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From the House of Commons Resolution to *Pictou Landing Band Council and Maurina Beadle v. Canada*: An Update on the Implementation of Jordan's Principle

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Jordan's Story

Jordan River Anderson was a child from Norway House Cree Nation in Manitoba. He 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 (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, 2008). Jordan remained in hospital while conflicts between the federal and provincial governments continued for more than two years. The disputes ranged from disagreements over funding for foster care to conflicts over payment for smaller items such as a showerhead (MacDonald & Attaran, 2007). In 2005, Jordan died in hospital, at the age of five, never having had the opportunity to live in a family home (King, 2012).

For Jordan, tragic delays in services resulted from a jurisdictional dispute which emerged because provincial and federal government departments disagreed on who should bear financial responsibility for necessary home care services, which were normally available to off-reserve children (Blackstock, Prakash, Loxley, & Wien, 2005). Status First Nations individuals are particularly vulnerable to jurisdictional disputes due to their unique status under Canadian law and policy (Blackstock et al., 2005; Nathanson, 2010). The federal government generally finances provincially/territorially regulated health and social services on-reserve, while provincial/territorial governments have sole responsibility for health and social

services to non-Status or off-reserve individuals.¹ There is increasing evidence of factors which could potentially contribute to jurisdictional disputes between governments or government departments over funding of services for children living on-reserve. These factors include: the systematic underfunding of on-reserve services by the federal government (Auditor General of Canada, 2008; McDonald & Ladd, 2000), federally/provincially recognized disparities in the services normally available to children on- and off-reserve (Auditor General of Canada, 2008; Terms of Reference Officials Working Group, 2009), and ambiguities in the delineation of federally and provincially funded on-reserve services (Federation of Saskatchewan Indian Nations, 2008).

Jordan's Principle is a child-first principle named in memory of Jordan River Anderson. The goal of Jordan's Principle is to ensure that Status First Nations children are not subjected to delay, denial, or disruption of needed services due to disputes between governments or government departments. It is intended to ensure equitable treatment of First Nations children, in accordance with Canada's national and international obligations (First Nations Child and Family Caring Society [the Caring Society], 2011). Jordan's Principle was unanimously endorsed by the Canadian House of Commons (Private Member's Motion M-296, 2007) and the federal government began implementing a response to Jordan's Principle in 2008. Federal and provincial efforts to translate this policy endorsement into law are detailed below.

This article draws from a comprehensive review of Jordan's Principle-related government documents, non-governmental agency reports, and academic articles (see Blumenthal & Sinha, 2014) to describe the steps that the federal government has taken to implement an administrative response to Jordan's Principle, and to outline some of the major limitations in the scope of that response. It also provides an overview of a legal case which centers on Jordan's Principle and raises troubling questions about the extent to which Canada has implemented Jordan's Principle (*Pictou Landing Band Council and Maurina Beadle v. the Attorney General of Canada [PLBC v. Canada]*, 2013). The Federal Court decision in this case has been appealed by the federal government, and the goal of this article is to provide readers with the background required to understand the context and importance of the upcoming appeal hearing.

The Implementation of Jordan's Principle

Working with advocates from across the nation and around the world, the First Nations Child and Family Caring Society (the Caring Society) has spearheaded Jordan's Principle advocacy since 2005. Jordan's Principle was first articulated in a series of extensive research reports that examined First Nations child welfare service funding (known as the *Wen:de* reports; for details see MacDonald & Walman, 2005). A motion (M-296) stating 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 on December 12, 2007. Debate on the principle considered its applicability to all First Nations children. Member of Parliament (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

1 While some have stated that the federal government is obligated through the Constitution Act (1982) to finance services for First Nations individuals (Boyer 2003), the federal government has argued that their funding of on-reserve services (particularly health services) is a matter of policy, not legal obligation (Boyer, 2004; Romanow, 2002).

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. (Blaney, 2007)

MP Blaney's paraphrasing of Jordan's Principle corresponds to the position of the Caring Society, which defines Jordan's Principle as applicable in situations where "a jurisdictional dispute arises between two government parties (provincial/territorial or federal) or between two departments or ministries of the same government" (the Caring Society, n.d.). As of May 2014, more than 8,000 individuals and organizations have signed on as supporters of Jordan's Principle through the Caring Society's website, including: the Assembly of First Nations (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 (the Caring Society, n.d.).

