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Accounting for Rights and Money in the Canadian Social Union

Barbara Cameron

In his budget speech to the House of Commons on 27 February 1995, then minister of finance Paul Martin announced the intention of the federal government to minimize the conditions attached to federal transfers in areas of clear provincial responsibility, declaring that, "[a]t present, transfers under the Canada Assistance Plan come with a lot of unnecessary strings attached."¹ The strings to which the minister referred involved two kinds of democratic accountability: accountability for the expenditure of money according to the purposes approved by Parliament and accountability for social rights. The 1995 federal budget marked the end of the *Canada Assistance Plan Act* (CAP) regime of accountability and set in motion a process that put in place a new accountability regime to govern the federal social transfer to the provinces.² This new regime, which has come to be known as the Social Union, consists of a network of intergovernmental agreements concluded among the executive (Cabinet) branch of government at the federal and provincial levels, along with supporting institutions and procedures.

This chapter examines the CAP and the Social Union as two regimes of accountability for rights and money, highlighting the different ways they have responded to the challenge of reconciling two of the historic principles of the Canadian Constitution – responsible government and federalism – with the principle of social citizenship. It argues that the CAP regime respected the principle of responsive government by ensuring that the federal executive was accountable to the elected House of Commons for the expenditure of public funds for the purposes approved by Parliament. In so doing, it conformed to the Westminster model of government. It also respected the principle of social citizenship in guaranteeing certain basic social and procedural rights to members of Canadian society. The administrative accountability procedures of the CAP, however, did require extensive monitoring of provincial programs and expenditures by federal officials in a way that was problematic from the perspective of the principle of federalism. The Social Union marks a significant departure from the CAP, drawing

Its approach to accountability from business and the New Public Management, and modeling its institutions and procedures on international relations. The result is that the Social Union does not provide effective, democratic accountability for either rights or money. The chapter concludes with a consideration of lessons that may be drawn from the CAP and Social Union regimes of accountability for the design of a social union that provides accountability for both rights and money within the system of Canadian federalism.

The CAP Regime of Accountability

The CAP, which was in effect between 1966 and 1996, governed the transfer to the provinces of federal monies in support of provincial income-support programs and services for the poorest Canadians. To qualify for cost-shared funding, the provinces had to meet the conditions in the federal-enabling statute that guaranteed basic rights of social citizenship to the poor and ensured the accountability of the federal executive to the House of Commons for the expenditure of federal revenue. The CAP legislation provided the framework for the negotiation of bilateral agreements to govern the social transfer. This framework consisted of a clear and very specific delegation of authority to the federal minister, with the approval of the governor-in-council, to enter into intergovernmental agreements; protections for the social and procedural rights of individuals in the form of conditions clearly spelled out in the legislation and attached to the federal transfer; and an elaborate system for federal monitoring of the compliance of provincial programs with the CAP conditions and for verifying provincial claims for funds. In exchange for provincial compliance with the CAP conditions, the federal government agreed to pay for 50 percent of the cost of income-support programs and welfare services for persons in need and for work-activity projects, which included training and rehabilitation programs for persons in need or likely to become in need. The federal government also agreed to provide statistical information and research and consultative services as requested by the provinces. The main instruments for implementing the CAP regime, then, were the federal statute and regulations, the bilateral intergovernmental agreement, a provincial statute and regulations, and various devices associated with the system of monitoring and verifying provincial compliance.

The CAP reflected the principle of social citizenship in provisions that guaranteed certain social and procedural rights to persons in need.¹ The guarantees of basic entitlements and procedural rights were not highlighted as such in the legislation but rather appeared as "terms" that had to be included in the intergovernmental agreements. In Part I of the act (which covered general income-support programs), the entitlements for individuals arose from provincial undertakings to:

- provide financial and/or other assistance to or for a person in need in an amount or manner that takes into account his budgetary requirements
- base the assistance on the budgetary requirements and the income and resources available to that person to meet these requirements
- provide assistance without any requirement of a period of residence in the province as a condition of eligibility
- put in place a procedure for individuals to appeal the decisions of the provincially approved agencies that determine whether an applicant qualified for support.

In Part III of the CAP (which dealt with work-activity projects directed at training and vocational rehabilitation), the rights of individuals appeared in a section dealing with provisions to be included in the bilateral agreements. This section required the provinces to agree that:

- no person will be denied assistance because he refuses to take part in a work-activity project
- allowances will be paid to participants in work-activity projects, which will be topped up if necessary by assistance payments if a gap still exists between the income and resources of an individual and his budgetary requirements
- participants in work-activity projects will have access to welfare services, which would include dental services and childcare services.

