Accountability Regimes for Federal Social Transfers: An Exercise in Deconstruction and Reconstruction*

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A. Introduction

Transfers from the federal government to the provinces for social programs within provincial legislative jurisdiction played an important role in both the promotion and the erosion of social citizenship rights in Canada. The constructive use of the transfers was seen in the creation of a Canada-wide system of universal, publicly administered medical insurance (medicare) and national norms for social assistance under the *Canada Assistance Plan*[1]. With the elite retreat from the Keynesian welfare state, the destructive possibilities were apparent in unilateral reductions by the federal government in the amounts transferred to provinces and the weakening or outright elimination of the conditions attached to the funds. As a consequence, social rights advocates in Canada outside of Quebec became increasingly concerned about accountability in the transfers. They continue to call not only for increases in funding for social transfers but also and very emphatically for the enforcement of existing federal conditions (in the *Canada Health Act*[2]), the reinstatement of federal conditions that were eliminated (for social assistance in the *Canada Assistance Plan*), the introduction of new federal standards (for post-secondary education, housing, poverty), and the creation of new programs with enforceable standards (for child-care services). The

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1 *Canada Assistance Plan,* RSC 1985, c 1.

2 *Canada Health Act*, RSC 1985, c C-6 s 7–12.

alternatives proposed to federal social transfers – in the form of the social and economic union provisions of the Charlottetown Agreement, the Social Union Framework, interprovincial cooperation through the Council of the Federation, or devolution to the provinces – have not been seen by these advocates as initiatives to strengthen social rights.

The federal spending power and the social transfers that are based on it are problematic, not least because of the historic opposition to them by Quebec governments supported by social rights advocates in that province.[3] One can imagine alternatives, but these would involve either a major constitutional change that recognizes the multinational character of the country (the preferred option of the author of this chapter), or an unprecedented degree of cooperation of the provinces to create the mechanisms to hold themselves accountable for social rights.[4] As neither of these alternatives is likely in the foreseeable future, social rights advocates have to advance their demands to protect and expand social citizenship rights within the constraints of the existing federal division of powers. In recognition of this, the chapter has three objectives: to outline a framework for analysing (and constructing) accountability regimes for federal social transfers, to use this framework to identify the key elements of the three accountability regimes that have governed federal social transfers, and to apply this framework to the challenge of developing an alternative regime for federal social transfers that is consistent with Canada's constitutional order and with the advancement of social rights and that builds on the experience of the previous regimes of accountability

A fundamental constitutional constraint is that Canada is a federal state with a Westminster system of government. This means that transfers of money from the central to subnational governments require an accountability regime that respects two fundamental constitutional principles: federalism and

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3 For a comprehensive summary, see Quebec, Secrétariat aux Affaires intergouvernementales canadiennes, "Quebec's Historical Position on the Federal Spending
Power 1944–1998" (1998), online: Secrétariat aux affaires intergouvernementales canadiennes
www.saic.gouv.qc.ca.

4 The author's views on the dilemmas of Canadian federalism are elaborated in other publications. See Barbara Cameron, "The Social Union, Executive Power and Social Rights" (2004) 13 Canadian Woman Studies 49; Barbara Cameron, "Federalism and Social Reproduction" in Kate Bezanson and Meg Luxton, eds, Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism (Montreal and Kingston: McGill Queen's University Press, 2006) 45; Barbara Cameron, "Accounting for Rights and Money in Canada's Social Union" in Susan Boyd et al, eds, Poverty: Rights, Social Citizenship and Legal Activism (Vancouver: University of British Columbia Press, 2007) 162; Barbara Cameron, "Harper, Quebec and Canadian Federalism" in Teresa Healy, ed, The Harper Record (Ottawa: Canadian Centre for Policy Alternatives, 2008) 419; Barbara Cameron, "Political Will, Child Care, and Canadian Federalism" (Spring 2009) Our Schools, Ourselves 129.

responsible government. The federal principle requires respect for the constitutional division of powers, which in Canada's case has evolved over time to give the federal government exclusive jurisdiction over unemployment insurance, shared jurisdiction with the provinces over pensions, and a shared responsibility with the provinces under section 36(1) of the *Constitution Act, 1982*, for "(a) promoting equal opportunities for the well-being of Canadians; *(b)* furthering economic development to reduce disparity in opportunities; and *(c)* providing essential public services of reasonable quality to all Canadians."[5] The provinces have exclusive legislative jurisdiction over social services, but both levels can spend on social benefits and services. Respect for the principle of responsible government requires that the executive branch be accountable to the elected legislature for spending money according to purposes approved by Parliament, even when the money is being spent by another level of government. Successive federal Liberal governments in Canada have attempted to design accountability regimes for federal social transfers that address, in different ways and to different extents, the constraints of these two fundamental constitutional principles.

