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Substantive Equality and Jordan's Principle: Challenges and Complexities

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Substantive Equality and Jordan's Principle: Challenges and Complexities

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This article examines the conceptual and procedural aspects of substantive equality with respect to Jordan's Principle—a child-first principle intended to ensure First Nations children have equitable access to public services in Canada. We begin by providing a brief history of Jordan's Principle and outlining how it has been linked to the concept of substantive equality. We then suggest that despite acceptance of the concept of substantive equality as a guiding principle, the federal government has not clearly explained its meaning nor operationalized it in the implementation of Jordan's Principle. In this regard, we explore five key challenges that undermine a substantive equality approach to Jordan's Principle: (i) implementation based on individualistic and demand-driven processes; (ii) inconsistent implementation and discretionary decision-making; (iii) burdensome request processes; (iv) delays in provision of funding and services; and (v) lack of an independent appeals process. While endorsing improvements in the implementation of Jordan's Principle to ensure equitable services for First Nations children and their families, we maintain that a substantive equality approach requires the development of proactive systemic solutions to address the inequities that First Nations children face.

A TROUBLING PATTERN OF DISPARITIES between the health, social, and educational services available to First Nations children and those available to other children persists across Canada. For First Nations children living on reserves,[1] funding for public services is provided primarily by the federal government. In contrast, services for most other children are funded by provincial or territorial governments.[2] This patchwork of funding arrangements for public services is linked to the division of powers between provincial, territorial, and federal governments.[3] Divided jurisdictional responsibilities have resulted in significant inequities in the public services available

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[1] For a definition of reserves, see *Indian Act*, RSC 1985, c I-5, s18. We use the term "reserves" in this article because of its continued legal effects. For a compelling critique of the *Indian Act*, including the reserve system, see *e.g.* John Milloy, "Indian Act Colonialism – A Century of Dishonour, 1869-1969" (2008), online (pdf): *National Centre for First Nations Governance* <fngovernance.org/ncfng_research/milloy.pdf> [perma.cc/CA62-TPJG].

[2] See Josée Lavoie et al, "The Aboriginal Health Legislation and Policy Framework in Canada" (2011), online (pdf): *National Collaborating Centre for Aboriginal Health* <www.nccih.ca/docs/context/FS-HealthLegislationPolicy-Lavoie-Gervais-Toner-Bergeron-Thomas-EN.pdf> [perma.cc/ZF55-757C].

[3] See Martha Jackman, "Constitutional Jurisdiction Over Health in Canada" (2000) 8 Health LJ 95 at 106–109.

to First Nations children on reserves, compounding the systemic and structural disadvantages facing First Nations communities as a result of the residential school system and other policies of cultural genocide.[4] In a context where self-governance continues to be denied to First Nations, First Nations children face a jurisdictional quagmire, plagued by funding inequities, delays and disruptions in accessing services, and, more fundamentally, service gaps (when needed services simply do not exist in some communities).[5]

One response to address these inequities is "Jordan's Principle"—a child-first principle intended to ensure that all First Nations children receive equitable access to public services.[6] Jordan's Principle was generated and advanced by First Nations organizations and advocates, and endorsed by the House of Commons in a motion that was unanimously adopted in 2007.[7] The principle is named in honour of Jordan River Anderson, a First Nations child from Norway House Cree Nation in Manitoba, who was born with a rare neuromuscular disease.[8] Because his complex medical needs could not be met within his First Nation, Jordan was transferred to a hospital in Winnipeg, far from his community and family home. In 2001, a hospital-based team decided that Jordan's needs would best be met in a specialized foster home. However, federal and provincial

[4] See *First Nations Child and Family Caring Society of Canada v Canada (AG)(MINAC)*, 2016 CHRT 2 at paras 416–22 [*Caring Society* 2016 (2)]; Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015) at 1, online (pdf): <www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [perma.cc/J86K-AVRR] (the Truth and Reconciliation Commission described Canadian government policy as "cultural genocide": "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada").

[5] Jordan's Principle Working Group, *Without denial, delay, or disruption: Ensuring First Nations children's access to equitable services through Jordan's Principle* (Ottawa, ON: Assembly of First Nations, 2015), online (pdf): <www.afn.ca/uploads/files/jordans_principle-report.pdf> [perma.cc/S2N2-RSMK].

[6] This article focuses on "First Nations children" because Jordan's Principle expressly applies to these children in its text, litigation around the Principle has involved First Nations children, and we draw from research done with First Nations organizations. However, the definition of "First Nations child" in the context of Jordan's Principle has been inconsistent over time. After a full hearing to provide clarity around the definition of "First Nations child" in the context of Jordan's Principle, the CHRT found that a "First Nations child" could include: (1) children, residing on or off reserve, whom a First Nation recognizes as belonging to their community; (2) children who neither have nor are eligible for *Indian Act* status, but have a parent who has or is eligible for *Indian Act* status; and (3) children residing off reserve, who have lost their connection to their First Nations communities due to colonial policies; pursuant to eligibility criteria it ordered the parties to consult on and generate (*First Nations Child & Family Caring Society of Canada v Canada (AG) (MINAC)*, 2020 CHRT 20 at paras 123, 231, 274 [*Caring Society* 2020]). The Federal government has sought judicial review of this decision and the matter is before the Federal Court. See *Canada (AG) v First Nations Child and Family Caring Society of Canada* (Notice of Application for Judicial Review) [22 December 2020], online (pdf): *First Nations Child & Family Caring Society* <fncaringsociety.com/sites/default/files/federal_court_document_december_22_2020.pdf> [perma.cc/Q43B-R2QU]. Similar to First Nations children, Inuit children can make requests for services through the Inuit Child First Initiative, and later in this article we discuss a recent federal act that refers specifically to First Nations, Inuit, and Métis children in the context of child welfare services, see Indigenous Services Canada, "Supporting Inuit children" (last modified 29 May 2020), online: *Government of Canada*, <www.sac-isc.gc.ca/eng/1536348095773/1536348148664> [perma.cc/KM46-GRNR].

[7] Tabled by Jean Crowder, Member of Parliament for Cowichan-Nanaimo (NDP), (M-296). See "Private Members' Business M-296" adopted, *House of Commons Journals*, 39-2, No 36 (12 December 2007). See also Vandna Sinha & Anne Blumenthal, "From the House of Commons resolution to Pictou Landing Band Council and Maurina Beadle v. Canada: An update on the implementation of Jordan's Principle" (2014) 9:1 First People's Child & Family Rev 80 at 81–82.

[8] See Trudy L Lavallee, "Honouring Jordan: Putting First Nations children first and funding fights second" (2005) 10:9 Paediatrics & Child Health 527 at 527–529.

governments argued over who would bear the financial responsibility for Jordan's recommended in-home services. As a result, Jordan remained in hospital, even though it was not medically necessary for him to be there. Jordan died in 2005 at the age of five, never having had the opportunity to live in a family home.[9]

Jordan's Principle was initially articulated to ensure that *all* First Nations children have timely access to the same services as other children in Canada by eliminating denials, delays, or disruptions in service resulting from disputes between governments or government departments regarding payment for services.[10] Since its inception, Jordan's Principle has stated that when a First Nations child requires services, the government or department to which the request is originally made should pay for or provide the services without delay, and seek reimbursement from other levels of government as needed after the service has been provided.[11]

Despite widespread support, Jordan's Principle was not effectively implemented, particularly in the early years. Between 2007 and 2016, the federal government applied a restrictive interpretation that narrowed the application of Jordan's Principle to cases in which a child was normally resident on reserve, was professionally assessed as having multiple disabilities, and required services from multiple providers.[12] Additionally, the services requested had to be comparable to existing provincial services in a "similar geographic" location.[13] This narrow application of Jordan's Principle allowed the federal government to assert — in 2010, 2012, and 2015 — that it knew of no Jordan's Principle cases in Canada.[14] In recent years, however, the scope of Jordan's Principle has greatly expanded and the approach to implementing the principle has

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[9] *Ibid.*

[10] See Cindy Blackstock et al, "Wen:de: We are coming to the light of day" (2005) at 17, online (pdf): *First Nations Child and Family Caring Society of Canada* <fncaringsociety.com/sites/default/files/WendeReport_0.pdf>. [perma.cc/QG54-5VMA]; Assembly of First Nations, resolution No 62/2016, *Full and proper implementation of the historic Canadian Human Rights Tribunal decisions in the provision of child welfare services and Jordan's Principle* (14 July 2006), at para B, online (pdf): *Assembly of First Nations* <www.afn.ca/uploads/files/resolutions/2016_aga_res.pdf> [perma.cc/MP5Z-3STS].

