Jordan's Principle: Reconciliation and the First Nations Child

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I. Introduction

The Truth and Reconciliation Commission of Canada (TRC) was mandated to "document the individual and collective harms" of residential schools and to "guide and inspire a process of truth and healing, leading toward reconciliation."[1] The stories of survivors revealed the intergenerational and egregious harms of taking children from their families and communities. In seeking to redress the legacy of the residential schools era, the TRC Calls to Action include greater recognition of self-governance of Indigenous Peoples, as well as numerous recommendations for equitable funding of health, educational, and child welfare services. The TRC specifically calls upon all levels of government "to fully implement Jordan's Principle."[2] This principle honours the memory of Jordan River Anderson, a young Cree child who died in hospital at the age of five. Jordan unnecessarily spent all of his short life in the hospital because the province of Manitoba and the federal government could not agree on who was responsible for paying his home care costs.[3] Following Jordan's death, the Federal House of Commons unanimously passed a motion affirming that the government should immediately adopt a child-first principle to ensure no gaps or delays in services to First Nations children.[4] Jordan's Principle requires that the first government approached by a First Nations community pay for the requested services, and that any jurisdictional disputes be resolved afterwards.[5]

In this article, I explore the connections between Jordan's Principle and reconciliation. The forced institutionalization of children during the residential schools era resonates with the fact that Jordan Anderson was institutionalized in a hospital and unable to live in his community during his short life. Ensuring that First Nations children are treated fairly and are secure in having their social, economic, educational, and health needs met is understandably a fundamental starting point for reconciliation.

To ensure that Jordan's Principle contributes fully to the journey towards reconciliation, however, it is also important to understand how it should be interpreted and applied in contexts of ongoing struggles for self-determination and autonomous governance in Indigenous communities. One of the foundational principles in the *United Nations Declaration on the Rights of Indigenous Peoples*[6] (UNDRIP) is the right of self-determination and self-governance:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[7]

The TRC endorses the UNDRIP as "the framework for reconciliation."[8] It would seem important, therefore, to develop the meaning of Jordan's Principle in a way that advances self-governance in First Nations communities. Affirming Jordan's Principle as an integral dimension of reconciliation *and* self-determination prompts us to consider its significance beyond the narrow (albeit important) question of which non-Indigenous government pays for services to prevent jurisdictional gaps. The promise of Jordan's principle lies in its potential to ensure equitable

health, educational, economic, and social services in revitalized, autonomous, and self-governing communities.

II. Jordan's Principle: Jurisdictional and Rights Dimensions

Although Jordan's principle was only a motion passed in the Federal House of Commons in 2007, its legal significance was confirmed in two important cases — *Pictou Landing Band Council v Canada (Attorney General)*[9] and *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and North Northern Affairs Canada)*.[10] Beyond addressing the jurisdictional dimensions of Jordan's Principle, these cases also expanded it to affirm a fundamental guarantee for equality in the provision of services to First Nations children. The first case concerned funding for home health care; the second, adequate funding for child welfare on reserves. In both cases, there is an underlying concern (that resonates with the TRC's work) that Indigenous children should live and flourish in their homes and communities, and not be subject to institutionalization in non-Indigenous institutions.

In the *Pictou Landing* case, Maurina Beadle, the primary caregiver for her teenage son, Jeremy Meawasige — who has complex health needs and multiple disabilities — drew on Jordan's Principle in support of her claim for additional funding to continue caring for her son at home. In May 2010, Maurina Beadle suffered a stroke and was unable to continue the level of care she had provided in the past to Jeremy. The Pictou Landing Band Council contacted the federal government to request additional financial assistance to maintain Jeremy's home care. Barbara Robinson, Manager of Social Programs, Aboriginal Affairs and Northern Development Canada, denied the request for additional funding. She maintained, erroneously, that Jeremy would not have been entitled to additional funding pursuant to provincial programs.[11]

What makes this case even more disturbing is the willingness of the federal government official to authorize significant funding for the institutionalization of Jeremy, but not for his home care. Jeremy's situation met the criteria for fully-funded "long term institutional care" which had been estimated to cost $350 per day (or approximately $10,500 per month); his home care was estimated to cost approximately $8,200.[12] To pay more for institutionalized care due to funding rules and procedures raises the very real risks of bureaucratic indifference to the human consequences of governmental decisions.