Signing the bilateral agreements was a prerequisite for a province to receive the federal funds but was not sufficient to ensure the flow of money. In addition, the province had to have in place a statute that conformed to the terms outlined in the federal CAP legislation. Under section 5, payments to the provinces were to be made "pursuant to the provincial law," which was defined in the CAP legislation as "Acts of the legislature of a province that provide for (a) assistance, or (b) welfare services in the province, under conditions consistent with the provisions of this Act and the regulations, and includes any regulations made under those Acts."⁴ The obligations undertaken by a province in exchange for the federal money assumed the form of entitlements of individual citizens once incorporated into provincial legislation pursuant to an intergovernmental agreement.⁵ The courts recognized an entitlement to assistance, even as they interpreted the eligibility requirements strictly and the entitlements narrowly in the 1990s.⁶ These conditions came to be seen by anti-poverty activists as social rights for the poor and were presented as such by the federal government in its reports to the United Nations committee monitoring country compliance with the *International Covenant on Economic, Social and Cultural Rights*.⁷ These entitlements were in effect guaranteed to persons in need through the

provincial statute complying with the terms of the bilateral intergovernmental agreement.

The intergovernmental agreement and the provincial legislation were part of a comprehensive system for monitoring provincial compliance with the federal legislation directed at ensuring that federal funds were spent as intended by the federal Parliament. Over and above the agreement and a conforming provincial statute, a province had to apply for approval for the specific programs that it wished to have cost-shared through a process known as "submission for listing in the schedules to the federal-provincial agreements." A review of the programs was conducted by the federal field staff, which comprised half of the staff of the CAP Directorate. Once approved, the programs were listed in one of three schedules to the federal-provincial agreement: schedule A, which lists homes for special care; schedule B, which includes provincially approved agencies providing welfare services; and schedule C, which comprises the provincial laws that authorize the provision of assistance and welfare services.⁸ These schedules were regularly updated to reflect any new listings or any changes to existing listings. The updating process was a formal one, requiring an amendment to the agreement signed by the designated provincial minister and the federal minister of national health and welfare. In having the programs listed, the onus was on the province to show that the programs met the requirements of the plan.

Once the programs were approved and listed, the provinces could submit claims for the federal share. These claims were reviewed by federal field staff who certified that the costs claimed met the conditions for cost-sharing. According to the 1986-7 annual report, "a major part of [field] staff time is spent verifying the eligibility and shareability of costs claimed, by conducting systems and sample compliance reviews of records at the provincial and district level."⁹ Once a certificate was issued by the field staff, the federal payments were made on a monthly basis and reconciled annually. In addition to audits by the provinces, the provincial claims were subjected to an annual audit conducted by officials from the CAP Program Finance Division. This process was cumbersome for both parties, and, beginning in 1989-90, experiments were begun to streamline the process. In British Columbia, a joint federal-provincial Audit and Settlement Review Committee was established to direct a single audit using a non-government auditor, and, in Ontario, the audit on behalf of both governments was done by the province's Ministry of Community and Social Services Internal Audit Group.¹⁰

The CAP operated within a larger regime of accountability: the Westminster model of government. Within this model, the central focus is on the accountability of the executive to the elected legislature with the requirement of legislative approval for the expenditure of funds being the primary mechanism to ensure executive responsibility. In keeping with the principle of responsible government, the executive is accountable to the people

through the elected representatives. The key instrument to ensure accountability is the federal statute characterized by clear delegation of responsibility to the executive. The Westminster model was apparent in the CAP regime's careful delegation of power to the executive, the elaborate system for monitoring provincial compliance and verifying provincial claims; and the requirement that the minister report annually to Parliament on the operation of the agreements and the payment of funds to the provinces. Under the CAP, the intergovernmental agreement was not simply a contract spelling out the mutual obligations of two equal parties. It was an instrument directed primarily at securing the accountability of the executive to the legislature as required under the traditional British system of government. In the case of the transfer of funds under the federal spending power in an area of exclusive provincial jurisdiction, this was achieved by requiring provincial legislation. Within the CAP regime, tensions between the principles of responsible government (executive accountability to the people through the elected legislature) and federalism were resolved in favour of executive accountability. Evidence of this bias is found in the requirement that provinces submit to federal auditing of provincial social welfare accounts.

In addition to providing procedures that facilitated parliamentary scrutiny of the expenditure of public funds for purposes approved by Parliament, the CAP regime brought about oversight of the exercise of delegated powers by administrators through appeals tribunals. The federal government no doubt did not anticipate a social assistance recipient challenging its enforcement of the CAP conditions since, traditionally, only the attorney general had standing to assert a purely public right.¹¹ However, Robert James Finlay, a recipient of social assistance whose benefits were reduced by the Manitoba government to capture an overpayment, succeeded in winning recognition by the Supreme Court of Canada that a citizen who has a genuine interest in a serious issue of public interest should be recognized, as a matter of judicial discretion, as having standing to sue for a declaration or an injunction to challenge the exercise of statutory authority.¹²

There was within the CAP regime a very specific conception of the principle of federalism. Within this conception, the federal Parliament had a responsibility to ensure the existence of basic minimum social entitlements for all Canadians irrespective of their province of residence. The federal funds were directed at encouraging provinces to bring social welfare programs in their area of jurisdiction up to common minimum standards with respect to both the level of benefits and certain procedural rights. In the case of the level of benefits, the minimum was defined vaguely in terms of adequacy, but the CAP agreement did obligate provinces to substitute a needs test for the stingier means test by requiring that the "budgetary requirements" of applicants as well as their income and assets be taken into account – an approach first introduced in the federal *Unemployment Assistance*

Act, 1956.¹³ Common minimum procedural rights were ensured through the requirement that a province put in place an appeals procedure for applicants for, and recipients of, social assistance.

