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## Substantive Equality, Self-determination, Administrative Discretion: Lessons from the Implementation of Jordan Principles in Two Provinces

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## Abstract

Canada has an obligation to implement Jordan's Principle in a way that achieves both substantive equality and self-determination. Both these principles require an approach that centres the full participation of First Nations, supports the development and provision of services tailored to culture and context, and enables differentiation across families and Nations. Canada's implementation of Jordan's Principle has relied so heavily on federal employees' use of administrative discretion that it has side-stepped the resource-intensive requirements of self-determination and substantive equality. Some use of administrative discretion is necessary to accommodate the diverse needs and context addressed by Jordan's Principle. However, excessive reliance on administrative discretion reproduces pre-existing, colonial power relations. Implementation of Jordan's Principle in keeping with the principles of self-determination and substantive equality requires: remedying the known gaps in existing policies and funding models that are being addressed through Jordan's Principle; providing First Nations with timely access to meaningful information about what can be funded through Jordan's Principle; ensuring that Jordan's Principle funding is extended on timelines and at levels that allow First Nations to take on responsibilities in tandem with their self-determined priorities; and ensuring First Nations' involvement in all levels of Jordan's Principle decision-making.

*Le Canada a l'obligation de mettre en œuvre le principe de Jordan de manière à réaliser à la fois l'égalité réelle et l'autodétermination. Ces deux principes requièrent une approche qui privilégie la pleine participation des Premières Nations, soutient le développement et la prestation de services adaptés à la culture et au contexte, et permet la différenciation entre les familles et les nations. La mise en œuvre du principe de Jordan par le Canada s'est tellement appuyée sur l'utilisation du pouvoir discrétionnaire des fonctionnaires fédéraux qu'elle a éludé les exigences d'autodétermination et d'égalité réelle, qui nécessitent beaucoup de ressources. Un certain recours au pouvoir discrétionnaire de l'administration est nécessaire pour répondre aux divers besoins et contextes visés par le principe de Jordan. Cependant, un recours excessif au pouvoir discrétionnaire administratif reproduit les relations de pouvoir coloniales préexistantes. La mise en œuvre du principe de Jordan dans le respect des principes d'autodétermination et d'égalité réelle exige de : combler les lacunes connues dans les politiques et les modèles de financement existants qui sont abordés dans le cadre du principe de Jordan ; fournir aux Premières Nations un accès opportun à des informations pertinentes sur ce qui peut être financé dans le cadre du principe de Jordan ; veiller à ce que le financement du principe de Jordan soit étendu dans des délais et à des niveaux qui permettent aux Premières Nations d'assumer des responsabilités en tandem avec leurs priorités autodéterminées ; et assurer la participation des Premières Nations à tous les niveaux de la prise de décision dans le cadre du principe de Jordan.*

### Key Messages

- The implementation of Jordan's Principle across First Nations has resulted in a dramatic expansion of services available to First Nations.
- This expansion has, however, been regulated largely through the administrative discretion of federally employed decision makers.
- As implemented, Jordan's Principle is providing funding to meet the needs of First Nation children without addressing the policy gaps and jurisdictional ambiguities that give rise to unmet needs.
- Reliance on administrative discretion has allowed Jordan's Principle to develop quickly and adapt to context and needs, but it has also reproduced colonial power dynamics that undermine First Nations' self-determination and the pursuit of substantive equality.
- Implementing Jordan's Principle in keeping with the goals of substantive equality and self-determination requires reconnecting Jordan's Principle to existing policy frameworks, making public detailed information about how Jordan's Principle funding is used, providing ongoing, long-term funding opportunities, and ensuring full and meaningful participation of First Nations at every level of Jordan's Principle decision-making.

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### Messages-clés

- *La mise en œuvre du principe de Jordan dans l'ensemble des Premières Nations a entraîné une expansion spectaculaire des services qui leur sont offerts.*
- *Cependant, cette expansion a été réglemantée en grande partie par la discrétion administrative des décideurs employés par le gouvernement fédéral.*
- *Tel qu'il est mis en œuvre, le principe de Jordan fournit des fonds pour répondre aux besoins des enfants des Premières Nations sans combler les lacunes des politiques et les ambiguïtés juridictionnelles qui donnent lieu à des besoins non satisfaits.*
- *Le fait de s'appuyer sur le pouvoir discrétionnaire de l'administration a permis au principe de Jordan de se développer rapidement et de s'adapter au contexte et aux besoins, mais il a également reproduit la dynamique coloniale du pouvoir qui mine l'autodétermination des Premières Nations et la poursuite de l'égalité réelle.*

- *Pour mettre en œuvre le principe de Jordan conformément aux objectifs d'égalité réelle et d'autodétermination, il faut le reconnecter aux cadres politiques existants, rendre publiques des informations détaillées sur la façon dont le financement du principe de Jordan est utilisé, offrir des possibilités de financement continues et à long terme, et garantir une participation pleine et significative des Premières Nations à tous les niveaux de la prise de décision concernant le principe de Jordan.*

## 1 INTRODUCTION

Jordan's Principle is a legal principle that requires the government of Canada to address gaps in services for First Nation children and ensure access to timely, culturally appropriate services that meet their needs and best interests. Starting in 2016, Indigenous Services Canada (ISC), the federal department responsible for Jordan's Principle, has allocated funding to support services through:

- individual requests, which require separate funding requests for each child in need of services, and
- group requests, which support the development of programs and services for multiple children (ISC 2023a, b).