[11] The motion stated, "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." See "Private Members' Business M-296" moved, *House of Commons Debates*, 39-1, No 157 (18 May 2007) at 1334–35 (Hon Jean Crowder) and "Private Members' Business M-296" adopted, *House of Commons Journals*, 39-2, No 36 (12 December 2007). See also *Caring Society* 2016 (2), which articulates Jordan's Principle as "a child-first principle [which] provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service" (*supra* note 4 at para 351) (emphasis in original).

[12] See *Pictou Landing Band Council and Maurina Beadle v Canada (AG)*, 2013 FC 342 at para 84 [*Pictou Landing*].

[13] *Ibid*.

[14] See Canada, House of Commons, *Question period note: Advice to the Minister - First Nations - Jordan's Principle - Funding* (23 April 2012) access to information document. Document request number is not available. At 19, the document states, "As part of the implementation of Jordan's Principle (JP), Budget 2008 established a $11M reserve fund to provide interim funding to cover the costs of a child's care in the event of a jurisdictional dispute … To date [23 April 2012] all potential Jordan's Principle cases have been addressed through existing mechanisms with none progressing to a declared jurisdictional dispute. Therefore, it has never been necessary to access the JP fund."); Indian and Northern Affairs Canada, "Jordan's Principle: Key messages" in Access to Information Document CIDM#3344547, *First Nations Caring Society*, (8 October 2010) at 00054, online (pdf): <fncaringsociety.com/sites/default/files/docs/A201003015_2011.pdf> [perma.cc/57YH-JFWA] ("To-date, no cases involving a federal/provincial jurisdictional dispute have been brought to the attention of the Government of Canada"); Bob Weber, "Aboriginal children receive poorer health care, suffer delays," *The Globe and Mail* (10 February 2015), online: <www.theglobeandmail.com/news/national/aboriginal-children-receive-poorer-health-care-suffer-delays/article22905265> [perma.cc/UKQ8-67HE].

also changed dramatically. The application of Jordan's Principle has been extended to a broader range of individual children and to respond to "group requests" which address service gaps affecting large numbers of children in a similar manner.[15] The federal government recently reported that, "[b]etween July 2016 and April 30, 2020, more than 594,000 products, services and supports were approved under Jordan's Principle;" these included "speech therapy, educational supports, medical equipment, mental health services, and more."[16]

The shift in the scope and implementation of Jordan's Principle after 2015 has been largely driven by a series of legal decisions that have interpreted Jordan's Principle broadly and as being integrally connected to substantive equality.[17] Connecting Jordan's Principle to substantive equality has expanded governmental obligations, in addition to increasing funding requirements, when it comes to the provision of services for First Nations children. The legal demands of substantive equality go beyond equal treatment to require equitable outcomes; differential treatment (*i.e.,* more funding to secure the same level of services) may well be needed to respond to the contextual realities and needs of First Nations children. The federal government has endorsed substantive equality as the guiding principle for ensuring the equitable and effective implementation of Jordan's Principle.[18] Despite the significance of this acknowledgement, we maintain that the federal government must clarify the meaning, implications, and full promise of an approach to Jordan's Principle rooted in substantive equality. There is not, to our knowledge, any comprehensive evaluation of the federal government's response to Jordan's Principle that is publicly available. Accordingly, we draw on the best available evidence to assess the implementation of Jordan's Principle, including analysis of legal and policy documents, as well as evidence from an evaluation of a Jordan's Principle initiative in Alberta to which two of the authors of this article recently contributed.[19] Using these sources, we critically assess the extent to which Canada's current Jordan's Principle implementation policies uphold the principle of substantive equality, both in terms of a coherent and comprehensive elaboration of the substantive requirements of the concept and in relation to the processes relied on for its realization.

I. SUBSTANTIVE EQUALITY AS A GUIDING PRINCIPLE

[15] See Indigenous Services Canada, "Submit a request under Jordan's Principle: Step 4. Who can submit requests" (last modified 18 June 2020), online: *Government of Canada* <www.canada.ca/en/indigenous-services-canada/services/jordans-principle/submit-request-under-jordans-principle-step-4.html> [perma.cc/PY9L-DBV2] [ISC, "Submit a request"].

[16] Indigenous Services Canada, "Jordan's Principle" (last modified 2 June 2020), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1568396042341/1568396159824> [perma.cc/3KHE-5ZHS].

[17] See *Pictou Landing, supra* note 12 at paras 86–87. See also, *Caring Society* 2016 (2), *supra* note 4; *First Nations Child & Family Caring Society of Canada v Canada (AG representing MINAC)*, 2017 CHRT 14 [*Caring Society* 2017 (14)]; *First Nations Child & Family Caring Society of Canada v Canada (AG) (MINAC)*, 2017 CHRT 35 [*Caring Society* 2017 (35)]; *First Nations Child & Family Caring Society of Canada v Canada (AG) (MINAC)*, 2018 CHRT 4 [*Caring Society* 2018(4)]; *First Nations Child & Family Caring Society of Canada v Canada (AG) (MINAC)*, 2019 CHRT 39 [*Caring Society* 2019 (39)].

[18] Indigenous Services Canada, "Jordan's Principle: Substantive equality principles" (last modified 21 November 2019), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1583698429175/1583698455266#chp1> [perma.cc/AC44-PEZZ] [ISC, "Substantive Equality"].

[19] Vandna Sinha has been the principal investigator for the First Nations Health Consortium Support Project. Kathryn Chadwick was also a member of the research team: see Children's Services Policy Research Group, "First Nations Health Consortium," online: *McGill University* <csprg.research.mcgill.ca/fnhc> [perma.cc/JE6Y-6G8X.

Substantive equality emerged as a legal concept in Canadian equality law in the wake of the constitutional entrenchment of equality rights in the *Charter of Rights and Freedoms* in the 1980s.[20] It has been described as the "animating norm" "at the heart" of constitutional equality rights.[21] As Justice Abella recently explained, substantive equality is "a remedy for exclusion and a recipe for inclusion."[22] In some cases, substantive equality is secured by ensuring that individuals from one group are not treated less favourably than those in another — *i.e.*, denied services readily available to others. But in other cases, substantive equality is violated when identical treatment or an apparently neutral law or policy gives rise to inequitable effects or perpetuates disadvantage. In such situations, substantive equality can only be achieved if differential treatment is accorded to different groups to secure equitable outcomes. Determining whether substantive equality has been violated, therefore, requires an assessment of the "full context of the claimant group's situation," the "actual impact of the law [or policy] on that situation," and the "persistent disadvantages [that] have operated to limit the opportunities available."[23]

Genuine substantive equality requires that both the concrete conditions of inequality be remedied and the structural sources that reproduce it be transformed.[24] Addressing the underlying structural sources of inequality in First Nations children's lives raises larger issues of redressing intergenerational injustice, supporting community well-being, and honouring continued quests for self-governance. Beyond ensuring adequate funding and services for First Nations children, First Nations governments must "control the development and implementation of such services."[25] Although this article focuses on the federal government's current initiatives to comply with Jordan's Principle to secure equitable funding and services, we recognize that the full realization of substantive equality will require much larger structural transformation. [26]

Implementing Jordan's Principle in accordance with substantive equality means clarifying the way substantive equality conceptually guides the development of policies and procedures related to the provision of services to First Nations children. Services must be provided in a manner that ensures accessible and timely care for *all* children. In a landmark human rights decision on discrimination in child welfare services on reserves, *First Nations Child and Family Society &*

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[20] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, s15. Section 15 equality rights did not come into force until 1985 to give governments time to ensure that their laws were in compliance with the equality guarantees. For a recent review of Canadian equality law, see Colleen Sheppard, *The Principles of Equality and Non-Discrimination: A Comparative Analysis – Canada* (European Parliamentary Research Service, 2020), online: <www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)659362> [perma.cc/MGU9-6NU9]. See also Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006); Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, On: LexisNexis, 2006).

