

Accountability Regimes for the Federal Social Transfer

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Accountability with respect to the federal social transfer¹ was a challenge for governments long before accountability became a buzzword of the new public management. The Auditor General has identified and forcefully criticized a lack of accountability with respect to the social transfer on several occasions.² Importantly for this paper, nongovernmental organizations promoting the protection and expansion of social rights have also called attention to the weak accountability governing the social transfer. As an indication of the importance attached to accountability, several unions and other nongovernmental organizations went to court to challenge the failure of the Minister of Health to report adequately to the House of Commons on provincial compliance with the criteria of the *Canada Health Act*.³ The Canadian Association of University Teachers calls for accountability mechanisms for the federal social transfer for post-secondary education to ensure that provinces respect national principles and spend the transfer for the purposes intended.⁴ While calling for an increase in federal funding for child care services, the Child Care Advocacy Association of Canada (CCAAC) has insisted that federal transfers be accompanied by effective mechanisms to ensure provincial compliance with national standards. Recent evidence of this concern is the CCAAC's involvement in the development of a Private Members' Bill directed at establishing criteria and conditions to govern the federal social transfer to the provinces for child care services.⁵

This paper arises out of research conducted as part of a Community-University Research Alliance project⁶ and takes as a starting point the accountability concerns of social rights advocacy organizations. Its objective is to clarify the practical meaning of accountability in the context of the federal social transfer as a contribution to the development of an approach to accountability consistent with social rights. This exercise involves first defining accountability and deconstructing the concept into the basic elements that

¹ When not capitalized, social transfer is used generically to encompass the resources (whether in the form of cash or tax points) that the federal government transfers to the provinces to support social programs delivered by provincial governments. When Social Transfer is capitalized it refers to the Canada Social Transfer introduced in 2004 when the Canada Health and Social Transfer was split into a Canada Health Transfer (CHT) and a Canada Social Transfer (CST).

² Canada, Auditor General. Report (November, 1999), chapter 29 and Status Report (September 2002): chapter 3. Both available on the website of the Auditor General of Canada (http://www.oag-bvg.gc.ca/internet/English/aud_fs_e_925.html).

³ *Canadian Union of Public Employees v. Canada (Minister of Health)* in which the Federal Court found that it was not up to the courts to determine the meaning of "all relevant information" in the section of the *Canada Health Act* covering the Minister's annual report to Parliament. Rather, the remedy for any failure of accountability on the part of the Minister was said to lie within Parliament rather than the courts.

⁴ Canadian Association of University Teachers. "CAUT Policy of Federal/Provincial Funding for Post-Secondary Education". Approved by the CAUT Council September 1991; revised, April 2002. <http://www.caut.ca/pages.asp?page=272&lang=1>

⁵ An Act to establish criteria and conditions in respect of funding for early learning and child care programs in order to ensure the quality, accessibility, universality and accountability of those programs, and to appoint a council to advise the Minister of Human Resources and Skills Development on matters relating to early learning and child care, Bill C-303 (Early Learning and Child Care Act), First Reading, May 17, 2006; Second Reading, November 22, 2006; concurred at report stage, November 21, 2007. (39th Parliament, 2nd sess.).

⁶ Social Rights Accountability Project, SSHRC Award Number 833-2003-1996.

comprise a relationship of accountability. The result is a general model or regime of accountability that may be used heuristically to analyze accountability in the context of the federal social transfer. The paper consists of three main sections. The first is devoted to the presentation of a general model of accountability and to the identification of the accountability relationships involved in social transfers from the federal to provincial governments in Canada. It identifies three regimes of accountability that have governed the federal social transfer. The second and longest section of the paper outlines the three regimes of accountability, identifying the basic elements of each regime according to the general model. It includes an examination of the treatment of child care services under each regime. The third section builds on the discussion in section two to identify the elements of an alternative regime of accountability consistent with Canada's international obligations to the progressive realization of particular social rights.

A GENERAL MODEL OF ACCOUNTABILITY

At its most basic level, accountability is a relationship between parties whereby one is answerable to the other for the performance of commitments or obligations that are evaluated against criteria or standards known to the parties and sanctions are applied for failure to meet the commitments. The underlying question is who is accountable to whom and for what? The relationship may be mutual, for example, where one party commits to do something in exchange for something done by the other, or it may be hierarchical, with one party having obligations to another by virtue of the position he/she holds. It may be formal or informal. In her study of internal contracts in the British National Health System, Anne Davies identifies four key features of an accountability mechanism: "setting standards against which to judge the account; obtaining the account; judging the account, and deciding what consequences, if any should follow from it"⁷. These features are actually processes that she elsewhere boils down to three: standard setting, monitoring (including obtaining and judging the account) and enforcement.⁸ These processes presuppose an instrument that establishes the accountability relationship, such as the internal contract studied by Davies, and these may be legal, customary, or informal. For example, it might be a contract, a statute, convention, or customary behaviour, such as a handshake. Other elements necessary to an accountability relationship are parties to the relationship, the obligations or commitments they undertake, standards or criteria against which the performance of the parties is evaluated, and sanctions.

This approach to accountability, drawn from Davies work, may usefully be applied to the study of accountability regimes or paradigms for the Canada Social Transfer. The approach needs to be slightly modified by adding another element to the regime: this is the funding mechanism for the transfer. Different funding mechanisms, for example, the cost-shared grant or a block transfer, have implications for accountability. To

⁷ Davies, A.C.L. *Accountability: A Public Law Analysis of Government by Contract*. (Oxford: Oxford University Press, 2001) 81-82.

⁸ Davies, p. x

summarize, using this approach to distinguish different accountability regimes involves identifying for each:

- The parties to the accountability relationship and the nature of the relationship (who is accountable to whom).
- The obligations undertaken as part of the relationship (what one party is accountable to the other for)
- The instrument that establishes the accountability relationship
- The standards or criteria by which performance in meeting the obligations is to be judged.
- Standard setting procedures
- Monitoring mechanisms
- Sanctions for non-performance and enforcement procedures.
- The funding mechanism for the transfer.

The Canadian social transfer involves three fundamental accountability relationships. The first is the accountability of legislatures at both the federal and provincial levels to citizens for the implementation of programs realizing social rights. The actors in this relationship are citizens, individually as rights-bearers and as electors and collectively through organizations they choose to represent them, and legislators, either individually as elected representatives or collectively as members of opposition or governing parties. The second accountability relationship centres on the principle of responsible government and involves the accountability of the executive branch to the elected legislature for the expenditure of public funds according to the purposes approved by parliament. The third is a relationship of mutual accountability between the executive branches at the federal and provincial levels. The federal executive is accountable for providing the promised funds and the provincial executive is accountable for spending the funds in ways agreed upon and reporting to the federal executive on that spending. While not usually presented this way, the accountability of the provincial executive is a necessary by-product of the principle of responsible government in a federal system of government in cases involving transfers of funds from the federal treasury to support social programs within provincial jurisdiction.⁹ Without the information about the expenditure of federal funds, the Cabinet at the federal level cannot be responsible to the House of Commons

⁹ This relationship is explored in more detail in the author's "Accounting for Rights and Money in Canada's Social Union", in Poverty: Rights, Social Citizenship and Legal Activism eds. Susan Boyd et al. (Vancouver: University of British Columbia Press, 2007).

for its spending. In the three regimes of accountability described below, the fundamental accountability relationships identified here are configured differently.

