

Legislating Jordan's Principle: An Indirect Success

A D A M N A T H A N S O N

I. INTRODUCTION

At age four, Jordan Anderson passed away in the hospital. He never lived in a home environment. Several years passed before Dr. Jon Gerrard requested to set aside the ordinary business of the Manitoba Legislative Assembly to make this a matter of urgent public importance. To some members of the House, there remained no greater concern than the crisis within Manitoba's Child and Family Services divisions. Children were not being treated equally, denied the love of their families, and dying in the system. Notwithstanding this exigency, the Speaker of the House deemed Dr. Gerrard's discussion as not pressing enough to give the matter immediate attention. Three days later, on 24 November 2008, the Liberal party reintroduced *The Jordan's Principle Implementation Act*.¹ The bill never made it to second reading. Six months prior, the bill's predecessor of the same title did not make it past second reading.² The names, preambles, definitions, and provisions of both bills remained identical.

This paper identifies the problems leading to Jordan's Principle, as well as Dr. Gerrard's connection with the issue. Discussion will focus on the reception of Bill 203 in the Legislature, the federal-provincial agreement and terms of reference to implement Jordan's Principle in Manitoba, the September 2008 House Resolution, and examples of Jordan's Principle in action. Weaving through this fabric is a virtuous idea: children's needs should be placed first when faced with jurisdictional disputes between governments. Looking through the provisions of both bills, however, one sees a legislative solution many in the Legislature labelled pointless. Practically speaking, Bill 203 had neither a proper implementation mechanism or a chance of enactment. Yet to raise public awareness for an issue that Dr. Gerrard felt passionately about, while also

¹ Bill 203, *The Jordan's Principle Implementation Act*, 3rd Sess, 39th Leg, Manitoba, 2008 (second reading not proceeded with) [Bill 203].

² Bill 233, *The Jordan's Principle Implementation Act*, 2nd Sess, 39th Leg, Manitoba, 2008 (second reading not proceeded with) [Bill 233].

applying pressure on the governing party to find a solution to the problem, meant that actions to legislate Jordan's Principle were an indirect success.

II. HISTORY

A. Jordan's Plight

In 1999, the Northern Manitoban Cree Nation community of Norway House welcomed the birth of Jordan, a boy with a rare muscular disorder named Carey Fineman Ziter Syndrome.³ Aboriginal children with complex medical or developmental needs cannot access a variety of services on their reserve. Many, like Jordan, require placement with the provincial branch of Child and Family Services ("CFS") to receive these often essential services.⁴ After his birth, Jordan was placed off-reserve in a Winnipeg hospital. Two years later, his condition improved and he could leave the hospital to receive care in a home tailored to his medical needs. The federal government would not fund alterations to Jordan's family home on reserve. As a result, Jordan's parents agreed to place him in a specialized foster home.⁵

Norway House leaders supported the move. They raised money to refit a van which allowed Jordan's attendance at cultural gatherings, family visits, and medical appointments.⁶ Before Jordan left his hospital bed, the federal and provincial governments disputed who was to pay for certain costs, such as transportation to medical appointments, special food,⁷ and even a \$30 showerhead.⁸ All the while, the cost for taxpayers to keep Jordan in the hospital was double the rate compared to foster home care.⁹ Member of the Legislative Assembly ("MLA") Kevin Lamoureux described the government's process as "bafflegab."¹⁰ After two more years, Jordan passed away in his hospital bed.

In November 2005, Trudy Lavallee brought Jordan's story to the attention of the public with her article entitled "Honouring Jordan: Putting First Nations

³ Trudy L Lavallee, "Honouring Jordan: Putting First Nations children first and funding fights second" (2005) 10 *Paediatrics and Child Health* 527 at 527–529.

⁴ *Ibid.*

⁵ Cindy Blackstock, "Jordan's principle: Editorial update" (2008) 13 *Paediatrics and Child Health* 589 at 589–590.

⁶ *Ibid.*

⁷ Lavallee, *supra* note 3 at 528.

⁸ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LXI No 52 (3 June 2008) at 2575 (Leanne Rowat) [*Debates* (3 June 2008)].

⁹ Lavallee, *supra* note 3.

¹⁰ *Debates* (3 June 2008), *supra* note 8 at 2579 (Kevin Lamoureux).

children first and funding fights second.”¹¹ Ms. Lavallee called for the federal and provincial governments to immediately adopt a “child first” policy and call it Jordan’s Principle, in honour of Jordan Anderson.¹²

B. What Created Jordan’s Situation?

Jordan never left the hospital because the federal and provincial governments fought over jurisdiction. Pursuant to the *Constitution*’s division of powers, child welfare matters are within provincial jurisdiction.¹³ “Indians” fall within federal jurisdiction.¹⁴ Under the federal *Indian Act*,¹⁵ there is no head of power for Aboriginal health care or child welfare. These matters are addressed by provinces.¹⁶

In the 1980s, tripartite agreements between the federal government, the provincial government, and First Nations governments established 13 First Nations family services divisions.¹⁷ These divisions provided services both on and off reserve under the provincial *Child and Family Services Act*.¹⁸ The agreements reinforced the constitutional responsibility of Manitoba to provide services to Aboriginal children through First Nations Child and Family Services (“CFS”)¹⁹ and the fiduciary duty of the federal government to fund these services on reserve through Indian and Northern Affairs Canada (“INAC”).²⁰ First Nation CFS agencies were to deliver provincially comparable services for eligible children on reserve.²¹

Unfortunately, jurisdictional disputes remained unresolved. The federal and provincial governments could not agree on funding responsibilities for Aboriginal children living on reserve in the care of provincial child welfare services. INAC and Health Canada argued over the right to receive contributions from a provincial health system that received federal health transfer dollars.²² INAC also claimed that the First Nations and Inuit Health

¹¹ Lavallee, *supra* note 3.