[21] See *Fraser v Canada*, 2020 SCC 28 [*Fraser*] at para 42, citing *Withler v Canada (AG)* 2011 SCC 12 at para 2 and *Quebec v A*, 2013 SCC 5 at para 161.

[22] *Fraser*, *ibid* at para 41.

[23] *Ibid* at para 42 (citations omitted).

[24] Colleen Sheppard, *Inclusive Equality: A Relational Approach to Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 60–64 (outlining the importance of both the substantive and the procedural/structural dimensions of equality).

[25] Colleen Sheppard, "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 26:4 Const Forum Const 3 at 7.

[26] See *ibid* at 8, "If the community is not empowered to address issues like health care and child welfare through self-governance and participatory processes, there is a risk that existing programs and services will not respond to the needs of the community."

Assembly of First Nations v Canada, the Canadian Human Rights Tribunal (CHRT) concluded that the federal government was not complying with Jordan's Principle and mandated its full and immediate implementation.[27] The CHRT outlined an expansive understanding of Jordan's Principle, reinforcing its procedural aspects and conceptually linking it to non-discrimination and substantive equality. The CHRT concluded that Jordan's Principle applies to *all* First Nations children, regardless of community of residence or (dis)ability, and to a broad range of services, including, but not limited to, "mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy."[28] Building on a prior federal court decision in *Pictou Landing*, the CHRT also expanded the range of situations to which Jordan's Principle applies, from "jurisdictional disputes" to "jurisdictional gaps" that result in "service gaps, delays and denials."[29]

Jordan's Principle was understood in the *Caring Society* case as an integral dimension of non-discrimination, since it was concerned with race-based inequities facing First Nations children. The CHRT, moreover, emphasized that Jordan's Principle was to be informed by a substantive vision of equality, measured in terms of achieving equitable outcomes for First Nations children. In the *Caring Society* decision, the CHRT clarified that a substantive equality approach means that the federal government has an obligation not to "perpetuate the historical disadvantages endured by Aboriginal peoples."[30] If government funding, policy, or conduct "widens the gap between First Nations and the rest of Canadian society rather than narrowing it," the government action is discriminatory and in violation of substantive equality.[31]

In response to the CHRT rulings, the federal government committed to three years of funding (2016–2019) for Enhanced Service Coordination (ESC) initiatives that were intended to help maximize access to existing health, social, and educational services while reducing service delays for First Nations children. Funding was also allocated to cover the cost of services approved under Jordan's Principle.[32] These funds were designated to cover both requests for services for individual children and "group requests," which address service gaps affecting large numbers of children.[33] Jordan's Principle funding was renewed in 2019 for an additional three years.[34]

The Government of Canada's website on the implementation of Jordan's Principle now affirms that, "[s]ubstantive equality is an overarching legal obligation that must guide the interpretation and implementation of Jordan's Principle."[35] The website further goes on to explain:

> Substantive equality is a legal principle that refers to the achievement of true equality in outcomes. It is achieved through equal access, equal opportunity, and, most importantly, the provision of services and benefits in a manner and according to

[27] *Caring Society* 2016 (2) *supra* note 4 at para 475. See also *First Nations Child and Family Caring Society of Canada v Canada (AG)(MINAC)*, 2016 CHRT 16 [*Caring Society* 2016 (16)]; *Caring Society* 2017 (14), *supra* note 17; *Caring Society* 2017 (35), *supra* note 17; *Caring Society* 2018 (4), *supra* note 17.
[28] *Caring Society* 2017 (14), *supra* note 17 at para 135.
[29] *Caring Society* 2016 (2), *supra* note 4 at para 381.
[30] *Ibid* at para 403.
[31] *Ibid*.
[32] See Indigenous Services Canada, "Horizontal initiatives: Jordan's Principle—A child-first initiative" (last modified 16 April 2018), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1523370831864/1523904290402> [perma.cc/M2SS-KVEH].
[33] See ISC, "Submit a request," *supra* note 15.
[34] See House of Commons, *Investing in the Middle Class: Budget 2019* (19 March 2019), online (pdf): *Government of Canada* <www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf> [perma.cc/MS9E-DAX7].
[35] ISC, "Substantive equality," *supra* note 18.

> standards that meet any unique needs and circumstances, such as cultural, social, economic and historical disadvantage.
>
> Substantive equality is both a process and an end goal relating to outcomes that seeks to acknowledge and overcome the barriers that have led to the inequality in the first place.
>
> When substantive equality in outcomes does not exist, inequality remains.[36]

As this passage suggests, the primary indicator of substantive equality is equitable outcomes. It also underscores, however, the importance of processes to the achievement of substantive equality. As we elaborate below, equitable processes integral to substantive equality should ensure accessibility, fairness, timeliness, accountability, and participation.

In the context of Jordan's Principle, substantive equality may be violated in cases of direct, unequal treatment in which First Nations children receive lower levels of funding for public services than the funding provided to non-First Nations children.[37] Tragically, divided jurisdictional responsibilities between federal and provincial governments and departments have resulted in a long history of lower levels of funding for health, social, and educational services for First Nations children on-reserve.[38] This direct, unequal treatment is discriminatory and violates entitlements to equality. Beyond discriminatory underfunding, substantive equality is also violated where provision of equal levels of funding fails to secure equitable outcomes for First Nations children living on reserves. For example, it may be necessary for the federal government to spend more for health and social services for a First Nations child living in a remote rural community than what a provincial government would spend for the same services for a child in an urban centre. Achieving equitable outcomes may require differential treatment that takes into account the different circumstances of individuals, groups, and communities. Measuring substantive equality in terms of equal outcomes (rather than simply sameness of treatment) was recently endorsed in the Final Report of the *National Inquiry into Murdered and Missing Indigenous Women and Girls*. This expression of the principle can be applied to understanding what substantive equality requires of the implementation of Jordan's Principle to reduce inequality:

> "Substantive equality" is a legal principle that refers to the achievement of true equality in outcomes. It is required in order to address the historical disadvantages, intergenerational trauma, and discrimination experienced by a person to narrow the

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[36] *Ibid*.

[37] As noted above, this underfunding would even violate formal equality.

[38] See *e.g.* Indigenous Services Canada, "Quality Education" (last modified 25 January 2018), online: *Government of Canada* <www.canada.ca/en/indigenous-services-canada/news/2018/01/quality_education.html> [perma.cc/9EGA-3PHY]; House of Commons, Standing Committee on Indigenous and Northern Affairs, *The Challenges of Delivering Continuing Care in First Nations Communities* (December 2018) (Chair: MaryAnn Mihychuk), online (pdf): <https://www.ourcommons.ca/Content/Committee/421/INAN/Reports/RP10260656/inanrp17/inanrp17-e.pdf> [perma.cc/GW7X-U4TF]; Indigenous and Northern Affairs Canada, "Evaluation of On-Reserve Housing" (2017), online (pdf): *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1506018589105/1555328867826> [perma.cc/8GEY-UQ4K]; Auditor General of Canada, *Oral Health Programs for First Nations and Inuit – Health Canada* (Office of the Auditor General, 2017), online: <www.oag-bvg.gc.ca/internet/English/parl_oag_201711_04_e_42669.html> [perma.cc/6FAG-58AT]; Auditor General of Canada, *Access to Health Services for Remote First Nations Communities* (Office of the Auditor General, 2015), online: <www.oag-bvg.gc.ca/internet/English/parl_oag_201504_04_e_40350.html> [perma.cc/9KYV-6B2F].

gap of inequality that they are experiencing in order to improve their overall well-being.[39]

Parliament has also recently passed Bill C-92, *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families,* which affirms Indigenous people's jurisdiction over child and family services and specifies the terms under which Indigenous groups and communities that have created their own child welfare legislation may assume jurisdiction over child and family services.[40] Though the Act does not explicitly mention Jordan's Principle, it provides legislative reinforcement for the CHRT's emphasis on achieving substantive equality in services for First Nations children, while also affirming the rights of Indigenous peoples to self-determination and to the inherent right of self-government.[41] The Act states it is to be interpreted and administered in accordance with the principle of substantive equality, and in relation to the process dimensions, endorses a participatory approach to rights: promoting a child's equal participation in their community; respecting children, their family, and their community's right to be heard without discrimination and have their views and preferences considered in decisions; and ensuring that jurisdictional disputes do not result in service gaps to Indigenous children.[42] The Act also states that child welfare services must be provided in a manner that promotes substantive equality between the Indigenous child and other children.[43] Although the legislation has been critiqued, its express references to the principle of substantive equality are significant.[44] The government's engagement with this important guiding principle may shape the development of equitable processes relating to Jordan's Principle moving forward.

