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## Addressing Critical Gaps in Service Provision for First Nations Children in Canada: The Establishment and Expansion of Jordan's Principle

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## Abstract

In 2007, the House of Commons unanimously passed a motion calling for the federal government to adopt Jordan's Principle. This child-first principle was intended to address jurisdictional disputes over the provision of services for First Nations children. The motion itself was vaguely worded—requiring no funding increases or new services for First Nations children—and allowed the federal government to implement a very narrow interpretation of Jordan's Principle. This narrowed scope applied only to on-reserve First Nations children with complex health issues and who were caught in a jurisdictional dispute. First Nations advocates then engaged in several legal challenges in order to strengthen and broaden the implementation of Jordan's Principle. In 2016 the Canadian Human Rights Tribunal (CHRT) ordered the federal government to immediately end discrimination against First Nations children and implement Jordan's Principle in full. Through subsequent compliance orders the CHRT increased the scope of Jordan's Principle to include all First Nations children living on or off a reserve—regardless of the presence of medical conditions or a jurisdictional dispute. Jordan's Principle now has the opportunity to address critical service gaps and increase the well-being of First Nations children throughout Canada. However, it remains to be seen if Canada will fully comply with the CHRT's order, and how the federal government will work with the provinces to implement Jordan's Principle.

*En 2007, la Chambre des Communes a voté à l'unanimité une motion demandant au gouvernement fédéral d'adopter le Principe de Jordan. Ce principe entend résoudre les conflits de juridictions sur la fourniture des services offerts aux enfants des Premières-Nations. La motion elle-même était rédigée de manière vague—n'imposant aucun coût supplémentaire ni nouveaux services pour les enfants des Premières-Nations—permettant au gouvernement de mettre en œuvre une interprétation restrictive du principe de Jordan. Dans cette interprétation limitée, le principe ne s'applique qu'aux enfants des Premières-Nations vivant dans une réserve, ayant des problèmes de santé complexes problèmes et objets d'un conflit de juridictions. Les défenseurs des Premières-Nations ont alors attaqué en justice afin de renforcer et élargir la portée de la mise en œuvre du Principe de Jordan. En 2016, le Tribunal Canadien des Droits de la Personne (TCDP) a requis que le gouvernement fédéral mette fin à la discrimination contre les enfants des Premières-Nations et mette pleinement en œuvre le Principe de Jordan. Utilisant des ordonnances de conformité, le TCDP a élargi la portée du Principe de Jordan à tout enfant des Premières-Nations, qu'ils vivent dans une réserve ou non, et indépendamment de leur problème de santé et qu'ils soient pris ou non dans un conflit juridictionnel. Le Principe de Jordan peut désormais combler les lacunes graves dans les services offerts aux enfants des Premières-Nations et ainsi améliorer leur bien-être. Il reste à voir cependant si le Canada se conformera pleinement aux directives*

*du TCDP et comment le gouvernement fédéral travaillera avec les provinces pour mettre en œuvre pleinement le Principe de Jordan.*

### Key Messages

- Since 2005, First Nations advocates have fought for the adoption and full implementation of Jordan’s Principle—a child-first principle for resolving jurisdictional disputes in service provision for First Nations children.
- Despite the formal adoption of Jordan’s Principle by the House of Commons in 2005, First Nations children continued to face significant barriers when accessing services.
- As of the Canadian Human Rights Tribunal’s 2017 compliance order, Jordan’s Principle now applies to all First Nations children, regardless of the presence or absence of medical conditions and jurisdictional disputes.

