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No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle

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Abstract
Jordan's Principle is a child first principle intended to ensure that First Nations children do not experience delay, denial, or disruption of services because of jurisdictional disputes. This article describes the development of a federally-led administrative response to Jordan's Principle and recent legal challenges to this administrative response. We identify seven major conceptual issues that currently prevent realization of the child first approach at the heart of Jordan's Principle and may also introduce new inequities for First Nations children. Through content analysis of legislative, administrative, and judicial documents related to Jordan's Principle, we demonstrate the complexity of policy making processes affecting Indigenous peoples in Canada, and in other countries (like the U.S.) that have similar structural frameworks.

Keywords
Jordan's Principle, policy implementation, First Nations, jurisdictional dispute, Canada, health and social services, content analysis, child welfare

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No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle

Jordan's Principle is a child first principle named in Jordan River Anderson's memory; it is intended to facilitate compliance with Canada's national and international obligations to ensure the equitable treatment of First Nations[1] children and to uphold their human rights. In particular, the goal of Jordan's Principle is to ensure that Status First Nations children are not subjected to delay, denial, or disruption of services due to disputes between and within governments or government departments (Blackstock, Prakash, Loxley & Wien, 2005). A motion (M-296, 2007) 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" was passed unanimously in the House of Commons in 2007 (Jordan's Principle, n.d., para. 2). Since that time, several publications have described the passage of Jordan's Principle as well as the legal and administrative challenges that have arisen during the implementation process (Blackstock & Auger, 2013; Blackstock, 2008a, 2009, 2012; Canadian Paediatric Society, 2012; King, 2012; Lett, 2008a, 2008b; N. E. MacDonald, 2012; Nathanson, 2010; UNICEF Canada, 2012; Wekerle, Bennett, & Fuchs, 2009; Woodgate, 2013). However, a comprehensive review of the governmental response to Jordan's Principle has never been formally published.

This article documents the results of a descriptive content analysis (Neuendorf, 2002) of Jordan's Principle-related documents that were retrieved through the multiple means described in Table 1. The compiled document base included records of the bipartite and tripartite Jordan's Principle agreements struck in four jurisdictions: New Brunswick (NB), Saskatchewan (SK), Manitoba (MB), and British Columbia (BC) as well as supporting documentation at the provincial and federal levels. Although our search was exhaustive, information about Jordan's Principle was often difficult to obtain and some relevant documents may have been unintentionally excluded from our review. An advisory team composed of McGill-based researchers, and representatives of the Assembly of First Nations (AFN), UNICEF Canada, the Canadian Paediatric Society (CPS), and the Canadian Association of Paediatric Health Centres (CAPHC) supported compilation and analysis of documents.

This article summarizes the results of a content analysis that focused on constructing a timeline of steps in the governmental response to Jordan's Principle. We describe significant elements of a federally-led administrative response to Jordan's Principle, outlining the development and implementation of federal and provincial or territorial policies for identifying and addressing cases involving jurisdictional disputes over payment for services to First Nations children. We also summarize two recent legal challenges to this administrative response. Our analysis suggests that seven major conceptual issues prevent the current administrative response from fully implementing a child first principle that ensures that First Nations children do not experience delays, disruptions, or denials of services due to jurisdictional disputes.

[1] First Nations are one of three groups of Aboriginal peoples in Canada specifically recognized by the Constitution Act (1982), the other two being the Inuit and Métis.

Table 1. Identification of Jordan's Principle Related Documents Reviewed for this Article

	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 publically available government reports
	Systematic search in legislative databases and websites	LEGISinfo and websites of provincial houses of parliament	Hansard (debate proceedings), jurisprudence, and publically available government reports
	Web search	Google	Non-governmental organization reports and publically 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 and reports
	Requests to responsible departments in: NB, SK, and MB	Information officers	Internal government documents related to bilateral and trilateral agreements
Direct Requests to Government Departments	Request for formal bilateral and trilateral agreements from responsible ministers in: NB, BC, SK, and MB	Provincial government officials	BC agreement
	Phone calls to each FNIHB and AANDC region requesting focal point contact information	HC and 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 publically available government reports
	Identification of documents by advisory committee members	Google	Academic articles, published non-governmental organization reports, publically 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

Note. FNIHB is the acronym for the First Nations Inuit Health Branch of Health Canada (HC).

Background and Context

Jordan's Story

Jordan River Anderson, a First Nations child from Norway House Cree Nation in Manitoba, was born with a rare neuromuscular disease in 1999 (Lavallee, 2005). 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 (N. E. MacDonald & Attaran, 2007). 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 care (Blackstock, 2008a). The disputes ranged from disagreements over funding of foster care to conflicts over payment for smaller items such as a showerhead (N. E. MacDonald & Attaran, 2007). 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 (King, 2012).

Need for a Child First Principle

In Jordan River Anderson'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. However, Status First Nations individuals and residents of reserve communities are particularly vulnerable to jurisdictional disputes due to their unique treatment under Canadian law and policy. While provincial and territorial governments both fund and directly provide almost all health and social services for non-Aboriginal Canadians and most services for First Nations Canadians living off-reserve, the federal government generally funds on-reserve services to First Nations individuals (Romanow, 2002). The federal government maintains that they fund on-reserve health services as a matter of policy and not because of legal obligation (Boyer, 2004); others maintain that the federal government has a constitutionally mandated, fiduciary obligation to First Nations individuals (Boyer, 2003, 2004; Romanow, 2002). This dispute is further complicated by the fact that, while services for Status First Nations people living on-reserve are generally funded by the federal government, they are regulated by provincial or territorial legislation and standards, and may also be delivered through provincial and territorial service systems. Thus, the structure of services for Status First Nations people living on-reserve inherently presents added possibilities for jurisdictional disputes because it fundamentally differs from the structure of services for all other people.

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 are apparent even as far back as the 1967 Hawthorn Report (see Cairns et al., 1967). 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 (McDonald & Ladd, 2000). 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 (McDonald & Ladd, 2000). It

recommended that "DIAND[2], Health Canada, the provinces/territories and First Nation agencies […] give priority to clarifying jurisdiction and resourcing issues related to responsibility for programming and funding for children with complex needs, such as handicapped children and children with emotional and/or medical needs" (McDonald & Ladd, 2000, p. 120).