The endorsement of Jordan's Principle by the House of Commons in 2007 provided the mandate for a child-first principle. Subsequently, several provincial and national level legislative efforts attempted to specify the measures needed for effective implementation. Legislative efforts to codify Jordan's Principle were undertaken in the Canadian House of Commons in 2008 (Bills C-563 and C-249), the Yukon in 2006 (Motion 700), and Manitoba in 2008 and 2009 (Bills 203, 233 and 214; see also Bourassa, 2010; Lett, 2008a, 2008b; Nathanson, 2010). These bills attempted to define: what qualified as a jurisdictional dispute, how payment mechanisms would be implemented, and who would preside over dispute resolution processes. None of the bills proceeded beyond first reading.

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. Bi-partite agreements were reached in Manitoba, Saskatchewan, and British Columbia. Tripartite agreements (agreements between federal and provincial governments and First Nations) were reached in Nova Scotia and in New Brunswick, where the latter's legislative assembly mandated the government to pursue a tripartite agreement in 2010 with Motion 68 (Canadian Paediatric Society, 2012; Government of British Columbia & Government of Canada, 2011; Government of Canada, 2010; Indian and Northern Affairs Canada [INAC]² & Federal Interlocutor for Métis and Non-Status Indians, 2010). By 2012, the federal government stated that all provinces "have been engaged in discussions [about Jordan's Principle] and have put joint processes in place" (Government of Canada, 2012, p. 17).

While information about the actual administrative response flowing from Jordan's Principle agreements is limited, the federal government has indicated that it focuses on cases which meet the following five criteria:

1. A First Nations child who has status or is eligible to have status is involved;

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 have used these names in accordance with the source documents from which we drew information.

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 (Aboriginal Affairs and Northern Development Canada [AANDC], 2013).

Thus, the administrative response has a much more limited focus than Jordan's Principle itself, which was intended to apply to all Status First Nations children in need of health, social, educational, or other services normally available to non-Aboriginal children (MacDonald & Walman, 2005). Neither the text of M-296 nor MP Blaney's comments on behalf of the government indicate that Jordan's Principle would apply only to children with multiple disabilities requiring services from multiple providers. The narrow focus of the administrative response limits the potential benefits of child-first protections and, in denying these protections to others, potentially introduces new disparities in the services available to different groups of Status First Nations children.

Building on non-legislative agreements, federal and provincial governments have developed dispute resolution mechanisms for addressing cases that fit their administrative response criteria. However, the available evidence suggests that these mechanisms essentially formalize the case conferencing process which led to tragic delays in services for Jordan River Anderson. In a 2009 appearance before the Standing Committee on Aboriginal Affairs and Northern Development, a senior INAC official highlighted the case-by-case approach, stating:

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)

"Focal points" are federal employees designated by the government to "help navigate cases within the existing range of health and social services based on the normative standards of care provided to children off-reserve in similar geographic locations" (INAC, 2010, p. 54). Focal points are charged with facilitating case conferencing, assessing the existence of jurisdictional disputes, and determining remedy for the jurisdictional disputes (Robinson, 2011). Our review found that little additional information is publicly available about focal points and details regarding the dispute resolution process are difficult to access. AANDC's description of its administrative response to Jordan's Principle notes that, "the current service provider that is caring for the child will continue to pay for necessary services until there is a resolution"

(AANDC, 2013).³ However, the mechanisms for timely enforcement of this policy, for ensuring payment in cases of requests for new services, and for repayment of funds expended during the case conferencing process are unclear.

Concerns about the administrative response to Jordan's Principle have been noted in a series of independent reviews. UNICEF Canada (2012) found that "there are missing elements that contribute to confusion among stakeholders" and highlighted "concerns that the implementation is construed in a far more limited scope than Parliament intended" (p. 4). In their 2012 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. Eight provinces/territories were rated as "poor," meaning that the jurisdiction had not adopted a child-first policy. Four provinces were rated as "fair," meaning that a child-first policy was adopted but not implemented. Nova Scotia, the only jurisdiction which CPS rated as "good," is also the site of a Jordan's Principle related legal challenge that is discussed in detail below (CPS, 2012).