¹² *Ibid* at 529.

¹³ *Constitution Act, 1982*, s 92(16), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution or Constitution Act*].

¹⁴ *Ibid*, s 91(24).

¹⁵ *Indian Act*, RSC, 1985, c I-5, s 88.

¹⁶ Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5th ed (Toronto: Carswell, 2007) at 764

¹⁷ Lavallee, *supra* note 3.

¹⁸ *Child and Family Services Act*, RSM 1985, c 80.

¹⁹ Lavallee, *supra* note 3

²⁰ Bennett, *supra* note 16 at 3.

²¹ *Ibid*.

²² Lavallee, *supra* note 3.

Branch (“FNIHB”) of Health Canada were responsible for funding medical needs on reserve. FNIHB believed that INAC was responsible since the child was in the care of a provincial First Nations family services agency. Both INAC and Health Canada concluded that provincial CFS should contribute, as this department had constitutional authority over child and family services.²³

The provincial government asserted that the federal government has a fiduciary responsibility for and to Aboriginal peoples, both on and off reserve.²⁴ In contrast, the 1997 *Winnipeg Child & Family Services* decision held that funds for discretionary services for Aboriginal children under the *Child and Family Services Act* was a federal policy decision, not a fiduciary or treaty obligation.²⁵ Despite this, Manitoba viewed any attempted enforcement of provincial funding for Aboriginals on reserve as federal offloading.²⁶ The Honourable Gord Mackintosh, then Manitoba Minister of Family Services and Housing, explained that funding for Aboriginal children on reserve was:

an on-reserve service. There's no dispute about whether it's provincial or federal. It's on-reserve services, and last time I challenged the member [Dr. Jon Gerrard]... was he advocating that provincial jurisdictions now get involved in providing medical services on-reserve because that would be quite a remarkable position to take and one that I know would be of interest to all the provinces and premiers across the country.²⁷

The provinces provided care in a foster home for Aboriginal children in the custody of CFS with complex medical needs, and the federal government reimbursed the cost of these services. However, no government department pledged funds for children in the care of provincial CFS living on reserve. A 2005 federally commissioned report found 393 children affected by jurisdictional disputes from a sample of 12 of the 105 First Nations welfare agencies.²⁸ Expanded to all Canadian First Nations, this equalled thousands of affected children whose individual care often exceeded \$250 000 to \$300 000 a year.²⁹

²³ *Ibid.*

²⁴ Lavallec, *supra* note 3 at 528.

²⁵ *Winnipeg Child & Family Services (Southeast Area) v Canada (AG)*, [1997] 9 WWR 236 at 22–24.

²⁶ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LXI No 37 (7 May 2008) at 1829 (Gord Mackintosh) [*Debates* (7 May 2008)].

²⁷ *Ibid.*

²⁸ Kelly A MacDonald, “Jordan’s Principle: A child first approach to jurisdictional issues” in *Wen:de: We are coming to the light of day* (First Nations Child and Family Caring Society of Canada, 2005) at 17 [*Wen:de*].

²⁹ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, vol LVII No 27B (8 December 2005) at 1043 (Tim Sale) [*Debates* (8 December 2005)].

The report concluded that these children were denied services available to non-Aboriginal children because of their Aboriginal race and on-reserve residency.³⁰

Ms. Lavallee argued that the lack of application of a child first policy to Aboriginal children reeked of discrimination.³¹ Other academics also saw discrimination, "pure and simple."³² If a non-Aboriginal child in Manitoba required the same essential services as Jordan, the entire cost would be covered by the appropriate agency. It is unlikely there would be a three year long dispute over whether the federal government was responsible for full reimbursement.³³ Further to this, statistics show that the average Canadian receives two and a half times greater an amount in government policies and programs than the average Aboriginal.³⁴ In 2009, up to 27 000 Aboriginal children resided in foster care across Canada.³⁵ In Manitoba, thirty nine per cent of Aboriginal children live in poverty.³⁶ 23% of all children in Manitoba are Aboriginal; however, 85% of all children in care of CFS are Aboriginal.³⁷ Despite this overrepresentation, First Nations CFS agencies receive twenty two per cent less funding per child than provincial agencies.³⁸

In early September 2009, the Canadian Human Rights Tribunal began hearing a historic case claiming discrimination on the part of the federal government in Aboriginal child welfare funding.³⁹ The case was adjourned in mid-November 2009 for the appointment of a new tribunal chair.⁴⁰ Before the hearing resumed in January 2010, INAC asserted that the complainants' allegations did not fit within the jurisdiction of the tribunal. In June 2010, the tribunal heard arguments for a motion to dismiss the proceedings. In March 2011, the Canadian Human Rights Tribunal dismissed the case, ruling that it

³⁰ *Wen:de*, *supra* note 28 at 16–17.