This chapter identifies three accountability regimes that have governed federal social transfers to the provinces. Identifying these distinct regimes, however, is not sufficient for accomplishing the underlying objective of this chapter, which is to propose a framework for developing an alternative regime of accountability that addresses some of the problems with past regimes and accommodates the objectives of social rights organizations. For this purpose it is necessary to deconstruct an accountability regime into the relationships and main elements that constitute it. The chapter begins with an outline of a general model of accountability and the elements that are essential to an accountability relationship. Using this model, it is possible to identify the main accountability relationships that underpin Canadian social transfers. The chapter then examines the three regimes of accountability that have governed Canadian social transfers, highlighting the ways each addresses the balance between responsible government and federalism, configures the elements that constitute an accountability relationship, and succeeds or fails to address the central accountability challenges of federal social transfers. The final section of the chapter outlines an alternative regime of accountability that addresses some of the weaknesses and builds on some of the strengths in the regimes studied.

B. A General Model of Accountability

The question that underlies even the most basic relationship of accountability is who is accountable to whom and for what. The focus of this chapter is on complex, institutionalized accountability relationships that involve formalized procedures. Such an accountability relationship may be defined as a

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5 *Canadian Charter of Rights and Freedoms,* s 36(1), Part 1 of the *Constitution Act, 1982,*
being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

relationship between parties whereby one party 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. A regime of accountability as the term is used in this chapter involves one or more sets of formal accountability relationships.

In her study of internal contracts in the British National Health System, Anne Davies identifies four key features of an institutionalized accountability relationship (or what she describes as 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".[6] These features are actually processes that she boils down to three activities: standard setting, monitoring (including obtaining and judging the account), and enforcement.[7] An advantage of Davies's public law framework is its consistency with an established approach to accountability for social rights under intergovernmental agreements: the one used by United Nations treaty bodies to monitor country compliance with obligations under international human rights treaties, including those dealing with social rights such as the *International Covenant on Economic, Social and Cultural Rights*,[8] the *Convention on the Elimination of Discrimination against Women*,[9] and the *Convention on the Rights of the Child*.[10] [11]

Slightly modified, Davies's framework may usefully be applied to the study of the accountability relationships inherent in Canadian intergovernmental social transfers. The processes identified by Davies presuppose an instrument that establishes the accountability relationship, such as the internal contract she studies, treaties, a piece of legislation, or an

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

7 *Ibid* at 89.

8 *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), UNGAOR, 21st Sess, Supp No 16, UN Doc A/6316 (1966) 49 (entered into force 3 January 1976).

9 *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 34/180, UNGAOR, Supp no 46, UN Doc A/34/46, (1981) 193.

10 *Convention on the Rights of the Child*, GA res 44/25, UNGAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 167.

11 For a basic overview of UN monitoring, see Shelagh Day, "Minding the Gap: Human Rights Commitments and Compliance", in Susan Boyd et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press, 2007); Barbara J Stark, "Economic, Social, and Cultural Rights" in David P Forsythe, ed, *Encyclopedia of Human Rights* (New York: Oxford University Press, 2009).

intergovernmental agreement. 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, monitoring procedures, and sanctions. In the case of federal transfers, the funding mechanism for the transfer (cost-shared or block grant) also needs to be included as an element of an accountability regime. To summarize, using this approach to distinguish different accountability relationships involves identifying for each:

1) The parties to the accountability relationship and the nature of the relationship (who is accountable to whom)
2) The obligations undertaken as part of the relationship (what one party is accountable to the other for)
3) The instrument that establishes the accountability relationship
4) The standards or criteria by which performance in meeting the obligations is to be judged
5) Standard-setting procedures
6) Monitoring mechanisms
7) Sanctions for non-performance and enforcement procedures
8) Funding mechanism

This framework allows us to identify three distinct accountability relationships implicated in regimes of accountability for federal social transfers to the provinces. The first of these is the relationship of legislators to citizens for the fulfilment of commitments regarding social entitlements (the social rights relationship). The second is the relationship of the federal executive branch to the House of Commons for spending federal money according to purposes approved by Parliament (the responsible government relationship). The third is the relationship between the executive branches at the federal and provincial levels for the performance of obligations undertaken under the administrative arrangements for the transfer (the federal relationship). The regimes of accountability that have governed the federal social transfer have not clearly distinguished these three relationships of accountability. The result is a confusion of the lines of accountability and, most importantly, obstacles for Canadians attempting to hold governments accountable for promises made regarding social rights.

