dispute. This broader understanding of “jurisdictional dispute” is clearly more closely aligned with the vision of Jordan’s Principle advanced by First Nations and endorsed by the House of Commons, than the narrow definition featured in the current governmental response. The potential for erroneous interpretation by federal and provincial/territorial officials, and for subsequent declaration of the absence of a jurisdictional dispute, was highlighted by *PLBC v. Canada*. The events in that case suggest that an independent body should carry out this assessment, and that there should be a mechanism for appealing the assessment.

## Introduction of Service Delays

The current governmental response to Jordan’s Principle requires that a case proceed through multiple stages of assessment and case conferencing prior to being declared a “Jordan’s Principle case” and becoming eligible for payment of services. The documents we reviewed suggest that

formal case conferencing is only initiated once local level case conferencing, of an unspecified duration, has been completed and necessary information has been forwarded to the focal point. Documentation from New Brunswick specifies that there are up to 55 working days allotted for formal case conferencing facilitated by the focal point; Table 2 presents a summary of this case conferencing process.<sup>73</sup> Recent testimony from a senior AANDC official at the Canadian Human Rights Tribunal confirmed that the process can be lengthy. The AANDC official testified about the case-conferencing process for an on-reserve child who required a medical bed, normally available to off-reserve children, in order to prevent a life threatening emergency. It took over six months to complete case conferencing and deliver the bed to the child.<sup>74</sup>

The prevention of service delays and disruptions for First Nations children has been a primary purpose of Jordan's Principle from the outset. Yet, an operational standard defining what constitutes a service delay is curiously absent from the documents we reviewed. At its core, the governmental response appears to involve formalization of the same type of potentially lengthy case conferencing process that occurred for Jordan River Anderson. An alternative case conferencing process was proposed by the federal/provincial working group in Manitoba.<sup>75</sup> It called for a primary agency of responsibility (PAR) to be determined and for payment of services to begin *prior* to case conferencing. However, the document did not specify who should determine the PAR. Moreover, the PAR process was outlined in a draft document, and we were unable to obtain documentation of the current processes in place.

## Failure to Specify a Consistent Repayment Mechanism

The current governmental response does not specify a formal mechanism for repayment of the costs of services provided during the case conferencing or dispute resolution process. AANDC has publicly indicated that, in cases involving children already receiving services, “[t]he current service provider that is caring for the child will continue to pay for necessary services until there is a resolution.”<sup>76</sup> The New Brunswick agreement further specified that in a case where there was no current service provider, meaning that the child was not already receiving services, the government or agency of first contact would be liable for payment of new services until the resolution of the jurisdictional dispute.<sup>77</sup> However, we did not find any specification of a formal timeline for ensuring repayment of costs incurred by a current service provider or government/agency of first contact.

We also did not find any indication of a source of compensatory funds in the event that a focal point ultimately determines that the cost of services provided exceeded the normative standards of care provided to similar children in a similar geographic location. The 2008 federal budget established a four-year, 11 million dollar reserve fund to support Jordan's Principle implementation.<sup>78</sup> This fund was intended to “provide interim funding to cover the costs of a child's care in the event of a jurisdictional dispute,” but no further details of the intended use of

these funds were available.<sup>79</sup> In 2012, noting that the fund had not been accessed in its three-year existence, the federal government cancelled the fund, one year before its designated sunset date.<sup>80</sup> We found no indication that other funds have been designated for repayment in such cases.<sup>81</sup> Indeed, the New Brunswick agreement specifically noted that “Jordan’s Principle implementation does not create a new program, service or funding source itself, rather solutions will be pursued within existing agencies, services and funding agreements.”<sup>82</sup> The fact that there is no funding specifically designated for costs incurred in Jordan’s Principle cases was confirmed in recent submissions to the Canadian Human Rights Tribunal.<sup>83</sup> Accordingly, the current governmental response creates a risk that, in some circumstances, governments or agencies honouring a child-first principle will not be reimbursed.

The potential for repayment is even more tenuous for First Nations service providers, which are responsible for the provision of large, and increasing, proportions of health and social services in First Nations communities.<sup>84</sup> The New Brunswick agreement noted that “in the unlikely event that a dispute cannot be resolved, the government of first contact, who has paid the service during the dispute resolution process, will not seek reimbursement from the First Nation or First Nation Child and Family Services agency.”<sup>85</sup> However, there is much less clarity around the reimbursement process if a First Nation/First Nations agency, as the current service provider or government/agency of first contact, pays for services during case conferencing and dispute resolution processes. In Jeremy Meawasige’s case, the Pictou Landing Band Council covered service costs during these processes, providing for Jeremy’s in-home care from 2010 until 2013. Yet, in *PLBC v. Canada*, the federal government argued that PLBC was not entitled to compensation for these costs, stating, “[i]f they are unhappy with the amounts they receive under their funding agreements, then their course is to ask Canada to renegotiate and amend those agreements.”<sup>86</sup>

Renegotiation of funding agreements may not be feasible for First Nations. In child welfare, for example, AANDC stated in 2013 that “an agreed upon allocation is provided over a 5-year period and cannot be changed or renegotiated throughout that timeframe, despite [First Nations] having annual funding agreements”; similar restrictions apply in other service domains.<sup>87</sup> Accordingly, it appears that First Nations service providers cannot expect their costs to be reimbursed under the current governmental response to Jordan’s Principle. When the expenses in a Jordan’s Principle case represent a significant proportion of a service provider’s budget, the funds available to support services to other children will be diminished or depleted. Thus, the current governmental response to Jordan’s Principle may have the perverse effect of *creating* new situations in which First Nations service providers lack the resources to provide on-reserve children with services comparable to those available to other children in Canada.

## Exclusion of First Nations

The burdens that the current governmental response imposes on First Nations are even

more problematic given that the record of collaboration with First Nations in developing and implementing this response has been mixed, at best. Saskatchewan, Manitoba, and British Columbia have bipartite agreements<sup>88</sup> to which First Nations were not party. Both the British Columbia Assembly of First Nations and the Assembly of First Nations Special Chiefs Assemblies passed resolutions (1(n)/2012 and 63/2008, respectively) decrying exclusion of First Nations from the Jordan's Principle case definition and policy implementation process.<sup>89</sup> In British Columbia, a bipartite working agreement was reached while the work of a tripartite Jordan's Principle working group was ongoing.<sup>90</sup> In Saskatchewan, Jordan's Principle agreement negotiations began in a trilateral fashion, but ended in a bilateral agreement, after the FSIN temporarily suspended Jordan's Principle agreement negotiations, citing concerns that were highlighted in the *PLBC v. Canada* case.<sup>91</sup> There is also indication of exclusion of First Nations in other jurisdictions. For example, noting that an existing tripartite agreement between Mi'kmaw Family and Children's Services<sup>92</sup> included a mechanism for "resolving JP type issues,"<sup>93</sup> the federal government concluded that Nova Scotia did not need a Jordan's Principle agreement. However, notes from an exploratory Jordan's Principle meeting between federal and Nova Scotia government representatives suggest that First Nations were not involved in making this assessment.<sup>94</sup>

At the national level, the AFN made numerous requests to the federal government that First Nations participate in the designation and training of Jordan's Principle focal points, but these requests were not honoured.<sup>95</sup> In testimony before the Canadian Human Rights Tribunal, an AANDC official indicated that the engagement with the AFN was limited to "two or three meetings" intended as forums for the federal government to describe their approach to and progress in implementing a governmental response to Jordan's Principle.<sup>96</sup> Indeed, testimony in the *Caring Society v. Canada* case indicates that engagement of First Nations in Jordan's Principle processes was left to provinces/territories, and that First Nations were not invited to participate in defining the terms of the governmental response.<sup>97</sup>

The exclusion of First Nations from the development and implementation of a governmental response is troubling given the genesis of Jordan's Principle: it is named in memory of a First Nations child, was drafted by First Nations advocates, and has been championed by First Nations organizations.<sup>98</sup> Moreover, it directly impacts the health and welfare of First Nations children, domains in which First Nations have asserted their pre-existing rights and responsibilities. The need for First Nations control over health and social services has been widely acknowledged, and First Nations increasingly play health and social service-provision roles.<sup>99</sup> Thus, the provincial and federal governments have a practical, moral/ethical and – where treaties regarding services exist – legal<sup>100</sup> duty to consult with First Nations on matters concerning the health and welfare of First Nations children. Such consultation may increase efficacy – there is evidence that engagement of Aboriginal representatives in health services provision can dramatically increase participation of Aboriginal communities.<sup>101</sup> It is also in keeping with a worldwide focus on supporting stakeholder engagement in policy development and implementation in order to improve governance.<sup>102</sup>



## Lack of Transparency and Accountability Mechanisms at the Individual and Systemic Levels

Along with stakeholder participation, accountability and transparency are recognized as integral elements of democratic governance and protection of human rights.<sup>103</sup> Our review of the current governmental response to Jordan's Principle indicates that accountability for and transparency of Jordan's Principle processes and outcomes is severely lacking at the individual case level. The existence of focal points and the processes for initiating a Jordan's Principle case are unclear to stakeholders. We attempted to locate focal points while researching this article. We found no contact information on the internet, but we were able to identify focal points in most regions through calls to AANDC and First Nations Inuit Health Branch (FNIHB) regional offices. In some instances, the person answering the phone easily identified focal points. However, in others, identification was only possible after a research team member explained Jordan's Principle and the focal point role; in some cases, several call transfers and discussions with multiple federal employees were required. AFN health technicians previously indicated that, in many regions, First Nations had no idea who the regional focal points were.<sup>104</sup> Thus, focal points are not always easily identifiable. Further, the process for addressing a case once the focal point has been contacted is not clear; we were unable to locate any publicly accessible documentation of the procedures followed once a case is brought to the attention of a focal point. Further, as demonstrated in *PLBC v. Canada*, there is no independent oversight of the case conferencing process and no recourse, other than costly and time-consuming legal action, for families that disagree with the resolution reached through the formal case conferencing process.

Our review also indicates a lack of transparency and accountability mechanisms at the systemic level. The bi/trilateral agreements on Jordan's Principle are not publicly accessible and direct requests to provincial health and social ministries did not result in the agreements being provided.<sup>ii</sup> Indeed, in testimony before the Canadian Human Rights Tribunal, an AANDC official explained that the development of the federal response to Jordan's Principle "was a process that was internal to government and it involved the policy process that was secret and subject to Cabinet confidence."<sup>105</sup> Access to the Jordan's Principle related documents reviewed in this article was greatly facilitated by the Caring Society's efforts to bring documents related to the *Caring Society v. Canada* case into the public domain, the sharing of information by other Aboriginal organizations/advocates, and the filing of provincial-level access to information requests. Still, it was time consuming and difficult to piece together the information needed to describe the process for pursuing a Jordan's Principle case.

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ii The sole exception was in British Columbia, where letters to provincial ministers requesting documents resulted in access to information requests automatically being filed on our behalf.

Transparency with respect to the outcomes and effectiveness of Jordan's Principle policies is also lacking. Federal representatives previously stated that "case conferencing" occurred on a number of "Jordan's Principle related" cases and that all these cases were resolved "before there was a formal payment dispute," but then indicated that information about case resolutions could not be made public.<sup>106</sup> A recent disclosure at the *Caring Society v. Canada* tribunal hearing included federal documentation of 27 "Jordan's Principle related" cases, but did not include any indication of the timing or duration of case conferencing processes. It did indicate that case conferencing/dispute resolution processes were ongoing for several cases and that federal representatives lacked the information needed to characterize the resolution of several additional cases. The resolutions noted for remaining cases included provision of one-time services on compassionate grounds, children "aging out" of eligibility for the service in question, negotiation of manufacturer price reductions by front-line staff, and referral to alternate administrative processes. We were not able to locate any additional documentation about the number, nature, procedures, or time taken to resolve Jordan's Principle cases.

