Jordan's Principle: Canada's broken promise to First Nations children?

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> In May 2010, I took a stroke... They wanted to place Jeremy in an institution, I told them over my dead body. I knew once I took on the Federal government, to help fight for my special needs son Jeremy and children like him across Canada it was going to be time consuming, but well worth the long battle. Jeremy's case and other children like him are worth more than what the Federal government thinks.
>
> – *Maurina Beadle (2012)*

Maurina Beadle of Pictou Landing First Nation in Nova Scotia is a loving single mother of Jeremy, who has a severe form of cerebral palsy and autism. Jeremy requires assistance with his personal care and exhibits self-harming behaviour related to his autism. In 2010, when Jeremy was 15 years of age, Maurina experienced a double stroke, leaving her unable to walk, hold a glass of water or attend to her own personal care without assistance. More importantly to Maurina, she could no longer attend to Jeremy's personal care and dignities. Phillipa Pictou, Health Director at Pictou Landing First Nation, met with Maurina to determine the supports she needed to care for Jeremy at home. Having heard about Jordan's Principle, a child-first principle intended to ensure children on-reserve received the same range and quality of government services available off-reserve, they began contacting the federal and provincial governments to secure the services Jeremy needed. Canada agreed to provide a capped amount of $2200.00 per month and refused to honour a clause in provincial policy that allowed for additional support under an exceptional circumstances clause. Pictou Landing Band Council stepped in to provide the funding to ensure Jeremy's needs were met but could not sustain the cost without government reimbursement. Canada refused to reimburse Pictou Landing Band Council, placing Jeremy's ongoing well-being and safety in jeopardy, so Maurina Beadle and Pictou Landing Band Council filed a case in federal court alleging Canada's "federal response to Jordan's Principle" was out of step with the Charter of Rights and Freedoms. The present article summarizes Jordan's Principle, the federal response to Jordan's Principle and raises important questions about Canada's interpretation and implementation of Jordan's Principle for First Nations children on reserves.

JORDAN'S PRINCIPLE

Jordan's Principle is a child-first principle intended to resolve jurisdictional disputes within, and between, provincial/territorial and federal governments concerning payment for services to First Nations children when the service is available to all other children. It was named in memory of Jordan River Anderson, a young boy from Norway House Cree Nation, who spent more than two years unnecessarily in hospital while Canada and Manitoba argued over payment for his at-home care. The reason for this is the province normally delivers health care off-reserve, but the federal government funds it on-reserve. In Jordan's case, the two governments could not agree on payment because Jordan was First Nations and, thus, left him in hospital while they argued over payment (1). Tragically, Jordan died at five years of age after waiting more than two years for both governments to resolve their dispute (2). In December 2007, Parliament unanimously supported Private Member's Motion 296 in support of Jordan's Principle 296 stating 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" (3). This should have ended tragic situations in which First Nations children are denied, or delayed receipt of, government services available to all others due to payment disputes. The achievement was so great that the Canadian Public Health Association celebrated its 100th anniversary by naming Jordan's Principle as one of the 12 most important achievements in the history of Canadian public health (4).

THE 'FEDERAL RESPONSE TO JORDAN'S PRINCIPLE': NARROWING EQUALITY OR GOOD PUBLIC POLICY?

After Motion 296 passed in 2007, federal officials began referring to a "federal response to Jordan's Principle", which the Assembly of First Nations believes was developed without meaningful consultation with First Nations (5). Aboriginal Affairs and Northern Development Canada (AANDC) official Corrine Baggley describes the 'federal response to Jordan's Principle' in testimony before the Standing Committee on the Status of Women in 2011:

> When the motion [296] was passed in 2007, INAC and Health Canada worked together to present a federal response to cabinet. That federal response outlines our focus for First Nations children under Jordan's principle. The focus is on those who were like Jordan – those who are the most vulnerable, those who have multiple disabilities and require multiple services from across jurisdictions. We thought children in that situation are most vulnerable and are more likely to be the subject of jurisdictional disputes.
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> That does not mean that the response excludes all other First Nations children. We focused on the most vulnerable but in the work we are doing with provinces and First Nations, which we continue to do, we are responding to all cases that are represented to us – not just those children with multiple disabilities, but children with a variety of needs. We have been able to connect those cases to the services those children require.
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> In the event of a provincial-jurisdictional dispute – and we haven't been presented with one yet – we are prepared to make sure that the service continues for that child while the federal and provincial governments attempt to resolve the fund or responsibility issues (6).