C. Three Regimes of Accountability

Three different accountability regimes have governed federal social transfers to the provinces at different times. These differ in terms of the balance established between the principles of responsible government and federalism, the priority given one or other of the three accountability relationships involved in federal social transfers, and the way that the elements identified above are configured. The first accountability regime 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 the model for many social rights 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.[12]

1) 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*[13], and the *Canada Assistance Plan*, enacted in 1966. In this regime, the monitoring, reporting, and some of the enforcement activities are located substantially 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 mutual *obligations* of governments in the form of the terms and conditions of that agreement, including 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 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

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12 *A Framework to Improve the Social Union for Canadians. An Agreement between the Government of Canada and the Governments of the Provinces and Territories* (4 February 1999), online: Canadian Intergovernmental Conference Secretariat www.scics.gc.ca [*Social Union Framework Agreement*]. The government of Quebec was not a party to the agreement.

13 *Hospital Insurance and Diagnostic Services Act*, RSC 1957, c 28 s 3.

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."[14] However, to the extent that rights were recognized 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 *standard-setting* process included negotiations with the provinces, but it is the federal government that played the predominant role as a result of its financial clout. The federal Parliament was involved through enactment of dedicated statutes that set out the purposes of the transfers.

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 the House of Commons. Monitoring of the minister was provided for in the requirement that he or she report annually to Parliament on the operation of the agreements and on the payments made to the provinces. 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. 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. Federal money was both a carrot and a stick, with the refusal to fund a program or transfer money the ultimate sanction. Yet it was federal officials, not Cabinet ministers, who were on the front line of monitoring and enforcement. Federal money was not so much withheld by ministers to punish non-complying provinces as transferred on the authority of these ministers to provinces once federal officials had determined that provincial programs and expenditures complied with standards contained in federal legislation. In the case of the *Canada Assistance Plan*, there as an additional enforcement mechanism 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

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14 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 at art 22.

provincial statute was a reversal of the decision in favour of the individual rights claimant.

The *funding mechanism* for programs operating within the administrative accountability regime was an open-ended cost-sharing grant, with the federal government contributing 50 per cent 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 fewer 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]

The administrative accountability regime favoured the executive/ legislative accountability relationship over the federal relationship, involving as it did an intrusive role for federal officials in monitoring provincial compliance. It was, however, the federal government's concern with the open-ended nature of the intergovernmental transfers and the requirement that it match provincial spending, more than provincial chafing under the accountability rules, that led to the demise of the regime for health care in 1977 and social assistance in 1995. Some of the conditions attached to the transfers did protect fundamental social rights, such as the obligation to provide assistance based on budgetary requirements. However, these were not clearly expressed in the language of rights but instead appeared as terms of the intergovernmental agreement, along with administrative arrangements.

2) 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 is that disputes over provincial compliance with standards in federal legislation rapidly become politicized and result in highly

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15 Yves Vaillancourt, "Quebec and the Federal Government: The Struggle over Opting Out" in Dan Glenday and Ann Duffy, eds*, Canadian Society: Understanding and Surviving in the 1990s* (Toronto: McClelland and Stewart, 1994) 168.

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 relationship being of the federal executive to the House of Commons for the expenditure of public funds. The principle of responsible government, however, is undermined by the dependence of the monitoring and enforcement provisions on the political will of the federal minister.

The *Canada Health Act* does contain substantive *standards* in the form of five criteria – public administration, comprehensiveness, universality, portability, and accessibility – set out in federal legislation.[16] The approach adopted by the federal government to the *standard-setting* process was, in the end, a unilateral one. This was the case in both the substantive (social rights) standards and the operational ones covering provincial reporting requirements. The federal government adopted this approach when achieving a provincial consensus appeared impossible, particularly after the announcement by the Quebec government that it would not sign another agreement.[17] The criteria in the *Canada Health Act* do, however, reflect those set out but not expressed so clearly in earlier legislation and subject to debate and negotiation at that time.

The primary accountability in the *Canada Health Act* is 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 procedures of parliamentary responsibility that the accountability of elected representatives to the public for a social right is to be achieved. The *obligation* of the executive branch to Parliament is to report on the administration and operation of the act; the implicit 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.

There is no *instrument* establishing the mutual accountability 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. The provincial executive assumes specific *obligations*, not through an

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16 *Canada Health Act*, above note 3.

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

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 continued 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. [18]

The main *monitoring mechanism* in the *Canada Health Act* is the annual report by the minister of health to Parliament, supported by a legislated requirement for 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] The act delegates to the minister 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 or her authority to issue those regulations, and certainly none has 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 *Canada Health Act* spells out a procedure that the minister of health is to follow in situations where he or she believes that a province is not respecting the standards set out in the legislation. The minister 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.