The lack of transparency around the governmental response to Jordan's Principle translates into a lack of government accountability. The basic information required to support rigorous, independent assessment of Jordan's Principle processes, and ensure a governmental response that functions in accordance with Canada's national and international obligations, is currently unavailable. Drawing on a human rights framework, UNICEF Canada assessed Jordan's Principle implementation and called for the following elements to be implemented in order to meet "human rights standards of transparency and accountability" and ultimately help ensure that Jordan's Principle is working for First Nations children:

- "a common and properly scoped definition of Jordan's Principle, including when/how a claim will be identified as subject to Jordan's Principle;
- standards for response time;
- a clearly identified focal point to receive queries;
- a transparent and consistent process for the resolution of claims, including standardized comparison and assessment methods;
- an independent oversight body;
- an appeal process rooted in procedural fairness;
- sufficient and designated financial and human resources for policy implementation, including a budget for adjudicating (as distinct from servicing) claims;
- regular access to training and capacity building amongst government officials and other relevant governance bodies, such as First Nations agencies; and
- a process of monitoring and evaluation, including regular, public reports on case management and outcomes."<sup>107</sup>



## Conclusion

Federal officials have publicly stated that they know of “no Jordan’s Principle cases” in Canada.<sup>108</sup> Our analysis suggests that this claim flows from a governmental response that severely narrows both the child population and the range of jurisdictional disputes to be considered under Jordan’s Principle. The current governmental response excludes most First Nations children from Jordan’s Principle protections, thereby potentially creating disparities between different groups of First Nations children. Moreover, it burdens the families of vulnerable First Nations children with responsibility for transforming known service inequities into jurisdictional disputes that qualify for Jordan’s Principle protections. The family of a First Nations child must know, or at least suspect, that they are being denied services that would normally be available to other children. They must persevere through a local case conferencing process and have the situation brought to the attention of a focal point. They must then navigate a multi-step and lengthy, formal case conferencing process. Only once normative provincial/territorial standards have been assessed and a jurisdictional dispute has been declared, by both federal and provincial/territorial governments, will the costs of services be covered. Even then, there is no consistent payment/repayment mechanism to ensure that a service provider that assumes the cost of service provision during case conferencing and jurisdictional dispute processes will be reimbursed. There is no independent oversight of the process for determining the services to be covered. There is no recourse, other than costly and time-consuming legal action, for families that disagree with the resolution reached through the formal case conferencing process. Accordingly, the governmental response to Jordan’s Principle falls far short of realizing the vision of Jordan’s Principle advanced by First Nations and endorsed by the House of Commons, one of a “child-first principle” that systematically prioritizes the best interests of First Nations children and ensures they receive services in accordance with the human rights principles, constitutional mandates, and treaty obligations that Canada must uphold.

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**Case 2:** First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada. (for the Minister of Indian Affairs and Northern Development Canada) (2012), CHRT T1340/7008 (Complainant Caring Society's Closing Arguments). Retrieved from <http://www.fncaringsociety.ca/sites/default/files/Caring%20Society%20-%20Closing%20Submissions.pdf>; Assembly of First Nations, & First Nations Child & Family Caring Society. (2007). *Human Rights Commission complaint form*. Retrieved from [http://www.fncaringsociety.com/sites/default/files/Caring%20Society\\_AFN%20HR%20complaint%202007.pdf](http://www.fncaringsociety.com/sites/default/files/Caring%20Society_AFN%20HR%20complaint%202007.pdf)

# Chapter 3:

## The Context of Jordan's Principle Cases in Health and Child Welfare Services

### Research Team Members

Vandna Sinha  
McGill University

Molly Churchill  
McGill University

Lucyna Lach  
McGill University

Anne Blumenthal  
University of Michigan

Josée G. Lavoie  
University of Manitoba

Nico Trocmé  
McGill University

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In this chapter, we build on the analysis of the current governmental response to Jordan's Principle, presented in Chapter 2, to describe the broader context of Jordan's Principle cases. We synthesize findings from the document review summarized in Chapter 2, a scoping literature review, and exploratory interviews with health and child welfare professionals. We focus specifically on health and child welfare services, two domains in which Jordan's Principle has been much discussed. In order to investigate the context in which jurisdictional disputes emerge, we first draw on existing literature to describe the complex structures of health and child welfare services for First Nations children, and to provide an overview of the widespread and well documented underfunding of these services. We then draw on both existing literature and interview data to examine the jurisdictional ambiguities that can give rise to jurisdictional disputes. We find that the structure of services for First Nations children presents First Nations families with unique challenges in accessing services. Continuing to draw on both interview data and existing literature, we examine the pathways for cases involving jurisdictional disputes which are not identified as Jordan's Principle cases under the current governmental response. We then describe existing service gaps and service disparities, as well as the extraordinary efforts that families, communities, and service providers make to access services for First Nations children. This chapter further explores the differences in standards and practices that can emerge in response to service gaps and disparities, and the ways in which denial of equitable services to First Nations children may ultimately result in their being subjected to more intensive interventions by the health or child welfare systems.

The evidence presented here demonstrates the necessity of a governmental response to Jordan's Principle which embodies the vision advanced by First Nations and endorsed by the House of Commons: one which eliminates denials, delays, and disruptions of services to First Nations children that are caused by jurisdictional disputes. However, it also points to the difficulty of fully realizing this vision. The systems of health and child welfare services for First Nations children are sufficiently complex and fragmented that, even with a governmental response that reflects this vision of Jordan's Principle, it is unlikely all potential Jordan's Principle cases will be identified. So long as the underlying jurisdictional ambiguities and underfunding are not addressed, children whose Jordan's Principle cases go unidentified will continue to encounter service gaps, service disparities, and circumstances requiring extraordinary efforts to access services. Accordingly, in order to better fulfill their responsibilities under national and international law and agreements, as well as their treaty obligations to First Nations peoples, federal and provincial/territorial governments must work in partnership with First Nations to continuously and systematically address the underlying jurisdictional ambiguities and underfunding which give rise to Jordan's Principle cases.

## Methods

As shown in Table 1, the analysis presented here draws on three sources of data: 1) the systematic

review of Jordan's Principle documents described in the prior chapter, 2) a scoping review of the existing academic and grey literature on health and child welfare services for First Nations children, and 3) twenty five exploratory interviews with key informants working in the domains of health and child welfare. The analysis of the current governmental response to Jordan's Principle that was presented in Chapter 2 provides the framework for the analysis presented in this chapter, shaping our understandings of key concepts examined and of the relationships between these concepts and Jordan's Principle. The scoping literature review is the primary basis for our description of the structural context of jurisdictional disputes. As described below, information from the literature review was also used to verify and complement the interview data, which describes the contexts and current pathways of cases involving jurisdictional disputes.

**Table 1. Data Collection Methods and Types of Data Analysed**

	Method of Identification	Types of Data Identified
Systematic literature review on "Jordan's Principle"	Systematic search in academic, legislative and web databases	Academic articles, published non-governmental organization reports, and publically available government reports
	Access to information requests and requests directly to government departments	Jordan's Principle agreements
	Other retrieval methods	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	Academic articles, published non-governmental organization reports, and publically available government reports
	Examination of the references lists of previously retrieved documents	
	Review of documents and testimony made public through the Canadian Human Rights Tribunal	Internal government memos/reports
Key informant interviews	Primary recruitment through a Canadian Association of Paediatric Health Centres webinar	10 child welfare workers/administrators, at 7 child welfare agencies in 4 provinces/territories  17 health care professionals, from 7 organizations in 4 provinces/territories.
	Primary recruitment through research team and Jordan's Principle Working Group member contacts	
	Secondary recruitment through snowball sampling	

Twenty-five interviews were conducted with health and child welfare professionals who had both: direct experience in providing/advocating for services to First Nations children, and a basis for comparing the processes of accessing services for First Nations children to the processes of

accessing services for other children. Primary recruitment of key informant interviewees involved three approaches. First, volunteers were recruited through an online webinar attended by paediatric health specialists and hosted by the Canadian Association of Paediatric Health Centres. Second, identification and recruitment of child welfare interviewees was facilitated by research team member contacts from prior research projects, such as the Canadian Incidence Study of Reported Child Abuse and Neglect. Third, Jordan's Principle Working Group members also directly facilitated identification and recruitment of interviewees. Secondary recruitment efforts involved a snowball sample method in which interviewees were asked to suggest others who would be able to identify differences in the processes for accessing services for First Nations and other children, and who might be interested in participating in our study.

The final sample consisted of 10 child welfare informants and 17 health informants (one interview involved multiple health care interviewees) from 6 provinces. Health interviewees included paediatricians, a nurse, patient advocates, NIHB navigators, a health policy analyst, and medical/paediatric social workers. Interviewees were recruited from children's hospitals, provincial/regional organizations of First Nations chiefs, and First Nations health technician networks. They worked in four provinces/territories, and the sample includes a minimum of two health interviewees from each of these provinces/territories. Child welfare interviewees included administrators and child welfare workers at seven First Nations and provincial child welfare agencies in four provinces; the sample includes a minimum of two child welfare interviewees from each of these provinces. Child welfare recruitment efforts initially focused on provincial/territorial and First Nations child welfare agencies/offices which serve both on- and off-reserve populations; five of the child welfare agencies/offices represented in the sample fall into this category. However, the rapid devolution of on-reserve child welfare services to First Nations has severely reduced the number of agencies serving both on- and off-reserve communities.<sup>1</sup> As a result, it was difficult to recruit additional interviewees from agencies serving both on- and off-reserve communities and the final two interviews were with workers/administrators at agencies serving only on-reserve populations.<sup>i</sup> Interviewees at these two agencies were able to compare the federal funding and administrative processes for the Status First Nations children served by their agencies to the provincial funding/processes for non-Status children their agencies served. In addition, they were sometimes able to make on- and off-reserve, or First Nations to non-Aboriginal comparisons based on prior work or indirect knowledge of other agencies.

While the practice standards, models and approaches of child welfare agencies/offices can vary

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i The limited number of child welfare agencies/offices serving both on- and off-reserve communities also shaped our decisions in terms of presenting interview data. In multiple provinces/territories, there are three or fewer agencies/offices that serve both on- and off-reserve communities; accordingly, identifying the geographic locations of interviewees would potentially allow for identification of the agencies/offices at which interviewees worked. In order to protect the anonymity of interviewees, information about the provinces/territories represented in the sample is not presented in this chapter.



greatly, the work of these agencies/offices is also guided by a relatively uniform set of clinical decisions; accordingly, child welfare interviews were guided by a map of common decisions taken in child welfare cases. The map, which was created with the aid of a focus group of former child welfare workers from three provinces, covered the full child welfare decision-making cycle, from intake/investigation to multiple possible case conclusions. Interviewees were systematically guided through the decisions in this map (e.g. the decisions to conduct an investigation, to substantiate maltreatment, to pursue a court order, or to place a child in out-of-home care), and asked to identify differences in the decision-making processes for on- and off-reserve First Nations children as well as the differences in processes for a First Nations child and a non-Aboriginal child living in the same off-reserve community.

The range of services provided by the health organizations from which health interviewees were recruited, and the roles of the individual health interviewees, were more varied than in the child welfare sample. Therefore, it was not possible to construct a map of common clinical decisions to guide the health interviews. Instead, health interviews were shaped by a focus on specific clinical profiles and specific types of services. For example, health interviewees were asked to compare the processes for accessing and providing services to on- and off-reserve First Nations children with complex disabilities. They were also asked to compare on- and off-reserve access to specific types of services, including: medical transport, assistive devices, physical and occupational therapy, respite care, and home care support services. Health interviewees were also asked to compare the processes for providing services to First Nations and other children living off reserve. In both health and child welfare interviews, when interviewees lacked the direct experience to confidently make on-off reserve or other comparisons, they were asked to identify challenges to accessing and providing services based on their knowledge and comparative information was compiled and verified through the means discussed below.

Interviews were initially audio recorded. Notes on differences in accessing and providing services were then compiled based on the recordings. The examples of process differences documented in these notes were then verified through multiple comparative processes. Interviewees sometimes identified challenges in accessing services for First Nations children that were linked to socio-demographic factors, such as poverty or geographic remoteness, which can also impact service access for other children. An initial step in verification therefore involved examination of the comparisons made within each interview in order to assess whether the interviewee was pointing to a process difference that applied only to First Nations children, or whether they indicated that other children might also encounter the same challenges to accessing services. Findings from each interview were also compared with those from other interviews, in order to identify themes that cut across interviews and service domains. In addition, interview findings were verified, and understanding of cross-cutting themes was supplemented, by comparison of interview findings to publicly available policy documents and existing research. In this report, we present only those interview examples that reflect barriers to service provision that were verified



through at least one means of comparison and were linked to the structure of services for First Nations children.