THREE REGIMES OF ACCOUNTABILITY

Three distinct accountability regimes have governed the federal social transfer to the provinces at different times in the period since the Second World War. The first I describe as the “administrative regime” because the monitoring and enforcement is largely located with federal officials. It is typified by the cost-shared agreements of the post-second world war era, including the *Canada Assistance Plan*. The second regime I call the “political regime” of accountability to reflect the significant shift of the monitoring and enforcement of standards from officials to the political executive. This regime is exemplified by the *Canada Health Act*, which has been a model for child care advocates. The third regime is the public reporting regime of accountability characteristic of the child care and health care agreements concluded in the era of the Social Union Framework Agreement (SUFA).

Administrative Accountability Regime

The administrative regime of accountability is typical of the cost-shared, conditional grant programs of the Keynesian era and is found in legislation such as the *Hospital Insurance and Diagnostic Services Act, 1957* and the *Canada Assistance Plan*.¹⁰ In this regime, the monitoring, reporting and some of the enforcement activities are substantially located in the bureaucracies of the federal and provincial governments. The three accountability relationships identified above – legislators to citizens; executive branch to legislatures, and provincial and federal executive branches to each other – are configured according to the Westminster model, modified to accommodate Canada’s federal structure.

The primary instruments of accountability are statutes enacted by federal and provincial legislatures and a bilateral intergovernmental agreement concluded between representatives of their executive branches. The federal legislation delegates authority to the federal Minister to enter into an agreement with a province, and specifies the terms and conditions of that agreement as well as the requirement for and some of the content of a provincial statute. Through the bilateral agreement, the provincial government commits to enacting legislation that conforms to the criteria in the federal statute and to respect its reporting requirements, and the federal government commits to transferring money once the provincial legislation is in place according to the terms and conditions specified in the federal statute and the bilateral agreement.

Within this model, standards or conditions are set out in the federal statute, repeated in the intergovernmental agreement and again in the provincial statute. The standard setting process includes negotiations with the provinces but it is the federal government that

¹⁰ *Hospital Insurance and Diagnostic Services Act, 1957*, 5-6 Elizabeth II, Chap. 28., section 3. *Canada Assistance Plan*, R.S.C. 1985, Chap. 1.

plays the predominant role due to its financial clout. The social programs of the Keynesian era were influenced by the rights discourse of the time, including that found in the *Universal Declaration of Human Rights* which provides in article 22 that “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”¹¹ However, to the extent that rights were granted in legislation of this period, they were not articulated clearly in the language of rights. Rather they were expressed as terms of an intergovernmental agreement along with other more administrative provisions, such as record-keeping requirements. Social rights were realized through conditions attached to the federal transfer, such as the *Canada Assistance Plan*’s prohibition on making participation in work activity projects a condition of receipt of welfare or the requirement that provincial social welfare plans provide assistance based on need taking into account budgetary requirements.

The *Canada Assistance Plan* established the right of a person in need to “financial aid or other assistance . . . in an amount or manner that takes into account the basic requirements of that person”.¹² The definition of assistance included “prescribed welfare services” and the *CAP* regulations listed day care services among the prescribed welfare services. *CAP* was not interpreted to grant a right to child care services. Indeed, Annis May Timpson has argued that child care services were provided under *CAP* as “a workfare measure to keep parents of low-income families in the labour force rather than dependent on welfare”.¹³ The positive obligation on the province to provide necessary welfare services (which might include day care) is associated with work activity projects, provided for in Part III of the legislation. Certainly, the rights of children related to their cognitive, emotional and social development were not central to the day-care provisions as the definition of welfare services to share in federal funding excluded “any service relating wholly, or mainly to education”.¹⁴ The *CAP* appeals mechanism did cover decisions related to services and so an individual could challenge an unfair denial of access to welfare services.

Within the administrative accountability regime, two types of monitoring were provided for: monitoring provincial compliance with the terms of the agreements and monitoring the performance of the Cabinet by Parliament. Monitoring of provincial compliance was done through a process whereby provincial programs to be cost-shared had to be approved by federal officials and listed in schedules to the bilateral agreement, which were updated regularly. In addition, federal officials audited provincial records and accounts. Monitoring of the Minister was provided for in the requirement that he report annually to Parliament on the operation of the agreements and on the payments made to

¹¹ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

¹² Canada Assistance Plan, s. 6(2)(1).

¹³ Annis May Timpson, *Driven Apart. Women’s Employment Equality and Child Care in Canadian Public Policy* (Vancouver: UBC Press, 2001) 64.

¹⁴ Canada Assistance Plan, s. 2.

the provinces. The enforcement mechanism related to provincial accountability was a certificate issued by the Minister of Health and Welfare, based on the results of the auditing of provincial records, which would trigger the final payment by the Minister of Finance. The sanction for failure to conform to the standards in the statutes and in the agreement was the withholding of federal funds. In the case of the *Canada Assistance Plan*, an additional enforcement mechanism existed in the form of the requirement that the provincial law provide for an appeals mechanism for individuals affected by the decisions of officials administering programs under the authority of the province. The penalty for the failure of an administrator to respect the provincial statute was a reversal of the decision in favour of the individual rights claimant.

The monitoring and enforcement mechanisms and the sanctions for child care services followed the pattern for CAP programs generally. The CAP legislation permitted federal funds to be used for services delivered by the province or by a non-profit agency approved by the provincial government. Those welfare services, including child care services, deemed eligible for federal cost-sharing by federal officials were listed in a schedule to the federal-provincial agreement. The monitoring process centred on approving services for funding and listing them in the schedule and then auditing provincial records to verify provincial claims. Once federal officials certified the audit of provincial records, a province was reimbursed the full fifty per cent of the cost of welfare services, including child care services for people in need or likely to become in need. The reward was the release of funds and the sanction was the withholding of federal transfer money. In the case of a successful individual appeal, the sanction was a reversal of the administrative decision and the provision of a benefit to the applicant.

The funding mechanism for programs operating within the administrative accountability regime was an open-ended cost-sharing grant, with the federal government contributing fifty percent of whatever the province spent. The link between the amount of the federal transfer and provincial spending meant that a province had to document the amount spent on programs approved and listed in the schedules to the agreement. An audit of provincial records by federal officials was necessary before the Minister of Health and Welfare recommended that the Minister of Finance release the funds. Cost-sharing can therefore be seen as a part of the accountability regime. There was a wrinkle in these funding arrangements introduced to accommodate the Quebec government's opposition to the exercise of the federal spending power in areas of provincial jurisdiction. In 1965, in anticipation of the coming into effect of the *Canada Assistance Plan*, the federal government offered provinces the choice of receiving the transfer in cash or tax points. The tax point offer included the safeguard of a cash top up if the tax points turned out to be less than a province would have received under the cash formula. The Quebec government expected the tax point arrangement to make the transfer effectively unconditional because once the tax points were transferred there would be no way for the federal government to enforce the conditions. While offered to all provinces, only Quebec was expected to take advantage of it and only Quebec did.¹⁵

¹⁵ Yves Vaillancourt, "Quebec and the Federal Government: The Struggle Over Opting Out", in *Canadian Society: Understanding and Surviving in the 1990s*, eds. Dan Glenday and Ann Duffy (Toronto: McClelland and Stewart, 1994) 172.