One significant departure from the primacy of the principle of executive accountability over federalism came in the arrangement with Québec. In anticipation of the coming into effect of the CAP, the *Established Programs (Interim Arrangements) Act* was passed in 1965, allowing a province effectively to opt out of existing cost-shared programs by electing to receive the federal contribution in the form of a transfer of tax points.¹⁴ While available to all provinces, only Québec was expected to avail itself of this option, which, indeed, is what happened. When the CAP was introduced in 1966, the opting-out provisions of the *Established Programs (Interim Arrangements) Act* were extended to it, and, as a result, Québec continued to operate under this "Interim" arrangement until the CAP came to an end in 1996. According to Yves Vaillancourt, Québec "had to send its claims to Ottawa and to submit to federal verification procedures" and, except for the method of payment, was treated like any other province.¹⁵ This assessment, however, understates the extent of Québec's unique relationship to the CAP. While Québec did not achieve the full withdrawal of the federal government for which it originally hoped, it did enjoy a special administrative status under the CAP, and the extensive administrative apparatus for certifying and verifying claims that operated in the other nine provinces did not exist in Québec. The special status of Québec was recorded in footnotes in the CAP annual reports, just as it is today in the Intergovernmental agreements in the Social Union.

Accountability in the New Social Union

The Social Union has its origins in the elimination of the CAP in the February 1995 federal budget and, with it, the rights of social citizenship and the procedures for executive accountability for spending contained in the CAP legislation. The elimination of the CAP made way for the introduction of a neo-liberal approach to social welfare focused on the failure of the unemployed to make themselves employable rather than the responsibility of the state to maintain conditions for full employment. In addition, the development of the Social Union was strongly influenced by the close federalist win in the 1995 Québec Referendum. The near loss of the federalist option strengthened the political imperative of demonstrating to the Québec population that Canadian federalism was indeed capable of change, despite the considerable evidence to the contrary provided by the failure of the Meech Lake and Charlottetown attempts at constitutional amendment. The regime of accountability put in place under the Social Union drew its inspiration more from corporate notions of executive accountability as reflected in the new public management than from the Westminster model. The

inspiration for the institutions and procedures for this new accountability regime came from the growing experience of intergovernmental relations specialists at the federal and provincial levels with the approaches to negotiation and dispute resolution in trade and other international regimes of regulation.

The exact parameters of the Social Union shift from time to time and so are a bit hard to discern. The official Social Union website focuses on two areas of social policy: children's benefits and services and vocational programs for persons with disabilities. These are programs that have come under the new federal Department of Social Development since 1 April 2004. Yet, health care figured prominently in the *Framework to Improve the Social Union for Canadians. An Agreement between the Government of Canada and the Governments of the Provinces and Territories (SUFA)*,¹⁶ which was concluded in February 1999, and the exchange of letters that constituted the agreement on the Canada Health Act Dispute Avoidance and Resolution Process links it directly to the SUFA.¹⁷ At the same time, other programs that might normally be considered integral to a regime of social welfare have never been considered part of the Social Union, including employment insurance, housing, training, and pensions. These programs differ from those that come under the umbrella of the Social Union in their funding arrangements. What links the programs that come under the Social Union is that they are either currently, or were in the past, cost-shared by the federal and provincial governments. The discussion that follows centres on the SUFA and the agreements in areas previously covered by the CAP: children's services and benefits. There are no agreements covering income-support programs and other services for adults on social assistance.¹⁸

The 1999 SUFA is presented publicly as the framework for the other Social Union agreements. However, it is not a framework in the sense that other agreements are negotiated necessarily in conformity with its provisions. Rather, the SUFA is an umbrella in the sense of providing political cover for the exercise of the federal spending power on social programs. Under the agreement, the prime minister agrees to certain limitations on this power in exchange for public recognition by the first ministers of all the provinces/territories, except Québec, of the legitimacy of the federal spending power, including when it is exercised through conditional transfers. Specifically, the prime minister agrees not to introduce any new Canada-wide block-funded or cost-shared initiatives without first obtaining the agreement of the majority of the provinces. He further accepts a form of "opting out with compensation" in agreeing that a provincial/territorial government with programs in place that fulfil the agreed objectives can reinvest the money in the same or a related priority area. With respect to the exercise of the federal spending power in the form of transfers made directly to individuals or organizations, he agrees only to provide at least three months notice to

the provinces/territories and to offer to consult with them to identify potential duplication and alternative approaches.