In a pathbreaking judgment, Justice Mandamin of the Federal Court of Canada interpreted Jordan's Principle broadly and contextually to conclude that it required the federal government, consistent with its adoption of Jordan's Principle as government policy, to provide the requested additional funding.[13] Although both the federal and provincial governments agreed that Jeremy should not be entitled to additional funding, Mandamin J found that the "absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available … and both then assert there is no jurisdictional dispute."[14] Specifically, he concludes that in exceptional cases involving significant hardship, a person with multiple disabilities living off-reserve in Nova Scotia would be entitled to additional funding for home care.[15] In contrast, Jeremy, a First Nations teenager living on reserve with severe disabilities was not entitled to additional funding despite being in "similar dire straits."[16] As Mandamin J explains, "Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdictional disputes between different levels of government."[17]

In applying Jordan's Principle, Justice Mandamin noted that to refuse the additional funding would result in the institutionalization of Jeremy and separation from his family and community:

> Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.[18]

He recognized the "deep bond" that Maurina Beadle has with her son, as "the only person who, at times, is able to understand and communicate with him"[19] and the importance of community in Jeremy's life. As Mandamin J wrote in describing Maurina Beadle:

> She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music while participating in community pow wows.[20]

Thus, Mandamin J ordered additional funding to secure continued home care for Jeremy. In light of his conclusions on Jordan's Principle, Justice Mandamin did not consider whether the discretionary denial of funding was also discriminatory in violation of section 15(1) of the *Canadian Charter of Rights and Freedoms*.[21]

The *First Nations Caring Society* case involved a complaint pursuant to the *Canadian Human Rights Act*[22] alleging discriminatory practices by the federal government for child welfare services on reserves.[23] As noted by the Canadian Human Rights Tribunal at the outset of its decision:

> This decision concerns <u>children</u>. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.[24]

The Tribunal concluded that the federal government was discriminating on the basis of race against First Nations children by failing to provide adequate child welfare services on reserves.[25] As a result, it held that a disproportionate number of First Nations children continue to be removed from their families and communities. Specifically, the Tribunal held that governmental funding mechanisms create an "incentive to take children into care."[26] Furthermore, families and communities are not being provided preventive child welfare services and supports that are considered a best practice in modern child welfare work and critical to reducing the need to take children away from their families.[27] Most poignantly, the Tribunal explained that for "First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic needs. Poverty, poor housing, and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services."[28] Moreover, the adverse effects of inadequate child welfare funding and policies "perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system."[29]

Although the case focused on discrimination pursuant to the *Canadian Human Rights Act*, the Tribunal addressed the relevance of Jordan's Principle, concluding that the "narrow definition and inadequate implementation of Jordan's Principle" has resulted in "service gaps, delays and denials for First Nations children."[30] Indeed, as the Tribunal explains, Jordan's Principle effectively mandates equitable treatment for First Nations children:

> Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.[31]

Thus, while initially framed as a jurisdictional issue, as illustrated in this decision, and implicit in the *Pictou Landing* case, Jordan's Principle contains within it a fundamental commitment to equality and non-discrimination. In the *First Nations Caring Society* case, Jordan's principle emerges as an equality principle — at the interstices of human rights protections against discrimination against First Nations children. As an affirmation of equality and non-discrimination, it entitles Indigenous children to the same level and quality of services as non-Indigenous children. As Cindy Blackstock notes, the inequitable treatment of First Nations children is racism: "If reconciliation means not saying 'sorry'

twice, the tribunal's decision must spur the federal government to stop using racial discrimination as public policy across all areas of First Nations experience."[32] Thus, Jordan's Principle has been expanded beyond the question of jurisdictional disputes to embrace a broader principle about equitable treatment of First Nations children. It contains, therefore, both a *jurisdictional dimension* (with jurisdiction being understood broadly) and a *rights dimension* (equitable access to services for First Nations children).