The Political Accountability Regime

The *Canada Health Act, 1984* is the example of the political regime of accountability, so named because it replaces the administrative monitoring of the previous model with monitoring and enforcement by the political executive. The effect of this is that disputes over provincial compliance with standards in federal legislation rapidly become politicized and result in highly public fights between the federal and provincial governments. On paper, the regime seems to correspond closely to that of the Westminster model, with the primary accountability being of the federal executive to the federal Parliament for the expenditure of public funds. The main instrument of accountability is the federal statute. It is through the mechanisms of parliamentary responsibility that the accountability of elected representatives to the public for a social right is achieved. The obligation of the executive branch to Parliament is to report on the administration and operation of the Act; the obligation of elected representatives to the public is to ensure that the stated objectives of government policy as expressed in the Act are met. These are “to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.” In the relationships of the Minister to Parliament and of elected representatives to the public, the regime is similar to that of the administrative accountability regime. The difference lies in the representation of the accountability relationship between the federal and provincial executives as unilaterally rather than bilaterally determined.

There is no intergovernmental agreement establishing the relationship between the federal and provincial executives. Rather, the terms on which a province may qualify for federal funding are set out only in the federal statute. The requirement of a provincial law reflecting the federal conditions is achieved through the definition section, which defines a provincial health insurance plan as “a plan or plans established by the law of the province to provide for insured health services” and then specifying in section 7 of the Act the criteria that a provincial health insurance plan must meet.¹⁶ The provincial executive assumes specific obligations not through an intergovernmental agreement but through the act of accepting the federal transfer. There is no specific obligation undertaken by a province to introduce a provincial law establishing a system of health insurance that meets the federal criteria. However, if such a system is in place the province will qualify for federal funding. The implied obligation is then to maintain such a system in exchange for continuing federal funding. The other obligation is to “provide the Minister with such information, of a type prescribed by the regulations, as the Minister may reasonably require for the purposes of this Act” and to recognize the federal transfer in public documents and promotional material.¹⁷

¹⁶ *Canada Health Act*, s. 3.

¹⁷ *Canada Health Act*, s. 23. These two obligations are described as “conditions” in the Act, while the five criteria that a provincial plan must meet are not.

The standard setting process in the political accountability model is a unilateral one in that the criteria are set out in federal legislature with no requirement of a minimum consensus among provinces. The federal government adopted this approach to address the problems of achieving a provincial consensus and, especially, Quebec's announcement that it would not sign an intergovernmental agreement.¹⁸ The criteria do, however, reflect those set out but not expressed so clearly in earlier legislation and subject to debate and negotiation then.

The *Canada Health Act* establishes two main monitoring mechanisms, reflecting the accountability of the Minister to Parliament and of the provincial to the federal executive branch. These are the annual report by the Minister of Health to Parliament and, in support of this, the requirement of provincial reporting as a condition of federal funding. Under the Act, the Minister of Health is to make an annual report to both the House of Commons and the Senate "respecting the administration and operation of this Act for that fiscal year, including all relevant information on the extent to which provincial health care insurance plans have satisfied the criteria, and the extent to which the provinces have satisfied the conditions, for payment under this Act"¹⁹ As the report of the Minister to Parliament is dependent on provincial information, the Act delegates to him the authority to introduce regulations governing the information provinces are required to provide on the operation of their plans but no other monitoring mechanism is envisaged. In practice, no Minister of Health has used his authority to issue those regulations and certainly none have used the authority in the Act to withhold funding if a province does not provide the information necessary for the Minister to report adequately to Parliament.

The ultimate sanction for failure to meet the conditions in the Act is the withholding of all or part of the federal transfer. In the absence of effective monitoring procedures, violations of the criteria often come to the Minister through complaints of advocacy groups or through the media. The CHA spells out a procedure that the Minister of Health is to follow in situation where he believes that a province is not respecting the standards set out in the legislation. He is to consult with the offending province and, if the province fails to remedy the problem, the Minister refers the matter to the Cabinet which may exercise its discretionary power to withhold all or part of the federal transfer to the provinces. A provincial violation of the extra-billing provisions of the Act triggers a different sanction procedure. The Act makes it mandatory for the Minister to withhold payment to a province for services that have been subject to extra billing and directs the Minister to deduct from the transfer to the province an amount equal to that billed over the provincial fee schedule by physicians or dentists. While there has been some enforcement of the extra-billing provisions, the Cabinet has not used its discretionary power to punish provinces that do not respect the five criteria of the Act.

The funding mechanism typical of the political accountability regime is the block grant. Indeed, the shift from cost-sharing to the block grant for health care was initially

¹⁸ A. W. Johnson, *Social Policy in Canada: The Past as it Conditions the Present* (Ottawa: Institute for Research on Public Policy, 1984).

¹⁹CHA, section 23.

associated with a move away from conditionality. However, public opposition to the removal of conditions and, particularly, to the practice of extra-billing by physicians led the federal government to reintroduce conditions through the *Canada Health Act* in 1984.

The federal transfer for child care services has never been governed by the political accountability regime. However, the *Canada Health Act* has had a strong influence on the notions of accountability of child care advocates. The *CHA* served as a model for a Private Members' Bill introduced for first reading in the House of Commons on May 17, 2006 by New Democratic Party Member of Parliament from Victoria, Denise Savoie, with the support of the Child Care Advocacy Association of Canada. The *Early Learning and Child Care Act*, or Bill C-303 is directed at establishing conditions to govern the federal transfer to the provinces for child care services and would cover both dedicated child care transfers and the Canada Social Transfer in so far as it relates to child care services. At the time this paper is being written, the Bill had passed the report stage and awaits third reading. The speaker has declared that the bill requires Royal Recommendation as a money bill and so will not proceed to a vote except, of course, in the unlikely event that the government decides to support it.

In its structure, the bill is modeled very closely on the *Canada Health Act*, with the definition of “early learning and child care program” replacing “health insurance plan” in the *CHA*. Bill C-303 defines “early learning and child care program” as “a program established by and regulated under the law of a province or territory to provide publicly-funded early learning and child care services”. Like the *Canada Health Act*, Bill C-303 sets out and defines the criteria that a province must satisfy in order to qualify for the federal transfer. The criteria identified are accountability, quality, universality, and accessibility. The accountability criterion requires that the early learning and child care program be directly administered by the province or by “an institution that is operated on a not-for-profit basis and that (a) is appointed or designated by the government of the province or territory; (b) reports to that government in respect of the administration and operation of the program; and (c) is subject to a public audit of its accounts and financial transactions”. Except for the words “directly administered by the province”, the accountability provision is identical to the public administration criterion in 8(1) of the *Canada Health Act*. An important difference between the proposed bill and the *CHA* is that the services eligible for funding are specifically identified as those “provided on a not-for-profit” basis, with existing commercial services being grandparented (section 6).