The *SUFA* is also a framework in that it endorses formally a new approach to accountability and to federal-provincial relations that is reflected in other agreements, including the two multilateral agreements that predated it dealing with the National Child Benefit (NCB) and employability programs for people with disabilities. The accountability methodology centres on direct reporting by the executive branch to the public, using performance or outcome measures developed, where appropriate, with the assistance of experts. The *SUFA* envisages the development of mechanisms for avoiding and resolving disputes among governments and outlines some of the operating principles and procedures that should be embodied in such mechanisms. It also sketches out a role for an executive-federalist political body, referred to as the Ministerial Council, to oversee the implementation of the agreement. The functions of this council include supporting sector ministers by collecting information and receiving reports from jurisdictions on progress in implementing the agreement and so presumes an administrative secretariat. Québec is not a party to the *SUFA* or, indeed, to any Social Union agreements outside the area of health care.¹⁹

The NCB differs from the other Social Union initiatives in that it is not a block-funded or cost-shared transfer to the provinces/territories but, rather, a direct transfer to low-income parents funded entirely by the federal government. The NCB is a supplement to the federal Canada Child Tax Benefit and has the same relationship to it that the Guaranteed Income Supplement has to Old Age Security. There are two components to the Canada Child Tax Benefit: the Basic Benefit and the National Child Benefit Supplement (NCBS). The Basic Benefit is notionally a replacement for earlier federal programs, including the once universal Family Allowance Benefit and the refundable and non-refundable child tax benefits that parents on provincial social assistance previously received on the same terms as other parents. It continues to be the case that this part of the Canada Child Tax Benefit is not treated as income by the provinces for the purposes of social assistance, which means it is not subtracted from the money parents receive from the provinces. The NCBS portion, however, is funded through money cut from the federal social transfer at the time that the cost-shared *CAP* was eliminated. It is designed to be used not just as an anti-poverty measure but also as an "employability measure," if a province so decides, for parents on social assistance. Under the Intergovernmental agreement around the NCB, the provinces/territories agree to invest in other benefits or services for low-income parents any money they save by treating the NCBS as income for parents on social assistance. Unlike the other Social Union agreements, therefore, the NCB agreement governs the spending power of the provinces as much as that of the federal government.

The existence of a federal-provincial/territorial agreement around the NCB was first announced in the federal speech from the throne on 23 September 1997. However, the main document governing the NCB, the *NCB Governance and Accountability Framework (NCB Framework)*, was not released until March 1998.²⁰ Predating the *SUFA*, the framework may have been a prototype for all of the Social Union agreements. The purposes of the NCB are stated as helping to prevent and reduce the depth of poverty, promoting attachment to the labour market, and reducing overlap and duplication. The framework describes the intergovernmental partnership approach as one that emphasizes "transparent and open communication between partners, de-emphasizes formal bureaucratic agreement between orders of government, and accentuates accountability to the general public."²¹ The *NCB Framework* contains a detailed outline of the mechanisms for decision making and accountability. The "principal mechanism of governance" was to be a political body described as a forum of federal/provincial/territorial ministers of social services, with responsibility for providing overall strategic policy direction, monitoring and assessing implementation, and adjudicating and resolving disputes where required. The ministers were to delegate responsibility for the general management, implementation, and operation of the initiative to an administrative body, the Federal/Provincial/Territorial Deputy Ministers Responsible for Social Services. A Federal/Provincial/Territorial NCB Working Group of Officials was to support these other two bodies. The "problem-solving mechanisms" outlined in the framework provided for referral of a dispute to any one of these federal/provincial/territorial bodies.

The two other multilateral agreements related to children's benefits and/or services that were successfully concluded among all governments (except that of Québec) cover federal transfers to the provinces/territories and so are more typical of other Social Union agreements. The *Communiqué on Early Childhood Development (CECD)* was released by the first ministers in September 2000,²² and the *Multilateral Framework on Early Learning and Child Care (MFELCC)* was concluded by them in March 2003.²³ The 2003 agreement was presented as building on the progress under the communiqué. The agreements differ in the scope of the programs and the specificity of the objectives. However, the accountability methodology outlined in both parallels that of the *SUFA* and the *NCB Framework*. Both were accompanied by injections of federal money into the social transfer system: \$2.2 billion over five years in the case of the *CECD* and \$900 million over five years under the *MFELCC*.²⁴ The program areas in the *CECD* are very broad: healthy pregnancy; birth and infancy; parenting and family supports; early learning development and care; and community supports. In contrast, the *MFELCC* focuses more specifically on investments in areas related to the construction or operation of provincially/territorially regulated early learning and

childcare programs for children under six. While the *CECD* refers generally to "effective approaches," the *MFELCC* sets out principles under the "effective approaches" section that are somewhat reminiscent of the "program criteria" in the *Canada Health Act*.²⁵ They are: available and accessible, affordable, quality, inclusive, and parental choice. The accountability provisions in both agreements rely on jointly developed performance measures and direct reporting by governments to their respective publics. Both also confirm that provinces and territories have primary responsibility for early childhood development and services. The absence of Québec is duly noted in a footnote. The more elaborate Institutional framework of the *NCB* and the *SUFA* has disappeared, and implementation is by federal, provincial, and territorial ministers responsible for social services.