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### Messages-clés

- *Depuis 2005, les défenseurs des Premières-Nations ont lutté pour l’adoption et la réalisation du Principe de Jordan en son intégralité—un principe qui place l’intérêt de l’enfant en priorité afin de résoudre les conflits juridictionnels à propos de la fourniture de services aux enfants des Premières-Nations.*
- *En dépit de l’adoption formelle du Principe de Jordan par le Chambre des Communes en 2005, les enfants des Premières-Nations ont néanmoins continué de rencontrer de nombreuses barrières dans l’accès aux services nécessaires.*
- *À partir de l’ordonnance de conformité du Tribunal Canadien des Droits de la Personne en 2017, le Principe de Jordan s’applique maintenant à tous les enfants des Premières-Nations, indépendamment de l’état de santé ou des conflits juridictionnels.*

## 1 BRIEF DESCRIPTION OF THE HEALTH POLICY REFORM

In 2005, a five-year-old First Nations child named Jordan River Anderson died in a hospital far away from his home in Norway House Cree Nation, Manitoba (JPWG 2015). Although there are conflicting accounts of Jordan’s story in the literature, it is clear that Jordan was born with complex medical needs that, in the first two years of his life, necessitated he remain in a Winnipeg hospital located far from his family’s home (Blackstock 2016; Blumenthal and Sinha 2015). Shortly after his second birthday, however, his medical team recommended that he be moved to a specialized foster home in Norway House, where his medical needs could be met in a more comfortable environment than the hospital. Jordan, however, did not receive the opportunity to be cared for in a family setting due to a two-year dispute between the provincial and federal governments over who should pay for the specialized in-home services provided by the foster home.

The Manitoba provincial government argued that the federal government was responsible for paying for the specialized in-home services, as they were being provided on a reserve, while the federal government felt the foster home fell under the jurisdiction of the province (FNCFCFS 2005; JPWG 2015). Shortly after Jordan’s passing, the First Nations Child & Family Caring Society (FNCFCFS) released *Wen:de We Are Coming to the Light of Day*, which documents the health and welfare of First Nations children in Canada. The *Wen:de* reports situated Jordan’s case in the broader systemic problem of underfunded and poorly coordinated child and family services for First Nations people. The reports also recommended the adoption of a *child-first principle*—named after Jordan River Anderson—that would require “the government (provincial or federal) who first receives a request for payment of services for a First Nations child [to] pay without disruption or delay when these services are otherwise available to non Aboriginal children in similiar [sic] circumstances” (FNCFCFS 2005, 17). In 2007, the House of Commons unanimously adopted the following motion (No. 296), based on the recommendations of the *Wen:de* reports:

That, in the opinion of the House, 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 (HCC 2007a).

The member of parliament who introduced Motion No. 296, Jean Crowder, made multiple references to the *Wen:de* reports in her presentation of the motion, and clearly intended the motion to reflect the recommendations of the FNCFCFS (HCC 2007a). Despite Jean Crowder’s intentions, this particular type of motion—also referred to as a resolution—could not compel the federal government to pursue any specific course of action. While the government did indeed implement Jordan’s Principle, the scope of the principle was narrower than the FNCFCFS desired and applied only to First Nations children who met the following criteria: 1) living on a reserve, 2) suffering from complex combinations of health conditions, and 3) encountering a clear jurisdictional dispute in service provision (Government of Canada &

Government of Nova Scotia 2010). First Nations advocates engaged in nearly a decade of legal challenges, which culminated in 2016 with a ruling from the Canadian Human Rights Tribunal (CHRT) (FNCFCFS 2016). The CHRT declared that the federal government had wrongfully discriminated against First Nations children and, as part of their ruling, ordered the immediate and full implementation of Jordan's Principle (FNCFCFS 2016). While Canada has yet to fully comply with the CHRT's orders, the principle now applies to all First Nations children regardless of where they live or the severity of their health conditions (CHRT 2017).

## 2 HISTORY AND CONTEXT

### 2.1 Major events in the history of Jordan's Principle

**2005:** FNCFCFS publishes *Wen:de We Are Coming to the Light of Day*, which recommends the immediate adoption of a child-first principle, named after Jordan River Anderson (FNCFCFS 2005; 2016).

**February 2007:** The AFN and the FNCFCFS file a complaint with the Canadian Human Rights Commission accusing Canada of discriminating against First Nations children (FNCFCFS 2016).

**December 2007:** The House of Commons unanimously adopts Motion No. 296, recommending the adoption of a child-first principle based on Jordan's Principle (JPWG 2015).