The accountability relationship between the provincial and federal governments in Bill C-303 follows the model of the *Canada Health Act* in that it is established unilaterally without an intergovernmental agreement or any requirement for provincial agreement. This makes the primary instrument of accountability the federal statute which simply announces that the federal government will make money available to any province whose program for child care services meets the conditions of the federal legislation. The basic enforcement mechanism in Bill C-303 is also the same as that of the *Canada Health Act*, the withholding of federal funds. In both, the enforcement is triggered by a recommendation by the responsible Minister to the Cabinet, which makes the final

decision to withhold funds. As in the CHA, the Cabinet decision is discretionary. Section 7 of the proposed Act states that

When advised by the Minister that the early learning and child care program of a province or territory did not satisfy a criterion or condition set out in [the Act] in a fiscal year, the Governor in Council may, where it considers it appropriate, direct all or a portion of any child care transfer payment to that province or territory for the following fiscal year be withheld.

In contrast to the CHA, Bill C-303 does not outline any procedures for consultation with a province before any part of the transfer is withheld.

Bill C-303 departs in four other significant ways from the *Canada Health Act* model. These are the specific directions regarding Ministerial reporting to Parliament, the provision for an Advisory Council, the requirement of a provincial action plan, and its treatment of Quebec.

Section 8 (2) of the Bill sets out in specific detail the kind of information the Minister must include in his annual report to Parliament, including for each province the amount expended, and indicators of quality (such as training requirements, child to caregiver ratios, group size); availability (such as the number of spaces available by age of child and type of setting); affordability (such as the average service fees charged as a percentage of average wages); and accessibility (such as eligibility criteria, number of children receiving subsidies, income levels of parents). In order to meet these requirements, the Minister would need to exercise his power set out in section 10 to make regulations respecting information provided by the provinces. As a result, accountability of the provinces to the federal government could be enhanced, but the main emphasis is on Ministerial accountability. In addition to the reporting provisions, Bill C-303 provides in section 10 for an Advisory Council appointed by the Minister consisting of 18 people “who support the purposes of this Act and are broadly representative of persons and organizations interested in and involved with early learning and child care from all regions of Canada, including representatives of provincial and territorial governments and of organizations that act on behalf of early learning and child care service providers, child care professionals, parents and children. The discretionary appointment power of the Minister would be limited by the provision in section 10 (2) that he choose members of the Advisory Council from a list of candidates chosen by the House standing committee responsible for human resources and social development through a public and transparent process. Furthermore, the Advisory Council would have the power to make a report to any standing committee of either house of Parliament or the Minister concerning any aspect of the Act as it felt appropriate. The report of the Advisory Council would be included in the Ministers annual report to Parliament.

In another departure from the CHA regime, Bill-C303 introduces a new accountability instrument in the form of a Plan that must be established as part of a provincial child care program. Bill C-303 makes the federal transfer payment conditional on the existence of a provincial plan “for providing comprehensive early learning and child care services that

are of a high quality, universal and accessible” (section 5 (1) (b)). Here, the bill picks up on an innovation introduced in the bilateral child care agreements described below that were signed in the last eight months of the government of Prime Minister Paul Martin.

Finally, the proposed legislation departs from the CHA and all other federal statutes in providing for an exemption for Quebec that is not available to other provinces. Section 4 of Bill C-303 reads:

Recognizing the unique nature of the jurisdiction of the Government of Quebec with regard to the education and development of children in Quebec society, and notwithstanding any other provision of this Act, the Government of Quebec may choose to be exempted from the application of this Act and, notwithstanding any such decision, shall receive the full transfer payment that would otherwise be paid under section 5.

This provision allows for what is commonly referred to as “opting out with compensation” but only for Quebec.

Public Reporting Accountability Regime

The Public Reporting Regime is typified by the multilateral intergovernmental agreements covering health care and programs for children concluded in the era of the Social Union Framework Agreement. It departs significantly from the other two regimes. In this regime, the emphasis in public pronouncements is on the accountability of the executive branch at both levels to their respective publics. However, there is no instrument establishing this relationship as the public was not party to the agreements and is positioned as a consumer of reports issued by the executive branch. The primary relationship is in fact between the executive (Cabinet) branches at the federal and provincial levels. They are the parties to the agreements. To the extent that there is any enforcement of commitments it is through a procedure to resolve disputes among governments. It is difficult to describe this as an accountability relationship, however, as the agreements go out of their way to emphasize that the governments are not accountable to each other.

The primary instrument establishing the government to government relationship is the multilateral framework agreement concluded among Cabinet representatives of the federal and provincial governments. As a consequence of the Supreme Court decision in the *Canada Assistance Plan* reference²⁰, parties to the agreements treat them as political accords rather than mutually binding contracts. The multilateral framework agreements

²⁰ Reference re: Canada Assistance Plan (B.C.) [1991] 2 S.C.R. 525 at paragraphs 46 and 47. The Supreme Court maintained that an agreement between governments does not have the same binding effect or mutuality as ordinary contracts by virtue of the principle of parliamentary sovereignty. Unlike the “mutually binding reciprocal undertakings” of ordinary contracts, the “parties were content to rely on the perceived political price for non-performance”.

set out the mutual obligations of the governments to each other and to their publics. In most cases, these obligations are expressed in very general terms as shared visions, objectives or principles. In the case of the Canada Health Transfer, which remains linked to the *Canada Health Act*, the standards are the criteria in that Act as well as the more specific purposes of targeted health transfers. In the case of the Canada Social Transfer, the only substantive standard is the prohibition on a residence requirement as a condition for receipt of social assistance. The agreements also outline the standards or criteria to be used to evaluate the progress of a government in meeting its commitments, which take the form of performance measures developed through intergovernmental negotiations. The mechanism for monitoring the performance of governments in meeting their obligations under the agreements is an annual report produced by the governments, organized around the agreed upon criteria or performance measures. There is generally a reference to third party involvement in monitoring but this has been honoured more in the breach than the observance.

Accountability of the executive branch to parliaments at either level is very weak. There is no statutory basis for most of the agreements other than the constitutionally necessary approval of expenditures by the federal Parliament.²¹ Several of the multilateral agreements specify that the transfer is not linked to performance. The exception to this are those standards embedded in statute rather than the agreements, namely the criteria in the *Canada Health Act* and the prohibition on residence requirements for social assistance mentioned above. The Social Union Framework Agreement included a provision for a dispute avoidance and resolution mechanism that would replace or modify the role of the federal Minister in determining violations of the agreement. The dispute resolution mechanism for health care specifies an elaborate procedure that must be followed where violations of the *Canada Health Act* are alleged, but the final decision still rests with the Governor in Council at the federal level. Despite the emphasis on the accountability of governments to the public, there is no mechanism to resolve disputes between governments and citizens, other than periodic elections.