The National Advisory Committee of the Joint National Policy Review requested that the First Nations Child and Family Caring Society (the Caring Society) undertake in-depth research regarding funding of services for First Nations children on-reserve (Blackstock et al., 2005). This project, which resulted in the three *Wen:de* reports, included a survey of 12 First Nations Child and Family Service agencies that reported experiencing 393 jurisdictional disputes in the prior year (Blackstock et al., 2005). 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%), federal and provincial departments (14%) (Blackstock et al., 2005).

Administrative Response to Jordan's Principle

Building on the evidence from the *Wen:de* reports, First Nations organizations began to advocate for a child first principle to promote the efficient resolution of jurisdictional disputes (Blackstock, 2008a). 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. (K. A. MacDonald & Walman, 2005, p. 107)

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 (Blackstock, 2009). 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) (Blackstock, 2009).

Early advocacy and support for Jordan's Principle reflected more than a simple need to resolve jurisdictional disputes; a fundamental goal was to achieve the equitable treatment of First Nations

[2] Aboriginal Affairs and Northern Development Canada (AANDC) was formerly known as Indian and Northern Affairs Canada (INAC) and, before that, as the Department of Indian Affairs and Northern Development (DIAND). We use these terms interchangeably, in accordance with the documents being referenced.

children relative to other Canadian children. Thus, Jordan's Principle was intended as a mechanism for ensuring greater adherence to the principles outlined in the *Convention on the Rights of the Child* (CRC, 1989), the *Canadian Charter of Rights and Freedoms* (1982) (the *Charter*), and other provincial, territorial, and federal legislation. The CRC (1989) 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 (Standing Senate Committee on Human Rights, 2005). Article 23(1) speaks directly to the specific details of Jordan's case: Stating first, 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 disabled children 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 3 (1) of the CRC establishes a governmental obligation to ensure that the "best interests of the child" are a primary consideration in all services to children. 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 3 (1) 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 (Child Welfare Policy Group, 2013). Additionally, Article 2 (1) is mirrored in section 15 of the *Charter* (1982), which declares that every individual "is equal before and under the law and has the right to the equal benefit and protection of the law, without discrimination."

Jordan's Principle has received support from numerous governments, and national and international organizations. An AFN Special Chiefs Assembly (2005, 2007) called for a child first principle to be implemented without delay in December 2005 (Resolution 67) and renewed their support for implementation in 2007 (Resolution 36). Federal government endorsement came in the form of unanimous House of Commons passage of Private Member's Motion (M-296, 2007), introduced by Member of Parliament (MP) Jean Crowder, in 2007. 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. (Parliament of Canada, 2007, Private member's business, Aboriginal affairs, paras. 3-4)

MP Blaney's paraphrasing of Jordan's Principle corresponds the position of the Caring Society, which defines Jordan's Principle as applicable to 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 (First Nations Child and Family Caring Society, n.d.b, para. 3). As of May, 2014, more than 8,000 individuals and organizations had signed on as supporters of Jordan's Principle, including: the AFN, The Canadian Nurses Association, the Canadian Paediatric Society (CPS), the Canadian Association of Paediatric Health Centres (CAPHC), The Canadian Medical Association Journal, and UNICEF Canada (First Nations Child and Family Caring Society, n.d.a).

Legislative Efforts to Define and Operationalize Jordan's Principle

The denotation of Jordan's Principle in the *Wen:de* reports and the endorsement of Jordan's Principle by the House of Commons provided the foundation for implementation of a child first principle. Subsequently, several legislative efforts attempted to specify the measures needed for effective implementation of a child first principle. Legislative efforts to operationalize Jordan's Principle at the federal level were first mounted in 2008 through House of Commons Private Member's Bill C-563 (2008). This bill specified a repayment principle, requiring the department responsible for services to reimburse a department which paid for services within 30 days. It also required the Minister of Indian Affairs and Northern Development to appoint an adjudicator to resolve disputes that arose between federal departments or between federal and provincial or territorial departments. Notably, these provisions would only have applied in disputes involving payment for health services. The bill, which was reintroduced three times (also as Bill C-249, 2008) never proceeding beyond first reading in the House of Commons, made no mention of social services (i.e., education or child welfare services).

Attempts to legislate Jordan's Principle were also made at the provincial level. In Manitoba, concern over slow and informal implementation of Jordan's Principle led to the introduction of Private Member's Bill 203 in 2008 (see Bill 203, 2008; Bourassa, 2010; Lett, 2008a). Bill 203 (2008) focused on health and social services, defining a jurisdictional dispute as "a dispute between the federal government and the provincial government or a government agency that is responsible for paying for the health care or social services required by a child" (Definitions section, para. 5). The bill would have affirmed the right of all children to receive the best health care and social services on a timely basis in their homes or communities. In situations in which these rights were contravened, Bill 203 directed provincial representatives to act to ensure that the child's rights were protected and to prevent similar occurrences in the future. If these corrections were not undertaken, the guardian could apply to the court for a remedy; however, the dispute resolution mechanism was never fully detailed (Nathanson, 2010). The bill was introduced three times, as Bills 233 (2008) and Bill 214 (2009), but did not proceed beyond first reading in the legislature (Lett, 2008a; Nathanson, 2010).

Two other provincial and territorial assemblies also introduced motions mandating governments to implement a child first policy. In the Yukon, a Notice of Motion (Motion 700, 2006), issued in 2006, urged the territorial government to implement a child first policy and work with other jurisdictions to investigate payment mechanisms that ensured equitable services for First Nations children. We could find no record of an endorsement of or action on this motion. Finally, in April, 2010, New Brunswick's Legislative Assembly endorsed a motion (Motion 68, 2010) mandating a tripartite partnership to: (a) develop an agreement on the application of Jordan's Principle, (b) negotiate new child welfare service funding, and (c) develop a plan to address the underlying causes of poor child welfare outcomes. The motion did not give details of the funding mechanism, but stated that "where required, funding disputes would be resolved with a dispute resolution mechanism but disagreements would not delay the provision of service" (Legislative Assembly of New Brunswick, 2010, p. 253).