Jordan's Principle covers a broad range of services and supports, extending across the domains of health, social services, and education. These include services such as those provided by health, allied health, and mental health workers, as well as dentists and orthodontists, Elders, traditional healers, respite care workers, and tutors or educational assistants. They also include supports such as transportation and mobility aids, wheelchair ramps, hearing aids, medical supplies and equipment, assistive technologies, and access to land-based and cultural programming. Jordan's Principle can also support housing renovations to accommodate disabilities, substance abuse treatment and, increasingly, provide support for basic needs, such as subsidies for rent, groceries, and clothing (ISC 2023b; Gaspard 2022; Sinha and Knott 2024). Jordan's Principle has transformed the landscape of services for First Nation children in Canada by radically redefining Canada's obligations to First Nation children, dramatically increasing funding for services to First Nation children, and creating new possibilities for First Nations to design and implement services (Sinha et al. 2021, 2022; Sangster et al. 2019). Jordan's Principle requests increased by 625% from 2017-2018 to 2020-2021, with funding for approved requests rising from \$71,625,544 to \$522,852,232 during this period (Gaspard 2022, 32).

Jordan's Principle is intended to address the gaps and inequities in services that arise within a complex Canadian policy framework. Services for First Nation children are supported by a mix of federal and provincial/territorial funding. Programs and services may be operated, funded, and administered by provincial, federal, or First Nations governments, or by independent providers. Arrangements differ by service domain and across Nations, and they are affected by changes in provincial/territorial, federal, and First Nations policies as well as on-going advocacy, and program development (Sinha and Kozłowski 2013; Lavoie et al. 2005; Aboriginal Affairs and Northern Development Canada 2008; Marchildon et al. 2015; Quiñonez and Lavoie 2009; Kyoon-Achan et al. 2021).

Research on federal funding for services for First Nation children shows that, prior to the implementation of Jordan's Principle, well documented funding shortfalls went unaddressed, leading to entrenched gaps and inequities in services that were compounded each time the funding, policies, or service priorities of any government shifted. Studies conducted across multiple domains and decades document persistent governmental failures to: fund services

for First Nation peoples based on actual needs rather than population estimates, update funding to account for inflation and changes in provincial/territorial policies and standards, account for the cost of needed infrastructure improvement and maintenance, and support data collection and research capacity (Auditor General of Canada 2019, 2011, 2008; Royal Commission on Aboriginal Peoples 1996; McDonald and Ladd 2000; Lavoie et al. 2005; KTA 2008). Recent studies show that known funding gaps across a broad range of service domains have persisted even after the implementation of Jordan's Principle (Institute for Fiscal Studies and Democracy 2020; Gaspard 2022). These challenges are compounded in rural and remote communities where unaddressed human resource shortages and costs mean that First Nation peoples may have to leave their home communities or place their children in care of Child and Family Services Agencies (CFS) to access needed services (Lawford, Bourgeault, Giles 2019; Auditor General of Canada 2021, 2015; Jordan's Principle Working Group, 2015; Lavoie 2006; Lavoie et al. 2006).

The failure to properly fund and ensure access to services for First Nation children compounds heightened risks and needs that have been created by colonial (both federal and provincial/territorial) policies and actions. These include the mass separation of First Nation children from their families and communities through the residential school and child welfare systems (Royal Commission on Aboriginal Peoples 1996; Truth and Reconciliation Commission of Canada 2015a, b). The intergenerational impacts of family separation through the residential school system, for example, include increased risks of suicidal ideation, suicide attempts, and mental health distress; CFS involvement; food insecurity; and living in overcrowded and low-income households (Truth and Reconciliation Commission of Canada 2015a, b, c; Bombay, Matheson, Anisman 2014; Barker et al. 2019; Gone et al. 2019; Wilk, Maltby, Cooke 2017; Moon-Riley et al. 2019).

In this article, we draw on findings from three studies on the implementation of Jordan's Principle in Alberta and Manitoba (Sangster et al. 2019; Sangster, Gad, Sinha 2021; Sinha et al. 2022), as well as other existing literature on Jordan's Principle, to examine variation in the implementation of Jordan's Principle between provinces and between First Nations within the province of Manitoba.

## 2 HISTORY AND CONTEXT

Jordan's Principle was initially designed to ensure that First Nation children did not experience denials, delays, or disruptions of service (Blumenthal and Sinha 2015). The Principle is named after Jordan River Anderson, a First Nation child from Norway House Cree Nation, in Manitoba. Jordan was born in 1999. Because his complex medical needs could not be treated in his Nation, he was transferred to a hospital in Winnipeg. In 2001, a hospital-based team recommended he be moved to a specialized foster home closer to his home community. However, neither the federal nor provincial governments accepted financial responsibility for Jordan's in-home care. Jordan remained in hospital as the governments

disputed responsibility for costs, though it was not medically necessary for him to be there. In 2005, he died in hospital, having never had the opportunity to live in a family home (Blumenthal and Sinha 2015).