In the Social Union, the multilateral agreement rather than the statute is the instrument that sets out the purposes of program initiatives and the rules governing intergovernmental relations. The statutory base of the Social Union agreements is either non-existent or reduced to the unavoidable constitutional requirement of parliamentary approval for the expenditure of federal tax dollars. There is no statutory basis at all for the *SUFA*, which did not have any expenditure of money attached to it. The statutory basis for the Canada Child Tax Benefit is the *Income Tax Act, 1985*,²⁶ which sets out the eligibility rules for parents to qualify for the benefits and the methods for calculating the amount of the benefit. It does not contain any statement of the purpose of the benefit or any references to the arrangement with the provinces regarding the *NCBS*. There is a clearer statutory base for the *CECD*, which is found in the *Canada Health Care, Early Childhood Development and Other Social Services Funding Act, 2000*.²⁷ The preamble to this act refers to the statements respecting health care services renewal and early childhood development arising from the first ministers' meeting on 11 September 2000 and states that "In light of these statements, the Government of Canada has agreed to increase funding to the provinces and territories for the purposes of health, post-secondary education, social assistance and social services, including early childhood development." The act then authorizes the minister of finance to make payments to the Medical Equipment Trust and to a corporation to be established to define standards related to health information networks as well as to amend the *Federal-Provincial Fiscal Arrangements Act* to include early learning and childcare services in the definition of social programs.²⁸ There is no statutory base for the *MFELCC*, other than the *Federal-Provincial Fiscal Arrangements Act*, which was amended again in 2003 to include early learning and childcare services in the definition of social programs.

Just as there is a weak or non-existent statutory base for the programs funded through the Intergovernmental agreements, there is no delegation of authority, or a very vague delegation, to the federal executive to enter

into the agreements. There is not even the pretence of a delegation of authority to the federal Cabinet to enter into the agreement with respect to the NCBS. One could perhaps point to the *Federal-Provincial Fiscal Arrangements Act* as amended by the 1995 federal budget as the source of the delegation of authority for discussions that resulted in agreements of the kind represented by the *CECD* and the *MFELCC*. This fiscal-arrangements act states in section 24.3(2) that "[t]he Minister of Human Resources Development shall invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objectives for social programs that could underlie the Canada Social Transfer." There is no specific mention of agreements here and the use of the conditional "could underlie" makes the legal status of the shared principles and objectives that might result from the process unclear. Yet, section 24.3(1) states that the objectives of the Canada Social Transfer are to (1) fund social programs in a way that gives the provinces flexibility; (2) maintain the national standard prohibiting residency requirements for social assistance; and (3) promote "any shared principles and objectives that are developed under subsection (2) with respect to the operation of social programs." The *Federal-Provincial Fiscal Arrangements Act* provides for the withholding of funds if the provinces do not respect the prohibition on residency requirements for social assistance and, under the section on the Canada Health Transfer, for the violation of the criteria in the *Canada Health Act*. There is no similar enforcement mechanism with respect to any principles and objectives that may emerge from the intergovernmental consultation process.

Whereas the Westminster model problematizes the power of the executive, the new paradigm assumes the legitimacy of executive action taken relatively freely from the constraints imposed by legislatures. The underlying model of accountability in the new Social Union is inspired more by corporate models of governance than by the Westminster system of parliamentary government. Within the new paradigm, the executive branch appears as a combined senior management/board of directors, with members of Parliament playing the role of shareholders and the public being the consumers of programs and services. Performance measures operate as a surrogate for market signals within the public sector. The accountability regime emphasizes results and outcomes, rather than process, with the main instrument of accountability being the promised annual performance report issued by the executive to the public at large. As consumers, individual members of the public are seen as having an interest in the quality and cost of the programs and services purchased with their tax dollars. They are not seen as having any entitlements or rights that may be claimed as a member of society. Parliament continues to control the purse strings and, at least in theory, can decide to invest its money elsewhere, but it does not have any serious role in debating social priorities or in monitoring the action of the

executive. With the authorization for executive action in most areas of social policy located in financial legislation, the Department of Finance remains firmly in control of the government's social policy agenda.