Note that the interview sample was small, and the interviews themselves were exploratory in nature. **The findings presented here are intended to illustrate the broad challenges that First Nations families face in accessing services for their children and to draw attention to the need for governmental action to address these challenges. They do not offer a comprehensive overview of jurisdictional ambiguities, underfunding, gaps and disparities, or other challenges in health and child welfare services for First Nations children.** Indeed, given the complex variations, and ongoing changes, in legislation, practice standards, funding agreements, and service delivery systems across service domains and provincial/territorial/First Nations jurisdictions, a comprehensive review would require sustained inter-governmental collaboration and is likely beyond the scope of any single study.

## The Structural Context of Jurisdictional Disputes

In examining the structural contexts of jurisdictional disputes in health and child welfare services for First Nations children, we draw on an operational definition of a jurisdictional dispute that emerged from analysis of the current governmental response to Jordan's Principle. A jurisdictional dispute exists in any situation in which:

1. ambiguity regarding responsibility for service funding/provision results in denial, delay or disruption of services; or
2. the resources provided by one government/government department are insufficient to enable another government/government department to provide services in accordance with normative practices that are consistent with legislated standards.<sup>2</sup>

Defined in this way, a jurisdictional dispute can result from either of two independent conditions: underfunding or jurisdictional ambiguity. Underfunding exists in any situation in which the available resources are insufficient to support timely provision of equitable services. A jurisdictional dispute exists in any situation in which underfunding by one government or government department prevents the timely provision of equitable services by another government/department. Jurisdictional ambiguity exists when the roles and responsibilities of different governments/government departments are unclear. In any situation in which jurisdictional ambiguity prevents the timely provision of equitable services, a jurisdictional dispute exists. Underfunding and jurisdictional ambiguity may co-occur, but either one by itself may give rise to a jurisdictional dispute. In the sections below, we examine the structure of health and child welfare services for First Nations children, the evidence of underfunding of these services, and the evidence of jurisdictional ambiguities within these service domains. In describing the structure and underfunding of services, we draw on existing literature; in describing jurisdictional ambiguities, we draw on both the limited existing literature and results from the

interviews we conducted with health and child welfare professionals.

## The Structure of Child Welfare Services for First Nations Children

Child welfare services in Canada are currently provided through a decentralized system of approximately 330 provincial/territorial child welfare service agencies/offices and more than 100 Métis, First Nations, and urban Aboriginal child and family services agencies.<sup>3</sup> In some provinces/territories, child welfare services for non-Aboriginal children are delivered through a centralized system of provincial/territorial ministry/department offices; in other provinces/territories, child welfare services for non-Aboriginal children are delivered through a decentralized system of independent agencies that are mandated to provide child welfare services.<sup>4</sup> Child welfare services for First Nations children are provided by a mix of these provincial/territorial agencies or offices, First Nations child welfare agencies, and urban Aboriginal child welfare agencies. Bi- or tripartite agreements allowing some First Nations to offer limited child welfare services on reserve were first signed in the late 1960s. The number and scope of First Nations child welfare agencies expanded dramatically in the 1990s.<sup>5</sup> As of 2011, 80 First Nations agencies were mandated to conduct child welfare investigations on reserve. In addition, 24 First Nations agencies provided preventative services and/or post-investigation services, on reserve, for cases transferred from investigating provincial/territorial agencies/offices.<sup>6</sup> In 2008, the Auditor General of Canada estimated that First Nations agencies provide at least partial services to about 442 of the over 600 First Nations communities in Canada.<sup>7</sup> In addition, some First Nations agencies provide off-reserve services within specific geographic boundaries, or to specific First Nations populations. First Nations children living off reserve may also fall under the jurisdiction of urban Aboriginal agencies serving pan-Aboriginal populations including those in Toronto, Vancouver, Winnipeg, and several smaller urban communities.<sup>8</sup>

Each province/territory makes its own child welfare legislation. Across jurisdictions, legislation includes a mandate to investigate allegations and/or suspicions of abuse, and to protect children from harm or future risk of harm. Notable differences across jurisdictions include variations in: the ages of children covered by child welfare agency mandates, the range of maltreatment types included as grounds for investigation or out-of-home placement, and the range of programs and services provided.<sup>9</sup> Variations in legislation and standards are more pronounced when it comes to First Nations children. Most jurisdictions now have special provisions for culturally appropriate services for Aboriginal children and families. Some examples include: the stipulation that the child's cultural heritage be taken into account in the planning of services, the requirement that bands are informed of any court proceedings which occur, and the potential for First Nations child welfare agencies to seek exemptions from specific child welfare provisions in order to better adapt services to the context of the communities they serve.<sup>10</sup> Further variations may be introduced through Aboriginal/First Nations specific child welfare standards and through the adoption of First Nations laws and customary traditions by First Nations agencies.<sup>11</sup>

Provinces/territories fund child welfare services for non-Aboriginal children in accordance with provincial/territorial legislation, standards, and programming. Funding of child welfare services for First Nations children is more complicated. It is based on a framework informed by three major constitutional and legislative provisions. *The Constitution Act, 1867*, describes the responsibilities that are under “the exclusive legislative authority of the Parliament of Canada,” including “Indians and lands reserved for the Indians.”<sup>12</sup> Pursuant to this area of exclusive jurisdiction, the Government of Canada passed the *Indian Act* in 1876, which, among other things, describes “Indian Status” eligibility and registration requirements, as well as the rights and responsibilities of band councils. A 1951 amendment to the *Indian Act*, which remains in place today, stipulates that “all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province.”<sup>13</sup> Based on the framework established through the *Indian Act* and the *Constitution Act*, the federal government has assumed the role of funding child welfare services for Status First Nations children ordinarily resident on reserve, while the funding of off-reserve child welfare services and services for non-Status First Nations people is provided by provinces/territories.

## The Structure of Health Services for First Nations Children

Health services in Canada are provided through a decentralized system in which the provision of services is fragmented; service providers differ by jurisdiction, but also by level of care (i.e. primary, secondary, tertiary), and by area of specialization.<sup>14</sup> The Supreme Court has ruled that provinces have general jurisdiction over health matters.<sup>15</sup> Accordingly, each jurisdiction has its own health legislation, policies, programs, and structure. All jurisdictions except PEI and Alberta provide these services through decentralized delivery systems in which authority for setting priorities and managing health resources is delegated from the ministry of health to regional health authorities. These regional health authorities are responsible for setting priorities and managing health resources within their respective regions.<sup>16</sup> However, unlike in child welfare, the federal government has also played a legislative role in health services. For example, the *Canada Health Act* mandates that provinces/territories must have a universal insurance plan that covers medically necessary hospital, physician, and surgical-dental services for residents of the province, and must provide a certain minimum of extended health care services. Provision of such services is required in order for a province/territory to receive federal subsidies for health services through the Canada Health Transfer.<sup>17</sup> Thus, when it comes to the general population, provinces/territories legislate and fund most health services; they also oversee service provision, either directly or through regional health authorities. However, these services are provided in keeping with broad federal legislation.

Health services for *all* Status First Nations children fall under the dual auspices of provincial/territorial and federal governments. While eligibility for most federal First Nations health programs is limited to First Nations individuals living on reserve, the federal government also

plays a unique role in the funding of health services for First Nations children living off reserve, through the Non-Insured Health Benefits (NIHB) program. Through NIHB, the federal government provides Status First Nations and Inuit peoples, regardless of on- or off-reserve residence, with supplementary health benefits “to meet medical or dental needs not covered by provincial, territorial or third-party health insurance plans.”<sup>18</sup> While First Nations often identify NIHB services as stemming from a treaty right to health care, the federal government has taken the position that NIHB was extended on humanitarian grounds.<sup>19</sup>

Health services for First Nations children ordinarily resident on reserve are a complicated mix of federally funded services provided by First Nations communities, federally funded services provided by the federal government, and (in rare cases) provincially funded services provided by a province.<sup>20</sup> At the federal level, while child welfare services on reserve fall under the jurisdiction of Aboriginal Affairs and Northern Development Canada (AANDC), health services fall under the jurisdiction of the Health Canada, through its First Nations and Inuit Health Branch. While the federal government’s role in off-reserve child welfare services is limited to funding, its role in on-reserve health services sometimes includes directly providing preventative and treatment health services.<sup>21</sup> These services include primary care nursing (in more remote communities), some environmental health services, and NIHB. In addition, the federal government funds First Nations to deliver community preventive health and health promotion programs/services themselves.<sup>22</sup> As in child welfare, the federal government has systematically transferred responsibility for health services to First Nations communities, formalizing the transfer with the 1989 Health Transfer Policy, which allows First Nations communities south of the sixtieth parallel to control resources and community-based health programs.<sup>23</sup> The extent of responsibility for service delivery varies from community to community, depending on the specific transfer agreement.<sup>24</sup> As of 2008, 88 percent of First Nations communities across Canada had assumed some responsibility for the delivery of on-reserve health services.<sup>25</sup> A partial list of the on-reserve health services funded by the federal government is provided in Table 2.

The basis for federal involvement in on-reserve health services is disputed. The federal government maintains that, since the Canada Health Transfer is calculated on a per capita basis,<sup>ii</sup> provinces/territories have an obligation to provide the health care services mandated in the *Canada Health Act* both on and off reserve.<sup>26</sup> The federal government further asserts a humanitarian basis for federal funding and provision of health services on reserve, denying that there is a constitutional, treaty, or other legal basis for provision of such services.<sup>27</sup> First Nations generally disagree, asserting treaty rights to health services funded by the federal government<sup>28</sup>; a 1999 Federal Court ruling supports the assertion that the federal government bears obligations

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ii Provincial residents excepted from the universality requirement are military personnel, those incarcerated in federal institutions, and those who have not met the province’s minimum stay requirement, which cannot be more than three months. “Indians” are not listed in the excepted residents in the *Canada Health Act*.



towards First Nations regarding provision of health services.<sup>29</sup> Provincial/territorial health ministries have interpreted their obligation to provide services to First Nations individuals living on reserve in different ways. In some provinces/territories, legislative provisions state that the health minister can choose to enter into agreements with First Nations regarding the delivery of health services, thereby clarifying that health ministries reject a provincial/territorial responsibility to extend access to provincially funded health services on reserve. In other provinces/territories, ambiguities over provincial responsibilities on reserve remain.<sup>30</sup>

**Table 2: A Sample of Federally Funded Health (and Health Related) Programs for First Nations Peoples<sup>a</sup>**

Program Name	Program Description
Assisted Living Program *	Funding to assist in non-medical, social support services to on-reserve populations, including children with physical and mental disabilities, to promote functional independence.
Healthy Pregnancy & Early Infancy	Available in some reserve communities, programming focuses on prenatal nutrition, maternal child health, and FASD. Includes home visits by community health nurses or other community-based workers.
AHSOR	Aboriginal Head Start funds early childhood intervention strategies to support the health and developmental needs of on-reserve First Nations children 0-6, and their families
Children's Oral Health Initiative	Goals include reduction & prevention of oral disease via education & promotion and increasing access to oral care. On-reserve services include: screenings, topical fluoride applications, placement of dental sealants and other procedures.
Brighter Futures	Objective: "To improve the quality of, and access to, culturally appropriate, holistic and community-directed mental health, child development, and injury prevention services at the community level." Services offered on-reserve.
NAYSPS	National Aboriginal Youth Suicide Prevention Strategy. Objectives: increase protective factors and decrease risk factors for Aboriginal youth suicide. Services offered on-reserve.
Clinical and Client Care	Goal: enable First Nations individuals to receive needed clinical care in their home communities. Services offered on-reserve.
Home and Community Care	Home and community-based health care services that enable on-reserve First Nations people with disabilities, chronic or acute illnesses to receive care in their homes and communities. Essential service elements include: client assessment, home care nursing, case management, home support (personal care and home management), in-home respite, linkages and referral, provision of/access to specialized medical equipment and supplies. Supportive services can include: rehab and other therapies, in-home mental health, etc.
Non-Insured Health Benefits	Intended to supplement other insurance plans; available to all registered First Nations regardless of on-reserve or off-reserve residency. Eligible benefits "include pharmacy, dental care, vision care, medical supplies and equipment, short-term crisis intervention mental health counselling, and medical transportation to access medically required health services not available on-reserve or in the community of residence"

\*A program of Aboriginal Affairs and Northern Development Canada. All other programs in the table are Health Canada programs.