**February 2010:** During a federal-provincial exploratory meeting, the federal government clarifies that Jordan's Principle only applies to cases where a First Nations child resides on a reserve, has multiple disabilities, needs several service providers engaged in their care, and the needed services would normally be available to a child living off reserve. These criteria suggest that the federal government felt provincial governments were responsible for ensuring adequate service provision for First Nations children living off reserve. They also explain that the principle is not a program or service and will not lead to any increases in funding (FNCFCFS 2016; Government of Canada & Government of Nova Scotia 2010).

**June 2011:** Pictou Landing Band Council & Maurina Beadle take the federal government to court over the limited implementation of Jordan's Principle (FNCFCFS 2016).

**April 2013:** The federal court rules in favour of Pictou Landing Band Council & Maurina Beadle, and forces the federal government to widen the scope of Jordan's Principle to ensure that First Nations children could readily access the same services provided to other children in the province (JPWG 2015).

**January 2016:** The CHRT rules on the human rights complaint filed by the AFN and FNCFCFS in 2007. The CHRT finds that the federal government has been actively discriminating against First Nations children (FNCFCFS 2016).

**April 2016:** The CHRT orders the immediate, full implementation of Jordan's Principle

by the federal government (FNCFCS 2016).

**September 2016:** The CHRT finds that the federal government is still not in compliance with the January ruling. Among other things, the tribunal orders that Jordan's Principle be applied to all First Nations children living on and off reserve (FNCFCS 2016).

**May 2017:** The CHRT issues a third compliance order, which mandates that all cases be processed within 12-48 hours of filing, and forbids the use of case conferencing—discussion between experienced professionals used to determine the needs of a specific child—which frequently delays service provision (CHRT 2017).

**June 2017:** Canada files for judicial review of the CHRT's latest order. They cite specific concerns with the 12- to 48-hour processing time and the provision against case conferencing (FNCFCS 2016; Kirkup 2017).

**November 2017:** The federal government withdraws their request for judicial review after coming to a tripartite agreement with the FNCFCS & AFN and the CHRT (Kirkup 2017).

While the above timeline summarizes the major events in the history of Jordan's Principle, starting in 2005 with the publication of the *Wen:de* reports, it is important to emphasize that Jordan's Principle is part of a much longer history of colonialism and discrimination perpetuated by the Canadian government since its founding. At several points in Canada's history, this colonialism and discrimination took the form of deliberate actions by the government to target the lands, livelihoods, and cultures of Indigenous populations. A clear example of this type of policy is the residential school system, which removed over 15,000 Indigenous children from their homes between 1884 and 1996, and continues to cause intergenerational health effects among some Indigenous populations (Bombay, Matheson, Anisman 2014).

At other times, however, the health of Indigenous communities was, and continues to be, jeopardized more by inaction on the part of the Canadian government. In the case of Jordan's Principle, the service provision issues primarily stemmed from the failure of the federal government to provide the necessary resources and support for Indigenous communities. According to the *Constitution Act* of 1867, the federal government is obligated to provide for the well-being of all Indigenous populations living on a reserve (HCC 2007b). This responsibility was further entrenched by the *Indian Act* of 1876, which declared First Nations populations to be wards of the federal government (Lavoie, Forget, Browne 2010). As reforms to both acts over the years expanded the legal status of First Nations, funding for service provision on reserves failed to keep up with the growing need (Lavoie, Forget, Browne 2010). Jurisdictional disputes increasingly emerged between the provincial and federal governments over service provision for First Nations populations living on reserves. The provincial governments maintained the federal government's constitutional obligations to Indigenous populations, while the federal government continuously argued that provincial governments were required to provide services equally to all children—e.g., if a province

funded foster homes off reserve it must also fund them on reserve (FNCFCFS 2005; HCC 2007b). These opposing arguments also lead to jurisdictional disputes over service provision for Indigenous children living off reserve, and especially those who moved between on and off reserve locations (FNCFCFS, 2005). The federal government also maintained that it was not obligated to pay for most services physically located off reserve, even if the services were provided to First Nations people living on a reserve (FNCFCFS 2005; HCC 2007b). The increasing difficulty associated with accessing sufficient, necessary services set the stage for the conflict between the FNCFCFS, Assembly of First Nations (AFN), and the federal government that would eventually lead to the full implementation of Jordan’s Principle by the CHRT.