³¹ Lavallee, *supra* note 3 at 527–529.

³² Noni MacDonald & Amir Attaran, "Jordan's Principle, governments' paralysis" (2007) 177 *Canadian Medical Association Journal* 321.

³³ *Ibid.*

³⁴ Lavallee, *supra* note 3.

³⁵ Laurie Monsebraaten, "Native children flooding into children's aid societies", *Toronto Star* (22 November 2009) A1.

³⁶ Jim Silver, *Solutions That Work: Fighting Poverty in Winnipeg* (Winnipeg: Fernwood Publishing, 2000) at 128.

³⁷ *Ibid.*

³⁸ Monsebraaten, *supra* note 35.

³⁹ "Feds shortchanging aboriginal child services: AFN" (15 September 2009), online: CBC News <<http://www.cbc.ca/news>>.

⁴⁰ Mindelle Jacobs, "Feds neglecting First Nations children", Editorial, *The Winnipeg Sun* (17 November 2009) 9.

cannot decide if federal funding for on-reserve child welfare services is discriminatory as Ottawa does not provide child welfare services anywhere else.⁴¹

On the other hand, others felt that the difficulty for implementing Jordan's Principle was its universality. A child first policy disregards not just ethnicity, but also geography. First Nations CFS agencies have an obligation to provide comparable services on reserve as one would expect anywhere else in Manitoba. Children with complex medical needs, however, often require specialized services not available on-reserve.

III. THE INITIATIVES OF DR. JON GERRARD

If politicians were superheroes, Jon Gerrard would be Everywhere Man. The leader of the Manitoba Liberal Party... shows up everywhere someone needs a politician's help... he is fast becoming legendary for taking on a myriad of issues no other politician will touch.⁴²

Dr. Jon Gerrard, MLA for River Heights, is the current leader of the Liberal party in Manitoba. A paediatrician for 12 years before entering politics, Dr. Gerrard was also a Member of Parliament in the House of Commons between 1993 and 1997.⁴³ While in Ottawa, Dr. Gerrard served as a Secretary of State in the Jean Chrétien government.⁴⁴ During his term, the federal government stopped the indexing of payments for on-reserve child welfare.⁴⁵

In the 1995 Manitoba provincial election, the Liberal party won only three seats and lost its official party status in the Legislature.⁴⁶ Dr. Gerrard stepped into the leadership position in February 1998 with the party on the verge of disintegration.⁴⁷ In 1999, Dr. Gerrard won the only Liberal seat in the Manitoba Legislative Assembly.⁴⁸ In 2007, the Liberals won two seats and 12% of the popular vote.⁴⁹

Throughout his political career, Dr. Gerrard remained an active advocate for children's health issues. In 2001, he helped design and develop Health

⁴¹ Mia Rabson, "Setback for child welfare challenge", *Winnipeg Free Press* (16 March 2011) A7.

⁴² Mia Rabson, "It's a bird, it's a plane, it's...Everywhere Man", *Winnipeg Free Press* (1 May 2002) A12.

⁴³ "Interview with Jon Gerrard" (2003) 30 Man LJ 117.

⁴⁴ *Ibid* at 119.

⁴⁵ *Debates* (7 May 2008), *supra* note 26 at 1830.

⁴⁶ "Results - 1995 General Election", online: Elections Manitoba <http://www.elections.mb.ca/en/Results/general_election_36.html>.

⁴⁷ "Gerrard's leadership bid backed by Carstairs", *Winnipeg Free Press* (16 September 1998) A4.

⁴⁸ Kim Guttormson, "Gerrard the last Liberal standing", *Winnipeg Free Press* (22 September 1999) A1.

⁴⁹ "Liberals hold 2 seats" (22 May 2007), online: CBC News <<http://www.cbc.ca/news>>.

Canada's "Pilot Project for A Model for Integrated Health Care Delivery for Children with Disabilities in Manitoba" ("Pilot Project").⁵⁰ This report noted that lack of access to specialty services or care available to children in rural or remote communities presented a challenge to the province.⁵¹

On 8 December 2005, a month after the publication of Ms. Lavallee's article, Dr. Gerrard presented the story of Jordan Anderson to the Manitoba Legislature. He asked then New Democratic Party ("NDP") Premier Gary Doer during the oral questions session:

Why did this government fail to put Jordan's interests first? Why did this government let intergovernmental bickering replace sensible policy? Why did Jordan have to die before he was ever able to go home?⁵²

The Honourable Tim Sale, then Minister of Health, responded for Mr. Doer. Mr. Sale affirmed that the NDP party supported putting the child first.⁵³ In the ensuing four years, Dr. Gerrard spoke to Jordan's Principle in the Legislature on fourteen separate occasions, proposed a private members' bill twice, attempted a House Resolution, and mentioned Jordan's Principle whenever possible. Implementing Jordan's Principle was a focus for Dr. Gerrard. Mr. Lamoureux explained:

There are periodically issues that I have noted my leader really take a stand on and I would suggest to you that this is probably one of those issues. ...I would find very difficult to come up with something other than an issue like this where my leader has been so passionate about, not only publicly but also privately...that this is something that's so important to Manitobans and he's taken it on as a mission.⁵⁴