## The Underfunding of Health and Child Welfare Services for First Nations Children

Existing research highlights severe underfunding of both health and child welfare services for on-reserve First Nations children. While budgetary constraints limit the provision of child welfare services for all children, existing research demonstrates that such constraints are more severe for on-reserve child welfare services. Federal funding for on-reserve child welfare services is currently provided in accordance with three major funding models, and underfunding has been clearly identified in analyses of all three. Indeed, a 2012 analysis by AANDC, which considered all provinces/territories and funding models, 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.<sup>31</sup> On-reserve child welfare services in Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia are currently funded in accordance with the Enhanced Prevention Focused Approach (EPFA) model, which AANDC began introducing in 2007. Though there has been no systematic documentation of the comparability of on- and off-reserve funding of child welfare services in these provinces, the director general of a Quebec agency that serves both on- and off-reserve communities recently testified before the Canadian Human Rights Tribunal that federal funding covers only one quarter of the costs for his agency to provide on-reserve services comparable to the services it provides off reserve.<sup>32</sup> In 2012, AANDC itself estimated the cost of achieving comparability of on- and off-reserve services in EPFA jurisdictions to be \$43 million, and described the current EPFA levels as supporting only “basic protection services and some prevention with families in the home.”<sup>33</sup>

The second major funding model, known as Directive 20-1, was used to determine funding for most on-reserve child welfare services until 2007, and is still applied in British Columbia, Yukon, Newfoundland and Labrador, and New Brunswick.<sup>34</sup> It consists solely of an operations budget and funds for maintenance of children in out-of-home care; this funding model does not provide any funds for preventative services or for support services to families retaining guardianship of their children.<sup>35</sup> AANDC itself has conceded that the failure to fund these services likely contributed to an increase in the number of First Nations children in care.<sup>36</sup> In addition, existing research suggests services for First Nations children in care are also underfunded. A 2000 review found that the federal funds provided per on-reserve child in care were, on average, 22% less than provincial/territorial funds provided for an off-reserve child in care.<sup>37</sup> The Auditor General has noted that there have been no major revisions to Directive 20-1 since that time,<sup>38</sup> and recent AANDC evaluations (considering both EPFA and Directive 20-1 together) explicitly note continued underfunding of maintenance costs.<sup>39</sup>

The final major funding formula stems from a 1965 agreement in Ontario, where the province is reimbursed 93 cents for every dollar spent for on-reserve services and maintenance.<sup>40</sup> A recent review of the Ontario child welfare funding model concluded that the cost structures and service



needs of First Nations agencies in Ontario differ “markedly” from those of provincial agencies and recommended development of a distinct funding approach.<sup>41</sup> AANDC has estimated that an additional \$5 million per year would be required to implement EPFA in Ontario, and, in keeping with AANDC’s conclusion that EPFA funding is not comparable to provincial/territorial funding for off-reserve services,<sup>42</sup> additional funds would be required to achieve on- and off-reserve comparability.

Numerous reports, including some by or for the federal government, document the underfunding of health and health-related services on reserve. A 2005 evaluation of the Health Transfer Policy found that funding between communities is inequitable, that the per capita funding does not correspond to the level of responsibility a community has taken on in terms of service provision, that the funding formula is outdated, and that the formula is not reflective of population growth or needs.<sup>43</sup> A 2008 analysis of the Home and Community Care (FNIHCC) program administered by Health Canada and the Assisted Living program administered by AANDC found that that “[r]ehabilitation, social and recreational activities, and specialized education services for children and youth with special needs are not currently resourced.”<sup>44</sup> It also found that many communities “are unable to provide access to the necessary supportive service elements such as respite, rehabilitative services and home based palliative care.”<sup>45</sup> The analysis presented three options that would close some of the most serious service gaps. The cost of the least comprehensive option, which would not address comparability with provincial/territorially funded services and would leave “gaps in the continuum of care,” was estimated to be \$183 million; the most comprehensive option was estimated to cost \$441 million.<sup>46</sup> A subsequent evaluation of the First Nations and Inuit Home and Community Care (FNIHCC) program, published in 2010, found that managers and key stakeholders identified “lack of funding” as posing a barrier to successful implementation and delivery of the program.<sup>47</sup> The authors concluded that the funding formula should be re-designed to be more needs based, account for the growing burden of chronic illness/injuries, and include funds for on-going training and capital requirements.<sup>48</sup>

In addition to a general need for increased funding, particularly in the area of prevention services, studies in both health and child welfare have consistently identified more specific funding needs.<sup>49</sup> These include:

- the systematic incorporation of cost escalators to account for inflation,
- funding based on actual needs and services provided rather than population estimates,
- clear and regularly updated links between funding and service requirements under provincial/territorial law/standards,
- enhanced operations funding for small agencies,
- enhanced funding for geographically remote agencies,
- funding for development of data collection capacity and research, and
- funding for infrastructure maintenance and improvement.

Thus, in both the health and child welfare domains, existing research points to prevalent underfunding. This underfunding has the potential to result in jurisdictional disputes that prevent the timely delivery of equitable services for First Nations children.

## **Jurisdictional Ambiguities in Health and Child Welfare Services for First Nations Children**

Existing literature also identifies ambiguity about core federal and provincial/territorial roles and responsibilities in both health and child welfare. For example, a 2008 report from the Auditor General of Canada highlighted this ambiguity in child welfare, outlining an expectation that agreements between federal and provincial/territorial governments should clarify roles and responsibilities, and noting surprise that such agreements did not exist.<sup>50</sup> More recently, this core ambiguity has been demonstrated in *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v. Attorney General of Canada (Caring Society v. Canada)*. The federal government has argued that, as the funder of on-reserve child welfare services, it “is not involved with and does not control decisions on what programs or services are offered” and, accordingly, cannot be held accountable for any inequities in on- and off-reserve services.<sup>51</sup> In response, the First Nations Child and Family Caring Society has highlighted the close connection between funding and the ability to provide services, pointed to the large body of case law which liberally interprets the *Canadian Human Rights Act* prohibition against denial of services on the basis of prohibited grounds of discrimination, and argued that the federal government has a responsibility to provide funding that enables provision of comparable services.<sup>52</sup> In the health domain, similar core ambiguity is illustrated by the contrast between the federal government’s assertion that its involvement in health services for First Nations peoples is a policy choice, and the position, taken by many others, that there is a federal obligation to provide First Nations healthcare.<sup>53</sup> Further evidence of ambiguity is illustrated by the existence of legislative provisions, in Quebec and in Newfoundland and Labrador, which clarify provincial roles and responsibilities “in health in areas included in self-government.”<sup>54</sup>

Data from the health and child welfare interviews indicate more specific areas of jurisdictional ambiguity around the core criteria that determine federal or provincial/territorial responsibility for funding services. Framed in the simplest possible terms, jurisdictional responsibility is typically determined on the basis of whether or not a child is registered as Status First Nations and whether he/she resides on or off reserve. Interviewees identified ambiguity around both of these general criteria. The federal government typically has responsibility for funding services for Status First Nations children, while provinces/territories typically have responsibility for funding services for other children. However, both health and child welfare interviewees indicated that jurisdictional ambiguity could exist in situations involving “Status-eligible” children: those children who qualify for designation as Status First Nations but for whom the governmental processes for registering as Status First Nations has not been undertaken/completed. Two child welfare

interviewees, from different provinces/territories, and one health interviewee indicated that the federal government would fund services to Status-eligible children only until their first birthdays, and that both the federal government and the province might refuse funding for unregistered, Status-eligible children after that. One child welfare interviewee discussed provincial and federal refusals to cover expenses for Status-eligible children in care after their first birthdays. The health interviewee provided a specific example around medical transportation coverage, indicating that, in her experience, NIHB will cover transportation costs for accessing medically required services for a Status-eligible child under the age of one, but if the child is not registered and is at least one year old, NIHB will not cover these costs.

The federal government typically has responsibility for funding services to Status First Nations children ordinarily resident on reserve, and the province typically has responsibility for funding services to other children. However, one health interviewee noted that there is also ambiguity around the definition of being “ordinarily resident on reserve.” She indicated that First Nations families who temporarily move off reserve in order to access health services may not be recognized as being resident on reserve by the federal government, and may also not be recognized as residing off reserve by provincial government. As a result, these families can find themselves falling through the cracks in terms of eligibility for both provincial/territorial programs and for federally-funded programs that provide needed income, housing, and other supports. Existing research suggests that policy changes designed to address this type of ambiguity have never been implemented. Changes to the definition of “ordinarily resident on reserve” that were first denoted in 2007, and also appear in more recent AANDC publications, indicate that individuals relocating off reserve for the purpose of obtaining care or to access social services that are not available on reserve are to be considered ordinarily resident on reserve.<sup>55</sup> Accordingly, individuals relocating in order to access care or social services *should* continue to be eligible for federally-funded income assistance, health, child welfare and education services while living off reserve.<sup>56</sup> However, the implications of the shift in operational definition of “ordinarily resident on reserve” have yet to be addressed: the federal government has not developed mechanisms to provide services off reserve, and First Nations communities’ budgets have not been adjusted to cover the additional costs of extending services to their members living off reserve.<sup>57</sup>

In addition to ambiguity around the core criteria for determining federal or provincial/territorial responsibility for funding services, interviewees also noted jurisdictional ambiguity that results when First Nations families are eligible for both federal and provincial benefits. For example, a health interviewee who shared an example related to dental care illustrated the perverse impacts of double-eligibility that some First Nations children encounter. She explained that, in her experience, a low-income, Status First Nations child living off reserve would likely experience delays in accessing dental services because both the province and NIHB might refuse to cover the cost of some dental services. NIHB ordinarily covers dental services, such as extractions or fillings, for Status First Nations children, and the province normally covers them for low-income families

living off reserve. In cases of Status First Nations children who are also members of low-income families living off reserve, double-eligibility can lead to disputes and delays. The interviewee suggested that in such a case, the fastest “solution” could be for the child to move in with grandparents on reserve, and receive NIHB funded services from a visiting dentist. A child welfare interviewee also noted challenges linked to dual eligibility. She explained that, in her jurisdiction, provincial coverage for counselling services is sometimes more generous than NIHB coverage, but that, in her experience, service providers might not even inform off-reserve First Nations families referred to counselling of provincial benefits because of an assumption that NIHB should cover the costs.

Thus, in both the health and child welfare domains, interviewees and existing research point to a complex web of jurisdictional ambiguities that have the potential to evolve into jurisdictional disputes preventing the timely delivery of equitable services for First Nations children. The prevalence of jurisdictional ambiguity is attested to by a list of jurisdictional ambiguities in health, education, and social services compiled for the Federation of Saskatchewan Indian Nations (FSIN) in 2008<sup>58</sup> and a list of jurisdictional ambiguities in health services compiled for the Manitoba Inter-governmental Committee on First Nations Health in 2005 (see Appendix 3).<sup>59</sup> Examples of areas of jurisdictional ambiguity in on-reserve services in Saskatchewan include speech and language services, respite care, physiotherapy, communication aids, respiratory equipment and supplies, prevention services in mental health, medical foster homes, and special needs assistants and teachers, to name but a few.<sup>60</sup> Examples identified in Manitoba span a range of professional, home/community care, mental health, public health, residential care, and other services.<sup>61</sup>

## Jurisdictional Disputes in Context

Existing research and data from our exploratory interviews point to widespread jurisdictional ambiguities and underfunding in health and child welfare services for First Nations children. Both jurisdictional ambiguities and underfunding can give rise to jurisdictional disputes, and interviewees in our study provided clear examples of explicit jurisdictional disputes that were tied to the unique structure of health and child welfare services for First Nations children. These included disputes over: payments for school-based services for an on-reserve First Nations child attending an off-reserve school, payments for school-based services for an on-reserve child in care, payment for costs of out-of-home care for “Status-eligible” children over the age of one, and payment for an on-reserve family’s court-ordered, off-reserve services. Interviewees also identified jurisdictional disputes in the area of dental services, indicating that disputes can exist both along a federal/provincial divide and between the federal government and private dental insurance companies.