As with the political accountability regime, the funding mechanism for the public reporting model is the block grant. In the case of social assistance, the block grant replaced the open-ended shared cost grant after the 1995 federal budget. The government of Prime Minister Paul Martin made use of dedicated transfers, flowed through trusts such as the Medical Equipment Trust or specially named transfers such as the Child Care Transfer, as well as the omnibus Canada Health Transfer and the Canada Social Transfer. The accountability mechanisms were generally too weak to ensure that the funds went to the targeted programs.²² Under the Canada Social Transfer, the allocation of money between social assistance (income support and welfare services), post-secondary education, child care and other social services is not specified.

²¹ For a more detailed discussion of this see the author's contribution in Boyd, et al. op cit. 9.

²² Lynell Andersen and Tammy Findlay, [Making the Connections: Using Public Reporting to Track Progress in Child Care Services in Canada](#) (Ottawa: Child Care Advocacy Association of Canada, 2007). The author of this paper served on the Reference Advisory Group for the Making the Connections project.

Two sets of intergovernmental agreements related to child care services fit within the public reporting regime are the 2000 *Early Childhood Development Agreement (ECD)*; the 2003 *Multilateral Framework on Early Learning and Child Care*. The public reporting regime is also reflected in the bilateral agreements entered into by the federal and provincial governments in the spring and fall of 2005. These depart in some important respects from the 2000 and 2003 agreements and will be discussed separately.

Both the ECD and *Multilateral Framework Agreement* were concluded among all the First Ministers, with the exception of the Premier of the province of Quebec. The accountability relationship is expressed as being between the executive branch at the two levels of government and their respective publics. Governments are to be judged by the public on their performance in meeting the commitments under the agreements. Both agreements state that “the purpose of performance measurement is for all governments to be accountable to their publics, not to each other”. Neither of the agreements were approved by any of the legislatures and so they are political accords with no legally binding effect. As the agreements cover a federal financial transfer, Parliamentary approval of the expenditure is a constitutional requirement. In each case, this took the form of an amendment to the *Federal Provincial Fiscal Arrangements Act*²³ to increase the amount of money being transferred under the Canada Health Transfer or the Canada Social Transfer. There are no specific purposes for the child care transfers to the provinces spelled out in any federal legislation.

The standard setting process involved intergovernmental negotiations between representatives of the executive branch (first administrative and then Ministerial) at the federal and provincial levels of government. These negotiations were conducted, as intergovernmental negotiations generally are, in private with the results being communicated to the public through the media at the conclusion of First Ministers’ meetings. The *Early Childhood Development* agreement does not contain any language that could be described as a standard, let alone a condition for a transfer. Instead, it lists two very general objectives (promoting early childhood development and helping families support their children within strong communities) and identifies four also very general key areas for action. These are: the promotion of health pregnancy, birth and infancy; improving parenting and family supports; and strengthening early childhood development, learning and care; and strengthening community supports. The *Multilateral Framework Agreement on Early Learning and Child Care* is more specific about the area of investment; it is to be regulated early learning and child care programs for children under six, primarily those providing direct care and early learning in settings such as child care centres, family child care homes, preschools and nursery schools. The agreement also identifies principles that are associated with effective approaches in such settings. These principles are: accessible; affordable; quality; inclusive; parental choice.

The central mechanism for monitoring the performance of governments is the annual report to the public. The methodology adopted to report progress is performance measurement. The *Early Childhood Development agreement* commits governments to

²³ Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8

report annually on their investments and progress in the four key areas and to work together to develop a shared framework that will include jointly agreed comparable indicators. It gives as an example of an indicator the availability and growth of services in each of the areas. The *Multilateral Framework Agreement* is more directive about the reporting requirements. It commits governments to release baseline information by the end of November 2003 and to release the first annual report in November 2004. The agreement further specifies in more detail the kind of descriptive and expenditure information that will be provided. Suggested indicators of availability are the number of spaces in early learning and child care settings broken down by age of child and type of setting. For affordability, the indicators suggested include the number of children receiving subsidies, income and social eligibility for fee subsidies and maximum subsidy by age of child. The suggested indicators of quality are training requirements, child/caregiver ratios and group size. Both agreements commit governments to ensuring that there are unspecified “effective mechanisms” to allow Canadians can participate in reviewing outcomes.

The enforcement mechanism envisaged is public approval or disapproval of a government’s performance based on the information provided in the annual report. Even though the agreements were occasioned by a federal promise of new funding, the withholding of federal funds as a sanction is explicitly ruled out. Both agreements contain the sentence: “The amount of federal funding provided to any jurisdiction will not depend on achieving a given level of performance”. Furthermore, funding is not tied in any way to meeting the reporting commitments. Ultimately, the enforcement mechanism is the ballot for both the performance and reporting commitments in the agreements.

The bilateral intergovernmental agreements negotiated by the government of Prime Minister Paul Martin in the spring and fall of 2005 can be viewed as both an extension of the public reporting model and a departure from it. In November 2004 and again in February 2005, federal and provincial Ministers of Social Services attempted to negotiate a multilateral agreement along the lines of the ECD and the *Multilateral Framework* to govern a promised \$5 billion federal transfer over five years. The November meeting reached agreement in principle on the four principles – known as the QUAD principles – of Quality, Universally Inclusive, Accessible and Developmental. However, no final multilateral agreement was reached. Instead, the federal government negotiated bilateral agreements with the provinces separately which included the QUAD principles.

The standard setting process might be viewed as multilateral in that the QUAD principles agreed to in November 2004 were incorporated into the bilateral agreements. (With one small change of “universal” to “universally inclusive”, the principles were those articulated in the spring 2004 Liberal election platform that also included the pledge of \$5 billion over 5 years). The agreements-in-principle define each of the principles in language reminiscent of the criteria outlined in the *Canada Health Act*. A departure from the multilateral agreements is the section in the agreements-in-principle that elaborate province specific five-year objectives related to the overarching principles. These provide more specific standards or criteria related to the realization of a substantive social right

against which the performance of the province can be judged. In addition, the Agreements-in-principle point towards an ongoing process of standard setting.

As is the case with *Early Childhood Development* agreement and the *Multilateral Framework on Early Learning and Child Care*, the monitoring methodology is reporting by governments directly to the public using performance indicators. In the Public Reporting section of the agreements-in-principle, specific indicators to be used in the annual reports are spelled out. These relate to three of the principles: availability, affordability and quality. There are no requirements with respect to universally inclusive or developmental. The agreements-in-principle state that both the Government of Canada and the province in question “will move forward in consultation with experts and other interested parties” in developing the National Quality Framework, the Evaluation Framework, an information and data strategy, and additional comparable program and child outcome indicators. All the Agreements include a commitment by the province to release an annual report for 2005/06 by a common reporting month, November 2006. The commitment to an annual report is not new; it appeared in both the *Early Childhood Development* agreement and the *Multilateral Framework* agreement, with the latter specifying a common date.

A main way the bilateral agreements depart from the multilateral agreements is the instruments of accountability. The most obvious difference is the fact that the agreements are bilateral rather than multilateral.²⁴ There were two types of bilateral agreements: agreements-in-principle and funding agreements. In the spring and fall of 2005, the federal government reached agreements-in-principle with all the provinces except Quebec and the more detailed funding agreements were reached with three provinces: Ontario, Manitoba and Quebec. In contrast to the multilateral agreements, both the bilateral agreements-in-principle and the funding agreements are signed by representatives of the two levels of government. This suggests that the bilaterals were seen as more binding than the multilateral agreements which were clearly political accords. A commitment to a binding agreement is particularly evident in the funding agreements which are written in contract like language, although with a clause that recognizes that the agreement may be terminated by either party on one year’s notice and the caveat that the funding depends on annual approval of the necessary appropriations by Parliament.