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18 *Canada Health Act,* above note 3 at s 13.

19 *Ibid,* s 23.

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 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 strength of the political accountability regime lies in the articulation of substantive *standards* that, in the case of the *Canada Health Act*, amount to a promised guarantee of a universal right to medically necessary services, irrespective of an individual's province or territory of residence. The clear statement of substantive standards (described as "criteria") in the legislation has been helpful to those proponents of universal access to health-care services as a right of Canadian social citizenship. The weaknesses of the regime lies in (1) the absence of effective monitoring procedures and the reluctance of the federal minister to make use of the provisions in the legislation regarding provincial reporting, and (2) the unwillingness of the federal Cabinet to precipitate public fights with provincial governments by invoking the enforcement mechanisms. In the end, accountability of the federal executive branch to the House of Commons and of the elected legislators to citizens is sacrificed to the goal of maintaining intergovernmental peace.

3) Public Reporting Accountability Regime

The public reporting regime was typified by the multilateral intergovernmental agreements covering health care and programs for children concluded in the era of the *Social Union Framework Agreement* between 1999 and the coming to office of the Conservative government of Stephen Harper in January 2006.[20] This regime departed significantly from the other two regimes in the balance between the principles of responsible government and federalism. While the administrative accountability regime conformed closely to the Westminster model of the executive–legislature relationship and the political accountability regime formally conformed to it, the public reporting regime all but abandoned it. For the most part, it bypassed legislatures in favour of accountability relationships between the federal and provincial executive branches and between the executive branch at both levels and the

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20 The Social Union Framework Agreement (see above note 13), an intergovernmental agreement involving the federal government and the nine provinces in English-speaking Canada, was concluded in 1999, but the public reporting approach contained in it was reflected in the 1997 agreements around the National Children's Agenda by the now defunct federal-provincial-territorial Council on Social Policy Renewal. The Social Union Framework Agreement approach was a response to the near loss by federalists of the 1995 Quebec Referendum on sovereignty and was designed to prove that Canadian federalism could work, despite the evidence of the spectacular failures of two major initiatives of constitutional reform in the late 1980s and early 1990s.

public. The public, however, was positioned more as a consumer of information than an active party to the accountability regime, having no effective institutional avenues of participation. The discussion below focuses on the child-care agreements concluded within the framework of the *Social Union Framework Agreement*, including the 2000 *Early Childhood Development Agreement*[21] and the 2003 *Multilateral Framework on Early Learning and Child Care*.[22]

In the public reporting regime, the primary *instrument* establishing the accountability relationships was the multilateral framework agreement concluded among Cabinet representatives of the federal and provincial governments. As a consequence of the Supreme Court 1991 decision in the *Canada Assistance Plan Reference*,[23] parties to the agreements treat them as political accords rather than mutually binding contracts. The statutory basis for the accountability regime is very weak.[24] There were no dedicated statutes setting out Parliament's purposes for the funding under the child-care agreements. Instead, the multilateral framework agreements focused on the mutual *obligations* of the governments to each other and, to a lesser extent, to their publics.

The multilateral framework agreements contained very weak articulations of *standards*. Instead, the language of shared visions, objectives, or principles was used. In the case of the Canada Social Transfer, the only substantive standard continues to be the prohibition on provinces imposing a residence requirement for eligibility for social assistance in the *Federal-*

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21 Canadian Intergovernmental Conference Secretariat, News Release, "First Ministers' Meeting Communiqué on Early Childhood Development" (September 11, 2000) online: Canadian Intergovernmental Conference Secretariat, www.scics.gc.ca [*Early Childhood Development Agreement*].

22 *Multilateral Framework on Early Learning and Child Care. An Agreement between the Government of Canada and the Governments of the Provinces and Territories* (March 2003) online: Canadian Intergovernmental Conference Secretariat www.scics.gc.ca [*Multilateral Framework on Early Learning and Child Care*]. The Government of Quebec was not party to this agreement.

23 *Reference Re Canada Assistance Plan*, (BC) [1991] 2 SCR 52 [*Canada Assistance Plan Reference*]. The Supreme Court maintained at paragraphs 46 and 47 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."

24 For more discussion on this point, see Barbara Cameron. "Accounting for Rights and Money in Canada's Social Union" in Susan Boyd et al eds. *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press 2007).