Our review suggests three conclusions which are critical to understanding the prevalence of jurisdictional disputes and the structural context of Jordan’s Principle cases:



- 1. First Nations children have greater potential to encounter jurisdictional disputes in accessing services than other children.** The jurisdictional ambiguities and issues of underfunding identified here are specific to services for First Nations children. They result from complexities in the funding and service delivery systems for First Nations children that do not exist in health and child welfare services for other children in Canada.
- 2. The enhanced potential for jurisdictional disputes is intrinsic to the complex nature of health and child welfare funding and service delivery systems for First Nations children.** Provinces/territories, First Nations, and the federal government share responsibility for funding and delivery of services for First Nations children. With this shared responsibility comes the potential for jurisdictional ambiguity. As demonstrated by the ambiguity around core criteria for determining federal or provincial/territorial responsibility, individual cases can challenge even straight forward divisions of responsibility, such as division along lines of on- or off-reserve residence, or Status registration. This ambiguity can be compounded when individual children fall into multiple groups which qualify for services (e.g. being in a low-income, off-reserve family *and* being Status First Nations). Similarly, when the shared responsibilities involve one entity funding services to be provided in accordance with standards developed by another entity, the potential for jurisdictional disputes linked to underfunding naturally emerges. Indeed, AANDC has been criticized for failing to implement any mechanism for establishing comparability of funding for on- and off-reserve child welfare services, and for failing to link the levels of funding provided on reserve to the responsibilities and obligations outlined by provincial/territorial legislation and standards.<sup>62</sup> Similarly, evaluations have criticized Health Canada for failing to fund on-reserve health services in a manner that reflects needs.<sup>63</sup>
- 3. Funding and service delivery policies change over time, presenting ongoing possibilities for the emergence of new issues of underfunding and jurisdictional ambiguity in services for First Nations children.** Services for First Nations children are shaped by distinct governments, departments and programs, with funding and service delivery policies that can evolve and shift independently. Reforms within one government/department/program have the potential to impact the delineation of jurisdictional responsibilities and the levels of funding required for other departments and programs, thus creating new jurisdictional ambiguities and underfunding issues that, in turn, have the potential to give rise to jurisdictional disputes. Indeed, in the area of child welfare, AANDC has acknowledged this potential. For example, a review of the EPFA in Nova Scotia both praises the funding formula's flexibility in comparison with Directive 20-1 and concludes, "It is unclear whether the EPFA is flexible enough to accommodate provincial funding changes throughout the five-year funding cycle."<sup>64</sup> Further, AANDC has identified



the challenge of providing adequate funding as being more than just keeping up with provincial/territorial child welfare funding; policy reform must also respond to external factors affecting child welfare patterns and to changes in federal policies in other domains related to child welfare. For example, a 2012 evaluation by AANDC identified the factors driving unmet costs in child welfare as including (but not limited to): Income Assistance reform, NIHB reform, reforms of “Other Social Programs”, unionization of foster homes, the privatization of care, and changes in the types of out-of-home placements required.<sup>65</sup> In the health domain, the potential for new issues of underfunding and jurisdictional ambiguity to emerge is amplified by the added complexity of funding and service delivery systems. The fragmentation of services by level of care and by area of specialization multiplies the number of programs which may implement policy changes that affect the delineation of jurisdictional responsibilities.

## Pathways for Cases Involving Jurisdictional Disputes

Our review of the current governmental response to Jordan’s Principle demonstrated that the response systematically prevents the identification of jurisdictional disputes as Jordan’s Principle cases.<sup>66</sup> The current response limits Jordan’s Principle designation to those cases involving both: a formally declared payment dispute between provincial/territorial and federal governments, and a Status or Status-eligible child, ordinarily resident on reserve, who has multiple, professionally-diagnosed disabilities requiring services from multiple providers. *Pictou Landing Band Council & Maurina Beadle v. Attorney General of Canada (PLBC v. Canada)* illustrates the challenges to obtaining declaration of a Jordan’s Principle case under the current governmental response. Despite the existence of a Nova Scotia Supreme Court ruling which mandated, for an off-reserve provincial resident, the type of services that PLBC and Maurina Beadle asked the federal government to fund on reserve, the case was not identified as a Jordan’s Principle case under the current governmental response.<sup>67</sup> The “options” for Jeremy’s care in the absence of federal funds for the required respite care were outlined in an email between Health Canada employees. The email suggested the PLBC could:

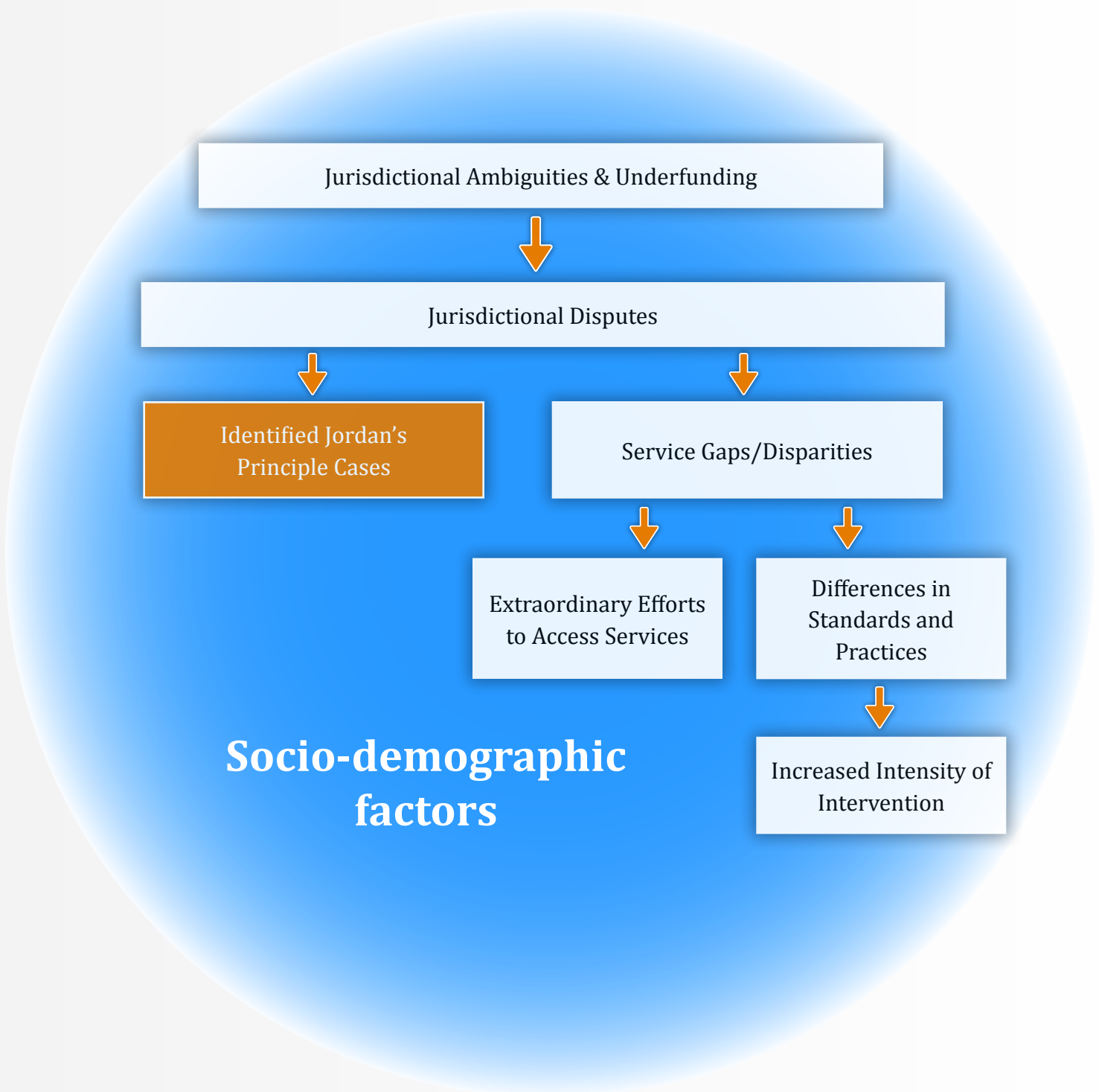
- “(1) keep paying for 24/7 care using their own source revenue,”
- “(2) continue service and arrange for facility placement on a temporary/respite or long term basis depending on how the needs evolve,”
- “(3) discontinue services thus requiring Child and Family Services (protection) intervention and emergency placement.”<sup>68</sup>

Maurina Beadle and the PLBC chose a fourth option: they launched a legal challenge to the decision to deny additional federal funding for respite care.<sup>69</sup>

The potential pathways in the PLBC case mirror those identified in our review of existing literature

and in the interviews with health and child welfare professionals. Jurisdictional ambiguities and underfunding can give rise to jurisdictional disputes and, in the absence of the timely access to

**Figure 1: Pathways for Cases Involving Jurisdictional Disputes**



equitable services that should be facilitated by Jordan's Principle, cases involving jurisdictional disputes follow one of the alternative pathways identified in Figure 1. Children may encounter service disparities: situations in which the range, quality, or timeliness of services to First Nations children are not equal to those available to other children. For example, in the PLBC case, both the limiting of respite service funds to \$2,200/month and the alternative possibility of institutional care may be seen as service disparities. First Nations children may also encounter service gaps: situations in which needed services do not exist for First Nations children, even though they would ordinarily be available to other children. Thus, the discontinuance of respite services that Health Canada identified as an option in the PLBC case would have created a service gap. As shown in Figure 1, service gaps and disparities may contribute to the emergence of differences in standards or practices for First Nations children as compared to other children. Differences in standards or practices exist when the absence of, or limitations in, services for First Nations children are normalized, and the expectations or approaches to services for First Nations children diverge from those for other children. Additionally, because of the lack of appropriate services, a First Nations child's situation may deteriorate and require more intensive intervention. For example, in the PLBC case, Health Canada indicated that if Jeremy's situation deteriorated, he would require out-of-home placement by child welfare services. Alternately, the families, communities and service providers of First Nations children may commit to taking extraordinary efforts in order to access or provide required services. For example, the PLBC took the extraordinary risk of covering the costs of respite care despite lacking any assurance of repayment, and Maurina Beadle, supported by the PLBC, took the extraordinary measure of filing a legal challenge, and persisting through the three years it took for the case to be decided, despite already being charged with caring for her son when her own physical health was compromised. Below, we draw on interview data and existing research to discuss in greater detail these alternate pathways for cases involving jurisdictional disputes.

## Service Gaps and Disparities

The jurisdictional ambiguities and underfunding in health and child welfare services that are detailed above have a clear and direct impact on the provision of services to First Nations children. In both the health and child welfare domains, they translate into service gaps and service disparities. For example, two child welfare interviewees in the same jurisdiction noted that there are no funds for on-reserve families to travel in order to attend court hearings about their children; one specified that the province would cover these expenses for an off-reserve family. In addition, child welfare interviewees in three different jurisdictions noted the absence of supports for on-reserve youth transitioning out of care, noting that such resources were available to off-reserve youth through a mix of government and non-profit services. Additional service gaps and disparities mentioned varied across communities, with different interviewees identifying drug and alcohol counselling, family preservation services, family mediation, one-to-one counselling, and mental health services as examples of services that were either (1) not available in reserve

communities (a service gap) or (2) available but provided by paraprofessionals or generalist service providers, even though, in a geographically similar off-reserve location, they would be provided by a professional with specialized training (a service disparity).

The existing child welfare literature also points to specific gaps and disparities in services for First Nations children, but enumeration of these gaps and disparities has been eclipsed by attention to the broader issue of underfunding. Recent evaluations at the national level note broad gaps and generalized disparities in child welfare funding for First Nations children, but do not identify the specific service gaps and disparities.<sup>70</sup> At the provincial/territorial level, some reports offer minimal examples of gaps/disparities as illustrations of more widespread deficits. For instance, the Representative for Children and Youth in British Columbia followed up on discussion of generalized gaps and disparities in the services provided by federally funded First Nations agencies by saying, “[f]or example, there are no distinct CYMH [child and youth mental health] or CYSN [child and youth with special needs] Aboriginal Programs/services on reserve.”<sup>71</sup> In other jurisdictions, evaluations note the services that should be offered, implying that gaps and disparities exist, without explicitly identifying the gaps/disparities that new services would address. For example, in New Brunswick, where child welfare funding is provided in accordance with Directive 20-1, there is no child welfare funding for prevention and in-home support services on reserve. A recent review recommended that the services offered by provincial and First Nations agencies/offices “emphasize preventative programming, such as culturally-based parenting courses and workshops, early childhood initiatives, Fetal Alcohol Spectrum Disorder (FASD) and pre-natal health, addictions, caring for difficult, mentally ill or addicted teens, domestic violence, and exposure to such within the family home.”<sup>72</sup>

In the health domain, service gaps and disparities were clearly identified by both interviewees and the existing literature. For example, one interviewee explained that drugs which the province/territory covers for off-reserve residents on social assistance are sometimes not covered for on-reserve First Nations individuals through NIHB. She discussed the specific case of drugs prescribed for children with ADHD. When Concerta, a slow-release version of Ritalin with fewer side effects, first came out, NIHB refused to cover it, while the province in which the interviewee works would cover it for residents on social assistance. As a result, low-income First Nations families living on reserve would end up paying out-of-pocket to access a drug which the province would cover if the family lived off reserve. Two other health interviewees stated that sometimes a drug prescribed and covered in hospital will not be covered once the patient is discharged and moves back to a reserve community.