²⁴ The agreements-in-principle were all published under the title “Moving Forward on Early Learning and Child Care: Agreement-in-Principle between the Government of Canada and the Government of the Province of [name of province]”. They can be accessed through the website of the Child Care Research and Resource Unit at www.childcarecanada.org. The bilateral funding agreements were the “Canada-Quebec Funding Agreement on Early Learning and Child Care”, dated October 28, 2005; The Ontario and Manitoba funding agreements were published under the title “Moving Forward on Early Learning and Child Care: Funding Agreement between the Government of Canada and the Government of [name of province]”. The Manitoba and Ontario funding agreements, which are only available in print form, were signed on November 18, 2005, November 25, 2005 respectively. The Quebec agreement is available electronically at (http://www.hrsdc.gc.ca/en/cs/comm/sd/news/agreements_principle/PCO_Quebec_e.pdf);

A significant innovation of the bilateral agreements-in-principle is the requirement that the province publish an Action Plan as a condition for moving to a funding agreement. This was not a requirement for Quebec which only signed a funding agreement. Under the agreements-in-principle, the provinces agreed to release an Action Plan covering the five years of new federal money by a specific date. Alberta did not agree to a specific date but instead had inserted in its Agreement-in-principle this wording: “Alberta agrees to develop and release as part of its business planning cycle, a strategic plan on early learning and child care regarding the five years of new federal funding under this initiative”.²⁵ There are slight variations in the wording of the Action Plan section of the bilaterals but all involve identifying priorities for investment, targets and baseline expenditures against which progress toward meeting the objectives of the agreement may be measured.

The funding agreements contain an enforcement mechanism in the form of a dispute avoidance and resolution procedure covering disagreements with respect to the interpretation or implementation of the terms of the funding agreement. It is a non-binding procedure which involves either the federal or provincial government notifying the other of its concerns, a bilateral attempt to resolve the disagreement, the involvement of mutually agreed third parties at the request of either of the governments, and, if no resolution is found, conveying information about the dispute to the Parliament of Canada or the provincial legislature. This dispute mechanism differs from that agreed to for the *Canada Health Act* as part of the SUFA process which retained the final determination with the federal Minister of Health.²⁶ In the case of the CHA, however, the dispute envisaged centred on the interpretation of the conditions in the federal statute and not only funding and information sharing arrangements.

For matters other than funding, the enforcement mechanism remains public approbation. For example, there is no other penalty attached to failure to meet the deadline for the annual report or to publish one at all. Once the Action Plan has been released and the multi-year funding agreement signed, the money will flow to the province as outlined in the schedule. There is no link in the funding agreement between the federal transfer and provincial performance in meeting its commitments, although the Government of Canada could use one of the escape clauses for this reason if it wished. This would likely be seen as a violation of the spirit of collaborative federalism by the provinces. As with the *Early Childhood Development* agreement and the *Multilateral Framework Agreement*, the ultimate sanction is the ballot box.

ELEMENTS OF A SOCIAL RIGHTS ACCOUNTABILITY MODEL

²⁵ “Moving Forward on Early Learning and Child Care: Agreement in Principle between the Government of Canada and the Government of Alberta”, July 7, 2005: 5-6.

²⁶ Anne McLellan, Minister of Health, Canada, to Gary Mar, Minister of Health and Wellness, Alberta, April 2, 2002 (http://www.hc-sc.gc.ca/hcs-sss/medi-assur/cha-lcs/avoid-prevent_e.html). Accessed February 10, 2008); and “Provinces Accept Federal Proposal on Disputes Resolution Mechanism”, Government of Alberta News Release, April 24, 2002 (<http://www.gov.ab.ca/acn/200204/12223.html>). Accessed February 10, 2008).

A regime of accountability for the Canadian social transfer free from tensions and compromises, including around underlying principles, is an unattainable goal. There are four main reasons for this. The first is that the division of powers in the Canadian constitution is an antiquated one, dating from a period when activities related to social welfare were indeed “matters of a merely local or private nature” and the responsibility of families, private charities or local governments. It is ill-suited to the task of guaranteeing shared social rights that are the heart of modern notions of social citizenship. The inability of governments to modernize the division of powers beyond a few amendments has resulted in a necessary but awkward reliance on the federal spending power if Canadians are to enjoy the equality of opportunity to which our governments committed themselves under section 36(1) of the *Constitution Act, 1982*. The second is that the combination of a federal system of government with the Westminster model of parliamentary government results in inescapable tensions between the principles of federalism and responsible government in situations involving intergovernmental transfers. The third challenge is the inherent asymmetry of a federal system in which nine of the provinces are territorially based and one, Quebec, is based on a national community that is a minority within Canada but a majority in that province. A fourth reason that ongoing tensions are unavoidable is that social rights frequently require for their realization the redistribution of significant social resources and conflicts around them are central to democratic class struggles. In Canada, both class and national conflicts become enmeshed in complicated ways with each other and with differences over the constitutional division of powers.

The objective here, then, is certainly not perfection. The aim of this section is to outline the main elements of an accountability regime for the federal social transfer as a framework for the realization of social rights to the fullest extent possible within the limitations of Canada’s constitutional arrangements. While it borrows elements from each of the three regimes of accountability examined in this paper, it differs from them in two significant ways. The first difference is that the proposed regime both expands and limits the federal role by situating it clearly as the promotion of a shared set of social rights that are the foundation of a common social citizenship. The substantive standards identified in the federal legislation should relate directly to social rights, with the provinces being afforded flexibility in the design and delivery of programs that realize those rights. The second difference is that the proposed alternative explicitly locates mechanisms for monitoring and enforcing the substantive social rights standards at a provincial rather than the federal level. As far as possible, responsibility for the realization of the substantive rights that are the purpose of the federal legislation should rest with mechanisms and procedures at the provincial level, once a provincial legislature has agreed to participate in a program funded through the federal spending power.

In place of federal criteria related to the design and delivery of social programs, the approach calls for two sorts of implementing conditions or criteria that provinces would have to meet. The first would be strictly enforced criteria requiring provinces to report in ways that showed that the federal money was used for the social rights purposes intended by Parliament. The second kind of implementing criteria would require legislated

mechanisms and procedures at the provincial level to facilitate the monitoring of a province's use of federal funds both by the provincial legislature and by interested individuals and organizations. The flow of federal funds should be dependent on respect for the procedural or operational criteria, specifically the reporting requirements and the establishment of appropriate monitoring and enforcement mechanisms under provincial law. As far as possible, the enforcement of federal substantive standards, that is those relating directly to social rights, should occur through political means. The goals would be to have pressure brought on provincial legislatures and governments to put in place the programs to operationalize the commitment to social rights they made in accepting the federal social transfer.