Grounded in the details of Jordan’s case, Jordan’s Principle originally focused on delays in services experienced by First Nation children due to jurisdictional disputes between governments or government departments over funding for services. The Wen:de report, which examined funding for First Nation’s child welfare noted: “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” (MacDonald and Walman 2005, 107).

The House of Commons passed a unanimous resolution in support of Jordan’s Principle in 2007, and the federal government signed Jordan’s Principle agreements with some First Nations and provinces/territories as early as 2009. The subsequent approach to Jordan’s Principle narrowed its application to cases in which a child, who was normally a resident on reserve and was professionally assessed as having multiple disabilities, would (hypothetically) receive services from multiple providers if they sought services through an off-reserve system in a “similar geographic” location. A 2013 Supreme Court ruling affirmed the federal government’s responsibility to implement Jordan’s Principle and called for it to be more broadly interpreted. Nonetheless, the government continued to interpret Jordan’s Principle so narrowly, and to mandate case conferencing and approval processes so onerous that, as late as 2015, the federal government indicated that it knew of no active Jordan’s Principle cases in Canada (Blumenthal and Sinha 2015; Sinha et al. 2021).

Starting in 2016, a series of Canadian Human Rights Tribunal (CHRT) rulings in *First Nations Child and Family Caring Society & Assembly of First Nations v. Canada (Caring Society v. Canada)* mandated the federal government to fully implement Jordan’s Principle, simultaneously clarifying and expanding its interpretation and application. Through these rulings, the CHRT established that Jordan’s Principle applies to all First Nation children and requires the federal government to address gaps in a broad range of services. It outlined timelines for response to Jordan’s Principle cases: 48 hours after an initial request for services for an individual child (12 hours for urgent requests), and one week for group requests (48 hours for urgent requests). The rulings also established that Jordan’s Principle applies to any child under the age of majority in their province/territory who is registered or eligible to be registered or has a parent/guardian who is registered or eligible to be registered under the *Indian Act*, and to children who are ordinarily a resident on reserve or are recognized by their Nation for the purposes of Jordan’s Principle (Indigenous Services Canada 2018; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* 2017, 2019; *Attorney General of Canada v. First Nations Child and Family Caring Society of Canada et al.* 2021).

Importantly, the CHRT rulings and subsequent federal policy decisions tie governmental obligations around Jordan’s Principle to two key legal standards: substantive equality and self-determination. Analyses of the implementation of Jordan’s Principle have, additionally, highlighted the role of administrative discretion in Jordan’s Principle (see, for example, Sinha et al. 2022).

## 2.1 Substantive equality

The CHRT rulings linked Jordan’s Principle to a standard of substantive equality, establishing an obligation that extends beyond simply providing equal services, to ensuring that children’s real needs and best interests are met in a timely and culturally appropriate way. Canada has interpreted its obligations under the substantive equality standard as one that “requires Canada to provide all First Nation children, on and off reserve, and Indigenous children ordinarily living on reserve, with publicly funded benefits, supports, programs, goods and services in a manner and according to a standard that meets their particular needs and circumstances, on a substantively equal basis with non-First Nation children” (ISC 2019). In addition, the federal government has noted that “Achieving substantive equality for members of a specific group requires the implementation of measures that consider and are tailored to respond to the unique causes of their historical disadvantage as well as their historical, geographical and cultural needs and circumstances” (ISC 2019).

The determination of Canada’s obligations under a substantive equality standard, therefore, must be specific to each individual child, considering complex contextual and historical factors in addition to their needs. Some legal scholars have also argued that substantive equality requires procedural equality; in the context of Jordan’s Principle, this requires the creation and application of structures, procedures, and approaches that facilitate meaningful First Nation participation in every level of decision-making around services for First Nation children (Sinha et al. 2021; Sheppard 2018).

## 2.2 Self-determination

Jordan’s Principle has also been closely linked with the principle of self-determination in existing policy documents. The Assembly of First Nations’ (AFN) handbook on Jordan’s Principle references the *Touchstones of Hope* reconciliation movement (Blackstock et al. 2006) and identifies self-determination as one of the key values that must be accounted for in determining substantive equality (AFN 2018). Similarly, ISC cites the *Touchstones*: “First Nation peoples are in the best position to make decisions that affect First Nation children, youth, families and communities. First Nations peoples must meaningfully participate in the development and implementation of Jordan’s Principle on a regular and ongoing basis” (ISC 2019).

This is in keeping with the Government of Canada’s *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*, which states that “The Government

of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government. This opening Principle affirms the priority of recognition in renewed nation-to-nation, government-to-government, and Inuit-Crown relationships” (Government of Canada 2021). Thus, just as the principle of substantive equality requires both First Nations’ participation in decision-making and case-by-case consideration of the needs of First Nation children, the principle of self-determination requires engagement with, and decision making by, individual Nations.