In short, there is widespread consensus that respecting Jordan's Principle requires governments to provide substantive equality in the level of services provided to First Nations children. Inequitable services or funding (*i.e.*, services or funding that do not ensure the same level and kind of services provided to other children) violate Jordan's Principle. Substantive equality provides us with a principled basis, therefore, for ensuring that First Nations children are able to attain health, social, and educational outcomes comparable to other children in Canada.

II. OPERATIONALIZING SUBSTANTIVE EQUALITY IN THE IMPLEMENTATION OF JORDAN'S PRINCIPLE

Though substantive equality has been clearly established as a guiding standard for Jordan's Principle, the implications of ensuring substantive equality in the implementation and application of Jordan's Principle have not been clearly articulated. A government webpage designed to

[39] National Inquiry into Missing and Murdered Indigenous Girls and Women, *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls,* vol 1b (2019) at 170.
[40] Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families,* 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019) SC 2019, c 24.
[41] *Ibid* at Preamble, s 18(1–2).
[42] *Ibid* at s 9(3).
[43] *Ibid* at s 11(d).
[44] For a critical analysis of the legislation, see *e.g.* Naiomi Walqwan Metallic, Hadley Friedland & Sarah Morales, *The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families* (Toronto: Yellowhead Institute, 2019). They question how it can promote substantive equality without providing secure built-in funding mechanisms. While the Act does say that coordination agreements between Indigenous governing bodies and Canada should respect fiscal arrangements that are consistent with the principle of substantive equality, there is no mention of funding for existing child and welfare services; Bill C-92, *supra* note 40 at s 20(2)(c).

"provide practical guidance" with respect to Jordan's Principle and "assist in the operationalization of substantive equality across the country" includes two illustrative examples intended to provide clarity on the consideration of substantive equality in reviewing Jordan's Principle requests.[45]

> **Request for clothing and footwear**
> A request was submitted for clothing and footwear for a school-age child with a specific diagnosis. This condition resulted in damage to the child's clothing and footwear on a much more frequent basis beyond the typical wear and tear expected. Upon review of the request, it was determined that the frequency of the clothing and footwear replacements due to the child's condition resulted in financial hardship to the family. In their efforts to meet the child's needs, the family incurred unexpected and elevated clothing costs. Due to substantive equality, the clothing and footwear costs were covered by Jordan's Principle.
>
> **Request for air transportation**
> A request was submitted by a family to attend a series of workshops for parents with children with special needs and transportation to and from the workshops. The requests for the workshops and transportation costs by car were approved. Following the approval, the family requested funding to cover the cost of air travel to attend the workshops since the family lived several hundred miles from where the workshops were being held. Upon review of the request for air travel, it was determined that the distance was too far for the family to travel by car. To ensure substantive equality in the provision of services to the child, Jordan's Principle provided funding to the family to cover air transportation to attend the workshops.[46]

These examples suggest that the principle of substantive equality is predominantly concerned with ensuring that funding for health, social, and education services responds to specific individual and familial needs. They do not clarify that the linchpin of substantive equality is equitable outcomes. Nor do they connect substantive equality to the historical and ongoing experiences of systemic and structural inequality in First Nations communities.

In the first example, additional funds are allocated for clothing and footwear given the specific medical condition of the child. It is not clear, however, if the higher clothing and footwear costs for some children with disabilities are generally covered as part of the funding for health conditions for children who receive healthcare through provincial health insurance. Nor is it clear whether these extra costs are necessary because of the specific needs of First Nations children. The first example does not provide much information or context. In the second example, a family received funding to cover air transportation to a series of workshops for parents with children with special needs. This example is easier to understand in relation to substantive equality. Whereas families living in urban areas would not need additional funds to cover transportation costs, First Nations families, who disproportionately live in remote rural areas, would need these funds to ensure equitable access to attend the special workshops. Thus, we see an example where differential treatment is required to secure equitable outcomes for the First Nations child, in line with the principle of substantive equality. Nevertheless, there is no express explanation of why the funding ensures substantive equality. While the examples illustrate fair funding outcomes, they do

[45] ISC, "Substantive Equality," *supra* note 18.
[46] *Ibid.*

not provide explicit justification for why clothing or air travel should be funded on the basis of substantive equality. They do not connect the individual and family needs analysis to larger patterns of historical, intergenerational, intersectional inequalities facing First Nations communities, particularly First Nations children. The example seems to suggest that substantive equality requires that all special family and individual needs be fully met. While that may well be the result of a substantive equality analysis, it is not clear why exactly or when it would ever be consistent with substantive equality to refuse a funding request. Thus, greater clarification of the meaning of substantive equality is needed to link individual and family requests to the larger patterns of injustice facing First Nations children.

Some greater insight into the federal government's interpretation of substantive equality can be gleaned from a list of questions it provided to guide assessment of requests for services that exceed normative standards (*i.e.*, the level of care *typically* provided to or funded for non-First Nations children).[47] These questions are posted on the federal government website and included in its Standard Operating Procedures Manual :

1. Does the child have heightened needs for the service in question as a result of an historical disadvantage?
2. Would the failure to provide the service perpetuate the disadvantage experienced by the child as a result of his or her race, nationality or ethnicity?
3. Would the failure to provide the service result in the child needing to leave the home or community for an extended period?
4. Would the failure to provide the service result in the child being placed at a significant disadvantage in terms of ability to participate in educational activities?
5. Is the provision of support necessary to ensure access to culturally appropriate services?
6. Is the provision of support necessary to avoid a significant interruption in the child's care?
7. Is the provision of support necessary in maintaining family stability?, as indicated by:
    - the risk of children being placed in care; and
    - caregivers being unable to assume caregiving responsibilities.
8. Does the individual circumstance of the child's health condition, family or community context (geographic, historical or cultural) lead to a different or greater need for services as compared to the circumstances of other children (*e.g.*, extraordinary costs associated with daily living due to a remote location)?
9. Would the requested service support the community/family's ability to serve, protect and nurture its children in a manner that strengthens the community/family's resilience, healing and self-determination?[48]

These questions endeavour to link a child's individual circumstances to broader patterns of historical and ongoing group-based disadvantage. It does not seem fair, however, to demand that

[47] Normative standards, as defined by the Jordan's Principle Standard Operating Procedures Manual, are "the average or customary level of provincial/territorial health, social and education programs and services available to achieve consistent outcomes related to population health." *Standard Operating Procedures: Jordan's Principles* (18 October 2019) at 23 [ISC, *Standard Operating Procedures*].
[48] *Ibid.*

First Nations families, facing immediate health or social service needs, answer (or supply the information needed for someone else to answer) the complicated list of questions enumerated above. Non-First Nations families are not required to provide the kind of extensive historically and contextually grounded information needed to answer these questions and, as is discussed in section III-C below, provision of this information may impose heavy temporal and emotional burdens on First Nations families. Rather than requiring individual families to provide evidence that their requests are justified under a standard of substantive equality it would seem more appropriate to develop proactive policies and practices for securing equitable services. Accordingly, to ensure substantive equality in the provision of services for First Nations children, Jordan's Principle requires the development and implementation of standards, guidelines, and processes that ensure the timely and consistent assessment of substantive equality in a way that does not burden individual children and their families.

III. CHALLENGES TO IMPLEMENTING JORDAN'S PRINCIPLE

The current approach to the implementation of Jordan's Principle is both complex and rapidly evolving. A comprehensive evaluation of Jordan's Principle processes across provinces and territories has not, to our knowledge, been conducted or made public. However, recent research conducted in Alberta suggests that numerous problems and irregularities in the federal government's processes established for dealing with Jordan's Principle requests have resulted in ongoing denials and delays in the delivery of needed services to First Nations children.[49] The problems include: (i) an individualistic and demand-driven process; (ii) inconsistent implementation and discretionary decision-making; (iii) a burdensome request process; (iv) delays in provision of funding and services; and (v) the lack of an independent appeals process.