Provincial Fiscal Arrangements Act.[25] The *Early Childhood Development Agreement* did not contain any language that could be described as a standard, let alone a condition for a transfer. Instead, it listed two very general objectives (promoting early childhood development and helping families support their children within strong communities) and identified four also very general key areas for action. These are the promotion of healthy pregnancy, birth, and infancy; improving parenting and family supports; strengthening early childhood development, learning, and care; and strengthening community supports. The *Multilateral Framework Agreement on Early Learning and Child Care* was more specific in naming the area of investment as government regulated early learning and child-care programs for children under six, and identified the principles associated with effective approaches in such settings as accessible, affordable, quality, inclusive, and parental choice. The multilateral agreements also outlined the principles (*standards*) or criteria to be used to evaluate the progress of a government in meeting its commitments, which was to take the form of indicators developed through intergovernmental negotiations.

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. Both the *Early Childhood Development Agreement* and *Multilateral Framework Agreement on Early Learning and Child Care* were concluded among all the first ministers, with the exception of the premier of the province of Quebec.

The mechanism for *monitoring* the performance of governments in meeting their obligations under the agreements was an annual report produced by the governments, organized around the agreed upon criteria or performance measures. There was generally a reference to third-party involvement in monitoring, but this was honoured more in the breach than the observance. The *Early Childhood Development Agreement* committed governments to report annually on their investments and progress in the four key areas and to work together to develop a shared framework that was to include jointly agreed comparable indicators. It gave as an example of indicators the availability and growth of services in each of the areas. . The *Multilateral Framework Agreement on Early Learning and Child Care* was more direct about the reporting requirements. . It committed governments to release baseline information by the end of November 2003 and to release the first annual report in November 2004. The agreement further specified the kind of descriptive and expenditure information that was to be provided. Both agreements committed governments to ensure that there were unspecified "effective mechanisms" to allow Canadians to participate in reviewing outcomes.

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25 *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8 s 24.

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

The *Social Union Framework Agreement* provided for an *enforcement mechanism* in the form of a dispute avoidance and resolution procedure that was to replace or modify the role of the federal minister in determining violations of the agreement. The dispute resolution mechanism agreed upon for health care specified an elaborate procedure that was to be followed where violations of the *Canada Health Act* were alleged, but the final decision was still to rest with the Governor-in-Council at the federal level.[26] Federal Liberal Health Minister Ujjal Dosanjh initiated proceedings under the mechanism around private diagnostic clinics in April 2005, but this approach to enforcement (or to the Social Union more generally) did not survive the defeat of the Liberal Party in the general election of January 2006.[27]

As with the political accountability regime, the *funding mechanism* for the public reporting model was the block grant, first introduced for social transfers to health and post-secondary education in 1977. 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 umbrella 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.[28] 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

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26 Health Canada, "Canada Health Act Annual Report, 2006–07" (2007), online: Health Canada www.hc-sc.gc.ca at Annex C.

27 Odette Madore, *Private Diagnostic Imaging Clinics and the Canada Health Act* (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 2002).

28 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); Lynell Andersen and Tammy Findlay, "Does Public Reporting Measure Up? Federalism, Accountability and Child-Care Policy in Canada" (2010) 53 Canadian Public Administration 417.

services was not specified during the period the Liberals were in office.[29] In 2005, the federal Liberal government moved to a different instrument – bilateral intergovernmental child-care agreements – after failing to gain the support of the provinces to a multilateral framework agreement to govern a promised $5 billion federal transfer over five years. 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. Like the multilateral framework agreements, these agreements were not enshrined in dedicated statutes, allowing the newly elected Conservative prime minister to unilaterally cancel them immediately after the swearing in of his government. There is, however, some evidence that the governments made an effort to ensure the bilateral agreements were more binding than the earlier agreements under this regime. In contrast to the multilateral agreements, the bilateral agreements-in-principle and the funding agreements were signed by representatives of the two levels of government. The funding agreements were written in contract-like language, although with a clause recognizing that the agreement could be terminated by either party on one year's notice and the caveat that the funding depended on annual approval of the necessary appropriations by Parliament.

The bilateral agreements can be viewed as both an extension of the public reporting model and a departure from it. Like the multilateral framework agreements, they relied heavily on public reporting as a *monitoring mechanism*, although there was also provision for a dispute resolution mechanism covering disagreements related to finances but not standards. The language around *standards* was stronger, echoing in some ways the criteria of the *Canada Health Act*, with the principles of quality, universally inclusive, accessible, and developmental being identified and defined. The *standard-setting process* departed from the executive-to-executive process of the multilateral agreements in that the standards are a modified version of the principles announced in the successful 2004 Liberal election campaign.[30] The most significant departures, however, related to accountability *instruments*: the use of bilateral rather than multilateral agreements and the innovation of a provincial Action Plan.