Non-Legislative Efforts to Define and Operationalize Jordan's Principle

While politicians and advocates were pursuing legislative approaches to Jordan's Principle implementation, the federal government began to discuss non-legislative agreements with provincial and

territorial governments. In May 2008, the Minister of Health and the Minister of Indian Affairs and Northern Development invited provincial and territorial governments "to work together to implement a child first principle to resolve jurisdictional disputes involving the care of First Nations children" (INAC & Federal Interlocutor for Métis and Non-Status Indians, 2010, p. 22). Soon after, Manitoba became the first province to reach a bilateral agreement with the federal government to implement a jurisdictional dispute resolution process for First Nations children (INAC & Federal Interlocutor for Métis and Non-Status Indians, 2010). A Joint Committee composed of federal and provincial representatives was established in 2008 and began work on a Jordan's Principle case conferencing and dispute resolution document (Government of Canada, 2012; Terms of Reference Officials Working Group, 2009). The preliminary report drafted by this working group outlined the spectrum of cases that would fall under Jordan's Principle and described potential processes for determining the agency with primary responsibility for funding services. It also described potential case conferencing mechanisms, dispute resolution processes, and appeal processes (Terms of Reference Officials Working Group, 2009). We were unable to obtain further documentation of Jordan's Principle policies in Manitoba.

In 2009, the federal government, Saskatchewan government, and Federation of Saskatchewan Indian Nations (FSIN) reported reaching a trilateral Jordan's Principle agreement (AANDC, 2011). The agreement was described in an interim implementation document that briefly outlined, in very broad terms, the need to formalize case conferencing practices, the definition of cases that would fall under Jordan's Principle, key Jordan's Principle related terminology, and a long-term agenda for implementing Jordan's Principle (including development of "dispute avoidance processes" (FSIN, Government of Saskatchewan, & Government of Canada, 2009). In June 2012, FSIN notified AANDC that it was suspending negotiations around implementation (because of concerns highlighted in an ongoing court case, *Pictou Landing Band Council & Marina Beadle v. Attorney General of Canada*, described below) (Lerat, 2012). Representatives from provincial and territorial governments signed a final bilateral dispute resolution protocol in July 2012 (Government of Saskatchewan & Government of Canada, 2012).

In Manitoba and Saskatchewan, Jordan's Principle was operationalized as applying to cases in which the following five criteria are met:

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 has 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 (AANDC, 2013; FSIN, Government of Saskatchewan, & Government of Canada, 2009; Terms of Reference Officials Working Group, 2009).

Thus, the administrative response to Jordan's Principle agreements implemented in these jurisdictions reflected a considerably narrower operationalization of the principle than that which was endorsed by

the House of Commons. An AFN Special Chiefs' Assembly (2008) carried, by consensus, a resolution (63/2008) that condemned the operational definition of Jordan's Principle adopted by the federal government as unreflective of the intent of the House and discriminatory.

British Columbia (BC) Premier Gordon Campbell gave his full support to Jordan's Principle in 2008 and a tripartite Jordan's Principle working group, including representatives of the British Columbia and federal governments as well as members of First Nations organizations, was formed (Turpel-Lafond, 2008). Three years later, in 2011, the British Columbia and federal governments reached a formal bilateral agreement to implement Jordan's Principle (AANDC, 2012). As shown in Table 2, a federal government assessment of Jordan's Principle implementation indicated that a draft bilateral statement on Jordan's Principle was distributed to First Nations in British Columbia at the same time that trilateral discussions were taking place. In 2012, the British Columbia Assembly of First Nations (2012) passed a unanimous resolution (1(n)/2012) decrying the creation of a bipartite dispute resolution mechanism without the incorporation of First Nations as equal partners.

Details of the bilateral agreement in British Columbia were outlined in a 2011 report jointly released by the British Columbia and federal governments (Government of British Columbia & Government of Canada, 2011). The report outlined an operational definition of jurisdictional disputes and the joint commitment to developing a dispute resolution mechanism; it also explicitly noted that the federal and provincial operationalizations of Jordan's Principle differed (Government of British Columbia & Government of Canada, 2011). In British Columbia's operationalization, Jordan's Principle applied to all First Nations children under the age of 19; in contrast, the federal operationalization was consistent with the Manitoba and Saskatchewan agreements, invoking the five requirements discussed above. The report did not outline steps to resolving the differences in operationalization nor did it give any details of a dispute resolution process.

In New Brunswick, a tripartite Jordan's Principle implementation agreement was reached between AANDC, New Brunswick, and First Nations Chiefs in New Brunswick in December of 2011 and announced in 2012 (First Nations Chiefs of New Brunswick, Government of New Brunswick, & Government of Canada, 2011; Government of Canada, 2012). In an internal document retrieved through an access to information request, AANDC noted that "the [New Brunswick] agreement is of particular note as it is the first tripartite document to include both a case conferencing and dispute resolution mechanism and is serving as a model for other jurisdictions" (AANDC, 2011, p. 4). Much like in British Columbia, the New Brunswick agreement noted differences in the federal, provincial, and First Nations understandings of the scope of Jordan's Principle. The federal government maintained the five-criteria operational definition used in other agreements, while New Brunswick's perspective was slightly broader and the First Nations parties' definition affirmed the right of every child to have access to equitable services (First Nations Chiefs of New Brunswick et al., 2011).

Table 2. Federal Memorandum: Federal and Provincial Engagement on Jordan's Principle (2010)

Province or Territory	Engagement Status	Notes
Alberta	Wishes to reach an agreement	"Province has expressed interest in establishing a dispute resolution process for JP implementation and working with First Nations."
British Columbia	Wishes to reach an agreement	"Draft bilateral Joint Process for the Implementation of JP has been shared with First Nations; bilateral and tripartite discussions are ongoing."
Manitoba	Has an agreement	"Tripartite agreement on an Interim Implementation Plan. Work is ongoing."
New Brunswick	Wishes to reach an agreement	"Developing a tripartite joint statement which outlines an agreed upon case conferencing/dispute resolution approach."
Newfoundland & Labrador	Not interested in formal process	"Province has indicated they have sufficient processes in place to address cases/jurisdictional disputes."
Northwest Territories*	-	-
Nova Scotia	Not interested in formal process	See Newfoundland & Labrador note.
Nunavut*	-	-
Ontario	Wishes to reach an agreement	"Does not see a need for a formal […] mechanism […] but would like to work with Canada and First Nations to support JP implementation."
Prince Edward Island	Not interested in formal process	See Newfoundland & Labrador note.
Quebec	Not interested in formal process	See Newfoundland & Labrador note.
Saskatchewan	Has an agreement	"Tripartite agreement on an Interim Implementation Plan. Work is ongoing."
Yukon	-	"Canada maintains a watching brief on activities inside the Yukon."