Using the elements of a general accountability regime outlined earlier in the paper, the rest of the paper sketches an accountability regime for the social transfer compatible with the progressive realization of social rights.

Accountability relationships

From the perspective of social rights, the primary accountability relationship is between Parliaments and members of the society. The other two accountability relationships, of the executive branch to the legislature and between the executive branch at the federal and provincial levels are subordinate to this primary relationship. They should be viewed as means to an end, rather than ends in themselves. Here, the end or objective is the implementation of promised social rights.

Instruments

The statute is the primary instrument for establishing the accountability relationship between legislatures and members of society and between the executive branch and the legislature. In the proposed accountability regime, statutes would be required at both the federal and provincial levels. These should be dedicated statutes setting out the purposes of legislation and the means to implement them rather than simple approval of funding in enabling financial legislation such as the *Federal-Provincial Fiscal Arrangements Act*, which has increasingly been the practice at the federal level. Intergovernmental agreements would be used to establish the accountability relationship between the executive branches at the two levels of government, as necessary. However, any such agreements would be seen as implementing instruments and subordinate to the statutes, which is consistent with their status as administrative agreements. Bilateral agreements, particularly funding agreements, are likely to be most useful. Whatever use multilateral framework agreements might have for expressing intergovernmental consensus, they should not be substitutes for dedicated legislation, as occurred under the Social Union Framework Agreement.

The federal statute would need to articulate clearly the purposes of the social transfer using the language of social rights and referencing where appropriate Canada's international human rights commitments. It would contain implementing criteria which would take the form of requirements for reporting – (of the Minister to Parliament and of

provinces on the use of federal funds) – and for the institution of monitoring mechanisms at the provincial level. It would also include an enforcement procedure which would make the federal transfer dependent on a province respecting the implementing criteria. The federal legislation could contain the funding commitments. If the funding formula appeared in the *Federal-Provincial Fiscal Arrangements Act*, this Act would need to reference the standards and criteria in the dedicated statute, as it currently does with the criteria in the *Canada Health Act*. The provincial statute would include a commitment to using the federal funds for the same purposes as in the federal legislation and would provide for the necessary monitoring mechanisms and reporting procedures.

Standards

The distinction between standards as social rights and implementing criteria was explained above. In many cases, Canada is already committed under international human rights treaties to respect specific social rights and is accountable to United Nations treaty bodies that monitor the implementation of these rights. These commitments should be referenced in legislation. Child care legislation, for example, could refer to article 11.2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which call on the states party to the agreement “to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities”.²⁷

As suggested above, the implementing criteria in federal legislation should relate either to the matters essential to the Minister’s accountability to the legislature or to monitoring mechanisms, which are discussed below. The Minister is responsible to the House of Commons for the expenditure of federal funds for purposes approved by Parliament and needs to be able to demonstrate that money transferred to the provinces has not disappeared into provincial treasuries to be used for provincial priorities unrelated to the substantive social rights Parliament seeks to promote. The reporting criteria in the federal legislation should relate directly to this parliamentary accountability relationship. The job of ensuring that a provincial government uses federal funds in the most effective and efficient way belongs not to the Parliament of Canada but to the provincial legislatures. Within this approach, commitments to develop common performance measures as called for in the SUFA multilateral framework agreements would not be part of the accountability regime for the federal social transfer. Similarly, the federal statute would not include the kind of detailed reporting requirements included in Bill C-303, the *Early Learning and Child Care Act*.

The objective here is to distinguish between the standard-setting that is appropriate for the federal government given its role in ensuring a country-wide shared social citizenship and what properly belongs to the provinces that have exclusive constitutional jurisdiction to legislate in the area of social services. Why, for example, are wait time guarantees for

²⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46

health care services something that the federal government would take the leadership role in? The approach suggested here does not necessarily preclude the federal government from playing a coordinating role in getting agreement on performance measures if the provinces request this. The federal government might choose to fund a research institute to collect the kind of information called for in Bill C-303, for example. However, with respect to coordination, the best route would be for the provinces to take their responsibility for social services seriously enough to coordinate their activities through existing and perhaps new inter-provincial institutions. This would be an appropriate focus of activity for the Council of the Federation, for example. The development of comparable measures for social services could contribute to fulfilling the promise of section 36(2) of the Constitution Act, 1982, that federal equalization payments will provide Canadians with “reasonably comparable levels of public services”.

The distinction between standards as social rights and implementing criteria helps clarify which actors should be involved in which standard-setting processes. If substantive standards are understood as social rights or criteria directly related to social rights, then it should be clear that intergovernmental negotiations are not the forum in which the fundamental social rights of Canadians should be determined. Social rights are central to democratic citizenship and debate around them belongs in public forums, including legislatures. Intergovernmental negotiations should centre on the implementation of the rights commitments of legislatures.

Monitoring

Within this alternative accountability regime, the federal monitoring role would be limited to ensuring, first, that provinces provide the information necessary for the federal Minister to account to the House of Commons for the expenditure of federal funds as described above and, secondly, that provinces put in place the mechanisms to facilitate effective monitoring by the provincial legislature and interested individuals and organizations.

In some situations, individual appeals mechanisms serve as a type of monitoring mechanism, as was the case with the *Canada Assistance Plan*. A measure consistent with the monitoring approach endorsed here would be to amend the *Canada Health Act* to require that provinces establish a transparent procedure for the determination of what services will be deemed “medically necessary” under a province’s health insurance plan. The bilateral child care agreements signed by the Liberal government of Paul Martin with nine provinces made the publication by a province of an Action Plan a condition of moving to a funding agreement. These Action Plans were to outline how the province intended to meet the QUAD principles of Quality, Universally Inclusive, Accessible and Developmental. Had the agreements not been cancelled by the Conservative government of Stephen Harper, the Action Plans could have served to focus public attention on the progress of a province in meeting its own commitments. This was an executive-to-executive exercise and would have been strengthened by legislation at both levels, including provisions at the provincial level delegating authority to the executive branch to develop Action Plans after consultation with interested parties.

Bill C-303, the private members' bill to govern the federal child care transfer, provided for an Advisory Council at the federal level comprised of individuals who support the purposes of the legislation and who would be chosen by a process involving the appropriate House of Commons standing committee. The Advisory Council would be able to report directly to Parliament and the Minister would be required to mention any advice received from the Council in his report to Parliament. Under the regime of accountability described here it might be more appropriate for such an Advisory Council to be set up at the provincial level. It could monitor the progress of a province in implementing its Action Plan and in meetings its obligations under the provincial child care legislation related to the federal social transfer. Legislation establishing the Advisory Council should provide for submissions by groups and individuals whose experience would supplement the knowledge of members of the Council.

Public reports as provided for in the SUFA agreements could also be useful if the Advisory Council had some input into the content and could comment on the assessment made by the government of its programs. The current practices with respect to public reporting would need to be improved to address the problems highlighted in the Child Care Advocacy Association's study of provincial reports under the child care agreements.²⁸ Monitoring of provincial spending of the federal social transfer could be included as a responsibility of the provincial auditors general. Provincial reporting of expenditures would need to be done in a way that demonstrated that federal money was not substituting for provincial spending. The goal of these, as well as other measures that should be explored, would be to create as much public space as possible at the provincial level to allow citizens to bring political pressure and to compel provincial legislatures to hold Ministers accountable for respecting the standards in provincial legislation related to the federal social transfer and for fulfilling commitments in a provincial Action Plan.