In addition, interviewees in the four sampled provinces/territories identified either delays in access to or, more commonly, a complete absence of respite services in First Nations communities. For example, one interviewee explained that the province she works in provides a grant of up to \$3500 per child per year to off-reserve families caring for children who are medically fragile, and/

or dependent on technological devices, and require round the clock monitoring, but this funding cannot be accessed by families living on reserve. Interviewees in another province explained that respite care had been identified by band councils as a needed service not currently available on reserve, and that on-reserve families of children with conditions such as epilepsy struggle to find respite care and other needed supports. Similarly, interviewees from three different jurisdictions reported disparities and gaps in on-reserve rehabilitative services (e.g. occupational therapy services, physiotherapy services, and speech pathology services). The challenges related to rehabilitative services that were identified included the availability of on-reserve services, access to outpatient services provided within reserve communities, access to services provided by specialists (rather than nurses), and limited frequency of follow-up service. Additionally, interviewees in all four jurisdictions raised concerns regarding gaps or disparities in access to quality diagnostic services for children in reserve communities. Challenges in this area included the failure of nursing station staff to properly screen and diagnose children's health issues (including diabetes and pneumonia), and reliance on visiting physicians in remote reserves. One interviewee also identified difficulties in accessing diagnostic services in the areas of mental health, autism, and FASD.

The service gaps and disparities identified by health interviewees are consistent with findings in existing research that identifies unmet healthcare needs for First Nations children on reserve. For example, a 2007 study identified gaps or disparities in the following areas:

weekend in-home respite services; access to physiotherapy, occupational therapy and speech language pathology services; psychological counseling; nutritional counseling and assessment; trained personal care services with infant/child care knowledge; paid medical transportation to tertiary care centers for assessment/ reassessment/follow up; intensive care support on a short term high need basis; parental support and education for children with congenital birth issues or developmental problems; access to medical respite for children with complex medical needs; specialized services for children living with endocrine diseases and blindness; access to lab services; scope of practice issues for nursing (percutaneous intravenous catheterization); access to services for mental disabilities; support for accident-related injuries; renovations to provide access for those with disabilities; medical transportation services; timely provision of medical supplies and equipment; and many others.<sup>73</sup>

## **Discrepancies in Service Standards and Practices**

The types of service gaps and disparities described above shape service standards and expectations for families and for service providers. The impact of service gaps and disparities



on families' standards for service is reflected in interviewees' discussion of respite services. For example, one health interviewee stated that on-reserve families in her jurisdiction do not even bother requesting respite services because they have no hope that such services will be provided, and another made the same observation regarding 24-hour nursing services. Yet another health interviewee observed that, in her experience, the only on-reserve respite services came from the informal care and support provided by family members. Similarly, service gaps and disparities necessarily impact the standards and practice approaches of service providers charged with aiding First Nations children. The limited access to diagnostic, support, and preventative services in both health and child welfare results in differences between the standards of services for First Nations children living on reserve and those for other children, shifting the point at which a service provider first has contact with a child/family or diagnoses a need, and shaping the service options that the provider can recommend.

Seven health interviewees, representing all four jurisdictions sampled, indicated that differences in service standards may also reflect differences in the types of health professionals accessible on and off reserve, or differences in frequency of access to these professionals. One interviewee explained that a reserve community is considered lucky if its on-reserve healthcare team includes a nurse practitioner. Another explained that the high turnover rate for nurses on reserve, and the federal government's use of agency nurses (i.e. temporary/contract employees) to service First Nations communities means that follow-up is not guaranteed for First Nations children on reserve. Another interviewee from the same jurisdiction explained that reliance on visiting physicians makes it difficult to ensure continuity of care and that transient healthcare professionals may less fully engage in advocacy efforts around patient care than they would if they were more permanent. This idea was echoed by an interviewee from a another jurisdiction, who questioned the quality of staff at some nursing stations. She noted that if the nursing station services do not meet the needs of a child in the community, a good nurse or doctor would engage in advocacy efforts to ensure access to needed services – but that, in her experience, on-reserve healthcare staff sometimes just try to make do with the services available.

While differences in the types of health professionals accessible and the frequency of access to professionals can be linked to socio-demographic factors such as geographic remoteness, there are indications that they also reflect disparities in funding for on- and off- reserve services. One interviewee linked concerns about healthcare staff qualifications to a significant wage disparity between health professionals working on reserve, and those working in the off-reserve provincial system, noting that this makes it difficult to retain health professionals on reserve. Existing literature also suggests that differences in the qualifications of or frequency of access to health care professionals may be linked to underfunding, which can make it difficult to attract/retain qualified staff. Health professionals who work with First Nations communities are often paid less than professionals employed through provincial/territorial health systems, and this is one explanation provided for the challenges of attracting and retaining qualified healthcare

professionals to serve in First Nations communities.<sup>74</sup>

Similar concerns about the difficulty of attracting and retaining qualified workers have been noted in the existing child welfare literature and attributed, at least in part, to the failure of federal funding to support competitive salaries and benefits<sup>75</sup>. These concerns were also raised in interviews. For example, two child welfare interviewees from the same jurisdiction noted that on-reserve child welfare workers often do not meet the educational/credential requirements for off-reserve child welfare work. However, while the two interviewees agreed on the pattern of on-reserve workers not meeting off-reserve credential requirements, their emphasis in discussing the pattern differed markedly. One worker raised questions about the potential negative impacts on families, noting that some on-reserve workers may not have the training and expertise needed to effectively support families with complex needs. The other stressed the value of hiring community members with strong local and cultural knowledge, suggesting that, even if these community workers lack the specified educational credentials, they are able to connect with families in ways that outside workers are not. Similarly, two child welfare workers in another jurisdiction indicated that an on-reserve case is more likely than an off-reserve case to be closed without referral to outside services. While they agreed on the pattern of closing without referral, the explanations they offered differed. One attributed this pattern to the lack of on-reserve services to which referrals could be made; the other highlighted the presence of strong family and community supports, suggesting that referral to professional services may not be necessary if a family has sufficient informal supports.

The complexity of discrepancies in standards was perhaps best illustrated in discussions of on-reserve foster care homes. Interviewees in three different jurisdictions noted a shortage of on-reserve foster homes. Three interviewees, representing two sampled jurisdictions, noted that provincial/territorial standards for foster homes are not well aligned with the socio-demographic and cultural realities of reserve communities. They indicated that a combination of factors, such as a cultural emphasis on extended families co-habiting, the persistent overrepresentation of First Nations people in the child welfare and criminal justice systems, and restrictions on housing availability and quality, result in situations in which on-reserve homes do not meet provincial/territorial standards for designation as foster homes. Accordingly, potential on-reserve foster homes might be ruled out because of issues like overcrowding or the presence of household members with prior child welfare or criminal justice involvement. Yet, two of these interviewees explicitly noted that they placed a high priority on keeping on-reserve children close to their family members, communities, and cultures. They described standards and practice differences that help facilitate this goal. One interviewee described an approach in which, rather than formalizing a long-term foster placement, a worker might seek dispensation(s) to extend, beyond the standard 60-day limit, a child's stay in a type of temporary placement for which foster home criteria are less strict. She noted that this facilitates the important goal of keeping First Nations children within their communities, but it comes at a cost. In contrast to other types of foster care, the families

providing this type of temporary placement do not receive funds to support a child's care. The second interviewee noted that modified standards for foster home investigation and approval might sometimes be applied in order to facilitate the existence of on-reserve foster homes.

Collectively, the existing literature and the interview results speak to both the existence of lower standards for on-reserve services, and the complexity of assessing and comparing service standards. The absence of services may shift family expectations for services, as well as service providers' practice approaches; thus differences in standards may reflect adaptation to existing service gaps and disparities. However, differences in standards may also reflect the sociodemographic realities of reserve communities, or First Nations priorities for maintaining and strengthening communal connections, informal supports, and cultures.

### Increased Intensity of Intervention

Service gaps/disparities and the related differences between standards of services for First Nations children and those for other children may result in situations where the needs of First Nations children go unmet until they reach an acute clinical level necessitating intensive intervention. Take, for example, the challenges that one interviewee noted in accessing services to diagnose/identify autism or FASD. There is general agreement that autism should be identified as early in life as possible in order to facilitate early intervention<sup>76</sup> and there is evidence that early identification of FASD is associated with better long term outcomes.<sup>77</sup> Barriers in access to this type of diagnostic service for First Nations children pose the potential to delay diagnosis and to result in a need for more intensive intervention at a later stage. Gaps and disparities in other diagnostic, prevention, and support services potentially have similar effects of shifting services for First Nations children towards more intensive options. For example, one health interviewee noted insufficient diabetes prevention services on reserve and another indicated that she knows of cases in which failure to provide early diagnosis of diabetes for children living on reserve has resulted in children being put on dialysis. Similarly, another interviewee mentioned the severe consequences that can sometimes result from nursing station staff failing to refer patients out of the community for adequate diagnostic testing. He noted, as an example, that it can result in cancers not being detected at an early stage.

Interviewees in all jurisdictions included in the sample suggested that the inadequate access to health related services for First Nations children living on reserve may sometimes lead to children being placed in institutional or foster care in order to access needed services. One interviewee vividly illustrated this pattern, indicating that the only formal respite care she knew of for First Nations families on reserve was the long-term respite that happens when a child is removed and put in a group home. Interviewee observations about the use of institutional and foster care are consistent with suggestions in the existing literature. For example, a 2005 study from Manitoba reported the following:

Concerning services to northern Manitoba First Nations children living with lifelong complex medical needs (and their families), in all but rare cases, these children have been required to leave their homes and families and live in either medical foster homes or medical institutions in order to access the medical services (primary, secondary, and tertiary) they require to survive and develop.<sup>78</sup>

A 2008 report by the Auditor General of Canada on funding for on-reserve child welfare services detailed the inflexibility in the use of funds under the Directive 20-1 funding model. It noted that “First Nations consider that, at times, this forces agencies to take children in care in order to access funds to provide the required services”; the report also indicated that some specific cases in which this occurred had been identified.<sup>79</sup> A 2009 report from a federal/provincial working group on Jordan’s Principle implementation in Manitoba identified out-of-home placement through the child welfare system as one way for on-reserve children to “more easily” access services in keeping with normative provincial standards.<sup>80</sup> Similarly, a 2009 evaluation of AANDC’s Assisted Living Program found that, because of an absence of funding and the resulting gap in assisted living services for on-reserve First Nations children with disabilities, parents whose children require such services sometimes end up giving Child and Family Services custody of their child “in order to access disability services through that route.”<sup>81</sup> In addition, a 2010 evaluation of the First Nations and Inuit Home and Community Care program reported that:

[T]he absence or gaps in services has required the relocation of children to institutions outside of their communities, sometimes with extended stays. Many reasons were cited for these relocations: complex care needs; lack of access to therapies in the community; IV requirements; limited FNIHCC capacity and, Non-Insured Health Benefit (NIHB) policies related to transportation and existing policy guidelines related to equipment procurement were cited as systemic reasons for these relocations.<sup>82</sup>

The suggestion that out-of-home care may be used as a mechanism for some First Nations children to access required services is also consistent with the events reported in the PLBC case: both institutionalization and out-of-home placement through the child welfare system were explicitly identified by a Health Canada employee as ‘options’ for Jeremy’s care.<sup>83</sup> The use of out-of-home care as a mechanism to facilitate First Nations children’s access to services extends an historical pattern of the removal of First Nations children from their homes by the residential school and child welfare systems.<sup>84</sup>



## Extraordinary Efforts to Access Services

While some First Nations children may encounter service gaps and disparities that ultimately result in more intensive forms of health or child welfare intervention, others may benefit from extraordinary efforts by families, communities, or service providers to ensure access to needed services. Many of the examples of extraordinary effort recounted by child welfare interviewees featured situations involving unfunded mandates. In these situations, a service is provided even though no resources have been allocated to support such service provision. For example, one child welfare interviewee noted the existence of legislative provisions requiring that First Nations band representatives be informed of court proceedings and other aspects of cases involving First Nations children, as well as practice standards which extend this requirement to mandate First Nations band representatives be involved in court proceedings. She indicated that no funding is provided for band representatives to travel for this purpose. On a broader level, another child welfare interviewee highlighted the challenges of adapting to provincial/territorial policy changes, noting that provincial/territorial agencies were given funds, training, and tools to support program changes, while First Nations agencies were often expected to implement policy changes without additional resources.