Note. Source: Government of Canada (2010, p. 1). * Territories not mentioned in the document.

We were unable to obtain documentation of Jordan's Principle agreements reached in other provinces and territories. As indicated in Table 2, the federal government's 2010 assessment of its administrative response to Jordan's Principle described Nova Scotia,[3] Newfoundland and Labrador, Prince Edward Island, and Quebec as uninterested in establishing formal dispute resolution processes. Ontario was characterized as desiring a Jordan's Principle agreement and, in statements to the Legislative Assembly of Ontario in 2009, the Ontario Government announced support for Jordan's Principle (Garrick, 2009). In 2010, a provincial study of Ontario's Children Aid's Societies indicated that Jordan's Principle was not being consistently applied (Ministry of Youth Services, 2010), but there is no indication of a subsequent agreement. The federal assessment also described Alberta as being interested in establishing a dispute resolution process, but our review did not yield any documentation of a resulting agreement.

Despite the mixed assessments reported in 2010, the federal government stated in 2012 that all provinces "have been engaged in discussions and have put joint processes in place" (Government of Canada, 2012, p. 17). However, the nature, extent, and quality of these joint processes remain unclear. Documentation to support further assessment of the quality of the joint processes was unavailable. AANDC itself has acknowledged discontent with these joint processes, 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. (AANDC, 2011, p. 4)

Case Conferencing and Dispute Resolution Processes

While the existence of federal-provincial agreements suggests a framework for implementation of a child first principle and the development of dispute resolution processes, many details remain unclear. The most detailed and recent description of Jordan's Principle case conferencing and dispute resolution processes appeared in the New Brunswick agreement. AANDC has identified this agreement as the template for other provinces (AANDC, 2011) and, indeed, the steps outlined in the tripartite dispute resolution agreement in New Brunswick closely mirror the language in the bipartite dispute resolution agreement in Saskatchewan. Table 3 summarizes steps outlined in the New Brunswick process. This process heavily emphasizes the idea that most disputes should be resolved at the local level and that progress to a formal case conferencing procedure should happen only in exceptional circumstances. No timeline is specified for progression to formal case conferencing. The emphasis on local level resolution is echoed in AANDC's public documentation of the administrative response, which stated, "case management will occur first at the local level" (INAC, 2010, p. 54).

[3] In Nova Scotia, a tripartite agreement was reached between federal and provincial governments and Mi'kmaw Family and Children's Services in 2009 (CPS, 2012).

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Table 3. Case Conferencing and Dispute Resolution Processes Outlined in the New Brunswick Jordan's Principle Agreement

Case Conferencing		
Step	**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 assistant deputy minister decides whether to declare a jurisdictional dispute	No time frame specified
6	Relevant assistant deputy minister notifies responsible counterpart in federal or provincial ministry, in writing, of a jurisdictional dispute and requests to enter into dispute resolution process	No time frame specified
7	Counterpart assistant deputy minister responds to request to enter into dispute process from primary assistant 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 normative standard, then the department of first contact covers the cost of services	Until matter is resolved
Dispute Resolution		
Step	**Step in Process**	**Time Frame Specified***
9	Resolution attempt at the assistant 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 mediators 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

Comments made during a 2009 appearance by a senior INAC official before the Standing Committee on Aboriginal Affairs and Northern Development offered some additional insight into a multi-step dispute resolution process. At this meeting, the official highlighted a case-by-case approach:

> In terms of what we're doing on Jordan's Principle, we do have a group we work with at Health Canada where, if we are made aware of a case, we have identified focal points in both departments in our regional offices. When these cases are brought to our attention, we then branch out and look at what program is implicated in our particular department. We look to see if we can resolve the case through that approach and do the case conferencing. But what's important is our need to be made aware of these cases. (Johnson, 2009, p. 18)

Focal points were described as individuals designated to "help navigate cases within the existing range of health and social service based on the normative standards of care provided to children off-reserve in similar geographic locations" (INAC, 2010, p. 54). Testimony from Pictou Landing Band Council and Maurina Beadle v. the Attorney General of Canada, 2013 (PLBC v. Canada, described below) also indicated that the focal point is responsible for gathering necessary information and determining a resolution through the formal case conferencing process (Robinson, 2011). Through phone calls to AANDC and First Nations Inuit Health Branch (FNIHB) offices, we were able to identify the names of focal points in most regions. However, little additional information about the focal points charged with facilitating case conferencing is publicly available.

The New Brunswick agreement specifies that a focal point must convene an initial case conference within 10 days of receiving the following: an assessment of the child from a health and service professional, information on current and proposed service plans for the child, a report of the issue or reason for referral to the focal point, and a summary of steps taken to resolve the issue. The focal point must then complete case conferencing within 45 subsequent working days. The case conferencing process involves: (1) verification of a child's diagnosis, (2) review of goods and services recommended and currently provided, (3) identification of unmet goods and services needs, (4) clarification of mandates for provision of required goods and 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" (First Nations Chiefs of New Brunswick et al., 2011, p. 11).

If a resolution is not reached through case conferencing, formal declaration of a provincial–federal jurisdictional dispute is the next step (steps 5 - 8 in Table 3). Though no time limit for this step is indicated in the New Brunswick documentation, a jurisdictional dispute is only considered to formally exist once declared (in writing) by a provincial or federal assistant deputy minister (First Nations Chiefs of New Brunswick et al., 2011) and accepted by the corresponding provincial or federal assistant deputy minister (Baggley, 2014a). It is only "once a Jordan's Principle dispute is declared and the service is deemed by the province as a provincial normative standard" that "the federal or provincial Department [*sic*] of first contact will cover the cost of the disputed service related to that case throughout the dispute resolution process until the matter is resolved" (First Nations Chiefs of New Brunswick et al., 2011, p. 5). Thus, it is at this point—after a local level case conferencing process of undetermined length, a formal case conferencing process, which may last up to 55 working days, and a formal declaration by two deputy ministers—that a child first principle is applied. Services that are consistent with the provincial

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standard assessed by a focal point and by "the province," are to be paid for by "the current service provider" or "in the absence of a current service provider, the agency of first contact" until the resolution of the jurisdictional dispute (First Nations Chiefs of New Brunswick et al., 2011, p. 3).