The monitoring role of the provincial legislature would be supported by reports of the Advisory Council, public reports by the government, and reports by the provincial auditor on the provincial expenditure of the federal transfer. In addition, legislation at both levels should affirm the status of intergovernmental agreements as implementing instruments by including provisions that explicitly delegate power to the executive branch to enter into such agreements. This was the practice in the era of shared cost programs and should be reintroduced for all social transfers in order to reinforce the accountability relationship of the executive to the legislative branch. The intergovernmental agreements should be tabled in the legislature and referred to the appropriate Standing Committee. A database of intergovernmental agreements should be kept and available on public websites, which is the practice in Quebec and the federal practice with respect to international treaties.

Enforcement

²⁸ Lynell Anderson and Tammy Findlay, *op. cit.* 22.

The federal spending power is a blunt enforcement mechanism and has recently not proven very effective in ensuring provincial respect for the criteria in the *Canada Health Act*. Intergovernmental dispute resolution mechanisms may be appropriate for addressing disputes between the executive branches of government related to federal-provincial implementing arrangements. They are not at all appropriate for enforcing respect for fundamental social rights. The suggestion in this alternative accountability regime is that the federal spending power be used to enforce provincial reporting (as a necessary condition for the Minister's accountability to the House of Commons) and to ensure effective monitoring mechanisms are in place provincially. With respect to substantive standards that express social rights, the emphasis here is on creating mechanisms that facilitate public engagement and encourage enforcement through political means with the province rather than the federal government being the focus of attention.

Funding Mechanism

The most effective funding mechanism from the perspective of accountability has been the conditional shared-cost grants. Open-ended shared-cost grants whereby the federal government agrees to match provincial spending are particularly useful when the infrastructure for social services is being put in place, which would be the situation with a Canada-wide system of child care services. This type of grants fell out of fashion because of federal concern about its spending was being driven by provincial expenditure decisions and, to a lesser extent, provincial concern over federal certification and auditing procedures. However, shared cost grants do not have to be open-ended. Under closed shared cost grants the federal government would agree to match provincial spending up to a certain limit. There is the additional criticism, however, that such grants favour the wealthier provinces that can afford to spend up to the maximum. Block grants can be designed with a suitable accountability framework along the lines suggested above.

The use of the term “opting out” to describe a province's relationship to a federally-initiated program funded through the social transfer is misleading. As the federal government has no constitutional authority to compel a province to participate in such a program, a province is only covered if it decides to “opt in”. “Opting out with compensation” really means that a provincial government should receive its citizens' share of the federal transfer even if the government decides not to participate in the program. If the federal government articulated the purposes of legislation in the language of social rights rather than federal/provincial relations or administrative requirements, it would be on better ground to counter provincial opposition. If the notion of “opting out with compensation” is to be entertained at all, the best approach from a social rights perspective would be similar to that found in the Social Union Framework Agreement whereby a province that has in place a program that meets the agreed objectives – (or, substantive standards, in the accountability regime proposed here) -- can qualify for the federal transfer and use it for other related priorities.²⁹ If it is necessary in other cases to

²⁹ “ Social Union Framework Agreement: A Framework to Improve the Social Union for Canadians, concluded between the Government of Canada and the Governments of the Provinces and Territories, February 4, 1999. (http://www.unionsociale.gc.ca/news/020499_e.html)

accede to demands of non-participating provinces for compensation, then there should be a requirement that the request come from the provincial legislature to provide space for at least some public debate. Furthermore, the compensation should take the form of a rebate of federal taxes to individual taxpayers rather than to the provincial treasury.

The Status of Quebec

The opposition of successive Quebec governments to the exercise of the federal spending power makes it impossible to design an accountability regime for federal social transfers that satisfies Quebec. The reality is that all the regimes of accountability that have been in place have accommodated the distinctiveness of Quebec by stealth or by default. In the administrative accountability regime, this was by the introduction of the tax point option for the federal social transfer; in the political accountability regime, this takes the form of the non-enforcement of provincial violations of the Canada Health Act; in the public reporting accountability regime, most of the agreements contained footnotes explaining that Quebec was not party to the agreement but would nonetheless receive the federal funding.

Quebec social rights advocates are active participants in international human rights forums, such as the World Social Forum and submissions to United Nations treaty monitoring bodies. However, the historic association of the federal division of powers with protections of the national rights of the French-speaking community of Quebec and the legacy of the exercise of the federal spending power over the objections of the Quebec National Assembly, hinder solidarity between social rights advocates in Quebec and the rest of Canada at the level of the central Canadian state. A social rights framework might make such solidarity possible at some future date but the pre-condition for this would be a recognition on the part of other Canadians of the national distinctiveness of Quebec and the different responsibilities of the Quebec National Assembly with respect to the social institutions of Quebec society, which include social welfare programs. Bill C-303, the child care private members' bill, provides an enabling formula which gives Quebec the option of exempting itself from the provisions of the Act while still receiving the full federal transfer. This formula received the support of all three opposition parties (Liberals, the Bloc Quebecois and the New Democratic model) and is a promising model for other programs funded through the federal social transfer.

Conclusion

The accountability regime proposed here borrows elements from all three regimes of accountability described earlier in the paper, although this was not intentional. The administrative accountability regime treated statutes as the key accountability instrument and intergovernmental agreements as implementing instruments subordinate to statutes and negotiated through authority specifically delegated by legislatures. Yet, the detailed administrative reporting and the monitoring of provincial compliance by federal officials and the detailed administrative reporting by the provinces are rejected in the proposed social rights regime of accountability. The political accountability regime typified by the *Canada Health Act* comes closest of the three regimes to using the language of social

rights and delineating criteria that operationalize a (limited) right to health care services. The alternative accountability regime proposed here would place the promotion of a common social citizenship and shared social rights at the centre of the federal role. It advocates articulating those rights explicitly and where appropriate referencing Canada's commitments to international human rights treaties directed at the progressive realization of rights. The public reporting regime lacks effective accountability mechanisms with respect to any of the three fundamental accountability relationships implicated in the federal social transfer. At the same time, the public reporting did begin to open space at the provincial level for public engagement – and pressure on provincial governments – through innovations such as the annual reports to the public and the Action Plans.

The claim made in this paper is not that the social rights accountability regime sketched above would solve all the accountability problems related to the federal social transfer. However, it is contended that the proposed alternative regime brings greater clarity to the three fundamental accountability relationships that underlie the transfer. These are the accountability of legislatures to the members of society for the implementation of social rights, of the executive branch to the legislature at both levels of government, and of the federal and provincial executives to each other for commitments undertaken as part of arrangements related to the federal social transfer. Furthermore, by situating the federal role as the promotion of a common social citizenship and by highlighting the social rights content of appropriate federal standards it offers a reasonable basis for defining and delimiting a federal role. Finally, by locating monitoring at the provincial level it holds out a greater possibility for an interested public to force governments to deliver on promised social rights than is currently the case.