Both of these cases attest to the risks of continued institutionalization and loss of community in Indigenous children's lives. Yet, both also represent important victories for the children, adults, families, communities, and community-based organizations involved. From these two pathbreaking decisions, we can see that Jordan's Principle has important jurisdictional and equality rights implications. The principle addresses a reality that in some cases, neither federal nor provincial governments want to assume jurisdiction and financial responsibility for health and other needs of First Nations children. Moreover, it affirms a rights-based entitlement to equitable services for First Nations children. It is important to ensure, however, that the transformative and reconciliatory potential of these legal victories is reinforced and that they are not understood simply as affirmations of non-Indigenous control or hegemony over First Nations communities. Instead, with respect to both the jurisdictional and rights-based dimensions of Jordan's principle, it is possible to affirm a broader, transformative interpretation, which integrates attentiveness to reconciliation and Indigenous self-determination consistent with the aspirations of the UNDRIP. I want to suggest, therefore, that to advance reconciliation, Jordan's Principle should ensure both equitable outcomes and equitable processes to advance community well-being, autonomy, and self-determination.

III. Jurisdictional Justice[33]

Thinking about jurisdiction evokes considerations of governance, sovereignty, and the division or sharing of responsibilities between different levels of government. In the conventional Canadian constitutional context, when we ask about who has jurisdiction, we often think about which non-Indigenous level of government (federal, provincial, or territorial) should be responsible for particular services and domains of everyday life. Whereas we often witness governments seeking greater jurisdictional responsibility in constitutional disputes about the division of governmental powers, with respect to jurisdictional responsibilities and in particular financial responsibilities towards Indigenous peoples, governments often retreat.[34] Such is the case, for example, with respect to ensuring safe water and housing, redressing structural conditions of poverty, and funding health services.[35] Indeed, Jordan's Principle emerged in the wake of a jurisdictional dispute where neither the federal nor the provincial government wanted to assume responsibility to fund Jordan's home-care health services.

Despite efforts by non-Indigenous governments to limit their jurisdictional responsibilities and concomitant financial obligations, the importance of Indigenous self-determination risks being overlooked in these federal-provincial jurisdictional disputes. As Mary Ellen Turpel explains in her critique of the Supreme Court jurisprudence regarding the question of jurisdiction over marital property rights on reserves, cases about Indigenous women's lives (including one case that involved domestic violence) were reduced to a dispute between the federal and provincial governments. There was no space for Indigenous women's voices, resulting in the "complete silencing of aboriginal women's experiences and indeed of the aboriginal dimension" of the cases.[36] Turpel cautions that, "to win may simply mean to more fully situate yourselves as a subordinate to a paternal guardian state."[37] As she further explains:

> Framing the issue in constitutional division of powers doctrine is an effective strategy for depoliticizing the cases and silencing any questioning of the overwhelming state control of (jurisdiction over) aboriginal people.
>
> …
>
> Colonial gaps are not there just to be filled. The regime is problematic as a whole because

> it seeks to bureaucratically administer Indian people according to Anglo-European standards.[38]

For Turpel, the Canadian legal regime is "thoroughly colonial."[39] To focus exclusively on ascertaining provincial versus federal jurisdiction is to fail "to step back and realize the oppressive and presumptuous nature of its exercise."[40]

Turpel's insights, therefore, underscore the idea that we should not limit concepts, such as Jordan's Principle, to the narrow question of ascertaining which non-Indigenous level of government has jurisdiction and funding responsibilities. Instead, we need to probe how Indigenous community governance, autonomy, and self-determination are engaged by Jordan's Principle. In so doing, questions arise about how essential social and health services are provided, who controls the development and delivery of those services, and whether Indigenous voices are heard and centred. As Turpel emphasizes, Indigenous autonomy, voice, and self-determination should be at the heart of these jurisdictional disputes, not erased through the technical doctrines of the constitutional division of powers.[41]