While the notions of accountability are drawn from corporate governance, the view of federalism is influenced by international relations. The importation of the patterns of international negotiations into federal/provincial relations in Canada came first through environmental policy and more recently through the *Agreement on Internal Trade*.²⁹ This model involves the negotiation of multilateral framework agreements by sovereign governments, which in the case of intergovernmental relations within Canada means governments that are sovereign within their own areas of constitutional jurisdiction. The framework agreements are the central instrument governing the relations among the parties and are intended as the umbrella under which sectoral and bilateral subagreements are negotiated. As is the case with the "soft law" of international relations, the agreements are not legally binding and depend on the continuing adherence of the parties to their terms.

Within international trade regimes, negotiations and the ongoing relations among the parties are supported through administrative secretariats and regulated through monitoring and dispute resolutions institutions and procedures. In the new Canadian Social Union, as is the case with Canada's negotiation of international treaties, the executive branch is assumed to have the authority to enter into agreements independently of elected legislatures and not to require the delegation of authority to make commitments. Adapting the international relations model to federal-provincial relations in the area of social programs poses many greater challenges than in the areas of trade and the environment. The political conflicts around social programs are fundamental to Canadian political life, centring as they do on the allocation of resources among social groups and the Québec/Canada relationship. It is much more difficult to depoliticize expensive social welfare initiatives by transferring them from the legislative to the intergovernmental arena than is the case where the governmental role is primarily regulatory. As a consequence, the full blown institutional model envisaged by the *SUTA* and the *NCB Framework* has never been put in place for federal transfers for programs previously funded and governed under the *CAP*.

A practical illustration of the challenges in balancing competing pressures is provided by the federal Liberal government's efforts to negotiate yet another multilateral agreement to cover the \$5 billion of new money for childcare promised in the 2004 Liberal election campaign. Facing stiff competition for Québec electoral support from the Bloc Québécois, the Liberals focused attention on maintaining their hold on Ontario seats by emphasizing an activist federal role in social programs. In addition to promising money, they pledged to enshrine in legislation four principles: quality, universality,

accessibility, and development (QUAD). Under the Liberal plan, provinces would be required to meet the QUAD principles in order to receive the federal funds and would be encouraged to implement the principles through legislation. At their 2 November 2004 meeting, the ministers responsible for social services agreed tentatively to an amended set of undefined principles – universal became universally inclusive – and to meet again early in the new year to finalize an agreement.³⁰ They met again on 11 February 2005 but failed to reach an agreement. Instead, they issued a statement claiming continuing progress and announcing that they would finalize an agreement at a meeting to be held after the formal announcement of the \$5 billion in funding expected in the federal budget scheduled for later that month.³¹ The difficulties in forging a consensus on the wording of a multilateral agreement delayed the promised meeting indefinitely. In April 2005, facing the prospect of defeat in the House of Commons over a scandal, the Liberals abandoned the attempt to finalize a multilateral agreement and, instead, hastily concluded bilateral agreements with those provinces willing to sign on. The political vulnerability of such executive accords was demonstrated when the new Canadian prime minister announced that he would cancel the agreements despite the opposition of a majority of the members of Parliament.

In comparison to the CAP regime, the Social Union gives a more explicit recognition of Québec's distinctiveness with respect to social programs. By refusing to put its province's name on most of the intergovernmental agreements while still receiving its share of the money, the Parti Québécois government managed to secure a *de facto* special status for Québec. This was reflected in footnotes to the agreements similar to that found in the first ministers' CECD: "While sharing the same concerns on early childhood development, Québec does not adhere to the present federal-provincial-territorial document because sections of it infringe on its constitutional jurisdiction on social matters. Québec intends to preserve its sole responsibility for developing, planning, managing and delivering early childhood development programs. Consequently, Québec expects to receive its share of any additional federal funding for early childhood development programs without new conditions."³²

In the case of health, where Québec has participated in the agreements, the recognition involves parallel but distinct institutions more along the lines of the *Canada/Québec Pension Plan* regime. The 2003 first ministers' *Accord on Health Care Renewal* explicitly acknowledged that the Québec Council on Health and Welfare, with a new mandate, would operate as a parallel institution to, and collaborate with, the Health Council established under the accord.³³ At the conclusion of the September 2004 First Ministers' Conference on Health, Québec Liberal premier Jean Charest moved recognition of Québec's difference from a footnote to a full-fledged statement in the

release of the document *Asymmetrical Federalism That Respects Québec's Jurisdiction*.¹⁴ However, the different status for Québec was placed within the frame of provincial equality by the assertion, made in the multilateral agreement and stressed by Québec premier Jean Charest at the final press conference, that the same arrangement was open to all of the provinces.¹⁵

A Social Union with Social Rights

The comparison of the regimes of accountability in the CAP and the new Social Union in this chapter identifies some of the central issues in reconciling the principles of social citizenship, responsible government, and federalism in situations involving large social transfers from the federal to the provincial governments. In neither the CAP regime nor the Social Union was the principle of social citizenship adequately distinguished from the principle of federalism. The CAP regime did recognize social rights and provided for procedures for individuals to challenge administrative decisions that denied or limited their rights. However, the social rights were not sufficiently highlighted in the legislation and were intermingled with administrative arrangements among governments. In the Social Union regime, the principle of social citizenship is entirely eclipsed by concerns about jurisdictional matters. It is the powers of government, not the rights of citizens, that are the central focus. The experience of both regimes demonstrates the importance of expressing entitlements clearly as social rights and making the advancement of these rights central to a social union. Intergovernmental relations should be seen as a means to achieve the objective of guaranteeing and advancing the clearly identified social rights of members of Canadian society and not as an end in themselves.