In addition, while much of the literature on Indigenous self-determination has focused on questions of definitions, legal foundations, and strategies for pursuing self-determination, recent literature also incorporates a focus on human capabilities by building links between self-determination and key constructs in human, community, and economic development. It outlines a complex set of interconnected factors that are integral to the realization of self-determination. These include, but are not limited to, support for the development of new policies and instruments; effective and inclusive collective deliberation and decision-making processes that are grounded in culture and free from “external interference or domination”; and the redressing of structural inequalities that impede the development of local capabilities and the right to self-determination (Murphy 2014, 10; Organisation for Economic Co-operation and Development 2019). These factors also include building “technical infrastructure, policies, interfaces, jobs, and educational programs” to support the sharing of information that “builds communal knowledge about how to deal with the many manifestations of colonialism” (Duarte 2014, 5). From this perspective, self-determination requires the establishment of Nation-to-Nation relationships that enable First Nation decision-making, as well as sustained investment in the capacity enhancement and structural improvements required to support self-determination.

Beyond a focus on human capabilities, self-determination is also a relational concept that recognizes that a sphere of autonomy must exist for both the Canadian state and individual First Nations. Further, self-determination acknowledges that a complex web of existing interconnections and interdependencies places practical and ethical constraints on autonomy and require co-operation (Murphy 2005).

### **2.3 Administrative discretion**

While not mentioned in official Jordan’s Principle policy documents, some analysts have also invoked the concept of administrative discretion as central to understanding the implementation of Jordan’s Principle (Sinha et al. 2021, 2022). Administrative discretion is grounded in a perspective which views policies as written regulations that are embodied in the daily decisions made by “street-level bureaucrats,” (front-line government officials). From this perspective, administrative discretion is an enduring, and perhaps necessary, aspect of the state provisions of services. Street-level bureaucrats require discretion to respond to complex situations in ways that take human and contextual factors into con-

sideration (Lipsky 2010). For example, in the case of Jordan's Principle, administrative discretion is required to tailor services and supports in accordance with a child's unique needs and, in keeping with the principle of substantive equality, to take historical disadvantage into account. Similarly, administrative discretion may be required to implement Jordan's Principle in keeping with First Nations' rights to self-determination.

However, when street-level bureaucrats are guided by inadequate conceptualizations of equity or lack of appropriate training/oversight, administrative discretion can contribute to inequity (Cárdenas and Ramírez de la Cruz 2017). In addition, Maynard-Moody and Musheno (2012) suggest that the decisions of street-level bureaucrats can often extend beyond the limits of rule-based discretion as they strive to establish and preserve the state's organizational framework. Lavoie and colleagues (2010) have illuminated some reasons for this extension of administrative discretion. They argued that, in the context of First Nations, the establishment and preservation of the state's structure requires street-level bureaucrats — such as the government focal points who determine a family/child's eligibility for support through Jordan's Principle — to base their decisions on a convoluted web of federal and provincial funding sources, striking a balance between:

- Enforcing rules (based on their understanding of those rules and their perception of user needs);
- Potentially politicising decisions (when eligibility is refused or needs are not met); and
- Managing ever-tighter budgets.

Finding a balance is difficult because of a policy framework that necessitates that choices to extend or deny eligibility to a child/family must consider program eligibility and jurisdictional accountability in the face of contradicting laws, constantly changing regulations, and jurisdictional uncertainty (Lavoie et al. 2010).

Substantive equality and self-determination are Nation-level concepts that require solutions informed by local knowledge and experience, but ISC and other government departments have been inconsistent in their use of administrative discretion to support these goals. Federal departments dealing with First Nations have at times operated in a centralized fashion, with policies being defined in Ottawa and applied with little regional/local differentiation. At other times, they have operated from a largely regional perspective, extending administrative discretion in ways that allow First Nation organizations to shape policies and program delivery (Lavoie et al. 2005). At times, both approaches have co-existed, with decisions over smaller or newer programs being decentralized, and decisions over larger and older programs (e.g., nursing) remaining largely centralized (Lavoie et al. 2005). Thus, the questions of who exercises administrative discretion, and how much discretion they exercise, have long been intimately tied to the ability to realize self-determination and substantive equality.

### 3 IMPLEMENTATION AND EVALUATION

The implementation of Jordan’s Principle has been shaped by multiple legal rulings, which sometimes set very short timelines for expansive policy analysis and revision (e.g., requiring the government to “take measures to immediately implement the full meaning and scope of Jordan’s Principle”; 2016 CHRT 2). Jordan’s Principle has been the focus of multiple legal actions, including a class action lawsuit that sought compensation for children and families harmed by the narrow application of Jordan’s Principle and governmental failures in child welfare (AFN 2023). In addition, since its original decision in January of 2016, the CHRT has continued to make new rulings in *Caring Society v. Canada*. Thus, a key driver of the implementation of Jordan’s Principle has been a CHRT-mediated dialectical process, in which governmental obligations around Jordan’s Principle have been clarified piece by piece and ruling by ruling.<sup>1</sup>

Within this context, the federal government has taken a decentralized approach in which the implementation of Jordan’s Principle differs greatly across regions. This is clear from evaluations of the implementation of Jordan’s Principle in Manitoba and Alberta (Sangster et al. 2019, 2020; Sinha et al. 2022). As shown in Table 1, these two prairie provinces have similarly sized First Nations and First Nation child/youth populations. First Nations in both provinces moved quickly to implement Jordan’s Principle, yet the shape and trajectory of Jordan’s Principle implementation in the two provinces has differed in important ways that we examine below.