Turpel's ideas resonate with Hester Lessard's analysis of a case involving a jurisdictional dispute about safe injection sites for drug users in Vancouver's Downtown Eastside.[42] Lessard tells the story of grassroots community mobilization for safe injection sites, involving politically marginalized groups generally excluded from democratic engagement. She insists that constitutional disputes about federal versus provincial jurisdiction need to take into account the democratic participation of the affected marginalized groups and communities. For Lessard, "jurisdictional justice" requires

> … a more substantive account of political engagement at the community level where two crucial elements are present. The first element is the voicelessness or political marginality of the community in question in relation to conventional institutional channels of democratic change. The second element is the fundamental nature of the interest at stake for that community… .[43]

Thus, like Turpel, Lessard maintains that debates about jurisdiction in Canadian constitutional law need to engage more fully with questions of community empowerment, democracy, and governance, rather than presuming the legitimacy of traditional structures of political power.[44]

In the context of Jordan's Principle, therefore, it is not just a matter of requiring the federal or provincial governments to provide more money for health or child welfare services; it is also critical to ensure that community voices are heard and that Indigenous governments control the development and implementation of such services. In the *Pictou Landing* case, members of Jeremy's family and community, as well as the local First Nations government, understood his physical and psychological needs. The federal bureaucratic decision-making process was insensitive to the egregious impact institutionalization would have had on Jeremy's life and well-being. The case is not simply about money and government funding; it raises the question of who decides critical issues about how people live and govern themselves with love and dignity.

Similarly, in the *First Nations Caring Society* case, child welfare is not just about increasing funding. It is also about securing preventive services in the child welfare system, addressing structural inequalities in communities, and honouring the participation of First Nations communities in forging solutions for how to best care for their children. In short, an understanding of Jordan's Principle that is rooted in jurisdictional justice requires a commitment to autonomy and self-determination in First Nations communities.

IV. Inclusive Equality

Similar concerns about the importance of community, autonomy, and empowerment apply to equality rights and non-discrimination. In both the *Pictou Landing* and *First Nations Caring Society* cases, Jordan's Principle is understood as ensuring equitable and non-discriminatory services for First Nations children. Increasingly, the principle has been framed as a human rights

claim. Over the past 35 years, rights have flourished in Canadian law, with the constitutional entrenchment of rights in the *Charter* and continued expansion of statutory anti-discrimination laws. Beyond the equality and non-discrimination rights at the heart of Jordan's Principle, there has also been the entrenchment of Aboriginal rights in section 35 of the *Constitution Act, 1982*,[45] growing recognition of international Indigenous rights, and efforts to advance economic and social rights.[46] Nevertheless, as in the case of jurisdictional disputes, there are risks to the rights-based approach.

Depending on how rights-based claims are framed, they may advertently or inadvertently perpetuate subordination. In her work on the paradoxes of rights, Wendy Brown has questioned "when and whether rights … are formulated in such a way as to enable the escape of the subordinated from the site of that violation … [and to challenge] the conditions within."[47] Brown's concerns echo those of Turpel and her concern about how Canadian colonial legal structures are premised on the subordination of Indigenous peoples.[48] Thus, while rights, including equality rights, may result in remedial relief that imposes additional obligations on governments, there is a risk that in doing so, non-Indigenous governmental control is increased over individuals and communities. Both the *Pictou Landing* and *First Nations Caring Society* cases were framed as claims for increased funding from non-Indigenous governments without expressly raising autonomy and self-determination as integral claims. Certainly, both the Pictou Band Council and the First Nations Caring Society are actively engaged with self-governance issues and activism towards greater community control over child health and welfare services. Nevertheless, the legal framing of the cases fits into a more traditional paradigm that could result in conceding governing authority to non-Indigenous governments.