### 3 GOALS OF THE REFORM

The original goal of the FNCFCFS, in proposing Jordan’s Principle, was to establish a policy for settling jurisdictional disputes that would prioritize the needs of First Nations children. This policy would require the federal or provincial department that first made contact with a First Nations child/family to immediately pay for all service requests before engaging in any funding disputes (FNCFCFS 2005). In introducing Motion No. 296 to parliament, Jean Crowder echoed the goals of the FNCFCFS, and indicated a desire to prevent service requests made on behalf First Nations children from being unnecessarily delayed or denied (HCC 2007a). Through the course of the CHRT process and compliance orders, the goal of the reform was further broadened as different priorities were brought forth. More specifically, Jordan’s Principle is now also intended to improve the tracking and addressing of key service gaps that continue to disadvantage First Nations children (CHRT 2017).

### 4 FACTORS THAT INFLUENCED HOW AND WHY

#### 4.1 The House of Commons adopted Jordan’s Principle: problems, proposals and politics

Kingdon’s (2003) framework proposes that specific issues are propelled onto the government’s agenda when three interconnected streams—problems, policies, and politics—combine to create a “policy window.” This framework allows for some explanation of why the House of Commons chose to unanimously support Jordan’s Principle, and why this support specifically took the form of a resolution. As the 2005 *Wen:de* reports revealed, Jordan’s case was part of a much larger problem of access to health and child services faced by many Indigenous families (FNCFCFS 2005). The reports also cast Jordan’s case against a backdrop of staggering health inequality between Indigenous and non-Indigenous people in Canada (FNCFCFS 2005; HCC 2007a). The severity of the issues facing First Nations children garnered significant support and attention for Jordan’s Principle from both politicians and the

public. This can be seen in debate over Jordan’s Principle on the floor of the House of Commons, which made continuous reference to the inequitable conditions that First Nations children were facing (HCC 2007a). However, identifying a severe problem is not always sufficient for creating policy. One of the strengths of the *Wen:de* reports is that they not only drew attention to a critical problem, but also proposed a concrete solution—Jordan’s Principle.

The motion that was finally introduced to the House of Commons took on a slightly different form than the FNCFC’s original proposal for a child-first principle. The *Wen:de* reports situated their proposal within a broader list of recommendations that would improve service provision for First Nations children (FNCFC 2005). For example, the reports also recommended a new funding formula for First Nations communities, which would include a jurisdictional dispute resolution system that included First Nations voices and cultural approaches (FNCFC 2005). Jean Crowder, the MP who introduced Motion No. 296, also framed Jordan’s Principle as part of a larger process of reducing inequality for First Nations children (HCC 2007a). As a resolution, however, the motion was not attached to any fiscal obligations or concrete changes in federal policy. The ambiguity inherent in this type of motion benefited Jordan’s Principle in the political stream, as it gave the motion a degree of separation from party and provincial politics. For example, during the floor debate Bloc Québécois member Mario Laframboise voiced his support for the motion while also mentioning repeatedly that certain provinces, like Québec, had already addressed this issue properly and should be under no obligation to change their service provision due to Jordan’s Principle (HCC 2007b). Many members of parliament likely saw this motion as having significant popular support, without requiring a significant political commitment. This lack of substantial political commitment combined with the severity of the issue and the viability of the proposal allowed for the motion’s unanimous adoption.

#### **4.2 The scope of Jordan’s Principle was expanded to encompass all First Nations children: interests, ideas and institutions**

The 3I framework proposes assessing the interests, institutions, and ideas that influence policy decision-making (Lavis *et al.*, 2012). This framework is particularly useful in the case of Jordan’s Principle, as it helps explain how the original idea behind the principle—formally recognized by the adoption of Motion No. 296—progressed into the policy it has become today. Due to the vague nature inherent in resolutions, the competing interests of the primary stakeholders—namely the federal government and First Nations advocates like the FNCFC—heavily influenced the implementation of Jordan’s Principle. The federal government had an interest in addressing gaps in service provision for First Nations children living on a reserve and suffering from multiple disabilities—whom they considered an especially vulnerable population (Government of Canada & Government of Nova Scotia 2010). However, the federal government was not interested in providing new services or significantly altering the allocation of resources for First Nations communities and children.