The dispute resolution process includes four steps, each with "established timelines" that may be extended if agreed upon by the parties (see Table 3). First, a dispute resolution attempt is made at the between federal and provincial government assistant deputy ministers 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 (First Nations Chiefs of New Brunswick et al., 2011).

Independent Assessments of Jordan's Principle Implementation

In the 2012 edition of their status report on Canadian public policy and child and youth health, the Canadian Paediatric Society (CPS) provided ratings of the implementation of Jordan's Principle in all provinces and territories. Drawing on government documents, websites, and personal communications, CPS assessed Jordan's Principle implementation on the four-category rating scale described in Table 4 (CPS, 2012). The findings stand in contrast to the federal government's 2012 statement that all provinces had put in place joint processes for addressing Jordan's Principle (Government of Canada, 2012). There were no changes in the CPS' ratings of implementation of Jordan's Principle by provinces and territories between 2009 and 2011. Eight of the provinces and territories were rated as "poor," meaning that there was no child first policy in the jurisdiction. Four provinces were rated as "fair." In Nova Scotia, the only jurisdiction that CPS rated as "good," Jordan's Principle implementation was the site of a legal challenge that is discussed in detail below.

Legal Challenges Based on Jordan's Principle

Pictou Landing Band Council & Marina Beadle v. Attorney General of Canada (PLBC v. Canada)

Pictou Landing First Nation is a Mi'kmaq community located on a small parcel of land next to Pictou Harbour, Nova Scotia and is governed by the elected Pictou Landing Band Council (PLBC). Maurina Beadle, a resident of Pictou Landing, 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 at times (Champ & Associates, 2011). 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 PLBC began funding 24-hour in-home care to assist both Ms. Beadle and Jeremy. Ms. Beadle's condition improved; however, an October 2010 assessment by the Pictou Landing Health Centre recommended that the Beadle family continue to receive in-home care services from a homecare worker to meet Jeremy's 24-hour care needs (Champ & Associates, 2011).

Table 4. Jordan's Principle Implementation Ratings by The Canadian Paediatric Society (2012)

Province or Territory	2009	2011
Alberta	Poor	Poor
British Columbia	Fair	Fair
Manitoba	Fair	Fair
New Brunswick	Poor	Poor
Newfoundland & Labrador	Poor	Poor
Northwest Territories	Poor	Poor
Nova Scotia	Good	Good
Nunavut	Poor	Poor
Ontario	Fair	Fair
Prince Edward Island	Poor	Poor
Quebec	Poor	Poor
Saskatchewan	Fair	Fair
Yukon	Poor	Poor

Canadian Paediatric Society Ratings Categories	
Excellent	Province or territory has adopted and implemented a child first principle to resolve jurisdictional disputes.
Good	Province or territory has a dispute resolution process with a child first principle for resolving jurisdictional disputes.
Fair	Province or territory has adopted a child first principle to resolve jurisdictional disputes, but has not yet developed or implemented specific strategy.
Poor	Province or territory has not adopted a child first principle.

The PLBC estimated that Jeremy's in-home care expenses totalled around $8,200 a month, which amounted to nearly 80% of the total monthly block contribution that PLBC received for home care services (Champ & Associates, 2011; PLBC & Marina Beadle v. Attorney General of Canada, 2013). In February 2011, the PLBC Health Director contacted the Health Canada Regional Director to discuss options for Jeremy's care. The health director was aware of Jordan's Principle and requested case conferencing regarding his needs. Two case conferencing meetings subsequently occurred between representatives of the Nova Scotia Department of Health and Wellness, PLBC Health Services, Health Canada, and AANDC (the AANDC representative served as a focal point in this case). The provincial representative explained that an off-reserve child requiring similar care would receive a maximum of $2,200 per month for in-home respite services. He further explained that, while the province would not provide home care exceeding this limit, it would fund the cost of institutional care (estimated to be approximately $10,500 per month, or 130% of the cost of Jeremy's in-home expenses at the time) (PLBC & Marina Beadle v. Attorney General of Canada, 2013).

Around the same time that case conferencing was occurring in Jeremy's case, the Nova Scotia Supreme Court decided on a similar issue of in-home care services, raised in the case of Nova Scotia (Community Services) v. Boudreau (2011). Brian Boudreau was a Nova Scotia resident who suffered from severe autism and required 24-hour care. The province had limited his in-home care service payments to $2,200 per month (identified as the standard maximum). The respondent in Nova Scotia Department of Community Services (NSCS) v. Boudreau charged that, in doing so, the Nova Scotia Department of Community Services violated legislation allowing for in-home care funding exceeding the standard maximum in "exceptional circumstances." On March 29, 2011, the Nova Scotia Supreme Court ruled that the Department of Community Services was obligated to provide additional in-home care funding for Brian. In addition to finding that Brian's case was one in which there were "exceptional circumstances," the ruling noted that Section 9 of the Nova Scotia *Social Assistance Act* (1989) directs the province to "furnish assistance to all persons in need" (Section 9(1)) and that "home care" is included in the list of services that the province must provide under the terms of the *Municipal Assistance Regulations.* In NSCS v. Boudreau, the court ruled 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 a formal request for federal authorities to provide additional funding for Jeremy's in-home care. The focal point responded on behalf of Health Canada and AANDC, concluding that Jordan's Principle did not apply because provincial and federal government agencies were in agreement that services provided to Jeremy should not exceed $2,200 per month. The focal point also reiterated that Jeremy's needs met the criteria for placement in fully funded institutional care (PLBC & Marina Beadle v. Attorney General of Canada, 2013).

In June 2011, the Pictou Landing Band Council and Marina Beadle filed an application asking 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*. They argued that Jordan's Principle is an essential mechanism for ensuring the protection

from discrimination on the basis of race, national or ethnic origin, or colour that is guaranteed by section 15 (1) of the *Charter* (Champ & Associates, 2011).