In my work on equality rights in other contexts, I have endeavoured to elaborate an approach I call "inclusive equality." [49] The key idea at the heart of inclusive equality is recognition of the importance of both *substantive* outcomes (i.e. economic, psychological, physical, and social well-being) as well as *procedural* equality (i.e. participatory decision-making processes, community autonomy, and equitable political power structures within organizations, communities, and countries). Inequality results from both the substantive effects of discrimination (including social, psychological, physical, and economic harms) and the systemic and institutional practices and processes that reproduce it.[50] Accordingly, "securing greater equality in access to economic and social well-being, community leadership opportunities, food, shelter, healthcare, education, and cultural activities on a long-term basis will require more than a redistribution of income. It will require a restructuring of human relations."[51] Indeed, a restructuring of relationships between indigenous and non-indigenous people is critical to the reconciliation project.[52] To begin to redress the structural and systemic inequalities facing First Nations children, therefore, it is important to examine the effects of both inequitable substantive funding and the problems in the processes of governance and service delivery as they affect First Nations children. 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. To the extent that long-term systemic and structural change is needed, it must be informed by the voices and experiential knowledge of First Nations communities and provide autonomy and decision-making power to those communities and to First Nations organizations working on these issues. In short, a systemic, substantive, and structural vision of inclusive equality and human rights remedies is both a challenge and an imperative to success.

V. Conclusion: Reconciliation and Jordan's Legacy

The significance of Jordan's Principle continues to grow. Borne of the bureaucratic indifference to the impact of jurisdictional disputes on individuals, families, and communities, it challenges us to keep our focus on the human con-

sequences of governmental decisions. From a motion in Parliament to honour the memory of Jordan Anderson, to consolidation of the legal significance of the principle in the *Pictou Landing* and *First Nations Caring Society* cases, Jordan's Principle is having a concrete impact on the legal obligations of the federal and provincial governments towards First Nations communities. Beyond responding to the risk of delays or denial of services resulting from jurisdictional uncertainties in Canadian federalism, Jordan's Principle effectively requires equitable health and welfare services for First Nations children. It affirms an entitlement to non-discriminatory governmental services and benefits.

While the progress we have made in understanding the full meaning of Jordan's Principle is important, significant challenges remain. Underfunding of programs and services to First Nations children continues.[53] Such underfunding continues even in contexts where there are remedial orders mandating an end to discriminatory funding.[54] Moreover, the realities of inequality in the lives of First Nations children reveal that Jordan's Principle is not simply about preventing jurisdictional gaps between federal and provincial governments or ensuring a certain amount of government funding for services. Both the jurisdictional and rights-based dimensions of Jordan's Principle deserve an interpretation that respects the decision-making authority and self-determination of First Nations communities. In this way, Jordan's Principle may advance the challenges of reconciliation and in so doing fully honour the memory of Jordan Anderson.

Endnotes

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1 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 23.

2 *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 1 (Call to Action #3) ("Calls to Action").

3 First Nations Child & Family Caring Society of Canada, "Jordan's Principle" (2016), online: <https://fncaringsociety.com/jordans-principle>.

4 Private Member's Motion M-296, 1st Sess, 39th Parl, 2007 (tabled by Jean Crowder, Nanaimo-Cowichan NDP, unanimously passed by House of Commons, 12 December 2007). See 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 Review 80.

5 See Jordan's Principle Working Group, *Without Denial, Delay or Disruption: Ensuring First Nations Children's Access to Equitable Services through Jordan's Principle* (Assembly of First Nations, 2015) at 4. For a good summary of Jordan's principle, see the remedial order of the Canadian Human Rights Tribunal outlining the key components of Jordan's principle: *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2017 CHRT 14 at para 135 ["Family Caring Society"].

6 GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007) (supported without qualification by Canada May 2016, commitment reaffirmed to adopt and implement the Declaration in accordance with the Canadian Constitution) [*UNDRIP*].