Jordan's Principle was the perfect issue for a renewed Manitoba Liberal party. The party prided themselves as "the most progressive, the most innovative and the most forward thinking of all parties."⁵⁵ What government would not pass legislation with one simple aim: putting children's needs first? The difficulty for legislating Jordan's Principle was that various levels of government provided needed services in the absence of clearly defined roles and responsibilities. Federal and provincial departments remained hesitant at first contact to supply services without a dispute resolution method or formula for reimbursement. One

⁵⁰ Linked Information Network for Kids with Disabilities, *A Model for Integrated Health Care Delivery for Children with Disabilities in Manitoba: A Pilot Project* (Winnipeg: Health Canada (Transition Fund), 2001) at 2.

⁵¹ *Ibid.*

⁵² *Debates* (8 December 2005), *supra* note 29 (Hon Jon Gerrard).

⁵³ *Ibid* (Tim Sale).

⁵⁴ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LX No 65A (9 September 2008) at 3018 (Kevin Lamoureux) [*Debates* (9 September 2008)].

⁵⁵ "Gerrard building a Liberal Vision for Manitoba", online: Manitoba Liberal Party <<http://mlp.manitobaliberals.ca>>.

could not legislate an effective solution without the participation of both levels of government.

Two years after Dr. Gerrard submitted Jordan's story, the federal House of Commons unanimously voted to implement Private Members Motion 296 in support of Jordan's Principle.⁵⁶ The motion stated that: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children, to put children first, funding arrangements second."⁵⁷ While some Members of Parliament spoke emotionally about Jordan's story and the neglect suffered by Aboriginal children,⁵⁸ others claimed that the motion was merely a "provisional measure" until the federal and provincial governments agreed upon implementation parameters.⁵⁹ Nevertheless, respected Aboriginal activist Cindy Blackstock stated that the "the moral temperature of the nation was taken" that day.⁶⁰ Ms. Blackstock cautioned that the discrimination faced by Aboriginal children would not end until the federal government began implementation of Jordan's Principle.⁶¹

In Manitoba, Dr. Gerrard moved for a first reading of Bill 233, *The Jordan's Principle Implementation Act*, a private members' bill, on 20 May 2008.⁶² He claimed that this bill put Jordan's Principle into law and provided a mechanism for implementation.⁶³ Dr. Gerrard's motion carried and on 3 June 2008, Bill 233 made it to second reading.

Once a bill passes second reading, it moves to the committee stage. At this point, the public can influence the legislative process through presenting oral or written submissions.⁶⁴ During second reading, Dr. Gerrard held that Bill 233 provided not just "legal rights for all children in Manitoba to get the services they need, but also the process for making sure it is getting implemented."⁶⁵

⁵⁶ *House of Commons Debates*, 39th Parl, 2nd Sess, No 31 (5 December 2007) at 1805 (Jean Crowder).

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 1755 (Judy Wasylycia-Leis).

⁵⁹ *Ibid* at 1745 (Mario Laframboise).

⁶⁰ Blackstock, *supra* note 5 at 590.

⁶¹ *Ibid.*

⁶² Bill 233, *supra* note 2.

⁶³ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LXI No 43B (20 May 2008) at 2253 (Hon Jon Gerrard) [*Debates* (20 May 2008)].

⁶⁴ "Fact Sheet No. 4 - How Laws are Made", online: The Manitoba Legislative Assembly <www.gov.mb.ca/hansard/info/factsheets/fact4.pdf>.

⁶⁵ *Debates* (3 June 2008), *supra* note 8 at 2572 (Hon Jon Gerrard).

Throughout second reading of a bill, debate must focus on the principle of the bill and not the details of its provisions.⁶⁶ Despite this, there were numerous problems with the provisions of Bill 233. The most notable failing was that the bill did not provide a proper mechanism for dispute resolution. As pointed out by many MLAs, this proved fatal to the legislation.

Most bills provide for implementation through their regulations. Under Bill 233, wronged parents or guardians could apply to a court for enforcement of their child's rights.⁶⁷ Dr. Gerrard hoped that this "broad legal hammer" would set a precedent for immediate provision of services and compel governments to reach an agreement.⁶⁸ This did not appease opposing MLAs, who called for a mechanism which engaged all government partners, including the First Nations.⁶⁹

In the debates, Progressive Conservative ("PC") MLA Leanne Rowat believed that reimbursement was not the issue. If a service provider felt entitled to compensation from another level of government due to jurisdictional responsibility, Ms. Rowat believed that they could seek reimbursement afterwards.⁷⁰ However, this approach mischaracterized the problem. Without a dispute resolution mechanism, the same problems which led to Jordan's Principle remained: no mutually agreed mechanism for reimbursement created uncertain cost responsibilities. Premier Doer explained that, without an implementation strategy, the taxpayers lost "because when the bill comes to be paid, the federal government goes to the bathroom."⁷¹

On the contrary, Mr. Lamoureux argued that any problems faced by the lack of a service delivery model were "pathetic" and a "copout" excuse.⁷² He believed that the services would follow the political will. He recast the argument

⁶⁶ "Second Reading and Referral of a Bill to a Committee", online: Compendium of House of Commons Procedure <http://www.parl.gc.ca/compendium/web-content/c_g_legislativeprocess-c.htm?Language=E#2c>.