Legal Appeal Based on Jordan's Principle

Background

Maurina Beadle, a resident of Pictou Landing First Nation, is a 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 Pictou Landing Band Council (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 to meet Jeremy's needs (Champ & Associates, 2011).

By February of 2011, Jeremy's care costs were \$8,200 per month, which was approximately 80% of the monthly home care services budget that PLBC Health Service received from the federal government. The PLBC Health Director was aware of Jordan's Principle and contacted the Health Canada Regional Director (the focal point in this case) to discuss Jeremy's case and to request case conferencing regarding payment for his care. In subsequent case conferences, the provincial representative explained that, in the case of an off-reserve child requiring similar care, the province would allocate a maximum of \$2,200 per month for in-home respite services (*PLBC v. Canada*, 2013).

At the same time that case conferencing was occurring in Jeremy's case, the Nova Scotia Supreme Court was deciding on a case which challenged the legality of the \$2,200 per month cap on in-home respite services (*Nova Scotia Community Services v. Boudreau* [*NSCS v. Boudreau*], 2011). The Boudreau

³ Where details were available in bi/tripartite agreements, the party responsible for payment for needed services, the child's "current service provider," was defined as the agency, ministry, or department that is providing services to a child, or the agency/government of first contact for services (Blumenthal & Sinha, 2014).

family claimed that the cap violated a legislative provision allowing for in-home care funding exceeding the standard maximum in “exceptional circumstances.” On March 29, 2011, the Nova Scotia Supreme Court ruled that Nova Scotia Community Services was obligated to provide in-home care exceeding \$2,200 in cases involving “exceptional circumstances,” which included (among other), situations where “a single care giver [sic] 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” (*NSCS v. Boudreau*, 2011, p. 7). The court also ruled that provision of home care fell under the requirement to “furnish assistance to all persons in need” mandated by the 1989 Nova Scotia *Social Assistance Act*. Importantly, the ruling noted that departmental discretionary regulations and policies do not take precedence over legislation.

The PLBC Health Director attached a copy of the *NSCS v. Boudreau* court ruling to a formal request that federal authorities provide additional funding for Jeremy’s in-home care. AANDC officials responded, reiterating that Jordan’s Principle did not apply in this case because there was no jurisdictional dispute; provincial and federal government agencies were in agreement that services provided to Jeremy should not exceed \$2,200 per month (*PLBC v. Canada*, 2013). They further noted that Jeremy did, however, meet the criteria for placement in institutional care (*PLBC v. Canada*, 2013). The cost of the institutional care was estimated to be approximately \$10,500 per month, an amount which was nearly 30% more than the cost of Jeremy’s in-home care (Robinson, 2011).

Pictou Landing Band Council and Maurina Beadle v. Canada

In June 2011, PLBC and Marina Beadle filed an application for judicial review in Federal Court, claiming the AANDC decision was a violation of the Nova Scotia *Social Assistance Act*, Jordan’s Principle and the *Charter of Rights and Freedoms* (hereafter the *Charter*; 1982). The applicants argued that Jordan’s Principle is an essential mechanism for ensuring protection from discrimination on the basis of race, national/ethnic origin, or colour that is guaranteed by section 15 (1) of the *Charter*, and that the AANDC decision constituted a violation of section 15 (1) (Champ & Associates, 2011).

The respondent, the Attorney General of Canada, argued that Jordan’s Principle did not apply in this case. They suggested that because the province and federal government agreed, there was no jurisdictional dispute, and Jordan’s Principle did not apply. They further argued that, because the province had not yet enacted policy changes to comply with the *NSCS v. Boudreau* ruling, the \$2,200 per month limit remained the normative provincial standard (Attorney General of Canada, 2012). Finally, the government argued that PLBC was not entitled to reimbursement for the cost of Jeremy’s care. They stated:

While the applicants have a right to seek judicial review regarding the [focal point/AANDC representative’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. (Attorney General of Canada, 2012, p. 672)

Accordingly, Canada argued the decision did not violate the *Charter*, and that Jeremy was treated no differently than any other Nova Scotian with similar needs.