7 *Ibid*, art 4

8 TRC, "Calls to Action", *supra* note 2 at 5 (Call to Action #45(ii)).

9 2013 FC 342, [2013] 3 CNLR 371 ["*Pictou Landing*"].

10 2016 CHRT 2, [2016] 2 CNLR 270 ["*First Nations Caring Society*"].

11 *Pictou Landing*, *supra* note 9 at paras 86, 92-94.

12 *Ibid* at para 26 (affirming full funding for long-term institutional care); paras 62 and 104 (community services estimate of $350 per day for institutional care) and para 11 (regarding cost estimate of home care). Of note as well in this case is the hidden value of home care done by family members over a period of many years. See Pat Armstrong & Hugh Armstrong, "Thinking it Through: Women, Work and Caring in the New Millennium" in Karen R Grant et al, eds, *Caring For/Caring About: Women,*

Home Care and Unpaid Caregiving (Toronto: University of Toronto Press, 2000) 5.

13 *Pictou Landing, supra* note 9 at para 111 ("I am satisfied that the federal government took on the obligation espoused in Jordan's Principle").

14 *Ibid* at para 86.

15 *Ibid* at para 96. As Mandamin J notes: "there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve. This policy has been used to provide individuals living off reserve with additional funds for home care in exceptional circumstances."

16 *Ibid* at para 97.

17 *Ibid* at para 81.

18 *Ibid* at para 110.

19 *Ibid* at paras 10 and 110.

20 *Ibid* at para 10. This passage in Mandamin J's judgment reminds me of Patricia Monture's insight that: "In order to understand equality, people must understand caring. Without understanding caring, we cannot understand 'peoplehood,' be it in a community as small as a gathering of a few people to something as large as the global community. Each person must be respected for whom and what they are. Only when we all understand caring will we have reached equality." (Patricia Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 CJWL 159 at 159).

21 *Pictou Landing*, *supra* note 9 at para 121. For a summary of the equality arguments submitted on each side, see paras 46-49 & 65-68. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c11.

22 *Canadian Human Rights Act*, RSC 1985, c H-6, s 5.

23 See Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285 ["The Complainant"].

24 *First Nations Caring Society, supra* note 10 at para 1.

25 *Ibid* at paras 456, 458-59, and 473.

26 *Ibid* at para 349.

27 See Canadian Association of Social Workers, "Social Work Practice in Child Welfare" (July 2005), online: <https://casw-acts.ca/en/social-work-practice-child-welfare>.

28 *First Nations Caring Society, supra* note 10 at para 120. See also, Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children" (2009) 25:2 Can J Fam L 223.

29 *First Nations Caring Society, supra* note 10 at para 459.

30 *Ibid* at para 458.

31 *Family Caring Society*, *supra* note 5 at para 135.

32 Blackstock, "The Complainant", *supra* note 23 at 326.

33 I first encountered the idea of "jurisdictional justice" in the work of Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93 ["Jurisdictional Justice"].

34 Federal and provincial governments assert authority in Aboriginal title cases when resource exploitation is at stake. See for example: *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] 2 SCR 257. However, when funding for programs or services is in question governments "pass the buck." See for example: *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99. The provincial and federal governments denied legislative authority over Métis and non-status Indians resulting in what the Court termed a "jurisdictional wasteland" with significant and disadvantaging consequences such as deprivation of funding. See also, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UNGAOR, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014) ["Special Rapporteur"].

35 See, e.g., Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39 Ottawa L Rev 63; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81 (See discussion on the provincial, territorial, and federal regulatory framework for drinking water at 96-100); Nathalie J Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 RGD 183. In the environmental context, see Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996) and "Special Rapporteur", *supra* note 33 at paras 16, 20, 30-31, and 84-85.