#### 3.1 The structure of Jordan’s Principle services

In Manitoba, where First Nations had been thinking about and advocating for Jordan’s Principle for many years, First Nation leadership and government officials acted quickly to secure funding, extend services across Nations and ensure First Nation responsibility for decision-making for individual Jordan’s Principle requests. Each Nation initially received funding for a case manager, adapted transportation, and respite care. Key, time-limited funding opportunities (e.g., funds for land-based programming) were subsequently extended to all Nations. ISC also entered into agreements with service providers that already contracted with the province to extend allied and mental health services to all Nations in Manitoba. Tribal Councils receive funding for service coordinators tasked with providing training and support for case managers. Tribal Councils and the Eagle Urban Transition Centre in Winnipeg also receive funding for case managers to support off-reserve families in navigating services. Decisions on a wide range of individual requests are made by service coordinators and off-reserve case managers. Organizations hosting service coordinators and off-reserve case managers administer payment for these requests. Group requests, as well as individual requests involving services that are costly or unavailable through a Nation are processed and administered by the federal government (Sinha et al. 2022).

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<sup>1</sup>See Chapter 2 of Sangster, Gad, Sinha 2021 for an overview.

The implementation of Jordan's Principle in Alberta and Manitoba (Sinha et al. 2022; Statistics Canada 2022; Indigenous Services Canada 2020a, b)

	<b>Alberta</b>	<b>Manitoba</b>
Total First Nation population registered under the <i>Indian Act</i>	126,530	127,205
Number of Nations	45	63
% registered First Nations population aged 0-19	37%	42%
Jordan's Principle expenditures		
2017-18	\$12,320,000	\$57,830,000
2018-19	\$40,900,000	\$78,310,000
2019-20	\$84,610,000	\$124,640,000
Trajectory of cases within the fiscal year (submission to approval)		
Individual requests	48% of all submitted requests approved within the 2019-20 fiscal year, 56% deemed to have sufficient information, and 85% of those approved within the fiscal year.	61% of all submitted requests approved within the 2019-20 fiscal year, 68% deemed to have sufficient information, and 90% of those approved within the fiscal year.
Group requests	21% of all submitted group requests approved within the 2019-20 fiscal year, 58% deemed to have sufficient information, and 37% of those approved within the fiscal year.	57% of all submitted group requests approved within the 2019-20 fiscal year, 78% deemed to have sufficient information, and 74% of those approved within the fiscal year.
Group vs. Individual requests	In 2019-20, 93% of services/products funded through group requests.	In 2019-20, 99% of services/products funded through group requests.

Prior to the CHRT rulings in *Caring Society v. Canada*, in Alberta, Jordan’s Principle was primarily understood as being child welfare related. As a result, early action to implement Jordan’s Principle took a more focused form. Experienced representatives from health organizations in four Nations built on their pre-existing relationships and history of working in partnership to form the First Nations Health Consortium (FNHC), which helps families throughout Alberta access Jordan’s Principle funding and supports. FNHC was established to support all First Nation families in the Alberta region in navigating services. FNHC helps connect First Nation families with existing services and also prepares and follows up on individual Jordan’s Principle requests. Decisions on both group and individual requests are made by federal government, at the regional level. FNHC administers payment for all individual requests in Alberta. All other payments are administered by the federal government (Sangster et al. 2019, 2020). Independently, or in partnership with tribal council, each Nation is responsible for developing group funding requests to support provision of services. Thus, in contrast to Manitoba, the provision of services like allied health, mental health, or respite care fully depends on Nations and organizations working with them. By the fall of 2020, fewer than 25% of First Nations in Alberta had established allied or mental health services comparable to those provided off-reserve, through the province.

### 3.2 Expenditures

In both jurisdictions, First Nations acted quickly to support the development of a systematic approach to Jordan’s Principle. By 2019-20, 99% of Jordan’s Principle funded services and products in Manitoba and 93% of Jordan’s Principle funded services and products in Alberta were being funded through group requests that support the development of programs/services rather than case-by-case response to individual requests for services. This systematic approach stood in contrast to the approach in some other regions at that time. For example, in British Columbia only 38% of services/products were funded through group requests (Sinha et al. 2022, 51). As shown in Table 1, Manitoba started with a fairly high level of Jordan’s Principle funding, and funding increased steadily in the following years. Jordan’s Principle expenditures in Alberta were minimal in 2017-2018, while First Nations were working to understand the new opportunities, but (as shown in Table 1) increased in subsequent years as the FNHC and Nation-level projects emerged.