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Another AADNC official testifying under oath would later clarify that the federal government would only provide funds for Jordan's Principle cases involving children with complex medical needs and multiple service providers (7). This raises an important question as to how Canada would ensure the provision of necessary and equitable services to children in other Jordan's Principle circumstances without providing any funds to do so.

In November 2010, Minister Duncan from the Department of AANDC (formerly known as Indian Affairs and Northern Development [INAC]) testified before the Aboriginal Affairs Parliamentary Committee with regard to First Nations child and family services. A Jordan's Principle briefing document prepared for that occasion states that AANDC had not identified any jurisdictional disputes involving the federal and provincial governments (8). A senior policy analyst for AANDC repeated this position in testimony before the Standing Committee on the Status of Women in February 2011 (6).

The Canadian government established Jordan's Principle focal points within each region of the country to manage any Jordan's Principle cases (9). Unfortunately, there is no evidence that Canada has taken effective measures to publicize the names, contact details or mandates/policies of these focal points. The federal government's lack of public education on how to report a Jordan's Principle case, and the process used to review them likely explains why government officials were able to testify that no jurisdictional disputes had come to their attention.

Even though AANDC states it is unaware of any jurisdictional disputes, First Nations suggest there are numerous Jordan's Principle cases that are not being responded to (10).

Would Jeremy receive a higher level of services if he lived off-reserve in Nova Scotia?

Nova Scotia policy identified an amount of $2,200.00 in support per month and included an exceptional circumstances clause for persons with greater needs. At some point, Nova Scotia arbitrarily stopped implementing the exceptional circumstances clause and a case known as the Boudreau case was brought against the province of Nova Scotia challenging the lack of enforcement of the exceptional circumstances clause. The Supreme Court of Nova Scotia ruled that the arbitrary cessation of the exceptional circumstances clause was inconsistent with law (11). Putting it simply, the Court believed funding levels should be based on a person's needs instead of arbitrary amounts set out in policy documents. Although Canadian government officials had been provided with a copy of the Boudreau decision while assessing Jeremy's case, a senior government official testified under oath that,

> ...my decision [to deny funds in excess of the $2,200.00 per month] is based in policy, that basically the policy reference in the funding agreement and in the national policy manual is to the existing provincial policy. This Supreme Court Decision has not changed the existing provincial policy. The direct family support policy is still in effect the amount that is the maximum eligible amount is still $2,200. Now whether or not the Supreme Court Decision may influence the future policy, that is a question that… you know, it's hypothetical, whether or not the Province wants to take that under advisement and revise their existing policy, but I work with existing policy, and this is why it [the Supreme Court Decision] is not relevant to my decision (7).

Robinson's testimony suggests Canada believes it is legitimate to rely on a provincial policy to establish the normative standard of care even when that policy has been ruled out of step with law by the highest court in the reference province.

MAURINA BEADLE AND PICTOU LANDING BAND COUNCIL V ATTORNEY GENERAL OF CANADA

The acting senior advisor for First Nations Inuit Health Branch sets out Canada's position regarding the Beadle case in an e-mail dated July 7, 2011, obtained under the Access to Information Act (12). Specifically, this e-mail states that Canada will not provide the additional funding nor does it believe it has a jurisdictional dispute with Nova Scotia, implying that Jordan's Principle should not be engaged. This same document suggests that Pictou Landing First Nation has the following options: continue to pay for the at-home care for Jeremy at its own expense; provide respite or permanent placement of Jeremy in a facility, or quoting Mr Were directly "discontinue service thus requiring Child and Family Services (protection) intervention and emergency placement" (12). Faced with the options of providing inadequate care at home, contrary to the advice of medical professionals, or placing her son in an institution that would likely reduce his quality of life and increase his self-harming behaviour or placing her son in child welfare because he was at risk due to denial of services available to other children in Nova Scotia, Maurina decided to take Canada to federal court to get the support Jeremy deserved. Her case suggests that Canada's failure to provide the exceptional circumstances funding in line with the proper implementation of Jordan's Principle is a violation of the equality provisions in the Charter of Rights and Freedoms (13).