The CAP and the Social Union represent different attempts at accommodating the principles of responsible government and federalism. In the Westminster model, reflected in the CAP regime, the primary and hard-won accountability mechanism is legislative control of the public purse in order to ensure that the executive spends money for purposes approved by the elected representatives of the people. Under the CAP, this principle takes precedence over the principle of federalism, with some limited accommodation of Québec. In the Social Union, the principle of responsible government is reduced to the minimal constitutional requirement of approving expenditures in omnibus budget implementation bills. Accountability is framed not as accountability of the executive to the elected legislature but directly to the people by means of periodic reports replete with vague performance measures and unhelpful expenditure information. The experience with both the CAP regime and the new Social Union suggests that there is a conflict between the principles of responsible government and federalism under the existing Canadian Constitution. This conflict cannot be entirely finessed and should instead be accommodated democratically, which requires

some concessions to responsible government. Provincial governments need to report in a transparent manner on their expenditure of funds transferred from the federal government not because they are accountable to the federal government but because the federal executive is accountable to the federal House of Commons. Framing the issue in this way would focus attention on finding the least intrusive, but still effective, way for this reporting to occur.

Historically, Québec governments have taken the position that would see the conflict between the principles of federalism and responsible government resolved by ending federal social transfers and transferring tax room to the provinces to allow them to fund programs within their jurisdiction.³⁰ While widely supported in Québec, this perspective has not captured the imagination of any but the more conservative elites in Canada outside of Québec. Both the CAP and the Social Union contain accommodations to the Québec position, although they do so differently. The CAP represents what might be called the "accommodation by stealth" approach. In the negotiations among senior Québec and federal bureaucrats leading up to the CAP, an opting out arrangement was agreed to that allowed Québec to receive the federal transfer predominantly in the form of tax points. As originally devised in 1964, this arrangement was offered to all of the provinces but was created for Québec and only taken up by it. In contrast, the Social Union initially offered "special status by default" as a consequence of the Parti Québécois government's refusal to sign any of the agreements outside of health. A footnote was quietly placed in the agreements, which were publicly announced as federal/provincial/territorial agreements without attention being drawn to Québec's lack of adherence. The September 2004 statement on asymmetry appeared to enhance Québec's status, but, in fact, it reduced it by framing its relationship to the Canadian Social Union in terms of provincial equality (sameness) rather than (*a de facto*) special status. A preferable approach would be an explicit and transparent endorsement of the distinct role of the Québec National Assembly with respect to social programs with a view to allowing Quebecers and Canadians outside of Québec to design arrangements that reconcile the principles of federalism and responsible government in a way that best suits their needs and traditions. The unwillingness of Canadians outside of Québec to provide this endorsement fuels the expansion of unaccountable executive-federalist institutions and of "patchwork federalism."

To the extent that the CAP was effective in furthering social rights, it was the result of these rights being secured in statutes at the federal and provincial levels. The relationship between the Intergovernmental agreement and the statute in the CAP regime, where the agreement is an instrument to implement statutory provisions, is the appropriate one in the Westminster system of government. Despite the rhetoric of accountability contained in

the agreements, there is little effective accountability for either social rights or money in the new Social Union. This lack of accountability arises from the substitution of the multilateral agreement for the statute as the framework governing the federal social transfer. In contrast to a statute that is the product of a legislative process, an intergovernmental agreement is the product of an executive process involving the first ministers or the cabinet ministers of the two levels of government. A statute sets out the parameters within which the executive can act and is the basis for the review by the courts of executive action. It is also the basis for the review by the auditor general, an official who reports directly to the House of Commons and whose mandate is to ensure that the executive spends money responsibly within the bounds of its statutory powers. In situations where a statute sets out entitlements of individuals, it is a basis for individual claims to be made. An intergovernmental agreement is a political accord that is only as binding as the parties to it wish it to be. An intergovernmental agreement not concluded under delegated powers or incorporated in legislation frees the executive in large measure from scrutiny by the legislature and the courts. Indeed, this escape from accountability by the executive branch seems to be a main objective of social policy through intergovernmental agreement.