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29 The Conservative government introduced a notional allocation of the CST in the 2007 federal budget, but this is not binding on the provinces.

30 The Liberals campaigned on the QUAD principles of quality, universal, affordable, developmental child care services. *Universal* was modified to *universally inclusive* in intergovernmental meetings in the fall of 2004 and appeared in the bilateral agreements-in-principle in this form, with a definition of each reminiscent of the language of the *Canada Health Act*. However, the indicators in the public reporting section of the agreements related only to availability, affordability, and quality.

The bilateral agreements-in-principle required that a province publish an Action Plan as a condition for moving to a funding agreement. This was not a requirement for Quebec, which signed only 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 the sentence "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." There were slight variations in the wording of the Action Plan section of the bilateral agreements, but all involved identifying priorities for investment, targets, and baseline expenditures against which progress toward meeting the objectives of the agreement may be measured.

The political accountability regime tipped the balance within the Canadian constitutional order very much toward the federal principle. It provided virtually no role for the elected legislature in holding the Cabinet accountable for the expenditure of public funds according to purposes approved by Parliament, as required by the principle of responsible government. To the extent that there was any accountability on social rights, it was between the executive branch and citizens through the annual public reports. Citizens, however, had no effective way to hold the executive branch accountable, either directly or through their elected members of Parliament.

D. Towards an Alternative Regime

From the perspective of advocates of social rights, the primary purpose of federal social transfers is to expand the social citizenship rights of members of Canadian society. This final section of the chapter draws on lessons of past regimes of accountability to outline an alternative regime consistent with that purpose. It does not attempt to design an ideal system of accountability, which is impossible within the existing Canadian constitutional order. The objective, however, is to address from a social rights perspective the main shortcomings of past regimes and to accommodate as much as possible the inescapable tensions within the Canadian political system. The hope is that the approach here will be of assistance to those social rights advocates committed to ensuring that federal social transfers continue and that effective accountability regimes are put in place to govern them.

Following the approach outlined in this chapter, the first task for anyone designing an alternative regime of accountability for federal social transfers is to be clear about the three distinct accountability relationships that underlie such a regime, each involving different sets of actors. The accountability relationships are of (1) elected legislators to citizens, (2) the federal executive branch to the House of Commons, and (3) the executive branches at the federal and provincial level to each other. Once these are identified, the elements that constitute an accountability relationship need to be considered in turn. As described at the beginning of the chapter, these are the obligations the parties have assumed, instrument(s) establishing the

accountability relationship, standards by which performance of obligations are to be assessed, the standard-setting procedure, monitoring mechanisms, sanctions for non-performance, enforcement procedures, and, where appropriate, the funding mechanism.

The obligations undertaken by the parties to the accountability relationship (the "what" of an accountability relationship) differ in each of the accountability relationships. The members of the House of Commons are accountable for fulfilling commitments regarding social entitlements or social rights. The federal Cabinet is accountable to the House of Commons for spending money for purposes approved by Parliament (the responsible government principle). The executive branches at each level are accountable to each other for carrying out the terms of their agreement, which in the case of the federal government means providing the agreed-upon funds, and of the provincial governments, spending that money in the ways agreed upon and then reporting on that spending.

Disentangling the three accountability relationships is an important step to avoid some of the confusion in previous regimes but, from a social rights perspective, it is not sufficient. If the purpose of the transfer is understood to be the realization of social rights, then the relationship between the elected legislators and citizens should be recognized as the primary accountability relationship. For the purposes of the social transfer, the relationship between the federal Cabinet and the members of the House of Commons, and the one between the executive branches at the two levels should be seen as secondary or implementing relationships.

A distinction between primary and secondary accountability relationships permits a further distinction between substantive standards and implementing standards or criteria. The substantive standards relate to the primary purpose of the social transfer, which is the realization of social rights. The implementing criteria relate to the secondary accountability relationships, which are the relationships between the executive branch at the federal level and the House of Commons, and between the executive branches at the federal and provincial levels. The five criteria of the *Canada Health Act* provide an illustration of substantive standards. The reporting requirements of the federal minister to the House of Commons or of the provincial executive to the federal minister are examples of secondary or operational standards. These two types of standards need to be distinguished in legislation and intergovernmental agreements on social programs.