Canada sets out its response to Maurina's case in its memorandum of fact and law (14). Basically, Canada affirms that Jordan's Principle is procedural and nonbinding and does not create a right. They go on to argue that Jordan's Principle is not properly engaged in this case because there is no dispute with Nova Scotia about the normative standard of care.

Maurina's case raises important questions of public policy ethics and law regarding the treatment of First Nations children and their families. Although the case is still before the courts, on its face, it appears that Canada's implementation of Jordan's Principle is extremely wanting. Canada appears to sift Jordan's Principle cases through a very narrow definition and then applies a series of policy strategies that have the effect of significantly reducing the probability that a First Nations child on-reserve will receive any relief when a service is denied, or delivered to a lower standard, on-reserve versus off-reserve. Paul Champs, Counsel for Maurina Beadle and Pictou Landing Band Council, notes the historical nature of the case,

> First Nations children deserve the same level of programs and services as children off-reserve. The Courts have never considered a case like this before. If Maurina and Jeremy win, it will confirm that the federal government has a legal obligation to provide programs and services on-reserve that are reasonably comparable to those available off-reserve.

The Federal Court has scheduled the hearings for June 2012. All Canadians concerned about the equitable treatment of children under the law should be devoting attention to this important, and precedent setting, case.

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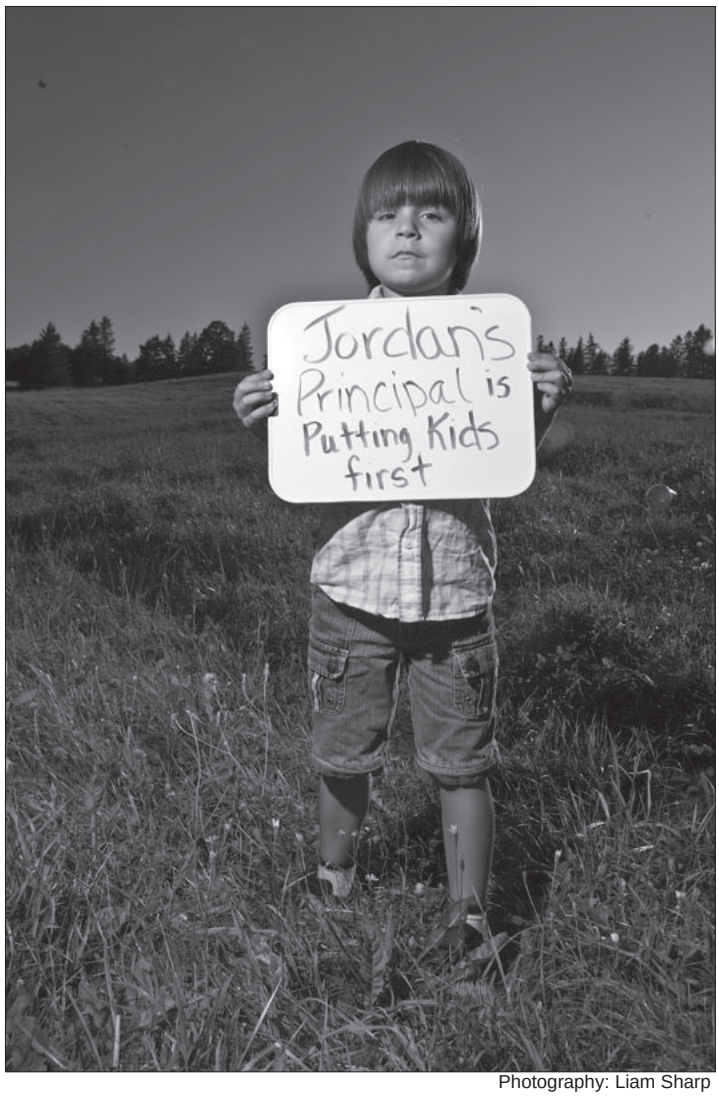

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