### 3.3 Impact of a discretionary approach

In keeping with an approach to implementation that relies heavily on administrative discretion, people advancing Jordan’s Principle initiatives in both Alberta and Manitoba sought to develop strong relationships with the ISC officials charged with overseeing the implementation of Jordan’s Principles (known as focal points). Focal points are key to accessing resources and successfully navigating complex administrative processes. In Manitoba, a long-term focal point, who previously worked in First Nations, has been instrumental in

advancing a coordinated centralized approach. However, they have also sometimes made major decisions and advanced the implementation of Jordan's Principle without engaging First Nations; the decision to engage specialized service providers to provide services across First Nations is one example. In other cases, this focal point's sharing of information and extension of opportunities across First Nations resulted in a transfer of decision-making from the region to the national office, a measure aimed to limit the focal point's autonomy, and by extension, regional autonomy (Sinha et al. 2022; Sangster et al. 2019, 2020).

In Alberta, where there has been more turnover in federal staff, focal points have approached Jordan's Principle more narrowly, leading to a significant difference in the processing of Jordan's Principle requests across the two provinces. In Manitoba, where most individual level requests are processed by First Nation organizations, 61% of all individual requests submitted in 2019-20 were approved within the fiscal year. In contrast, in Alberta, where individual requests are processed by the regional ISC office, 48% of all submitted requests were approved within the 2019-20 fiscal year. The disparity in processing of group requests was even more pronounced. Group requests were processed by ISC in both regions. In Manitoba, 57% of all submitted group requests were approved within the 2019-20 fiscal year. In Alberta, only 21% of all submitted group requests approved within the 2019-20 fiscal year (Sinha et al. 2022, 60).

Sangster et al.'s (2021) documentation of the development of children's resources in the five Nations served by the Kee Tas Kee Now Tribal Council Health Services (KTC) sheds light on the trajectory of group requests in Alberta. While attempting to sustain, expand, and develop new services, KTC faced ongoing shifts in policies, standards, and expectations for group request submissions. These changes were often communicated only after a request was denied, were profound enough that they sometimes threatened the continuation of funding that KTC had already secured, and were occasionally in clear contradiction of information previously circulated by ISC. Examples of these shifts include a denial on the grounds that group requests needed to include de-identified information on the needs of individual children and plans to address these individual needs. Previous submissions required only the number of children to be served, age/grade range, and information on context/disadvantage. No shift in requirements had been announced, and this change was part of an ongoing pattern of expectations for increased information. KTC administrators were also warned to expect substantial reductions in funding and loss of funds to support prevention services; ISC officials explained that this did not reflect a shift in national policy/standards, but an attempt to bring Alberta standards in line with other regions (ISC 2021a, b).

These challenges in Alberta were layered on top of challenges to the development of new services that affected First Nations in both Alberta and Manitoba. In both provinces, little information was available to guide Nations in understanding the scope of group requests that could be funded. Though informal discussions suggested wide variation in Jordan's Principle funded services across Nations, no information about variation in the nature, structure, and scale of services was publicly available. Consequently, Nations had to guess

at, or dream of, what they could have funded. In addition, First Nations and First Nation organizations in Manitoba and Alberta faced long delays in decision-making when cases were escalated to the National office in Ottawa. Though standards for escalation shifted over time, they seemed to occur whenever requests/approvals in a certain domain (orthodontics or housing renovations, for example) increased and also eventually came to include any request for which denial was recommended at the regional level.

### 3.4 Different pathways for different Nations

Variation in the implementation of Jordan's Principle is also evident in examination of Nations within Manitoba, a province in which extending opportunities to each Nation has been prioritized. Sinha et al. (2022) contrasted two anonymized First Nations within Manitoba that had access to similar opportunities through Jordan's Principle but significantly different outcomes. The two Nations have similarly sized populations (less than 2,000 people), but the contexts in which the populations live differ dramatically.

Nation A is rural, less than half a day's drive from a major service centre, and one hour away from the nearest hospital. The Nation suffers from a housing shortage that is only partially mitigated by available housing in nearby communities. It benefits from relatively easy access to a trained labour force from the closest major service centre and the presence of long-term health and education directors who have fostered good working relationships between service providers and provide stability despite staff turnover. Independent of Jordan's Principle, the Nation has a well-established health centre with an on-site physician, mental health worker, nurses, and a pharmacist, as well as strong partnerships with other health services. Jordan's Principle case managers hired by the Nation have taken on a broad role scaffolded by support from the health director, Nation leadership, regular meetings with other service directors in the Nation, and a Jordan's Principle administrative assistant. Through Jordan's Principle, the Nation has gained access to mental and allied health services provided by organizations serving First Nations across Manitoba and funded: a local rehabilitation aid, five child development/respite care workers, a coordinator for youth in transition to adulthood, land-based programming, a language educator, and a family wellness camp.