The distinction between substantive and operational or administrative standards is helpful in conceptualizing and locating standard-setting procedures. Intergovernmental forums are a suitable place to determine the standards each level of government is to respect in meeting their mutual obligations. But the fundamental social rights of Canadians should not be determined in negotiations between representatives of the executive branches of the two levels of government. The realization of social rights involves choices about the allocation of society's resources and the regulation of markets that are essentially political. In a democratic society, debates about what priority is to be given to them belong in forums that permit dialogue

between elected representatives and the people, including election campaigns, transparent public consultations, and legislatures. Given the shared responsibility for social rights under Canada's constitution, such debates can occur at the federal or provincial levels or both. The standard-setting procedures for the executive–legislature relationship are the established parliamentary procedures and conventions.

Under the proposed alternative accountability regime, the statute would be the primary instrument for establishing the accountability relationship between legislators and members of society, and between the executive branch and the legislature. At the federal level, these should be dedicated statutes setting out the purposes of the transfer and the accountability regime to govern them, rather than omnibus financial legislation such as the *Federal-Provincial Fiscal Arrangements Act* that provides little more than spending authorization. The purposes and substantive standards of the transfer should be articulated clearly, using the language of social rights and referencing where appropriate Canada's international human rights commitments.[31]

These should be explicitly linked to the federal Parliament and government's role in promoting a shared, countrywide social citizenship and to their commitment under section 36(1) of the *Constitution Act, 1982*, to promoting equal opportunities for the well-being and providing essential public services to all Canadians. The procedures governing the accountability of the minister to the House of Commons should be clearly specified, with details provided on the kind of reporting required. The nature and scope of the authority delegated to the minister to negotiate agreements with the provinces should also be clearly delineated. 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 should be seen as implementing instruments concluded under authority delegated through the statutes, which is consistent with their status as administrative agreements.

The monitoring and enforcement of standards have been the most problematic elements of previous regimes of accountability. Between elections, which are the ultimate enforcement procedure, citizens are dependent on the legislature to hold the executive branch accountable. They are assisted in this task mainly by non-governmental organizations that monitor the activities of government, usually with very limited resources. The accountability of the federal executive to the House of Commons is governed by the procedures and conventions of Parliament and the often very general

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31 An example of this was Bill C-304, *An Act to Ensure Adequate, Accessible and Affordable Housing for Canadians*, which explicitly referenced the International Covenant on Economic, Social and Cultural Rights. This private member's bill would have required that the federal government consult with provinces with a view to establishing "a national housing strategy designed to respect, protect, promote and fulfil the right to adequate housing as guaranteed under international human rights treaties ratified by Canada."

statutory delegations of power. Legislative oversight is very weak and could be strengthened by measures such as requiring that intergovernmental agreements be tabled in the House of Commons and automatically referred to a standing committee, which is the current practice regarding regulations – another type of executive instrument. The agreements should also be made publicly available on government websites, as is the case with intergovernmental agreements in Quebec and international treaties at the federal level. Reporting requirements of the minister to the House of Commons could be made more explicit and stricter in legislation. Additional support could be provided to the elected legislature by the creation of a representative advisory council, as recommended below.

It is, however, the monitoring and enforcement procedures involved in the relationship between the executive branches at the two levels of government that have been the most contested and present the greatest challenges. There are two aspects to this. The first is the accountability of the provincial executive for spending federal money according to the terms of the agreement, which effectively means according to purposes approved by Parliament, and reporting on that spending. The second is the accountability of the federal government to deliver on the funding promised to the provinces in exchange for their acceptance of the federal conditions.

The alternative regime would address the tension between federalism and responsible government inherent in the provincial expenditure of federal tax dollars by locating as much of the monitoring and enforcement activity as possible at the provincial level. An innovative approach borrowed from the 2005 bilateral agreements-in-principle around the $5 billion promised by the government of Paul Martin for child-care transfers might help achieve this goal. Instead of tying federal funding to the realization of the substantive objective of the funding, the bilateral agreements made the trigger for the flow of federal money the publication by the province of an Action Plan. This plan was to show how the province intended to use the federal funding to progress toward the realization of objectives. The idea was that the citizens of a province rather than the federal government would hold the province accountable for carrying out its own Action Plan. As discussed earlier, the weakness of the accountability regime in the agreements was that it relied too heavily on public reporting by the provincial executive to the public. Instead, stronger mechanisms for monitoring a province's record in fulfilling its Action Plan need to be created at a provincial level. These mechanisms should provide increased avenues for public engagement linked to and supportive of the legislature's role in holding the executive branch accountable.

An example of a stronger monitoring mechanism was set out in Bill C-303, the private member's bill directed at putting in place an accountability regime for federal social transfers for child-care services.[32] The bill called for an Advisory Council to consist 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 was to report

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32 See above note 1.

directly to Parliament, and the minister would be required to mention any advice received from the Council in his report to Parliament. An Advisory Committee with similar reporting powers at the provincial level could monitor progress under the province's Action Plan. Another way that monitoring could be located at the provincial level would be to have the provincial auditor general report on the province's use of a federal social transfer. An appeals procedure for individuals with rights under a program funded by the transfer could serve as both a monitoring and enforcement mechanism, as was the case under the *Canada Assistance Plan*.