The respondent, the Attorney General of Canada, argued that Jordan's Principle was not engaged in this case. The Attorney General suggested that, because the province and federal government agreed, there was no jurisdictional dispute and further argued that, because the very recent Supreme Court ruling in NSCS v. Boudreau had not yet resulted in a change in provincial practice, the $2,200 per month cap on in-home service payments remained the normative provincial standard. Finally, the government argued that PLBC was not entitled to reimbursement for the cost of Jeremy's care. The Attorney General of Canada (2012) stated:

> While the applicants have a right to seek judicial review regarding the [focal point's] decision that Jordan's Principle was not engaged here, if 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. (p. 672)

Accordingly, Canada argued the decision did not violate the *Charter*, and that Jeremy's needs were treated no differently than any other Nova Scotian with similar needs. 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 court ruled that, in assigning Jordan's Principle focal points, the federal government accepted the task of implementing Jordan's Principle and, thus, incurred a responsibility to do so. Moreover, the court found that Jordan's Principle applied in Jeremy's case and that, accordingly, it did not need to consider the question of whether the AANDC decision in that case violated Jeremy's *Charter* rights. The Court rejected Canada's arguments that the "exceptional case" clause in existing regulation did not apply and that a jurisdictional dispute did not exist. On the issue of the applicability of the exceptional case clause, the Court stated:

> The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's. (PLBC & Marina Beadle v. Attorney General of Canada, 2013, p. 31)

With regard to the existence of a jurisdictional dispute, the Court stated:

> I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute. (PLBC & Marina Beadle v. Attorney General of Canada, 2013, p. 28)

The Court further clarified the interpretation of a jurisdictional dispute and the findings on Canada's claim that Jordan's Principle did not call for reimbursement in cases involving block funding:

> Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the Federal Government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before. (PLBC & Marina Beadle v. Attorney General of Canada, 2013, p. 34)

Accordingly, the court ruled that Jeremy did qualify for home-care funding greater than $2,200 per month, quashed the AANDC decision, and directed the federal government to provide reimbursement to the PLBC for Jeremy's in-home care without delay. On May 6, 2013, the Attorney General of Canada appealed the decision to the Federal Court of Appeal. Canada's memorandum of fact and law for the appeal argued that the Court erred in the interpretation and application of Jordan's Principle by focusing on an underlying service disparity rather than a jurisdictional dispute. Further, Canada argued that the decision was unreasonable because it ignored evidence and instead was based on "opinion" (Attorney General of Canada, 2013, p. 18). Finally, Canada argued that the court did not have authority to mandate the remedy granted to the respondents (Attorney General of Canada, 2013). By March 2014, the Caring Society, Amnesty International, and the Assembly of Manitoba Chiefs had been granted the right to intervene in the case (Federal Court of Appeal, 2014a, 2014b). On July 11, 2014, without explanation, the Attorney General of Canada filed a notice of discontinuance in the case, formally dropping the appeal. Thus, the 2013 ruling in PLBC & Marina Beadle v. Attorney General of Canada stands (Attorney General of Canada, 2014). It remains to be seen how the federal government adapts its administrative response to Jordan's Principle to comply with the ruling.

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

The federal government's administrative response to Jordan's Principle also lies at the heart of the ongoing Canadian Human Rights Tribunal case, First Nations Child and Family Caring Society et al. v. the Attorney General of Canada. 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 and ethnicity. The complainants argued that the failure to provide First Nations children and families ordinarily on-reserve children with child welfare funding and benefits comparable to those received by all other children and families contravened 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 (Wilson Christian LLP, 2013). 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 (First Nations Child and Family Caring Society, 2014). In closing submissions, the complainants provided evidence on the current administrative 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 (Power Law, 2014, p. 145). A ruling in the case is expected in 2015 (First Nations Child and Family Caring Society, 2014).

Key Issues in Implementation of the Administrative Response to Jordan's Principle

The administrative response to Jordan's Principle has evolved in an iterative fashion, emerging from negotiations between the federal and provincial and territorial governments, and being further clarified in response to challenges like the PLBC & Marina Beadle v. Attorney General of Canada case. Our review of Jordan's Principle documents and of PLBC & Marina Beadle v. Attorney General of Canada suggests that, in its current form, this administrative response fails to implement the child first approach that lies at the heart of Jordan's Principle. 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 exclude intra-governmental disputes, thus further limiting the cases to be considered under Jordan's Principle.

3. Treats the existence of a formal payment dispute to be the indicator of a jurisdictional dispute, thereby potentially excluding cases involving known service disparities from consideration under Jordan's Principle.

4. Institutionalizes a potentially lengthy case conferencing process as a precursor to declaration of a jurisdictional dispute, thus introducing possible service delays.

5. Fails to specify a consistent mechanism for repayment of costs incurred by the government or agency providing services during case conferencing and dispute resolution processes.

6. Excludes First Nations from administrative and dispute resolution processes.

7. Lacks mechanisms for transparency and accountability, which are essential to the protection of human rights.

Limits on Eligibility

Jordan's Principle, as documented in the *Wen:de* reports and as 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 or 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 (AANDC, 2013; Indian Affairs and Northern Development, 2010). This operational definition denies access to Jordan's Principle processes to First Nations children who have multiple disabilities that 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. The most explicit 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 INAC explained the narrow operationalization, stating, "The focus is on those who were like Jordan—those who are the most

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vulnerable, those who have multiple disabilities and require multiple services from across jurisdictions" (Baggley, 2011, Mrs. Corrine Baggley section, para. 1).

The Narrowing of 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 operationalizations 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 and territories off-reserve) is a core justification for a child first principle, which focuses specifically on First Nations children. The potential for jurisdictional disputes around specific services for First Nations children in care, with medical needs, or with disabilities has been clearly outlined in some jurisdictions (Bourassa, 2010; FSIN, 2008; Woodgate, 2013). 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 equal 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 (Nathanson, 2010), 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 administrative response, the operational definition of a "jurisdictional dispute" is a case in which:

- There is disagreement between the federal and provincial governments;
- Case conferencing occurred at the local level but did not lead to case resolution;
- 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;
- An AANDC focal point determined that there is a formal payment dispute between provincial or territorial and federal governments even after case conferencing has occurred; and
- Assistant deputy ministers, within both a provincial and a federal government department, formally declare a jurisdictional dispute.

The federal operationalization has a narrow focus on disputes between provincial 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 and in subsequent 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 or territorial governments may exclude consideration of many situations in which First Nations children experience delay, denials, or disruptions of service. The *Wen:de* reports 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 2 times the number of federal–provincial disputes (Blackstock, et al., 2005). Federal inter-departmental disputes are also specific to Status First Nations children; they do not occur around the provincially and territorially funded services provided to non-Status children. These disputes, however, are not captured within the federal government's narrow operationalization of Jordan's Principle.