To illustrate the complexities of these requests, consider the following example in which a family was supported by ESC staff—an Access Worker and a Service Coordinator who assist families in accessing existing services—in seeking Jordan's Principle funding for needed services.

> A First Nations mother, accompanied by her own mother, travelled from their home community to a large children's hospital with her severely malnourished infant. The grandmother's first language was Cree and the hospital lacked a Cree translator, which created a barrier when communicating with hospital staff. The family connected with a Jordan's Principle Service Coordinator who was informed by the hospital social worker that the baby would be discharged on Friday and would require liquid formula when returning home. Two days before the baby was to be discharged home, the service coordinator started gathering information about the family and phoned a nurse in the family's home community to gather information about the community and the process of shipping supplies North.

[49] See Meghan Sangster et al, "Advancing Jordan's Principle by realizing Enhanced Service Coordination in the Alberta Region" (2019), online (pdf): *First Nations Health Consortium* <static1.squarespace.com/static/57320457ab48dea767e5e69f/t/5db34642a621353113c9ab79/1572030080205/final+report_FNHC_evaluation.pdf> [perma.cc/2XD9-VUV9].

She learned that the family lived in an isolated northern community only accessible by plane or by ice road. As in many northern communities, caring for children in the community was complicated by the cost of food and the lack of clean water. In the spring of 2018, a gallon of milk cost $70. The price of baby formula was also exorbitant and a permanent boil water advisory made it difficult for parents to prepare powdered formula. Despite widespread and sometimes permanent boil water advisories in First Nations communities throughout the province, the Government of Canada's Non-Insured Health Benefit program (NIHB) did not cover bottled water or (pre-mixed) liquid baby formula. Doctors completing rotations in the community often brought medications and prescriptions, but access to these resources was weather-dependent, with up to 3 weeks between shipments.

The Service Coordinator asked the hospital nurse to have the attending doctor write a prescription for the liquid formula and took it to the pharmacy immediately. When the pharmacy tried to charge NIHB for the liquid formula they received an immediate denial. When the doctor then faxed the NIHB a form justifying the need for the prescription, the Jordan's Principle Access Worker was advised it could take 24 to 48 hours for an answer from NIHB—time the family did not have, because the baby was soon to be discharged. When the family received a second denial for liquid formula coverage, the Jordan's Principle Focal Point, a federal official charged with facilitating the administration of Jordan's Principle requests, approved the funding instead.

In the interim, the child remained in hospital for observation and doctors prescribed a different liquid formula in order to better meet the child's medical and developmental needs. Government representatives charged with facilitating Jordan's Principle applications informed the Access Worker that the family must again apply to NIHB, for the new formula, before Jordan's Principle funding could be approved. The new prescription was taken to the pharmacy and upon receiving another immediate denial from NIHB, the doctor wrote another letter to explain why the prescription was changed. This was followed by a fourth submission to NIHB, which received another denial, and a second Jordan's Principle application. Only after four NIHB denials and two Jordan's Principle applications did NIHB agree to fund the medically necessary liquid formula for the family.

The community and the Access Worker were concerned by the family's experience and submitted a successful Jordan's Principle group request to circumvent potentially life-threatening delays in the future. Through this group request, all parents in the community have access to liquid formula for their children under the age of 2. According to the Service Coordinator, this cost more than $700,000. The group application process took about 2½ months.[50]

[50] Case study taken from Vandna Sinha, Luna Vives & Alison Gerlach, "Implementing Jordan's Principle Service Coordination in the Alberta Region" (2018), online (pdf): *First Nations Health Consortium* <static1.squarespace.com/static/57320457ab48dea767e5e69f/t/5c97103eeef1a1538c20022e/1553403977185/2019-FNHC_InterimReport-WEB.pdf> [perma.cc/4KQV-8HWN].

This example demonstrates some of the complexities that can occur in Jordan's Principle cases. Community conditions created by historic and current systemic discrimination interact with individual circumstances and complex policies surrounding public services to create numerous barriers to efficiently meeting the needs of First Nations children.

The hospitalization of the infant in this example occurred in the spring of 2018. Jordan's Principle policies and processes have continued to evolve since that time. Yet, recently completed research in Alberta[51] and a review of a manual of Standard Operating Procedures for Jordan's Principle dated October 2019,[52] indicate that many features of the approach to Jordan's Principle demonstrated in this case study are still relevant.

A. AN INDIVIDUALISTIC AND DEMAND-DRIVEN PROCESS

One of the persistent problems with the federal government's approach to Jordan's Principle is its individualistic and demand-driven process. The Jordan's Principle Operating Procedures Manual indicates that "Focal Points"—regionalemployees of the federal government who have responsibility for administering and responding to Jordan's Principle requests—must "consider requests on a case-by-case basis, focusing on how the request will address the immediate needs of the child, rather than long-term systemic change."[53] Based on their assessment, Focal Points may approve requests in which there is already clear precedent for approval, or forward documents to the national office for a decision when further guidance is needed. The Manual further provides that the individual, case-by-case approach to assessing requests should proceed without regard for existing programs and services for which the First Nations child is eligible if a referral to existing services cannot be completed within the CHRT mandated timeframe.[54]

The submission of group requests for Jordan's Principle funding to address the needs of groups of children does allow for the development of services that proactively address the needs of multiple children in some cases. However, even the group request application process is demand-driven. For both individual and group requests, the requestor (whether an individual or organization) must:

- identify a need that is unmet by existing services;
- bring that potential need to the attention of someone charged with facilitating Jordan's Principle cases; and
- present evidence in order to qualify for services under Jordan's Principle.

Research in Alberta indicates that First Nations are not provided with information about group requests made or approved by other organizations and communities in their region, nor the range of services or level of funding that First Nations can request. In addition, needs are not being systematically assessed across communities. Further, the group request process does not include an assessment of whether the organization requesting funds is best placed to provide requested services.[55] Descriptions of regional Jordan's Principle initiatives recently produced by the federal

[51] See Sangster et al, *supra* note 49.
[52] See ISC, *Standard Operating Procedures*, *supra* note 47.
[53] *Ibid* at 29.
[54] *Ibid* at 42. The Manual specifically explains that in cases where a pre-existing service exists, Jordan's Principle funding should only be approved for the length of the estimated delay in accessing the existing service.
[55] Sinha, Vives & Gerlach, *supra* note 50 at 12.

government indicate that some regions (*e.g.*, Manitoba) are taking a more systemic approach to providing services. However, the federal government's descriptions do not indicate what resources were allocated to support such an approach, nor do they provide a policy framework to guide a similar approach in other jurisdictions.[56]

Jordan's Principle, therefore, is only applied after individuals or groups assess and advance a request for funds to remedy inequitable funding or services. If a claim for additional funding or services on the basis of Jordan's Principle is not made, inequities are not addressed. This case-by-case approach to the implementation of Jordan's principle can be described as what Tania Murray Li calls a "project system" or "projectification."[57] In discussing this approach in relation to issues of rural development, she argues that the project system encourages people to think that a problem can be fixed without actually addressing the underlying processes that created the problem in the first place.[58] Such an approach fails to make long-term, systemic change, so when the time-bound project ends, the problems the projects were intended to address persist. Hyper-localized, time-limited, individual claims target individual problems, rather than addressing them through more systemic public policy reforms.

Under the demand-driven approach to Jordan's Principle, relief is contingent on the ingenuity, knowledge, and ability of individual, community-based actors to make effective Jordan's Principle claims. The identical needs of other individuals or groups may go unrecognized and unaddressed if they do not have the capacity to formulate Jordan's Principle requests or if they fail to provide sufficient evidence of how the request is linked to substantive equality. The burden of advancing Jordan's Principle requests and justifying requests on the basis of substantive equality falls on individual families and service providers, because there is no mechanism linking the services provided through Jordan's Principle to broader efforts to ameliorate the underlying barriers to equitable service. While the barriers faced by these families are systemic, the burden to overcome these barriers is individualized.[59]

An individualistic, case-by-case approach to Jordan's Principle might be appropriate if First Nations children generally had access to equitable services. Exceptional, individual, or group cases outside this norm of equitable services could be addressed through the Jordan's Principle claims process. However, the reality is that the problem of inequitable services for First Nations children living on reserves is persistent, systemic, and impacts a wide range of health, social, and education services.[60] In such a context, the remedy of individual claims is a sorely inadequate means of addressing the challenge of larger systemic and structural problems.