Meanwhile, the FNCFCs and the AFN were interested in improving service provision for *all* First Nations children living on and off reserve (FNCFCs 2016). They also viewed this single issue as part of a much larger need to address the health disparities faced by First Nations children and end discrimination against First Nations children and families.

The competing interests of the federal government and First Nations advocates were settled at the institutional level through two court cases, which gave the stakeholders an opportunity to justify their interpretations of Jordan's Principle. In the 2013 case, *Pictou Landing Band Council & Maurina Beadle v. Attorney General of Canada*, the court ruled against the narrow interpretation of "jurisdictional dispute" argued by the federal government and the provincial government of Nova Scotia. Until this point, Jordan's Principle had applied only to cases where two governmental departments—not including First Nations authorities—agreed a service dispute existed, and this narrow interpretation resulted in zero instances of jurisdictional dispute being identified between 2007 and 2012 (JPWG 2015). The court's ruling forced the federal government to expand the scope they used in assessing Jordan's Principle cases to ensure service provision for First Nations children always met provincial norms (JPWG 2015). In 2016, Jordan's Principle was further strengthened when the CHRT ruled in favour of the FNCFCs and AFN, declaring that Canada was guilty of discriminating against First Nations children. As part of their initial ruling and subsequent compliance orders, the CHRT widened the interpretation of Jordan's Principle to include nearly all types of service provision for all First Nations children (FNCFCs 2016). It was only at the institutional level that a settlement over the competing interests of the federal government and First Nations advocates was reached. This settlement, in turn, shaped the idea behind the principle into its final form.

## 5 IMPLEMENTATION

As of the CHRT's May 2017 compliance order, Jordan's Principle now applies to all First Nations children living on and off reserve, including those without disabilities or severe short-term medical issues. It also now applies to all government services and requires the governmental department of first contact—whether federal or provincial—to always pay for the required service before seeking funding/repayment from a different department (CHRT 2017). In addition, jurisdictional disputes are no longer necessary conditions for a Jordan's Principle case, and the principle can be applied to services not provided to all children in Canada (CHRT 2017). That said, the CHRT only holds jurisdiction over the federal government, and not the provinces/territories, meaning the federal government must still coordinate with each province/territory to ensure that the principle is upheld (CHRT 2017).

The provision of services has also been radically transformed by the CHRT's compliance orders. While the original May 2017 CHRT compliance order forbade the use of case conferencing and required that all cases be solved within 12-48 hours, the order was amended slightly in November following a tripartite agreement between all parties (CHRT 2017).

Under the revised order, case conferencing can be used when “reasonably necessary” (CHRT 2017, 1). However, service requests must still be addressed within 12 hours for urgent cases and 48 hours for non-urgent cases, and case conferencing cannot impede service provision (CHRT 2017). The amended order allows for service determinations to be longer than 48 hours only when in the best interests of the child, or when addressing service gaps affecting large groups of children (CHRT 2017). Requests for service provision are to be approved whenever a governmental service is available to all other children in the jurisdiction in question, or “to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child” (CHRT 2017, 45). Approval means that the requested service is immediately provided, after which the governmental department of contact may seek reimbursement from another department/government (CHRT 2017). The federal government was also given further instructions for disseminating this information about Jordan’s Principle, including posting information online and developing public education materials (CHRT 2017).

In February of 2018 the Federal Government opened a Jordan’s Principle call centre, and created a network of Jordan’s Principle representatives to oversee the processing of Jordan’s Principle cases (Indigenous Services Canada 2018). Although the CHRT’s 2018 compliance order still stipulates that the governmental department of contact is responsible for initially funding services, the Federal Government and First Nations partners have instead implemented this call centre/representative network model to assess and fulfill Jordan’s Principle cases. Jordan’s Principle representatives ensure that all cases made by First Nations children, families or legal guardians are assessed within the timelines stipulated by the CHRT, and decide if the requested service falls under the guidelines for service provision also outlined by the CHRT (Government of Canada 2018). If a case is approved, the representatives then coordinate service/funding provision as necessary (Government of Canada 2018). If the case is denied, the individual who initiated the service request has one year to contact a Jordan’s Principle representative and initiate an appeal (Government of Canada 2018)