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

The potential for additional children to be excluded from Jordan's Principle eligibility because of the federal government's narrow definition of a jurisdictional dispute was made clear in the PLBC & Marina Beadle v. Attorney General of Canada ruling. Reflecting on the provincial–federal agreement that the $2,200 per month limit for in-home care services applied, 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" (PLBC & Marina Beadle v. Attorney General of Canada, 2013, p. 28). Thus, the ruling highlighted a potential for inter-governmental collusion that is implicit to the federal government's operational definition of Jordan's Principle. First Nations children who experience delays or disruption of services normally available to other children can be excluded from Jordan's Principle protections if federal and provincial governments simply decline to formally declare a jurisdictional dispute.

The systemic implications of this potential for collusion were evident in the federal–provincial working group report on Jordan's Principle implementation in Manitoba (Terms of Reference Officials Working Group, 2009). The report enumerated a number of "service gaps and 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 (Terms of Reference Officials Working Group, 2009, p. 12). 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 (Terms of Reference Officials Working Group, 2009, pp. 13–14). 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 (Terms of Reference Officials Working Group, 2009, p.15). However, the report, authored by a working group that 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" (Terms of Reference Officials Working Group, 2009, p. 15). Thus, on a systemic level, defining a jurisdictional dispute as a situation in which a formal payment dispute exists serves as a basis for excluding on-reserve children, receiving services that both federal and provincial governments have identified as failing to meet provincial normative standards, from Jordan's Principle processes and protections.

In PLBC & Marina Beadle v. Attorney General of Canada, the Federal Court ruled that a jurisdictional dispute existed because the federal funding provided was insufficient to allow PLBC to provide services in compliance with provincial legislation. Accordingly, it indicated that an alternate means of identifying jurisdictional disputes would be to assess whether or not the services and funds being provided were sufficient to meet the requirements set forth by existing legislation and standards. In this approach, the existence of a service disparity or service gap would be the trigger for provision of Jordan's Principle protections. The potential for federal–provincial collusion highlighted by PLBC & Marina Beadle v. Attorney General of Canada suggests 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 administrative 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 suggested 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 (First Nations Chiefs of New Brunswick et al., 2011). Recent testimony from a senior AANDC official at the Canadian Human Rights Tribunal confirmed that the process could be lengthy. In one example, the AANDC official testified regarding the case conferencing process for an on-reserve, Status First Nations 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 (Baggley, 2014b). Additionally, the requirement that the provincial normative standard be determined prior to payment seems to imply that services will be only be covered in accordance with provincial standards. There is no indication of an alternative to a lengthy legal challenge if, as in the case of PLBC & Marina Beadle v. Attorney General of Canada, the provincial standard itself is in question.

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 administrative response appears to involve formalization of the same type of potentially lengthy case conferencing process that occurred for Jordan River Anderson. The federal–provincial working group in Manitoba proposed an alternative case conferencing process (Terms of Reference Officials Working Group, 2009). 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 administrative response does not appear to specify a formal mechanism for repayment of funds dispensed for 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" (AANDC, 2013, para 6). The New Brunswick agreement further specified that in a case where there was no current service provider, the government or agency of first contact would be liable for payment of new services until the resolution of the jurisdictional dispute (First Nations Chiefs of New Brunswick et al., 2011). However, we did not find any specification of a formal timeline for ensuring repayment of costs incurred by a current service provider, or government or agency of first contact.

We also did not find any indication of a source for compensation funds in the event that a focal point 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 (Government of Canada, 2012). This fund was intended to "provide interim funding to cover the costs of a child's care in the event of a jurisdictional dispute" (Government of Canada, 2012, p. 19). 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 (Government of Canada, 2012). We found no indication that other funds have been designated for repayment in such cases (Government of Canada, 2012). 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" (First Nations Chiefs of New Brunswick et al., 2011, p. 3). Thus, the current administrative response appears to create a risk that, in some circumstances, governments or agencies honouring a child first principle may not be reimbursed.

The potential for repayment is even more tenuous for First Nations service providers, which are responsible for the provision of a large, and increasing, proportion of health and social services in First Nations communities (Sinha & Kozlowski, 2013; Smith & Lavoie, 2008). 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" (First Nations Chiefs of New Brunswick et al., 2011, p. 5). However, there is much less clarity around the reimbursement process if a First Nation or First Nations agency, as the current service provider, or government or agency of first contact, pays for services during case conferencing and dispute 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 & Marina Beadle v. Attorney General of Canada, the federal government argued that PLBC was not entitled to compensation for these costs, stating that, "if 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" (Attorney General of Canada, 2012, p. 672).

Accordingly, it appears that First Nations service providers cannot expect their costs to be reimbursed under the current administrative response. When the expenses represent a significant proportion of the service provider's budget, the block funds they have available to provide services to other children may be depleted. Thus, this aspect of the administrative response may have the perverse effect of *creating* new situations in which First Nations service providers lack the resources to provide on-reserve children with the same level of service available to their off-reserve counterparts. Indeed, in the PLBC case, federal officials recognized that PLBC could not sustain the cost of Jeremy's care, indicating that if

PLBC were to cease funding respite services, the options for Jeremy's care would be institutionalization or out-of-home placement through the child welfare system (Were, 2011).

Exclusion of First Nations

The potential burden that the current administrative response imposes on First Nations is even more problematic given that collaboration with First Nations in developing and implementing this response has been mixed, at best. Manitoba and British Columbia both have bipartite agreements (Government of Canada, 2012), to which First Nations were not party. Both the British Columbia Assembly of First Nations (2012) and the Assembly of First Nations Special Chiefs Assemblies (2008) 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. In Saskatchewan, Jordan's Principle agreement negotiations began in a trilateral fashion, but ended in a bilateral agreement after FSIN withdrew from Jordan's Principle agreement negotiations citing concern around the wording used in the agreement (Lerat, 2012). In addition, definitional differences between government authorities and First Nations authorities in terms of the scope of Jordan's Principle were evident in the documents we reviewed from British Columbia, New Brunswick, and Saskatchewan (FSIN et al., 2009; First Nations Chiefs of New Brunswick et al., 2011; Government of British Columbia & Government of Canada, 2011). Finally, there is also some suggestion of exclusion of First Nations in other jurisdictions. For example, noting that an existing tripartite agreement between Mi'kmaw Family and Children's Services (Government of Canada, 2012), which included a mechanism for "resolving JP [Jordan's Principle] type issues" (Government of Canada & Government of Nova Scotia, 2010), 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 (Government of Canada & Government of Nova Scotia, 2010).