Nation B is a remote Northern Nation with fly-in access only. The Nation faces an acute housing shortage and housing quality issues, a lack of consistent access to clean water, and a suicide crisis. Access to a trained labour force is limited, and the Nation experiences high turnover in their primarily fly-in service staff. Independent of Jordan's Principle, the Nation has a nursing station, a school which is part of a regional First Nation organization that supports on-reserve schools, primary dental services, and child and family services. Jordan's Principle case managers hired by the Nation face shifting expectations to address a broad range of community needs and fill deep gaps across service systems. Through Jordan's Principle, the Nation has gained access to limited mental and allied health services provided by organizations serving First Nations across Manitoba, remote

pediatric services, four wellness workers, and equipment for a land-based program.

Thus, even within Manitoba, where there have been concerted efforts to extend resources across Nations, there are important differences in what Nations have been able to establish through Jordan's Principle. The frequency and level of services provided by external service providers is limited by Nation B's remoteness, as well as growing caseloads and waitlists. Severe housing and water challenges sometimes undermine the efficacy of the services that are provided. Despite the pronounced needs in the Nation, it receives funding for a single case manager. People in this position face heavy expectations to quickly develop and implement a broad range of clinical services and community programs; this task is complicated by the difficulty in recruiting and retaining qualified staff. Without strong support/guidance from others working within the Nation, turnover in the Case Manager position compounds these challenges – each new person must again begin critical relationship building processes and do so while working to make sense of and shouldering responsibility for the prior work around Jordan's Principle (Sinha et al. 2022).

To achieve equitable outcomes, First Nations must have the flexibility and support to self-determine paths that allow them to build from their current context. Large scale investments in human resources are needed to support and enhance local capacity and address housing, water, and other infrastructure issues. In the absence of an approach that incorporates these elements, Nations that have pre-existing capacity and the experience/connections can dream big and immediately use Jordan's Principle funds to realize those dreams, while others are left behind.

## 4 ANALYTICAL COMPARISON

Based on an analysis of Jordan's Principle in Alberta and Manitoba, we posit that, in the implementation of Jordan's Principle, ISC has relied on administrative discretion to an extent that compromises the goals of self-determination and substantive equality. Some use of administrative discretion in Jordan's Principle decision-making is unavoidable, and needed to address the unique needs of First Nation children and families living in diverse contexts. When left unchecked however, the exercise of administrative discretion by the ISC focal points, who are charged with overseeing regional implementation of Jordan's Principle and draw on their own values and regional interpretations of ISC policies, may lead to inequities in the implementation of Jordan's Principle. In addition, once administrative discretion is elevated to the national office, distant from localized contexts and needs, the risk of decontextualized decisions is magnified.

The principles of self-determination and substantive equality call for implementation processes that centre the full participation of First Nations at every level of decision-making; support the tailoring of services to reflect the contexts, needs, priorities, and cultures of Nations; and aim to meet the unique needs of each First Nation child. In practice, however, the implementation of Jordan's Principle has sometimes been shaped by legal actions and

advocacy that have focused on overcoming ongoing governmental failures to fully implement Jordan's Principle. This has created space for increasing administrative discretion. Here, we highlight three features to implementing Jordan's Principle that are linked to the reliance on administrative discretion: projectification, limited access to information, and provision time-limited funding.

#### 4.1 Projectification

Some early analyses of Jordan's Principle framed it as a means for meeting the immediate needs of individual children *and* for identifying and redressing gaps and disparities in existing policy frameworks (Jordan's Principle Working Group 2015). In the current federal approach to Jordan's Principle's implementation, this second goal has not been prioritized. Rather than being used as a mechanism for repairing the fabric of existing services for First Nation children, Jordan's Principle has been added as another patch in the disarticulated patchwork of existing services for First Nation children. The federal government has not systematically collected information about the gaps in funding and services giving rise to Jordan's Principle cases (Gaspard 2022), extended solutions to problems identified in one province or territory to other jurisdictions, or attempted to repair known problems with existing services.

For example, Sinha et al. (2021) highlight a Jordan's Principle group request, submitted by the FNHC that provided liquid formula to families in Nations within Alberta that had boil water advisories. Requests for nutritional supplements typically fall under the jurisdiction of Non-insured Health Benefits (NIHB)<sup>2</sup> but NIHB would only approve powdered formula, forcing caregivers in Nations under boil-water advisory to boil and cool water every time a baby required formula. FNHC submitted a group request to provide liquid (pre-mixed) formula to families in Nations with boil water advisories and, rather than revising NIHB policy to remedy the problem across jurisdictions, the group request was approved and liquid formula was provided through Jordan's Principle. Sinha et al. (2021) have drawn on economic development literature (Murray Li 2019) to describe this decoupling of Jordan's Principle from an existing policy framework as projectification: an approach to economic development that enables innovation and rapid development of projects by encouraging people to think that a problem can be fixed without redressing the underlying causes of inequity. In this type of project framework, decoupling from an existing policy framework also facilitates the expanded use of administrative discretion, creating conditions in which each new request to Jordan's Principle is considered individually and addressed through discretionary decision-making instead of being addressed through revised policy that incorporates new standards.