⁶⁷ Bill 233, *supra* note 2, cl 6.

⁶⁸ Letter from Dr. Jon Gerrard (6 December 2009) [Gerrard].

⁶⁹ *Debates* (3 June 2008), *supra* note 8 at 2574 (Kerri Irvin-Ross). One should note that Dr. Gerrard knew this issue. In 2007, he signed the Manitoba Liberals' submission to the Regional Health Authority External Review Committee. See Jon Gerrard, Doug Kayler, Craig Hildahl & MJ Willard, *Delivering the care you need when you need it*, (Winnipeg: Manitoba Liberal Caucus, 2007). One of the things the report found was a desperate need for a more effective three-way partnership between First Nations, the Government of Manitoba, and the Government of Canada.

⁷⁰ *Debates* (3 June 2008), *supra* note 8.

⁷¹ *Ibid* at 2596 (Hon Gary Doer).

⁷² *Debates* (3 June 2008), *supra* note 8 at 2579 (Kevin Lamoureux).

and informed the Legislature that the issue was, “do you care about the children?”⁷³

Rhetorical jabs aside, Mr. Lamoureux illustrated the political astuteness of Dr. Gerrard’s actions. The work of the Liberals toward legislating Jordan’s Principle placed the NDP government between a rock and a hard place. If they accepted Bill 233 with no dispute resolution mechanism, the province was accountable for on-reserve health care and social services. This sizeable shift in public policy created massive funding responsibilities and no promise of federal reimbursement. On the other hand, if the province did not accept Bill 233, the public could believe that the NDP government did not support equality rights for children in Manitoba. The provincial government took the latter option.

Faced with repeated calls for action, the NDP government shifted fault to the federal government. Premier Doer stated that an understanding “in principle” was in place with the federal government to provide the services first and argue about the bills second.⁷⁴ Both governments needed to sit down and negotiate terms for implementation. The Honourable Kerri Irvin-Ross, Minister of Healthy Living, asserted that Manitoba MLAs tried to engage the federal government through writing letters and travelling to Ottawa.⁷⁵ Doug Martindale, NDP MLA for Burrows, explained that months before the House of Commons passed Motion 296, Manitoba was the first province in Canada to approach the federal government to implement Jordan’s Principle.⁷⁶ Manitoba appointed their lead official for the panel. Almost a year later, Health Canada had not assigned its representative.⁷⁷ Mr. Martindale blamed “federal foot-dragging”⁷⁸ for the lack of progress made on this issue.

Overall, Bill 233 could not be enacted; there were too many shortcomings beyond the lack of a dispute resolution mechanism. First, the bill was overbroad. Bill 233 legally enforced the rights of parents or guardians to receive information about available options for their children in a timely fashion.⁷⁹ Furthermore, parents or guardians were to participate in health care or social services decisions, receive information on the qualifications and experience of those providing services, and to receive considerate, compassionate, and respectful health and social services.⁸⁰

⁷³ *Ibid.*

⁷⁴ *Debates* (20 May 2008), *supra* note 63 at 2254 (Hon Gary Doer).

⁷⁵ *Debates* (3 June 2008), *supra* note 8 at 2600 (Hon Kerri Irvin-Ross).

⁷⁶ *Debates* (20 May 2008), *supra* note 63 at 2577 (Doug Martindale).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 2578.

⁷⁹ Bill 233, *supra* note 2, cl 3(1)(a).

⁸⁰ *Ibid.*, cl 3(1)(b)–(d).

The timely access provision was familiar to many during the 2007 provincial election. There, Dr. Gerrard's campaign spoke of a "Patient Bill of Rights" with a legally enforceable guarantee of timely access to quality care.⁸¹ Additionally, providing information to parents about child health care was a strong interest for Dr. Gerrard. A 1998 *Canadian Medical Association Journal* article reported that he was busy constructing a database that delivered reliable information on a child's health to both physicians and parents.⁸² The article stated that parents, not just physicians, required accurate information on the health care of their child.⁸³ To this day, Dr. Gerrard identifies access to information for parents or guardians as both a human right and important to good decision making.⁸⁴

While it is important for parents or guardians to receive information about their child's medical care, Jordan's situation did not confront this problem. His parents did not experience a lack of information. Rather, they had only one choice for their son: placement with a provincial CFS agency in order for Jordan to receive the necessary medical care. Once Jordan recovered, they also did not have a choice over whether or not to take him home, as neither government would fund necessary alterations to accommodate Jordan's special needs at his on-reserve home. Lack of choices and subsequent government disagreements gave rise to Jordan's Principle, not a lack of information.

Additionally, Bill 233 stated that the rights of a child should be placed first "particularly," but not exclusively, when complex medical needs were involved.⁸⁵ Children with complex needs, as noted in Dr. Gerrard's 2001 Pilot Project, interact with numerous distinct government services and are especially susceptible to jurisdictional disputes. These children are often placed into the care of CFS agencies to access essential services. Dr. Gerrard's broad application of Bill 233 to all Aboriginal children in Manitoba, regardless of the medical complexity of the child's needs, amplified the responsibilities of the provincial government. As a result, this made the bill less likely to pass. Still, others argued that Jordan's legacy was the creation of equality for all children "not to be

⁸¹ Manitoba Liberal Party, *Prescription for Progress: Platform 2007* (Winnipeg: Manitoba Liberals, 2007) at 4, online: Manitoba Liberal Party <<http://mlp.manitobaliberals.ca/wp-content/uploads/platform-final.pdf>>.