The federal spending power is a blunt enforcement mechanism and has recently not ensured 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, which are matters between citizens and legislators. The alternative accountability regime would reserve the sanction of withholding federal money for enforcing provincial reporting (as a necessary condition for the minister's accountability to the House of Commons) and ensuring 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. The emphasis should be on political *sanctions* enforced through public debate, political mobilization, and elections.

The accountability of the federal executive to the provincial executive to deliver on the promised funding is more difficult to resolve. Here, there are two problems: unilateral federal changes in the course of an intergovernmental agreement, and the reductions in the federal contribution at the termination of an agreement. The first problem was caused by the 1991 Supreme Court of Canada decision in the reference case on the *Canada Assistance Plan*. While the Court made general statements about the political rather than legal enforceability of intergovernmental agreements, the reasons it gave were more specific, referring to the appearance of the funding formulae only in the federal legislation and not in the funding agreement and other details of the arrangement. Governments appeared to be trying to address these criticisms in the 2005 bilateral child-care funding agreements, which were written in contract-like language. The second problem, sustaining the federal funding commitment over the long term, is essentially a political one, requiring public pressure on the federal government. The provinces could facilitate this by educating Canadians about the shared federal and provincial responsibility for social rights and the role that the social transfers play in this. Instead, the provinces frequently imply that the federal government has virtually no role in social programs and then complain about the inadequacy of federal funding.

The tension between federalism and responsible government needs to be kept in mind in choosing the funding mechanism for the transfer. The

federal government can legitimately require that a province report on its expenditure of federal revenue because it must have this information for its accountability to the House of Commons. The province is accountable to its own legislature for the expenditure of revenue raised through provincial taxation. From a practical perspective, a provincial legislature cannot be expected to adopt as its own the purposes of the federal Parliament unless the federal government makes a very significant contribution of money. In those cases, a shared-cost grant might be the appropriate funding mechanism. In cases where the federal contribution does not represent a large, ongoing contribution, then a block grant is more appropriate. Although the cost-shared grants have been associated with the stricter accountability regimes in the past, it is possible to design a regime of accountability consistent with the alternate regime outlined here for a block transfer.

No accountability regime can end the challenge by Quebec governments to the legitimacy of the federal spending power, which is the constitutional basis for federal social transfers. Responding to Quebec concerns ultimately requires constitutional change that recognizes the unique role of the Quebec National Assembly with respect to the presence of a majority French-speaking population in that province. In the meantime, influential social rights advocates in English Canada have learned to accept the special status of Quebec and worked with opposition members of the Canadian Parliament to include a specific Quebec exemption in bills calling for national strategies and national standards. A parallel version of the following paragraph from Bill C-303 appears in Bill C-545 (An Act to Eliminate Poverty in Canada), which received first reading in the House of Commons on 16 June 2010:[33]

> 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.[34]

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33 Bill C-545, *An Act to Eliminate Poverty in Canada*, 3rd Sess, 40th Parl, 2010 (first reading 16 June 2010). The precise wording of article 4 of that bill is:

> Recognizing the unique nature of the jurisdiction of the Government of Quebec with regard to poverty elimination 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 within its territory under this Act.

34 See above note 1.

The Quebec exemption allowed Bloc Québécois MPs to join their Liberal and New Democratic colleagues in supporting the child-care and anti-poverty bills. The provision makes explicit and public the recognition of Quebec's special status that political elites have privately accepted in intergovernmental arrangements since the mid-1960s.[35] In the current political context, it offers a path out of an impasse.

The proposed accountability regime outlined in this chapter does not purport to solve all the accountability problems related to federal social transfers. However, it has a number of advantages over the ones that have governed social transfers in the past. It highlights three distinct accountability relationships that underlie federal social transfers and identifies as the primary accountability relationship that of legislators to citizens for the fulfilment of social rights. It provides a reasonable basis for defining and delimiting the federal role by situating it as the promotion of a common social citizenship and emphasizing the social rights content of appropriate federal standards. 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. It would allow the conflicts of interest that underlie political struggles around intergovernmental social transfers to play out within a framework in which the democratic issues at stake and the choices being made would be more visible.

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35 The author of this chapter was involved in the consultations that led to this provision and supports the approach, although would prefer the wording "Quebec National Assembly" to "government of Quebec." On elite accommodation in the mid-1960s, see above note 15.