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[56] Indigenous Services Canada, "Jordan's Principle Implementation – Manitoba Region." *Communiqué to all Chiefs, Health, Social and Education Directors, Jordan's Principle Service Coordinators, First Nations Child and Family Service Agencies* (2019) at 2–3.

[57] Tanya Murray Li, "Problematising the Project System: Rural Development in Indonesia" in Damian Hodgson, Mats Fred, Simon Bailey & Patrik Hall, eds, *The Projectification of the Public Sector*, 1st ed (New York: Routledge, 2019) at 56.

[58] *Ibid* at 57.

[59] For a critique of individualization strategies, see Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1:2 Studies in Soc Justice 93 at 103–104; Janine Brodie, "Social Literacy and Social Justice in Times of Crisis," (Big Thinking Lecture Series delivered at Wilfrid Laurier University/University of Waterloo 30 May 2012) at 134–7, online (pdf): *Trudeau Foundation* <www.fondationtrudeau.ca/sites/default/files/u5/social_literacy_and_social_justice_in_times_of_crisis_-_janine_brodie.pdf> [perma.cc/W2U8-VP7M]. For critiques of project-based funding, see Tanya Murray Li, *supra* note 57 at 57.

[60] See *supra* note 38.

B. INCONSISTENT IMPLEMENTATION AND DISCRETIONARY DECISION-MAKING

Federal government documentation indicates that, in addition to intake information, confirmation of eligibility, and information about the cost of required services, families requesting Jordan's Principle may need to provide "an assessment/prescription/referral/letter from a health/social/educational professional directly serving the child that indicates diagnosis/es or identified need, directly recommends the requested intervention, and if applicable, stipulates the recommended frequency/duration."[61] Research in Alberta confirms that prescriptions, letters from service providers detailing the impact of the identified service or product on the child's diagnosis, fixed budgets, and quotes for costs of service are typically required to ensure requests move forward efficiently.[62]

If a child requires services that exceed normative standards, the request for Jordan's Principle funding must also include documentation "to support evidence of substantive equality, culturally appropriate service provision, and/or safeguarding the best interests of the child."[63] The Jordan's Principle Standard Operating Procedures Manual indicates that such evidence might consist of "a letter of support provided by a health/social/educational professional directly involved in the child's circle of care … a verbal statement/testimony or letter of support from a family member/Elder/community member; and/or a verbal statement/testimony or letter describing the cultural significance of a requested product/service/support."[64] However, research in Alberta indicates that service coordinators in that jurisdiction have sometimes also been instructed to provide answers to the substantive equality questions enumerated on the federal government web-page if a child requires services beyond provincial standards, which complicates the process.[65]

Focal Points decide whether requests are approved, but they have little guidance with which to make these decisions. The Standard Operating Procedure Manual used by federal Focal Points indicates that they must use their discretion to determine whether the request should be approved on the basis of substantive equality using the guiding questions.[66] While this discretionary approach holds the potential for increased flexibility to meet children's needs and best interest, it also comes with a risk of inconsistent and inequitable decision making.[67] An individual Focal Point's familiarity with the identified needs and requested services, as well as their ability to utilize the guiding questions and examples, may influence the outcome of the request. A Focal Point who is knowledgeable about, and inclined to consider, the numerous factors that contribute to the historic disadvantage could be more likely to approve Jordan's Principle requests. Further, while some Focal Points might have close connections to local communities,

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[61] ISC, *Standard Operating Procedures*, *supra* note 47 at 49.
[62] See Sangster et al, *supra* note 49 at 48.
[63] ISC, *Standard Operating Procedures*, *supra* note 47 at 49.
[64] *Ibid.*
[65] Sangster et al, *supra* note 49 at 49 (at 12 for the list of questions).
[66] ISC, *Standard Operating Procedures*, *supra* note 47 at 27–28.
[67] For an informative discussion of administrative discretion and decision making in public services, see Michael Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russel Sage Foundation, 1980). See also Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27:2 Queen's LJ 809; Jennifer Raso, "From Enforcement to Integration: Infusing Administrative Decision-Making with Human Rights Values" (2015) 32:1 Windsor YB Access Just 71; Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375.

others do not. In the latter situation, there is a risk that a lack of local knowledge could hamper efforts to provide culturally appropriate services.

In the case study presented above, regarding liquid formula, for example, consideration of the substantive equality questions outlined on the federal government website would require that a Focal Point be knowledgeable about (or presented with information explaining) the potential short and long-term health impacts on the infant if pre-mixed formula was not approved. Full consideration of the substantive equality questions might also require that the Focal Point understand factors such as:

- the difficulty of safe and consistent preparation of powdered formula in a community with high cost of living and a boil-water advisory;
- the specific history of, and projections for, the boil-water advisory in the family's community;
- federal government responsibility for and historic response to unsafe drinking water in First Nations communities; and
- the risk of child welfare involvement if the infant continued to suffer from malnutrition, and the community's history with residential schools and child removal by the child welfare system.

Under the current federal guidelines, it is possible that a Focal Point might approve a request solely on the basis of the impact on a child's health. However, it is also possible that a Focal Point might feel it necessary to be presented with and to review documentation pertaining to some, or even all, such factors in order to approve the request. The current Jordan's Principle processes do not specify the way in which the guiding questions will be used clearly enough to ensure the consistent application and assessment of substantive equality across cases and jurisdictions. This, in turn, makes it difficult to assess whether the goal of equal outcomes is being achieved.

C. BURDENSOME REQUEST PROCESSES

The current, poorly specified framework for consideration of and response to Jordan's Principle requests also creates substantial burdens for First Nations communities and families. As discussed in section A, the demand-driven approach to Jordan's Principle means that responsibility for identifying needs, bringing these needs to the attention of Focal Points, and compiling documents to justify a Jordan's Principle request falls largely on First Nations families, organizations, and communities.

This burden is exacerbated when the request being submitted must be justified on the grounds of substantive equality. As discussed above, an assessment that services should be provided on the basis of substantive equality considerations may depend on the extent to which the Focal Point has, or is presented with, answers to the guiding questions outlined on the federal webpage. Answering these questions requires substantial knowledge of historic processes of assimilation, discrimination, and dislocation.[68] These are complex questions which may be traumatic for families and communities to answer, much less answer quickly, for those in need of health and social services. Indeed, researchers, historians, jurists, and community activists often spend many years seeking to answer these kinds of questions. The last question asks whether the

[68] For the list of questions, see Sangster et al, *supra* note 49 at 12.

"requested service [would] support the community/family's ability to serve, protect and nurture its children in a manner that strengthens the community/family's resilience, healing and self-determination?"[69] Answering this last question is particularly difficult, and would require extensive knowledge about theories of resilience, healing, and self-determination. This question places the burden on families and communities of assessing potential, long-term or secondary effects of services, and of explaining both the assessment and the importance of the potential impacts to the federal government.

Though federal documentation does not specify a process for answering these complex questions or how extensively they must be answered, recent research in Alberta indicates that it is the parents or other family members who must often provide answers to substantive equality questions put forth by the federal government.[70] The process of answering these questions can cause applicants to relive experiences of trauma or discrimination experienced by themselves or their family or community members.[71] While these questions are helpful in delineating a more robust understanding of how substantive equality is linked to recognition of historical disadvantages facing First Nations communities, they are problematic as a component of individual requests for funding in which the burden is placed on First Nations families. As the federal government has acknowledged, substantive equality "is both a process and an end goal relating to outcomes that seeks to acknowledge and overcome the barriers that have led to the inequality in the first place."[72] Thus, the process for accessing the funding intended to ensure substantive equality should not include barriers that will lead to further inequality.[73] The use of these questions in the assessment of substantive equality may, in and of itself, violate the principle of substantive equality, imposing burdens on First Nations children and families who must spend time and resources advocating for the federal government to address needs created by the government's historic discriminatory treatment. The federal government has a legal obligation to ensure First Nations communities face fewer barriers to accessing services, not more.