Existing literature complements these examples, highlighting instances in which First Nations child welfare agencies have fulfilled unfunded mandates in order to meet basic child welfare responsibilities. For example, provision of prevention and support services is required under all provincial/territorial standards, but these services are not funded under Directive 20-1, and are insufficiently funded under EPFA.<sup>85</sup> AANDC acknowledges that some First Nations Child and Family Service (FNCFS) agencies have nonetheless offered preventive services, even prior to implementation of EPFA.<sup>86</sup> Similarly, AANDC has noted that some families who are willing to provide foster homes for on-reserve children are unable to do so, because both parents are employed and federal funding does not cover day care subsidies for foster parents. For example, in a 2013 report, AANDC highlighted an agency in Saskatchewan that offers day care subsidies in order to recruit and retain foster parents, even though this is not a reimbursable expense under the agency's funding agreement.<sup>87</sup>

In health services, there are also clearly documented examples of service mandates for which no resources have been provided. For example, while services for children have fallen under the mandate of the Assisted Living Program since 2003, no funding has been provided to support services to children.<sup>88</sup> Additional service areas which exist under program authorities but for which no funding has been provided include: 24/7 home nursing (home nursing is not funded weekends and evenings), respite care required for longer periods of time, rehabilitation services (including occupational therapy, physical therapy, and speech therapy), family/informal caregiver training and support, mental health home-based services for long term psychiatric clients and clients experiencing mental or emotional illness, social services directly related to continuing



care, and coordinated discharge.<sup>89</sup> Provision of any of the services on this list entails an unfunded mandate.

A spreadsheet documenting information on “Jordan’s Principle related” cases collected by the federal government was presented as evidentiary documentation to the Canadian Human Rights Tribunal. It reveals further examples of extraordinary efforts by service providers to ensure First Nations children’s access to needed services and supports.<sup>90</sup> Several of the cases were identified as being resolved on humanitarian grounds. The documented resolutions include a case worker negotiating with a manufacturer to provide free samples of an infant formula for dietary management, a physician negotiating a discount from the manufacturer of a wireless system for a child with permanent hearing loss, and a provincial department covering the costs of needed equipment for an on-reserve child when the federal government did not do so in a timely fashion.

The three interviewees who discussed disputes around services to Status-eligible children also pointed to extraordinary efforts that service providers take in order to ensure First Nations children/families have the documentation required to ensure federal payment for services. For example, Status registration of a child requires submission of the child’s long form birth certificate, the signatures of both parents, and the parent’s Band names and numbers.<sup>91</sup> The requirement for information from both parents can be particularly burdensome or complicated in situations involving family/intimate partner violence or people who have lost/gained Status through policy or legislative changes. Two child welfare interviewees described the pursuit of Status registration as one of the first things they start working on with a family that has an unregistered Status-eligible child. One noted that the process can take six to twelve months, and the other explained that acquisition of long form birth certificates and other necessary documentation entails unfunded expenses for child welfare agencies.

Interviewees also spoke of extraordinary measures that families take to access services, including examples related to medical travel and relocation. As mentioned above, in the section on increased intensity of interventions, a number of interviewees identified failures of on-reserve nursing station staff to adequately screen patients and/or refer them for off-reserve diagnostic services. One interviewee explained that if a child’s condition deteriorates as a result of inadequate screening/diagnosis, a family member may end up paying out-of-pocket for the airfare to get the child out of a remote community and to a hospital emergency room. Another interviewee described the extraordinary efforts that were required to access services for which NIHB does not cover travel expenses. Because NIHB covers transportation costs only for “medically required” services, travel for services such as physiotherapy or optometry may not be covered.<sup>92</sup> The interviewee explained that, as a result, families and those assisting them must learn to coordinate medical visits, scheduling multiple appointments alongside a medical appointment for which NIHB will cover transportation costs.

Another interviewee offered an even more extreme example of the extraordinary efforts taken to ensure First Nations children's access to services. She explained that if a First Nations child who lives on reserve requires a serious procedure, such as an organ transplant, he may have to relocate to a city to in order to be near, or in, the hospital while he waits for an organ donor, undergoes surgery, and completes recovery. The parents of such a child must move to the city with their child for this time period – but this can mean leaving jobs in their home community. Because these families are ordinarily resident on reserve, but temporarily living off reserve, they can become subject to jurisdictional ambiguity around income support, housing and other services. They may be denied both those services regularly available to First Nations people living on reserve and those for low-income families living off reserve. The interviewee indicated that, as a result, the family may have to rely on fundraising efforts and on band resources for support.

The phenomenon of families and communities covering service related costs is also documented in the spreadsheet containing information on “Jordan’s Principle related cases” compiled by the federal government.<sup>93</sup> One of the cases described in the document involved a teenager, diagnosed with cerebral palsy, who required a food supplement: the family ended up paying for this supplement because of a jurisdictional dispute between the province and NIHB over payment. Similarly, evidence presented before the Canadian Human Rights Tribunal included testimony from the director of a First Nations child welfare agency about a case in which agency staff conducted a community fundraising campaign to finance the purchase of a wheelchair for a paraplegic child in out-of-home care. Health Canada denied the request for funds to purchase the wheelchair and, as appealing this decision could be a lengthy process involving three levels of review, the agency deemed that fundraising was the only reasonable option.<sup>94</sup>

Cumulatively, interviews and existing literature point to diverse, but extraordinary measures that service providers, First Nations families, and First Nations communities take to ensure First Nations children have access to services. These extraordinary measures entail added burdens for already strained systems of care. Agencies accepting the costs associated with unfunded mandates potentially open themselves up to charges of fiscal mismanagement. Negotiation of access to services/supports on compassionate grounds and provision of support for families pursuing Status registration entails additional work for under-resourced health and child welfare staff. Communities and families that cover service or relocation costs out-of-pocket accept significant financial burdens on top of their pre-existing responsibilities for caring for First Nations children.

# The Prospects for Eliminating Denials, Delays, or Disruptions of Services for First Nations Children

## Full Implementation of Jordan's Principle Is Necessary and Will Require Significant, Sustained Resources

The analysis presented here suggests that the potential for jurisdictional ambiguities and underfunding, which can result in jurisdictional disputes, is intrinsic to the complex structure of health and child welfare services for First Nations children. Though our analysis is exploratory, rather than comprehensive, it presents evidence of widespread and well-documented underfunding and jurisdictional ambiguities in health and child welfare services for First Nations children. It also speaks to the continuous potential for new jurisdictional ambiguities and underfunding to emerge in response to policy reforms and external factors. Both jurisdictional ambiguities and underfunding have the potential to give rise to jurisdictional disputes, causing denials, delays, or disruptions of services to First Nations children. In the context of the current governmental response to Jordan's Principle, which has placed the bar for declaration of a Jordan's Principle case so high that the federal government has claimed that it knows of no Jordan's Principle cases in Canada,<sup>95</sup> these jurisdictional disputes have serious, negative consequences for First Nations children. In the domains of health and child welfare, First Nations children encounter service gaps and disparities which can shift normative standards for services and necessitate more intensive intervention for First Nations children than would ordinarily be required for other children. Under the current governmental response, families, communities, and service providers wishing to ensure First Nations children have access to needed services may be required to take extraordinary measures, at great personal, community, or organizational cost. While all families may face challenges in accessing services for children, the evidence presented here suggests that First Nations families encounter challenges above and beyond those faced by other families. Accordingly, it demonstrates the need for a governmental response to Jordan's Principle that embodies the vision advanced by First Nations and endorsed by the House of Commons, one which is broad in application and seeks to eliminate denials, delays, and disruptions of services that result from jurisdictional disputes.

Implementation of a governmental response to Jordan's Principle that addresses the limitations of the current response<sup>96</sup> will extend child-first protections to a much broader range of cases and eliminate many of the challenges that individual First Nations families face in activating Jordan's Principle protections. In particular, the adoption of new standards for identifying Jordan's Principle cases - standards which center on the existence of jurisdictional ambiguities or underfunding that results in denials, delays, or disruptions of service, rather than the formal declaration of a payment dispute - will expand the range of cases eligible for Jordan's Principle protections. Implementation of a true child-first principle, which eliminates denials, delays, and

disruptions of services, will ease the burdens associated with pursuing a Jordan's Principle case. Accordingly, these measures should increase the proportion of situations involving jurisdictional disputes which are identified as Jordan's Principle cases, reduce the number of situations in which First Nations children encounter gaps and disparities in service, and reduce the need to take extraordinary efforts to access services in individual cases.

However, the evidence presented here also suggests that full implementation of Jordan's Principle, "under which jurisdictional confusion would never lead to a denial, delay, or disruption in providing a service,"<sup>97</sup> will be difficult to achieve. The structure of services for First Nations children is complex and fragmented; accordingly, service providers may not have a natural basis for comparing normative standards of service for First Nations children to those for other children. For example, responsibility for provision of on-reserve health and child welfare services increasingly rests with First Nations service providers that primarily serve on-reserve populations; these service providers may not have easy access to information about the normative standards of care/treatment for off-reserve children. In addition, normative standards for services vary across contexts, and differences in standards may develop in response to service gaps/disparities and/or in response to factors such as the socio-demographic conditions or cultural priorities of First Nations communities. Thus, the true challenge of comparing normative standards is more than just that of ensuring that First Nations children receive services that are equivalent to those provided to other children. In order to achieve *equitable* standards of service, we must ensure that service providers adopt practice approaches that fit with First Nations priorities and realities, while *also* ensuring that the service options for First Nations children are not shaped by lower standards for service or care. This is a complicated goal and service providers working with First Nations families may not always be able to independently determine whether the standards of service being applied for First Nations families are inequitable.

Thus, realization of the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons will require more than just the development and implementation of procedures for fairly and efficiently addressing Jordan's Principle cases once they have been identified. It will also require the development of educational initiatives, resources for determining provincial standards of service, and information sharing networks to support identification of Jordan's Principle cases by service providers. Across service domains, all service providers will need to understand what Jordan's Principle is, how they can identify the existence of a jurisdictional dispute, and how to activate Jordan's Principle once a dispute is identified. Achieving these conditions will require sustained and concerted collaborative efforts by federal, provincial/territorial and First Nations governments in order to engage service providers, professional organizations, universities/colleges, and others in implementing Jordan's Principle. These efforts must be undertaken in order to ensure that First Nations children's human, constitutional, and treaty rights are respected.



## Systematic Mechanisms for Remediating Underfunding and Jurisdictional Ambiguities Are Also Required

Even if the efforts to fully implement Jordan's Principle that are described above are undertaken, mechanisms to *prevent* the emergence of Jordan's Principle cases must also be implemented. The federal government has not understood Jordan's Principle as requiring governments to change their programs or funding policies in order to remedy the underlying jurisdictional ambiguities or underfunding that give rise to Jordan's Principle cases. In its closing submissions to the Canadian Human Rights Tribunal, the federal government described Jordan's Principle in the following way: "Although it is meant to assist with the resolution of jurisdictional disputes that arise with respect to certain programs, Jordan's Principle is not equipped to address or amend the parameters of the implicated, existing program."<sup>98</sup> Therefore, even if a situation involving a jurisdictional dispute has already been identified as a Jordan's Principle case for one First Nations child, this will not prevent a second First Nations child from encountering the exact same jurisdictional dispute. This second child would still have to activate Jordan's Principle processes and protections in order to receive services comparable to those ordinarily available to other children in Canada.