Federal court ruling

On April 4, 2013, the Federal Court ruled in favour of Maurina Beadle and the Pictou Landing First Nation, finding that Jordan's Principle is binding on the Government of Canada and ordering AANDC to reimburse Pictou Landing for costs associated with Jeremy's care (*PLBC v. Canada*, 2013). The court found that, in assigning Jordan's Principle focal points, the federal government accepted the task of implementing Jordan's Principle and 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 AANDC's decision 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 [Social Assistance Act]* 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 v. Canada*, 2013, p. 31)

In 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 v. Canada*, 2013, p. 28)

The ruling stated that "the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards." It further highlighted the cost of Jeremy's in-home care, noting that it was equal to 80% of the PLBC personal/home care service budget, and concluding that, "this is not a cost that the PLBC can sustain" (*PLBC v. Canada*, 2013, p. 34).

Accordingly, the court ruled that Jeremy did qualify for in-home care funding greater than \$2,200 per month, quashed the AANDC decision, and directed the federal government to reimburse the PLBC for Jeremy's in-home care without delay (*PLBC v. Canada*, 2013). This ruling can be read as setting a precedent that a jurisdictional dispute exists if program standards and/or provincial legislation require on-reserve services that are not funded by the federal government.

Appeal

On May 6, 2013, the Attorney General of Canada appealed the decision in *PLBC v. Canada* to the Federal Court of Appeal (Department of Justice, 2013). The Notice of Appeal filed by Canada argues that: the Court erred in the interpretation and application of Jordan's Principle; the decision was unreasonable; that the remedy granted to the respondents was wrong; and other grounds to be determined (Department of Justice, 2013). On January 29, 2014, both Amnesty International and the Caring Society were granted intervener status in the *PLBC v. Canada* legal appeal; the Assembly of Manitoba Chiefs was granted

intervener status on February 20, 2014 (Federal Court of Appeal, 2014a, 2014b). Interveners in a case may only present arguments that the applicants (PLBC and Maurina Beadle) will not present. Amnesty International will present arguments that focus on the AANDC manager's decision (the focal point) to deny services to Jeremy in light of Canada's international human rights obligations, while the Caring Society will present arguments focusing on the meaning and spirit of Jordan's Principle as a child-first principle (Hensel Barristers, 2014; Stockwoods LLP Barristers, 2014). The hearing of the appeal is scheduled for September 8, 2014 (Blackstock, 2014).

Conclusion

Jeremy Meawisige's case, in many ways, exemplifies the type of situation that the federal government's administrative response to Jordan's Principle claims to address. This administrative response is limited in scope, yet Jeremy fits within the narrow parameters defined by AANDC. He is Status First Nations, ordinarily resident on-reserve, and has "been assessed by health and social service professionals and [...] been found to have multiple disabilities requiring services from multiple providers" (AANDC, 2013). Additionally, he resides in Nova Scotia, the only jurisdiction in which Jordan's Principle implementation has been rated "good" by the Canadian Paediatric Society (CPS, 2012). Moreover, the *NSCS v. Boudreaux* (2011) ruling provided a clear and explicit description of the "normative standards of care provided to similar children in a similar geographic location" (AANDC, 2013).

That Jordan's Principle was not honored under these circumstances raises troubling questions about the extent to which Canada is implementing Jordan's Principle, even within the narrow parameters it has outlined. Although the *PLBC v. Canada* ruling did not explicitly challenge this narrowing, the court strongly endorsed the federal obligation to implement Jordan's Principle as a child-first principle that ensures Status First Nations children with multiple disabilities and service providers are not subject to delay, denial, or disruption of services because of federal government failure to fund services that are in keeping with provincial legislation and standards. Thus, the ruling in *PLBC v. Canada* is an important step towards ensuring timely and equitable services for some of the most vulnerable First Nations children. It remains to be seen, however, whether the ruling's indictment of the federal government's administrative response to Jordan's Principle will withstand appeal. In addition, it remains to be seen whether action will be taken to extend child-first protections to the wider population of Status First Nations children who are not currently addressed by the administrative response to Jordan's Principle.

For more information about Jordan's Principle and for updates on the government's appeal to PLBC v. Canada, visit: www.jordansprinciple.ca.

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