D. DELAYS IN PROVISION OF FUNDING AND SERVICES

The current approach to implementing Jordan's Principle also fails to ensure that First Nations children receive timely services. Despite strict timelines outlined by the CHRT, recent research in Alberta demonstrates that the Jordan's Principle request process can be lengthy.[74] The CHRT has ruled that the federal government must respond to a Jordan's Principle request within forty-eight hours of an initial request for services for an individual child (twelve hours for urgent requests), and one week for group requests (forty-eight hours for urgent requests).[75] However, the federal government has interpreted the CHRT's orders so as to "start the clock" only when the Focal Points

[69] ISC, "Substantive Equality," *supra* note 18.
[70] See Sangster et al, *supra* note 49 at 13; ISC, *Standard Operating Procedures, supra* note 47 at 39.
[71] *Ibid.*
[72] ISC, "Substantive Equality," *supra* note 18.
[73] See Catherine Lu, "History and Structural Injustice" in *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017) ch 5. Lu highlights how structurally unjust processes can produce and perpetuate social vulnerabilities and unjust outcomes. She argues that focusing on the role of social structures and processes, rather than individual agents in producing structural injustices is a more plausible way to understand and address the link between historical colonial acts and present-day injustices. Through this lens, we can understand how the current Jordan's Principle request process may in fact be perpetuating the disparities it purports to address.
[74] See Sangster et al, *supra* note 49 at 69–70.
[75] *Caring Society* 2017 (35), *supra* note 27 at para 10.

have received all documentation they deem necessary based on their discretionary assessment of a request. Furthermore, the "clinical case conferencing" permitted within the CHRT timeframes is defined internally as conferencing between Focal Points and service providers, and may potentially include cases in which the Focal Point questions the validity of the service or support the professional service provider has recommended.[76]

This interpretation of the timelines means that any delays that occur between the time an initial request is made and the moment that a Focal Point confirms they have all necessary documentation are not reflected in the federal government's reporting on its response time. Research in Alberta demonstrates, "an ongoing pattern of delays in the federal government's assessment of and response to Jordan's Principle requests" because of factors such as: unclear, inconsistent, and burdensome requirements for documentation supporting a Jordan's Principle request; shifts in federal policies and procedures; and federal failures to sufficiently staff and to provide adequate infrastructure to support Jordan's Principle processes. In the Alberta context, the process before the CHRT-designated timeline begins can take as long as several months in complex cases. Delays of additional weeks, and even months, for payment of services after service approval were also observed. [77]

The Jordan's Principle timeline extends even longer when a Focal Point determines that a requested service or support may not be eligible for Jordan's Principle funding. In such cases, the request is sent for review to the national-level Indigenous Services Canada office in Ottawa, where the Assistant Deputy Minister of Regional Operations, First Nations and Inuit Health Branch retains sole authority to deny a Jordan's Principle funding request.[78] All cases involving requests for services to youth over the age of majority, and those involving specific types of services specified by the federal government, must also be approved at the national level.[79] Though federal documentation notes that this review should take place within CHRT timelines, research in Alberta suggests that escalation can result in lengthy, additional delays.[80] Substantive equality must be implemented in both processes and outcomes. When First Nations children are denied funding and services due to administrative delays that do not impact non-Indigenous children, the principles of substantive equality are violated. As demonstrated in the case of Jordan River Anderson, denials and delays in provision of funding inflict avoidable harm and suffering on First Nations children and families.

E. THE LACK OF AN INDEPENDENT APPEALS PROCESS

The options for appealing a decision rendered in response to a Jordan's Principle request are limited and internal to the federal government. At the current time, a committee composed of two deputy ministers within Indigenous Services Canada—the same government branch responsible for Focal Points and all other aspects of the Jordan's Principle process—oversees the appeals

[76] See ISC, *Standard Operating Procedures*, *supra* note 47 at 56.
[77] See Sangster et al, *supra* note 49 at 69–70.
[78] ISC, *Standard Operating Procedures*, *supra* note 47 at 69.
[79] See Sinha, Vives & Gerlach, *supra* note 50. Specifically, cases that must be escalated to the national level include: those where the regional Focal Point recommends denial; those where the regional Focal Point requires advice on a request which has not been resolved from consultation with the National Coordinating Team; those where the child is not registered, is not entitled to be registered, and lives off-reserve; those where the child's community does not meet eligibility requirements for Self-Governing First Nations; and those where the minor child will attain the age of majority during the requested payment schedule. See ISC, *Standard Operating Procedures*, *supra* note 47 at 70.
[80] See Sangster et al, *supra* note 49 at 70.

process.[81] While federal guidelines note that, "[u]nder no circumstance may the individual who made the initial decision render a determination" in the appeals process, it is the committee member who made the initial decision who designates an alternate committee member.[82] Committee decisions must be conveyed to Focal Points within twelve hours. The timeline for communicating decisions to the families or organizations filing the appeals is much longer: within thirty days.[83]

The dangers of relying solely on an internal appeals process were on display in a Jordan's Principle legal decision in 2013: *Pictou Landing*.[84] In that case, the federal government denied a First Nations family's request for additional respite care services after a case conferencing process during which federal and provincial officials agreed that the request exceeded the current provincial limits on respite care funding.[85] They continued to maintain this assessment, even after the plaintiffs informed them of a Nova Scotia Supreme Court decision that had struck down the provincial limits on respite care funding.[86] Describing the case as one in which "officials of both levels of government maintain an erroneous position on what is available to persons in need of such services," the Federal Court ordered that the requested respite care services should be provided.[87] This decision came only after a lengthy and costly legal proceeding;[88] had PLBC and the Beadle family accepted the decision rendered through internal, governmental processes, they would have been denied much-needed services. The federal government notes that an independent appeals process is being developed and should be approved in 2020,[89] but the details of this independent appeals process remain to be seen. Such a process is necessary to ensure that Jordan's Principle is enabling equitable outcomes for First Nations children and not erroneously denying children much needed support.

IV. CONCLUSION: PATHWAYS FORWARD

In the early phases of its implementation, Jordan's Principle was interpreted restrictively by the federal government. It is only more recently that a broader approach, informed by a commitment to substantive equality, has been endorsed by courts, tribunals, and governments. The endorsement of substantive equality as the animating principle for understanding and applying Jordan's Principle is to be applauded. Substantive equality emerged to reinforce an equitable approach to the treatment of individuals, families, and communities. It requires that the contextual realities of

[81] See ISC, *Standard Operating Procedures*, *supra* note 47 at 83–85.
[82] *Ibid* at 85.
[83] *Ibid* at 86.
[84] *Pictou Landing*, *supra* note 12.
[85] *Ibid.*
[86] See *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126.
[87] *Pictou Landing*, *supra* note 12 at para 86.
[88] The Beadle family waited almost two years from the time of their application for judicial review before receiving the judgment in their favour by the Federal Court. The Federal government then appealed the case, and the Beadle family had to wait another fifteen months before the government dropped the appeal. See Sinha & Blumenthal, *supra* note 7 at 85–86; Amnesty International Legal Team, "Canada v Pictou Landing Band Council and Maurina Beadle" (20 November 2016), online: *Amnesty International Canada* <www.amnesty.ca/legal-brief/canada-v-pictou-landing-band-council-and-maurina-beadle> [perma.cc/G2JV-AV3G].
[89] See ISC, *Standard Operating Procedures*, *supra* note 47 at 73. A call for health, social service, and education professionals to apply to serve on a new Jordan's Principle External Appeals committee was circulated in winter of 2021, but additional information about the appeals committee is not yet available. (See <www.sac-isc.gc.ca/eng/1568396042341/1568396159824> [perma.cc/2CNT-T72D].)

individual children's lives and the structural inequalities facing the communities in which they live be taken into account in government policy-making and funding. Substantive equality is measured predominantly in terms of equitable outcomes—meaning that in some circumstances, more funding may be required to provide First Nations children the same level and quality of public services available to other children in Canada. Substantive equality has also been recognized as having a procedural dimension. It is a concept that requires the development of both equitable policies and on-the-ground procedures to actually achieve equitable outcomes. It is enhanced by equitable participation of those whose lives have been impacted by historical and ongoing inequalities, and it requires accessible, fair, open, and accountable public processes. Finally, substantive equality is a concept that is rooted in recognition of historical patterns of disadvantage experienced by groups and communities. Substantive equality must, therefore, be informed by an understanding of the egregious inequalities experienced by First Nations children, their families, and communities. To implement substantive equality is to embrace its relational and collective aspects.