36 Mary Ellen Turpel, "Home/Land" (1991) 10 Can J Fam L 17 at 39 ["Home/Land"], commenting on *Paul v Paul*, [1986] 1 SCR 306, 26 DLR (4th) 196 (on exclusive possession of the matrimonial home in a case involving allegations of domestic violence) and *Derrickson v Derrickson*, [1986] 1 SCR 285, 26 DLR (4th) 175 (on division of matrimonial

property). Turpel cites Patricia Monture on the "violence of silence": "Because others have the power to define my existence, experience, and even my feelings, I am left with no place to stand and validly construct my reality. That is the violence of silence" (Patricia Monture-Okanee, "The Violence We Women Do: A First Nations View" in Constance Backhouse and David H Flaherty, eds, *Challenging Times: The Women's Movement in Canada and the United States* (Montreal: McGill-Queen's Press, 1992) 193 at 198).

37 Turpel, *supra* note 36 at 19-20.

38 *Ibid* at 30, 36.

39 *Ibid* at 34.

40 *Ibid*.

41 *Ibid* at 30. See also, Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children" (2009) 25:2 Can J Fam L 223.

42 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134. PHS, the organization that operates Vancouver's supervised injection site "Insite", brought a constitutional claim to continue providing their services after the Federal Health Minister denied their application for the renewal of an exemption from prosecution under the *Controlled Drugs and Substances Act,* SC 1996, c 19 (*CDSA*) in 2008. They also argued that the alternative, denying drug users access to health services at Insite would violate their rights to life, liberty, and security of the person under section 7 of the *Charter*. The Court held that the criminal prohibitions on possession and trafficking in the *CDSA* were constitutionally valid and applicable to Insite under the division of powers and that there was no "protected core" of provincial power over health. However, the Court found that the Minister's refusal to grant an exemption threatened the health and lives of injection drug users by preventing them from accessing Insite's services, in violation of their *Charter* rights.

43 Lessard, "Jurisdictional Justice", *supra* note 33 at 94.

44 See also Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order (2005) 38:4 Can J of Pol Sci 923 and John Borrows, "Aboriginal and Treaty Rights and Violence against Women" (2013) 50:3 Osgoode Hall LJ 699.

45 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

46 See John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Can Hist Rev 114; Kiera Ladner, "Take 35: Reconciling Constitutional Orders" (Paper delivered at the 78th Annual Conference of the Canadian Political Science Association, York, 1-3 June 2006) [unpublished], online: <https://cpsa-acsp.ca/papers-2006/Ladner.pdf>; Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Difference* (London: University of California Press, 2003); and Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Oñati Socio-Legal Series 225.

47 Wendy Brown, "Suffering the Paradoxes of Rights" (2000) 7:2 Constellations — An Int'l J of Crit and Dem Theory 230 at 231. See also the discussion in Lessard, *supra* note 33 at 104-05.

48 Turpel, "Home/Land", *supra* note 36 at 19-20.

49 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010).

50 *Ibid* at 147.

51 *Ibid* at 11.

52 John Borrows & Michael Coyne, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017); Brenda L Gunn, "Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination" (2015) 38 Dalhousie LJ 237; and TRC, "Calls to Action", *supra* note 2.

53 *First Nations Caring Society, supra* note 10 at para 356: "The funds were provided annually, in $3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggley, *Transcript* Vol. 57 at pp. 123-125)." Also see: Anne Blumenthal & Vandna Sinha, "No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle" (2015) 6:1 The Int'l Indig Policy J 1; United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UNCERDOR, 93rd Sess, UN Doc CERD/C/CAN/CO/21-23 (2017), arts 27 and 28; and Jordan's Principle Working Group, *Without Denial, Delay, or Disruption: Ensuring First Nations Children's Access to Equitable Services through Jordan's Principle* (Ottawa: Assembly of First Nations, 2015).

54 Since the Canadian Human Rights Tribunal finding of discrimination in *First Nations Caring Society*, *supra* note 10, there have been three remedial orders regarding compliance. See: *First Nations Child and Family Caring Society of Canada*

et al. v Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10; *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16; and *Family Caring Society*, *supra* note 5.