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<sup>2</sup>NIHB provides eligible First Nations and Inuit clients with coverage for a range of health benefits that are not covered through other social programs, private insurance plans, or provincial or territorial health insurance (ISC 2024).

## 4.2 Limited access to information

Within a project system, administrative discretion takes on more power when information about funding opportunities is limited. Ideally, the variation in approaches to Jordan's Principle would be a rich source of information to support the development and implementation of services. With more complete information, Nations would be able to look across a menu of funded services, examine key variations in approach to developing services, and tailor their own programs accordingly. However, such information has not been available; the federal government has failed to support the development of a First Nation-led infrastructure to collate wise practices and provide information to support Nations, particularly small and remote Nations (as highlighted in the case studies above), in learning, dreaming, and imagining. In the absence of such information, the power of the administrative discretion wielded by government focal points is amplified, and transparency is diminished. Without a public record of past decisions to guide decision-making and support First Nations in advocating for equity, a strong relationship with focal points can become the primary means of learning about and fully benefitting from funding opportunities. In this context, inequity may be exacerbated when Nations or organizations with close ties to focal points have access to greater information than those that have not been able to build similar connections. Thus, in the absence of government transparency around funding opportunities and allocations, reliance on a relational approach can serve as a barrier to accessing, or even understanding the scale and scope of, existing funding opportunities.

## 4.3 Time-limited funding

The power of federal administrative discretion within the current approach to Jordan's Principle observed in Manitoba and Alberta is heightened by the provision of time-limited funding opportunities. Examples include:

- The provision of year-by-year funding, with renewal of funding sometimes granted just before the end of the fiscal year. In the absence of clear commitments to ongoing funding, First Nations and organizations serving First Nations are unable to effectively plan for ongoing services, much less for needed growth and innovation.
- The provision of one-time funding opportunities, with no clear commitment to ongoing funding opportunities. To make effective use of funding for services, Nations may need to plan for integration with existing resources, develop infrastructure, recruit and train staff, and enhance existing capacity. Not all Nations will be equipped to effectively take advantage of one-time funding opportunities. For example, Nation B, in the case study presented above, used a one-time land-based programming funding opportunity to purchase equipment for a land-based program, but the equipment was left unused and fell into disrepair when the Nation was unable to hire staff to develop and facilitate programming (Sinha et al. 2022).

The principles of substantive equality and self-determination call for funding on a tem-

poral scale that allows each Nation/organization to engage in needed capacity enhancement, to take on new responsibilities in accordance with their priorities, and to plan for growth and innovation. In the absence of such funding, Nations are more reliant on, and vulnerable to, the impacts of federal administrative discretion. Inequity is also compounded as some Nations get further ahead and others fall further behind.

#### **4.4 Excessive reliance on administrative discretion as perpetuating colonial power relations**

Administrative discretion can be an important means of enabling the agility required to meet complex needs in diverse localized contexts. However, administrative discretion can also serve other goals: “Street-level discretion promotes workers’ self-regard and encourages clients to believe that workers hold the key to their well-being. For both workers and clients, maintenance of discretion contributes to the legitimacy of the welfare-services state” (Lipsky 2010, 15).

The use of administrative discretion in the implementation of Jordan’s Principle is currently not bounded by strong connections to existing policy frameworks, public sharing of information that allows Nations and organizations to assess the potential for Jordan’s Principle funding, or clear commitments to ongoing funding opportunities. In this context, reliance on administrative discretion is amplified, and individual federal decision-makers are empowered to rule on the legitimacy of applications for funding, based on their own interpretation of policy, needs, and perhaps, personal values. This poses risks of Jordan’s Principle decision-making that reflects biases, as a result of differences in relationships between First Nation organizations and regional ISC offices; regional advocacy, readiness and priorities; and public servant personalities. Such an approach perpetuates a system of colonial power relations that is in direct contradiction to self-determination and undermines substantive equality.

Thus, our analysis suggests that, while a discretionary approach has allowed First Nations substantial flexibility to tailor services and develop their own models of service delivery, it may also have deepened inequities between First Nations. It enables those that can develop strong relationships with focal points to take advantage of time limited funding to effectively exercise self-determination by strengthening community capacity, developing innovative services and expanding infrastructure, while others fall further behind. Accordingly, implementing Jordan’s Principle in alignment with the goals of substantive equality and self-determination requires a commitment to reconnect Jordan’s Principle to existing policy frameworks by addressing known gaps in services and narrowing the range of situations in which reliance on administrative discretion is required. This also means making more detailed information about the use of Jordan’s Principle funding publicly available. Transparency in this regard would help ensure accountability and better support the judicious use of administrative discretion. It also requires provision of long-term funding to reduce the vulnerability of First Nations to the impacts of administrative discretion and

support their ability to take on service responsibilities in accordance with their priorities and capacities. Given the relational nature of administrative discretion, the incorporation of these elements into the implementation of Jordan's Principle should be accompanied by measures to support the full and meaningful participation of First Nations at every level of Jordan's Principle decision-making.

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