First Nations were also excluded from participating in implementation of the administrative response to Jordan's Principle. At the national level, the AFN made numerous attempts to ensure First Nations participation in the designation and training of Jordan's Principle focal points, but were not included in these processes (AFN National First Nations Health Technicians, 2009). There are some indications of First Nations participation at the provincial level; for example, engagement of the Chiefs of New Brunswick in negotiating the dispute resolution process in that province (Baggley, 2014a). However, the nature and extent of the inclusion of First Nations representatives in these implementation processes is unclear. Additional information regarding partnerships with provincial or national First Nations organizations was notably absent in the documents we reviewed.

Exclusion of First Nations from the development and implementation of an administrative 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 (Blackstock, 2009). Moreover, it is directly associated with 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 (Auditor General of Canada, 2008; Blackstock, Cross, George, Brown, & Formsma, 2006; Sinha & Kozlowski, 2013; Smith & Lavoie,

2008). Thus, the provincial and federal governments have a moral and ethical 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 referrals from Aboriginal communities (Health Canada, 2010). It is also in keeping with a worldwide focus on supporting stakeholder engagement in policy development and implementation in order to improve governance (The World Bank, 2011).

Lack of Transparency and Accountability Mechanisms

Along with stakeholder participation, accountability, and transparency are recognized as integral elements of democratic governance and protection of human rights (Kaufmann, 2004; United Nations & Office of the High Commissioner for Human Rights, 2007). Our review of the administrative response to Jordan's Principle indicates that transparency of Jordan's Principle processes and outcomes is severely lacking. The process for pursuing a Jordan's Principle case is unclear; focal points are not always easily identifiable. AFN health technicians previously indicated that, in many regions, First Nations had no idea who the regional focal points were (AFN National First Nations Health Technicians, 2009). We attempted to locate focal points while researching this article. We found no contact information on the internet but were able to identify focal points in most regions through calls to AANDC and FNIHB regional offices. In some instances, focal points were easily identified by the person answering the phone. However, in others, identification was only possible after Jordan's Principle and the focal point role was explained to the person answering the phone; in some cases, several call transfers and discussions with multiple federal employees were required.

Moreover, we were unable to locate any publically accessible documentation of the procedures followed once a case is brought to the attention of a focal point. Even basic documentation of Jordan's Principle policies was difficult to obtain. The bilateral and 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 turned over.[4] 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 First Nations Child and Family Caring Society et al. v. Attorney General of Canada (2014) case into the public domain, the sharing of information by other Aboriginal organizations and advocates, and the filing of provincial level access to information requests. Still, it was time consuming and difficult to piece together information needed to describe the processes for pursuing a Jordan's Principle case.

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 (Government of Canada & Government of Nova Scotia, 2010, p. 2; see also INAC, 2010). A recent disclosure at the First Nations Child and Family Caring Society et al. v. Attorney General of Canada (2014) tribunal hearing included federal documentation of 27 "Jordan's Principle related" cases, but did

[4] 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.

not include any indication of the timing or duration of case conferencing processes. It did indicate that case conferencing and 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, 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 to resolve Jordan's Principle cases.

The lack of transparency around the administrative 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 to ensure that the administrative response functions in accordance with Canada's national and international obligations, is currently unavailable. Drawing on a human rights framework, UNICEF Canada (2012) 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" (p. 4):

- 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. (UNICEF Canada, 2012, pp. 4-5)

Conclusion

Federal officials have publicly stated that they know of "no Jordan's Principle cases" in Canada (Government of Canada, 2012; INAC, 2010). However, multiple sources of evidence suggest the existence of cases which fall within the scope of Jordan's Principle, as originally envisioned and endorsed by the House of Commons. In addition to the First Nations Child and Family Caring Society et al. v. Attorney General of Canada (2014) case, there is another human rights case under review at the

Canadian Human Rights Commission alleging inequitable service provision for Status First Nations individuals (AANDC, n.d.; N. E. MacDonald, 2012; Robinson, 2014). There are also reports that Norway House Cree Nation paid for services for 37 children that were denied in-home medical and social services due to a jurisdictional dispute between federal and provincial agencies in 2008 (Blackstock, 2008b, 2009; Lett, 2008b). Moreover, recent research on the experiences and perceptions First Nations people documents perceptions that Status First Nations children have experienced delay, denial, or disruption of health and social services ordinarily available to other children (First Nations Information Governance Centre, 2012; Woodgate, 2013). These perceptions of service inequities are supported by strong documentation of gaps in, and/or chronic underfunding of, on-reserve health and social services (Auditor General of Canada, 2008; Blackstock, Prakash, Loxley, & Wien, 2005; Committee on the Rights of the Child, 2012; House Standing Committee on Public Accounts, 2010; King, 2012; Loxley et al., 2005; McDonald & Ladd, 2000; Terms of Reference Officials Working Group, 2009).

Our analysis suggests that the claim that there are no Jordan's Principle cases in Canada flows from an administrative response that severely narrows both the child population and the range of jurisdictional disputes to be considered under Jordan's Principle. The Federal government's administrative response excludes most First Nations children from Jordan's Principle protections, thereby potentially creating disparities between different groups of First Nations children. Moreover, our analysis suggests that the current administrative response 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 Status First Nations child living on-reserve must know, or at least suspect, that they are being denied services that would normally be available to off-reserve 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, potentially lengthy, formal case conferencing process. Only once normative provincial standards have been assessed and a jurisdictional dispute has been declared by both federal and provincial governments will the costs of services be covered.

Even then, there is no consistent payment or repayment mechanism to ensure that a service provider assuming 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 who disagree with the resolution reached through the formal case conferencing process. Moreover, even if case conferencing yields needed services for a specific First Nations child, there is little indication that resolution of a Jordan's Principle case leads to underlying service inequities being addressed at a systemic level. Accordingly, the administrative response to Jordan's Principle falls far short of realizing a "child first principle," which systematically prioritizes the best interests of First Nations children and ensures that they receive services in accordance with the human rights principles and constitutional mandates that Canada is obligated to uphold. A new approach to implementing Jordan's Principle—one that starts with consideration of Canada's legal and ethical obligations to uphold the human rights of First Nations children, prioritizes the clinical needs of vulnerable children over administrative concerns, and engages First Nations as full partners—is required.

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