In terms of funding, Canada originally pledged \$382 million in 2016, split over three years, to address service gaps and enforce Jordan’s Principle (CHRT 2017). The CHRT (2017) felt that this arrangement was insufficient, and instructed the Government of Canada to revise their funding provision. The federal government was further ordered to develop systems that would track the processing of cases in order to help identify service gaps in each province and territory (CHRT 2017). Despite these efforts, it remains unclear how Canada will engage with each individual province/territory to implement Jordan’s Principle, since the CHRT does not have jurisdiction over provincial governments (CHRT 2018). The CHRT anticipated little resistance to their compliance orders from the provinces/territories—as each has legislation that aligns with the child welfare principles outlined by the CHRT (CHRT 2017). However, in the past the federal government has shifted responsibility for the lack of progress on Jordan’s Principle to the provinces/territories (CHRT 2018), so there is uncertainty over how the two levels of government will work together and with

First Nations communities moving forward.

## 6 EVALUATION

There is not yet sufficient information on the number of Jordan’s Principle cases or the extent of service gaps. According to the federal government, between July 2016 and November 2018, over 171,000 Jordan’s Principle cases were approved (Government of Canada 2018). However, it is impossible to know what percent of possible cases that number represents, or what service gaps might still exist. Approving 171,000 cases is arguably an improvement over the zero cases Canada recognized between 2007 and 2012 (JPWG 2015), but, without a reliable comparison, it is difficult to evaluate how well Canada’s processing and evaluation methods are working.

In February 2017, the CHRT again found that Canada was not in compliance and, as a result, issued a fourth order. While this order did not directly address the implementation of Jordan’s Principle, it did criticize the federal government for using “consultation” as an excuse for not directly implementing reform (CHRT 2018). The CHRT ruled that the federal government could use Jordan’s Principle to immediately address service gaps while engaging in consultation with First Nations groups to develop long-term reform plans (CHRT 2018). This ruling suggests that the federal government may be unnecessarily delaying the implementation of Jordan’s Principle. The CHRT further ordered the federal government to file a report on its compliance by the end of May 2018 and retains jurisdiction over its compliance orders until December 2018 (CHRT 2018). Therefore, the best source of evaluation will likely be future compliance reports and orders.

## 7 STRENGTHS, WEAKNESSES, OPPORTUNITIES AND THREATS

Table 1 presents the potential strengths, weaknesses, opportunities, and threats associated with the adoption and strengthening of Jordan’s Principle from the perspective of the First Nations, Indigenous, and allied advocates involved in the process.

Table 1: SWOT Analysis

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Provides a process for addressing critical gaps in service provision for First Nations children</li> </ul>	<ul style="list-style-type: none"> <li>• Currently framed as an immediate relief measure—unclear how Canada will work with First Nations to develop long-term reform</li> </ul>

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Will improve service provision for issues that are not urgent or life threatening</li> <li>• Allows for better tracking of where service gaps exist</li> </ul>	<ul style="list-style-type: none"> <li>• Does not address service provision for Inuit or Métis populations (CPS 2016)</li> <li>• Does not address service provision for First Nations adults</li> <li>• Unclear how Canada will work with provinces to address service gaps</li> <li>• Does not address issues of autonomy or self-determination for First Nation’s communities</li> </ul>
OPPORTUNITIES	THREATS
<ul style="list-style-type: none"> <li>• Could allow Canada to address underlying systemic issues contributing to poor health outcomes—such as issues with access to housing or food</li> <li>• If combined with the development of new services, could greatly improve First Nations child welfare</li> </ul>	<ul style="list-style-type: none"> <li>• Canada has yet to fully comply with a CHRT order</li> <li>• History of failing to work with the FNCFCS and other First Nations groups to compromise on compliance order disputes (Kirkup 2017)</li> </ul>

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## 9 FOR MORE DETAIL

### 9.1 On Kingdon's framework for examining policy agendas

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