⁸² David Square, "Dr. Jon Gerrard's attention switches from federal cabinet to evidence based child care" (1998) 158 *Canadian Medical Association Journal* 1187.

⁸³ *Ibid* at 1188.

⁸⁴ Gerrard, *supra* note 68.

⁸⁵ Bill 233, *supra* note 2, Preamble.

applied on a selective basis...[and] that race was not a criterion for the delivery of government services.”⁸⁶

IV. THE FEDERAL-PROVINCIAL AGREEMENT

A Canada/Manitoba Joint Steering Committee on Jordan’s Principle began meeting in the summer of 2008.⁸⁷ The group included members of Health Canada, Indian Affairs & Northern Development, Family Services & Housing (Manitoba), and Health & Healthy Living (Manitoba).⁸⁸ The Committee finalized an agreement to implement Jordan’s Principle in Manitoba. Within their terms of reference (“terms”), they established a number of important points. First, Jordan’s Principle applied to First Nations children with multiple disabilities living on reserve who normally would receive the necessary services in similar circumstances where there were not jurisdictional disputes over funding. Second, the primary agency of responsibility paid for necessary services until the establishment of responsibility for payment. Third, case conferences would establish a body of decisions to guide other implementations of Jordan’s Principle.⁸⁹

Notably, the terms indicated that a dispute resolution mechanism was “critical” to the successful implementation of Jordan’s Principle; however, a solution was not defined by the committee.⁹⁰ Recorded as a specific issue to be addressed, the committee was to examine and recommend a dispute resolution mechanism.⁹¹ This problem, as well as many definitions that guided the application of Jordan’s Principle, would be presented in a final report to government no later than January 2009. These definitions included which government services were prone to jurisdictional conflicts, what constituted normative services in Manitoba, which children and services were covered, and what the process was to determine the primary agency of responsibility. The final report would also revisit the effectiveness of case conferencing and determine a process to engage First Nations stakeholders.⁹²

⁸⁶ Cindy Blackstock, “Jordan’s Story: How One Boy Inspired a World of Change” in *Aboriginal Children’s Health: Leaving No Child Behind* (Toronto: Canadian UNICEF Committee, 2009) 46 at 50.

⁸⁷ Letter from Linda Burnside (13 July 2010).

⁸⁸ Joint Committee on the Implementation of Jordan’s Principle, “Terms of Reference” (15 September 2008) at 1 [“Terms of Reference”].

⁸⁹ *Ibid* at 3.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 4.

⁹² *Ibid.*

The agreement successfully committed both sides to solving the jurisdictional problems and established a common understanding of Jordan's Principle. Furthermore, qualified Aboriginal children with complex medical needs living on-reserve received services at first contact. Funding disputes would be solved at a later date as to not affect the care of the child. Despite the agreement, not all parties involved were happy. Dr. Gerrard believed that the agreement did not help children with less severe disabilities.⁹³ Also, Dr. Gerrard believed that case conferences provided a way for the governments to delay their decisions.⁹⁴ Other MLAs claimed that families affected by the agreement did not know where to look for support.⁹⁵

Dr. Gerrard introduced Resolution 18 four days after the announcement of the agreement.⁹⁶ In the Legislature, the NDP and PC parties each receive one House Resolution per week. The Manitoba Liberal party does not have official party status, and as a result, they do not usually receive the opportunity to bring forward resolutions.⁹⁷ The importance of this moment was not lost on Mr. Lamoureux. He believed that in Dr. Gerrard's ten years in the Legislature, the Liberal leader attempted only three resolutions.⁹⁸

Dr. Gerrard's resolution was similar in construction but worded differently than Bill 233. Missing were mentions of "complex medical needs" or the United Nations *Convention on the Rights of the Child*.⁹⁹ The resolution now included a broader statement that "all children in Manitoba should know the comforts of home and their community and should never have to sacrifice these rights."¹⁰⁰ Also, the agreement stipulated that "timely access to quality health and social services is a right, not a privilege, to be afforded to all children in Manitoba."¹⁰¹

In response, the Manitoba Legislature did not adopt Resolution 18. Their sentiments were clearly expressed by Mr. Martindale:

Instead of putting a meaningless bill forward, we have relentlessly pushed the federal government to find a resolution to Jordan's Principle, and we are pleased that, after two years, we have finally come to an agreement with the federal government on how to

⁹³ Gerrard, *supra* note 68.

⁹⁴ *Ibid.*

⁹⁵ *Debates* (9 September 2008), *supra* note 54 at 3033 (Leanne Rowat).

⁹⁶ Resolution 18, *Adopt Jordan's Principle*, 2nd Sess, 39th Leg, Manitoba, 2008 (not proceeded with) ["Resolution 18"].

⁹⁷ Gerrard, *supra* note 68.