Given the complexity of service funding and delivery systems for First Nations children, the extent of the disparities and gaps in on-reserve services, and the complex relationship between existing service gaps and normative standards for services, it is unlikely that *all* cases involving jurisdictional disputes which result in the denials, delays, or disruptions of services for First Nations children will be identified as Jordan's Principle cases. Determination of the standards of service for First Nations and other children may continue to be difficult for individual service providers. For example, providers serving only on-reserve children may not be familiar with normative standards for services to other children; accordingly, they may not be able to identify the existence of a jurisdictional dispute. The challenge of identification is heightened in the case of service gaps, particularly in situations involving the absence of diagnostic and preventative services. In cases involving jurisdictional ambiguities and underfunding that impede initial access to services, families will not necessarily be in contact with a service provider who can facilitate identification of a Jordan's Principle case. They will have to independently determine the existence of a jurisdictional dispute, and pursue declaration of a Jordan's Principle case, while also ensuring care of a child with needs that are not being met by available services. No matter the ease of activating Jordan's Principle processes, it seems feasible that the families of some children who are eligible for Jordan's Principle protections will not identify the existence of a jurisdictional dispute, or will not pursue declaration of a Jordan's Principle case. In cases that are not formally identified as eligible for Jordan's Principle, First Nations children will continue to face service gaps, service disparities, and situations demanding extraordinary efforts to access services.

Accordingly, Jordan's Principle alone is not enough to ensure First Nations children have access to the equitable services that are their right under international, national, provincial/



territorial, and First Nations laws and agreements. In addition to eliminating denials, delays, and disruptions of services to individual First Nations children in identified Jordan's Principle cases, the governmental response to Jordan's Principle must also seek to systematically identify *and remedy* the underlying jurisdictional ambiguities and issues of underfunding which give rise to the jurisdictional dispute in each identified Jordan's Principle case. Thus, as each new Jordan's Principle case is identified, federal, provincial, and territorial governments must work with First Nations to clarify jurisdictional responsibilities and eliminate underfunding in order to prevent the emergence of similar cases in the future.

## Conclusion

Our analysis suggests that the jurisdictional ambiguities and underfunding that give rise to jurisdictional disputes are prevalent and that, as a result, First Nations children face challenges to accessing services that are above and beyond those faced by other children. Indeed, existing literature and our exploratory interviews suggest that the potential for underfunding and jurisdictional ambiguities is intrinsic to the complex system for funding and delivering services to First Nations children and that, as a result, the potential for new jurisdictional disputes is omnipresent. As a result of jurisdictional disputes, First Nations children are exposed to service gaps and disparities; these can lead to the development of differential standards of service and, ultimately, to the need for increased-intensity interventions. Alternately, the families, communities, and service providers of First Nations children may take extraordinary efforts, which place additional burden on already strained systems of care, in order to access services.

The obligation for federal and provincial/territorial governments to ensure that First Nations children receive equitable treatment is outlined in the *Convention on the Rights of the Child*, the *United Nations Declaration on the Rights of Indigenous Peoples*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* and in other federal, provincial/territorial, and First Nations legislation and agreements. When services to First Nations children are denied, delayed or disrupted because of jurisdictional disputes, federal and provincial/territorial governments fail to meet this obligation. Accordingly, the development of a governmental response to Jordan's Principle which reflects the vision advanced by First Nations and endorsed by the House of Commons – one which eliminates denials, delays and disruptions of service in identified Jordan's Principle cases – is a necessary mechanism for ensuring the human, constitutional and treaty rights of First Nations children. However, systematic application of child-first protections to all identified cases involving a jurisdictional dispute over services to a First Nations child is not enough. The governmental response to Jordan's Principle must also seek to systematically identify *and remedy* the underlying jurisdictional ambiguities and issues of underfunding which give rise to Jordan's Principle cases. As each new Jordan's Principle case is identified, federal, provincial, and territorial governments must work with First Nations to clarify jurisdictional responsibility and to eliminate underfunding in order to prevent the emergence of similar cases in the future.

The realization of a governmental response which both ensures the timely provision of equitable services in individual cases *and* prevents the future emergence of similar cases will require sustained and concerted, collaborative efforts by federal, provincial/territorial and First Nations governments, service providers, professional organizations, and educational institutions.

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## Appendix 1: Organizations Represented in the Jordan's Principle Working Group

**The Assembly of First Nations (AFN)** is a national advocacy organization representing First Nation citizens in Canada, which includes more than 900,000 people living in 634 First Nation communities and in cities and towns across the country. The role of the National Chief and the AFN is to advocate on behalf of First Nations as directed by Chiefs-in-Assembly. This includes facilitation and coordination of national and regional discussions and dialogue, advocacy efforts and campaigns, legal and policy analysis, communicating with governments, including facilitating relationship building between First Nations and the Crown as well as public and private sectors and the general public. For more information about AFN, please visit: <http://www.afn.ca/index.php/en>

**The Canadian Paediatric Society (CPS)** is the national association of paediatricians, working to advance the health of children and youth by nurturing excellence in health care, advocacy, education, research and support of its membership. As a voluntary professional association, the CPS represents more than 3,000 paediatricians, paediatric subspecialists, paediatric residents, and other people who work with and care for children and youth. For more information about CPS, please visit: <http://www.cps.ca>.

**UNICEF Canada** is a registered Canadian charity, a National Committee of the United Nations Children's Fund (UNICEF). UNICEF works in 190 countries through country programs and National Committees. UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the United Nations Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. For more information about UNICEF, please visit [www.unicef.ca](http://www.unicef.ca).



## Appendix 2: Jordan's Principle Related Documents Reviewed for Chapter 2

	Method of Identification	Source of Documents Identified	Types of Documents Identified
Electronic Searches for "Jordan's Principle"	Systematic search in academic databases	Scopus, ProQuest, JSTOR, ERIC, and PubMed	Academic articles, published non-governmental organization reports, and publicly available government reports
	Systematic search in legislative databases and websites	LEGISinfo and websites of provincial/territorial houses of parliament	Hansard (debate proceedings), jurisprudence, and publicly available government reports
	Web search	Google	Non-governmental organization reports and publicly available government reports
Access to Information Requests	Aboriginal Affairs and Northern Development Canada documents referring to "Jordan's Principle"	First Nations Child and Family Caring Society of Canada	Internal government memos/reports
	Requests to responsible departments in: NB, SK, and MB	Information officers	Internal government documents related to bi/trilateral agreements
Direct Requests to Government Departments	Request for formal bi/trilateral agreements from responsible ministers in: NB, BC, SK, and MB	Provincial government officials	BC agreement
	Phone calls to FNIHB/AANDC regions for focal point contact information	HC/AANDC employees	Information regarding the existence of designated focal points for jurisdictional disputes in each region
Other Retrieval Methods	Examination of the references lists of previously retrieved documents	Google, Scopus, ProQuest, JSTOR, ERIC, and PubMed	Academic articles, published non-governmental organization reports, and publicly available government reports
	Identification of documents by advisory committee members	Google	Academic articles, published non-governmental organization reports, publicly available government reports
	Review of documents made public through the Canadian Human Rights Tribunal Process	First Nations Child and Family Caring Society of Canada	Internal government memos/reports



## Appendix 3: Previously Identified Jurisdictional Ambiguities in Saskatchewan and Manitoba

Areas of Jurisdictional Ambiguity in Health (Reproduced from: Federation of Saskatchewan Indian Nations, 2008)

Professional Services	On-reserve	Off-reserve
Podiatry/Chiroprody	Ambiguity	Saskatchewan. Health
Chiropractic	Ambiguity	Saskatchewan Health
Optometric	FNIHB/Sask. Health	Ambiguity
<b>Home/Community Based Services</b>		
Respite Care	Ambiguity	Saskatchewan Health
Palliative Care	Ambiguity	Saskatchewan Health
<b>Community Rehabilitation</b>		
Physiotherapy	Ambiguity	Saskatchewan Health
Speech & Language	Ambiguity	Saskatchewan Health
Audiology	Ambiguity	Saskatchewan Health
<b>Aids to Persons with Physical Disabilities</b>		
Communication Aids	Ambiguity	Ambiguity
Orthodontic/Prosthetic Devices	Ambiguity	Ambiguity
Respiratory Equipment & Supplies	Ambiguity	Ambiguity
Wheelchair, Mobility Aids & Seating	Ambiguity	Ambiguity
Medical Supplies & Equipment	FNIHB	Saskatchewan Health
<b>Public Health</b>		
Public Health Inspector & Monitoring	Ambiguity	Saskatchewan Health
Food and Drug Safety	Ambiguity	FNIHB/Sask. Health
<b>Residential Long Term</b>		
Personal Care Homes (higher levels of care)	Ambiguity	Saskatchewan Health
Personal Care Homes (lower levels of care)	INAC	Saskatchewan Health
Residential Care Facilities	Ambiguity	Ambiguity
Independent Living Units with Support Services	Ambiguity	Ambiguity
Chronic Care Hospitals	Ambiguity	Ambiguity
<b>Mental Health Services</b>		
Crisis Counselling	FNIHB	Ambiguity
Prevention	Ambiguity	Sask. Health
<b>Transportation</b>		

Professional Services	On-reserve	Off-reserve
Medical Transportation	Ambiguity	Ambiguity
<b>Ambulance Services</b>		
Ground Ambulance	Ambiguity	Saskatchewan Health
Air Ambulance	Ambiguity	Saskatchewan Health
<b>Social Services:</b>		
Assisted Adoption	Ambiguity	Saskatchewan Ministry of Social Services (MSS)
Permanency Planning	Ambiguity	Saskatchewan MSS
<b>In Home Family Supports</b>		
Assisted Living	Ambiguity	Saskatchewan Health
Home Care	Ambiguity	Saskatchewan Health
Medical Foster Homes	Ambiguity	Saskatchewan MSS
Special Needs & Disability from 18-25	Ambiguity	Saskatchewan MSS
<b>Education</b>		
Accessibility	Ambiguity	Saskatchewan Ministry of Education
Sp. Needs Assistant/Teachers	Ambiguity	Saskatchewan Ministry of Education
Special Needs/Cognitive Disability	Ambiguity	SK Health/MSS/Education
<b>Social Assistance</b>		
18-30 years	Ambiguity	Saskatchewan MSS

Federation of Saskatchewan Indian Nations. (2008). *Information note*. Regina, SK: Federation of Saskatchewan Indian Nations.

### Jurisdictional Ambiguities in Health Services in Manitoba, (Reproduced from: Allec, 2005)

Professional services	On-reserve	Off-reserve
Podiatry/Chiropody	Ambiguity	Manitoba Health
Chiropractic	Ambiguity	Manitoba Health
Optometric	FNIHB/Sask. Health	Ambiguity
<b>Home/Community Based Services</b>		
Respite Care	Ambiguity	Manitoba Health
Palliative Care	Ambiguity	Manitoba Health
<b>Community Rehabilitation</b>		
Physiotherapy	Ambiguity	Manitoba Health
Speech & Language	Ambiguity	Manitoba Health

Professional services	On-reserve	Off-reserve
Audiology	Ambiguity	Manitoba Health
<b>Aids to Persons with Physical Disabilities</b>		
Communication Aids	Ambiguity	Ambiguity
Orthodontic/Prosthetic Devices	Ambiguity	Ambiguity
Respiratory Equipment & Supplies	Ambiguity	Ambiguity
Wheelchair, Mobility Aids & Seating	Ambiguity	Ambiguity
Medical Supplies & Equipment	FNIHB	Manitoba Health
<b>Public Health</b>		
Public Health Inspector & Monitoring	Ambiguity	Manitoba Health
Food and Drug Safety	Ambiguity	Manitoba Health/Health Canada
<b>Residential Long Term</b>		
Personal Care Homes (higher levels of care)	Ambiguity	Manitoba Health
Personal Care Homes (lower levels of care)	INAC	Manitoba Health
Residential Care Facilities	Ambiguity	Ambiguity
Independent Living Units with Support Services	Ambiguity	Ambiguity
Chronic Care Hospitals	Ambiguity	Ambiguity
<b>Mental Health Services</b>		
Crisis Counselling	FNIHB	Ambiguity
Prevention	Ambiguity	Manitoba Health
<b>Transportation</b>		
Medical Transportation	Ambiguity	Ambiguity
<b>Ambulance Services</b>		
Ground Ambulance	Ambiguity	Manitoba Health
Air Ambulance	Ambiguity	Manitoba Health
Source: The information presented above is based on interviews and a review of information provided by Manitoba Health, FNIHB, INAC, AMC, the Romanow report, and a presentation by Josee G. Lavoie at the Primary Health Care Conference on First Nations Health and Wellness, Winnipeg (March, 2005)		



# The Jordan's Principle

## Working Group

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