There continue to be significant obstacles to the full and effective implementation of Jordan's Principle in accordance with the principle of substantive equality. One challenge has been the failure on the part of the federal government to provide a clearly articulated and operationalized standard of substantive equality linked to historical and ongoing inequalities facing First Nations communities. A second problem is the significant burden imposed on individuals, families, and communities to make claims on the basis of Jordan's Principle and to articulate them using the legalistic language of substantive equality. The individualized, demand-driven request process favours those with the capacity to apply for funding, while leaving those with fewer resources or access to information without redress.[90] The process is further plagued by the risk of inconsistent discretionary decisions, inadequate information about funding decisions, delays in accessing funding, and the absence of an independent appeal process. Jordan's Principle thus provides relief only to those who are successful in navigating the complex request process.

At the core of the ongoing challenges with implementation of Jordan's Principle is a failure to address how it can evolve beyond the principle's original purpose as an individual-level mechanism to respond to denials of funding, delays, and disruptions of services in exceptional cases. It has been expanded to a project system which provides temporary funding for specific First Nations services and initiatives.[91] However, this approach is insufficient and risks creating new sources of inequality in the provision of services. The inequitable access to health and social services that First Nations children experience is a complex, multi-faceted problem resulting from long-term underfunding, a lack of comprehensive public policies, and inequitable public service funding frameworks. Accordingly, it requires systemic reforms. As the Jordan's Principle Working Group, an interdisciplinary collaboration to document Jordan's Principle implementation in 2015 (prior to the CHRT rulings in *Caring Society*), noted:

> … [we must] systematically identify and address the jurisdictional ambiguities and underfunding that give rise to each Jordan's Principle case. By clarifying jurisdictional responsibilities and eliminating the underfunding identified in individual cases, governments can *prevent* denials, delays, and disruptions in services for other children

[90] See Sinha, Vives & Gerlach, *supra* note 50 at 53, 64–74.

[91] Funding is temporary; its renewal is dependant on government budgetary allocations. The federal government has currently committed to Jordan's Principle funding until 2022. See House of Commons, *supra* note 34.

> in similar circumstances. Accordingly, they can better assume the responsibilities to ensure equitable treatment of First Nations children.[92]

The primary mechanism for addressing the inequalities in First Nations children's lives, therefore, needs to be a much more preventive, systemic, and proactive approach. Shifting away from a reactive, individualistic, and demand-driven approach in implementing Jordan's Principle would substantially reduce the burden on individual families already struggling to deal with denials of necessary services. In keeping with First Nations' rights to self-government and self-determination, this revised approach must be developed and implemented by First Nations working with full support and collaboration from federal and provincial governments. As a significant paradigm change, this revised approach will take time to develop and implement. While the full contours of a revised approach are beyond the scope of this article, we have enumerated some potential (short- and medium-term) reforms based on the concerns we identified with respect to the implementation of Jordan's Principle.

1. To reduce reliance on the current individualistic and demand-driven process:
   - Systematic collection, routine consolidation, and ongoing analysis of data on the specific needs being addressed through individual Jordan's Principle requests. The data needed is not simply the broad category of services being funded, such as "vision," but a specific description that supports examination of the existing policy framework, *e.g.*, "second pair of glasses within a year, not covered by Non Insured Health Benefits (NIHB)."
   - Greater transparency around Jordan's Principle group requests. The information that could be shared might include things like: the types of services being funded, the identified gaps in services being addressed, the amount of funding being provided per capita, and the variation in funding levels across provinces/territories and remote/rural/urban communities.
   - Greater synthesis, summary, and widespread dissemination of existing research on the needs of, and gaps in services to, First Nations children. This synthesis should enable the provision of dedicated support for ongoing research in order to address gaps in existing research/knowledge.
   - The development of a system and infrastructure for supporting ongoing policy revision in order to address gaps in health, social, and education services. Ongoing analysis is required to identify gaps and revise existing policy so that future reliance on Jordan's Principle is reduced. One mechanism for achieving this might be the creation of a national-level ombudsperson with jurisdiction over federal funding of services for First Nations children.[93]

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[92] Jordan's Principle Working Group, *supra* note 5 at 21 [emphasis in original].

[93] As called for by the National Inquiry into Missing and Murdered Indigenous Women and Girls, see *supra* note 39 at 178; Canadian Council of Youth Advocates, "Statement on Children's Rights in Canada" (2019), online (pdf): <www.cccya.ca/Images/english/pdf/0326%20Statement%20on%20Children%27s%20Rights%20EN-Final.pdf> [perma.cc/2PK2-8HF6]; UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations: Canada*, UNCRCOR, 34th Sess, CRC/C/15/Add2.15 (2003), online (pdf): <www.refworld.org/docid/403a22804.html> [perma.cc/MSX3-AY99]; UNICEF Canada, "It's Time for a National Children's Commissioner for Canada" (2010), online (pdf): *UNICEF* <www.unicef.ca/sites/default/files/imce_uploads/DISCOVER/OUR%20WORK/ADVOCACY/DOMESTIC/GOVERNANCE/DOCS/Commission%20booklet%20English%20Final.pdf> [perma.cc/95D6-YF9Y]; Standing Senate Committee on Human Rights, *Effective Implementation of Canada's International Obligations with Respect to the*

2. To reduce inconsistent implementation and reliance on discretionary decision-making:
    - A clearer and more comprehensive, publicly available, articulation of substantive equality in the context of Jordan's Principle by the Federal government. This should include anonymized examples of actual requests that were approved as well as examples of actual requests that were denied Jordan's Principle funding on the basis of substantive equality. A detailed explanation of each decision should also be provided.
    - The development and widespread public dissemination of clear guidelines and procedures to support a more transparent assessment of requests based on a substantive equality standard. These guidelines should support consideration of, and deference to, assessments of service providers familiar with the details and context of each child's specific case.
    - Development of, and financial/technical support for, meaningful First Nations oversight of, engagement in, and regular public-reporting on decision making at every level of Jordan's Principle. This includes decisions regarding individual and group requests, as well as broader policy decisions related to identifying and addressing systemic service gaps.

3. To eliminate current, burdensome request processes:
    - Integration of Jordan's Principle requests into existing service assessment procedures. For example, integration with the NIHB request process, so that any request denied by NIHB is automatically forwarded for consideration under Jordan's Principle.
    - Redesign of the Jordan's Principle request process to simplify and reduce the burden on individual families and service providers. Revised guidelines/procedures should minimize requirements for individual families and service providers to document/demonstrate historical disadvantage. For example, decision makers should be required to offer an initial assessment based on review of systemic information.
    - Responsibility for compiling the information required in order to assess substantive equality should fall on Focal Points, not families. The federal government must ensure sufficient financial and technical support to ensure Focal Points are able to take on these new responsibilities.

4. To eliminate delays in the provision of funding of services:
    - Revision of standards for meeting CHRT-mandated timelines so that the clock starts upon receipt of initial application rather than allowing for an unspecified period, before the clock is started, during which Focal Points may request additional documentation.
    - Establishment of clear timelines for payment of approved Jordan's Principle requests, and revision of existing payment policies/procedures in order to comply with the established timelines.

5. To remedy the lack of an independent appeals process:
    - The establishment and provision of sufficient financial and technical resources to support a First Nations led, external appeals process.

Rights of Children (April 2007) (Chair: Raynell Andreychuk), online (pdf): <sencanada.ca/content/sen/Committee/391/huma/rep/rep10apr07-e.pdf> [perma.cc/Q77T-MQ28]; Child Welfare League of Canada et al, "Children and youth have a right to an advocate – they also desperately need one" (15 November 2018), online: *Canadian Coalition for the Rights of Children* <rightsofchildren.ca/childrens-rights-in-canada/children-and-youth-have-a-right-to-an-advocate/> [perma.cc/KQP5-B9T8].

Failure to revise the current approach to Jordan's Principle will result in First Nations children with urgent needs continuing to be beholden to a burdensome, inconsistent, and highly discretionary application process where individual requests are considered one at a time, while the broader social policies that have created the need for Jordan's Principle remain uncontested. Surely, this is inconsistent with the full promise of substantive equality, which requires a commitment and willingness to redress ongoing structural and systemic inequalities facing First Nations children.