⁹⁸ *Debates* (9 September 2008), *supra* note 54 at 3018 (Kevin Lamoureux).

⁹⁹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991), art 3.

¹⁰⁰ Resolution 18, *supra* note 98.

¹⁰¹ *Ibid.*

proceed with negotiations and deal with jurisdictional issues as they arise. Therefore, I don't think there's a real need for this bill. We have an agreement already.¹⁰²

Dr. Gerrard was shocked that the resolution did not pass.¹⁰³ He blamed the NDP government's failure to realize that "this is one issue where [we] all have to work together to ensure [that] the children in [care] are properly supported, and that the rights of children to proper health and social support come first and ahead of governmental jurisdictional disputes."¹⁰⁴ He reiterated that the problem with the agreement was the application of this principle only to children with complex medical needs. Moreover, the terms of the federal-provincial terms of reference were difficult to work in practice.¹⁰⁵ For Dr. Gerrard, the agreement did not go far enough.

V. WHY RE-INTRODUCE BILL 203?

The Jordan's Principle Implementation Act could drive government policy without enactment. Whenever the Liberal Party of Manitoba introduces a bill, they send out corresponding media releases to all major news outlets. This ensures maximum public awareness.¹⁰⁶

Very few private members' bills become law.¹⁰⁷ According to a report by the Hillwatch Lobbying Firm, private members' bills at the federal level often outnumber government bills four to one.¹⁰⁸ Yet of the 1 142 private members' bills tabled in the House of Commons between 1993 and 2001, only eighteen (1.5%) received Royal Assent.¹⁰⁹ The Hillwatch report looked to a senior House source for what elements led to a votable private members' bill. This source identified success factors as a connection to newsworthy issues, timing, and being

¹⁰² *Debates* (9 September 2008), *supra* note 54 at 3033 (Doug Martindale). One should note that at 3022, Mr. Lamoureux pointed out that Mr. Martindale spoke about a Bill, most likely Bill 233, and not Resolution 18. This confusion did not seem to throw Minister Andrew Swan, who effectively stalled the matter by speaking about Mr. Martindale's passion and heart. Minister Swan spoke until the House recessed at noon, thereby denying any vote on Resolution 18.

¹⁰³ Jon Gerrard, "Children in Manitoba, Jordan's Principle, FASD and the price of milk" (9 September 2008), online: Jon Gerrard's Personal Weblog <<http://www.manitobaliberals.ca/jonsblog.html>>.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Letter from Leah Ross, legislative assistant to Dr. Gerrard (4 December 2009).

¹⁰⁷ One should note that in 2007, the NDP government passed *The Apology Act*, SM 2007, c 25, a private member bill introduced by a Liberal MLA.

¹⁰⁸ Bill Curry "Believe it or not, Private Members Bills are 'rattling a few cages'", *The Hill Times* (2 July 2001).

¹⁰⁹ *Ibid.*

in sync with evolving government policy.¹¹⁰ In conclusion, the source held that private members' bills do not have to pass in order to affect government policy. The bills, through their introduction, could still push the public agenda in a particular direction.¹¹¹ In the alternative, the governing party could adopt the bill as their own. In 2006, the NDP government enacted *The Good Samaritan Protection Act*, an almost exact replica of the Liberal's earlier *The Good Samaritan Act*.¹¹²

One day into the Third Session of the Thirty-Ninth Manitoba Legislative Assembly, Dr. Gerrard brought forward Bill 203 as a Matter of Urgent Public Importance. Under section 36(1) of the *Rules of the Legislature*, any MLA may move to set aside the regularly scheduled House business to discuss a matter of urgent public importance.¹¹³ Urgency in this context meant the urgency of immediate debate, not of the subject matter of the motion.¹¹⁴ When given the floor, Dr. Gerrard stated that a considerable number of children with disabilities were not considered for services.¹¹⁵ Others declared that children were dying in the system.¹¹⁶ Still, the Speaker rejected the section 36(1) application.¹¹⁷

Three days later, Dr. Gerrard introduced Bill 203 for a first reading.¹¹⁸ The federal-provincial agreement changed the circumstances for Jordan's Principle, yet there were no changes from the previous year's version, whose wording was "optimal."¹¹⁹ Dr. Gerrard addressed the Legislature with a now familiar statement: Bill 203 provided for "the principle that children be considered first and that jurisdictional arguments between governments or between departments be considered afterwards."¹²⁰ Faced with limited opportunities to bring other Liberal bills to second reading, Dr. Gerrard never presented Bill 203 for a second

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Bill 201, *The Good Samaritan Act*, 5th Sess, 38th Leg, Manitoba, 2006 (withdrawn 5 Dec 2006). Later reappeared as *The Good Samaritan Protection Act*, CCSM c G65.

¹¹³ *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba* (adopted 10 April 1980, as amended 7 December 2005), s 36(1) ["Rules of the Legislature"].

¹¹⁴ Alistair Fraser, WF Dawson, John A Holtby, eds, *Beauchesne's Rules & Forms of the House of Commons of Canada*, 6th ed (Toronto: Carswell, 1989) at n 390.

¹¹⁵ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 28B (21 April 2009) at 916 (Hon Jon Gerrard).

¹¹⁶ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 2 (21 November 2009) at 27 (Bonnie Mitchelson).

¹¹⁷ *Ibid* at 29 (Hon George Hickes).

¹¹⁸ Bill 203, *supra* note 1.

¹¹⁹ Gerrard, *supra* note 68.

¹²⁰ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 2 (24 November 2008) at 39 (Hon Jon Gerrard).

reading.¹²¹ Instead, he kept the bill ready and waited for palpable deficiencies in the federal-provincial agreement or a “major public outcry.”¹²²

VI. EXAMPLES OF THE APPLICATION OF JORDAN’S PRINCIPLE

Regardless of Dr. Gerrard’s attempts to legislate Jordan’s Principle in Manitoba, one can see examples of Jordan’s Principle in action. Premier Doer believed that Jordan’s Principle applied not just to Aboriginal children, but to every individual caught between jurisdictional arguments. Doer stated that the first instance of provincial application of Jordan’s Principle took place in 2007, following the refusal of the federal government to pay ambulance costs for Aboriginals on social assistance.¹²³ The provincial government opted to pay the City of Winnipeg \$11.7 million dollars owed from the federal government rather than see people in medical need not receive ambulance service.¹²⁴ The province said it will go after the federal government for reimbursement of these costs in the future.¹²⁵ A second instance is when the provincial government stepped in to provide funding for on-reserve personal care homes when that need was not addressed by the federal government.¹²⁶

There were also jurisdictional disputes in Ontario. At CFB Petawawa in April 2007, the children of Canadian Armed Forces personnel living on base were on the “brink of suicide.”¹²⁷ This base significantly contributed to Canadian Forces efforts in Afghanistan. As a result, children often had to come to terms with the deaths of parents, friends, or neighbours. Most children waited four to six months to receive mental health care, and some even waited up to a year.¹²⁸ When Ontario Ombudsman André Marin requested funding from the provincial government, Ontario’s Ministry of Children and Youth Services initially resisted, stating the federal government was responsible for war and military personnel.¹²⁹ The province eventually worked out a cost share agreement with the federal

¹²¹ Gerrard, *supra* note 68.

¹²² *Ibid.*

¹²³ *Debates* (20 May 2008), *supra* note 63 at 2254 (Hon Gary Doer).

¹²⁴ *Debates* (9 September 2008), *supra* note 54 at 3017 (Hon Kerri Irvin-Ross).

¹²⁵ “Governments battle over \$7.5M ambulance bill” (4 December 2007), online: CBC News <<http://www.cbc.ca/news>>.

¹²⁶ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LXI No 36B (6 May 2008) at 1767 (Steve Ashton).

¹²⁷ “Children in ‘real crisis’ on Petawawa military base: ombudsman” (13 April 2007), online: CBC News <<http://www.cbc.ca/news>>.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

government, and in the end, the needs of children were placed ahead of financial disputes.

In 2008, INAC, Health Canada, and the provincial government all contributed \$75 000 towards a four month pilot project in Jordan Anderson's former Norway House community. The project provided services for children on-reserve who required medical assistance and disability support to live at home with their parents.¹³⁰ The goal was to develop a template for the application of Jordan's Principle across Manitoba.¹³¹ This project continues on a year-to-year basis and contributes significantly to the care of 26 Aboriginal children with complex medical needs and allows them to receive medical care in a home environment.¹³²

VII. CONCLUSION

Was Bill 203 necessary? In 2007, Parliament adopted a child first policy. One year later, the federal and provincial governments agreed to implement their definition of Jordan's Principle. A joint committee was working through the terms to solve jurisdictional and application difficulties. Examples of Jordan's Principle can be seen in Manitoba and Ontario, and a concerned public supported the issue. Despite all this, Bill 203 did not change one word from Bill 233 to reflect these new circumstances.

Perhaps Dr. Gerrard did not seek enactment as the primary goal for Bill 203, but as a vehicle to pressure the NDP government into adopting a child first policy. As the January 2009 target date for the committee's final report passed, Jordan's Principle remained a viable political issue for the Liberal party. The agreed upon version of Jordan's Principle only helped Aboriginal children with complex medical needs that would otherwise receive the service in similar circumstances. While *The Jordan's Principle Implementation Act* was not successfully enacted, Bill 203 connected the Liberal party to a sympathetic policy issue that their leader felt passionate about. Also, the bill kept pressure on involved parties to finalize definitions, methods of application, and solutions.

On 7 December 2009, Dr. Gerrard placed *The Jordan's Principle Implementation Act* on the Order Paper to be introduced again without any amendments or modifications.¹³³ For the third consecutive year, Dr. Gerrard and his party vocalized the plight of all Aboriginal children caught between

¹³⁰ *Debates* (9 September 2008), *supra* note 54 at 3019–3120 (Doug Martindale).

¹³¹ *Debates* (3 June 2008), *supra* note 8 at 2600 (Hon Kerri Irvin-Ross).

¹³² Interview of Trudy Lavallee (8 December 2009).

¹³³ Bill 214, *The Jordan's Principle Implementation Act*, 4th Sess, 39th Leg, Manitoba, 2009 (second reading not proceeded with).

jurisdictional disputes; and for the third consecutive year, thousands of children in care across Manitoba anxiously awaited some definitive action from the provincial government. This time, however, they were not waiting alone.