If a social union is fundamentally about social rights rather than the powers of governments, this should be reflected in the design of a dispute resolution mechanism. The dispute resolution procedures in the new Social Union are directed exclusively at resolving disputes among governments. The CAP regime's statutory requirement of an appeals procedure for individuals affected by decisions of provincial administrators not only allowed individuals to claim their rights but also supported the principle of responsible government by ensuring that the purposes of the federal statute, as repeated in the intergovernmental agreement and the provincial statute, were respected. A social union with social rights requires appeals procedures to permit individuals to challenge the actions of governments, whether these are challenges to decisions of administrators or the failure of governments to meet their commitments under statute.

The comparison of the regimes of accountability of the CAP and the Social Union suggests that intergovernmental institutions could have a place in a social union that respects the principles of both social citizenship and federalism. However, accountability for social rights and money requires that these institutions operate within the framework of the Westminster model of government and support rather than supplant the principle of executive accountability to the elected legislature. Some of the appropriate activities for intergovernmental institutions and procedures might include coordinating the implementation of Canada's commitments under international human rights treaties and reporting on Canada's compliance to UN monitoring bodies as well as monitoring provincial expenditure of

federal social transfers in ways that support scrutiny of executive actions by the federal House of Commons. In addition to the requirement of a statutory basis and clear delegations of power, intergovernmental agreements should be tabled in the House of Commons and automatically referred to a House Standing Committee, as is now the case with government regulations. The development of outcomes, measures, and reporting on performance by jurisdiction, which is currently promoted as the central activity of intergovernmental institutions, is potentially useful, provided that the administrative goal of achieving "value for money" is not confused with the democratic priority of realizing social rights. Intergovernmental agreements have a role within a social union with social rights, provided these are subordinate instruments to statutes, directed at implementing legislated provisions guaranteeing the social and procedural rights of individuals and ensuring the accountability of the federal executive to the House of Commons for the social transfers to the provinces.

Notes

- 1 *House of Commons Debates*, 160 (27 February 1995) at 1715 (Hon. Paul Martin), <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=35&Ses=1&DocId=2332416> (2 February 2007).
- 2 *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, s. 1 [CAP].
- 3 A "person in need" is defined in the CAP legislation as "a person who, by reason of inability to obtain employment, loss of the principal family provider, illness, disability, age or other cause of any kind acceptable to the provincial authority, is found to be unable, on the basis of a test established by the provincial authority that takes into account the budgetary requirements of that person and the income and resources available to that person to meet those requirements, to provide adequately for himself, or for himself and his dependants or any of them." There is a second category of persons in need that covers a person under twenty-one under the supervision of a child welfare agency or who is a foster-child. CAP, *supra* note 2.
- 4 *Ibid.* at s. 2 (emphasis added).
- 5 *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [Finlay 1986] at 20: "Although the Plan was enacted for the benefit of persons in need, it does not confer any rights on such persons, their entitlement to social assistance arises under provincial legislation."
- 6 *Kerr v. Metropolitan Toronto (Department of Social Services)* (1995), 22 O.R. (3d) 588, O.J. No. 121; *Masse v. Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 200 at 6; and *Finlay v. Canada (Minister of Finance)*, [1995] 1 S.C.R. 1080 [Finlay 1995].
- 7 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).
- 8 Health and Welfare Canada, *Canada Assistance Plan Annual Reports for 1986-87, 1987-88, 1988-89* (Ottawa: Health and Welfare Canada, 1996) at 7 [CAP Annual Reports 1986-89]. This is an omnibus annual report in response to criticism that the Conservative government had failed to submit annual reports to Parliament as required by statute. Reports for the three years were submitted together.
- 9 *Ibid.* at A5 and A6.
- 10 Health and Welfare Canada, *Canada Assistance Plan Annual Report for 1989-90* (Ottawa: Health and Welfare Canada, 1990) at 12 [CAP Annual Report 1989-90].
- 11 *Finlay* 1986, *supra* note 5, was mentioned in the CAP Annual Report for 1989-90, *supra* note 10, which referred to a federal-provincial working group studying the implications of the Federal Court of Canada's ruling that the reduction of benefits below basic requirements in

order to capture an overpayment violated the CAP. The CAP Annual Report for 1989-90 referred to the May 1990 Federal Court of Appeal decision upholding the Federal Court's ruling with respect to the violation of the CAP and the federal government's appeal to the Supreme Court of Canada. It stated that "the Department [of Health and Welfare] had discussions with provincial and territorial governments throughout the process" (at 12).

- 12 *Finlay* 1995, *supra* note 6.
- 13 *Unemployment Assistance Act*, 1956, S.C. 1956, c. 2; John E. Osborne, "The Evolution of the Canada Assistance Plan (CAP)" in Task Force on Program Review, *The Canada Assistance Plan: A Study Team Report to the Task Force on Program Review* (Ottawa: Task Force on Program Review, 1985), Appendix. The distinction between "means test" and "needs test" was important to the dissent written by McLachlin J. in *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080 at paras. 47 and 48.
- 14 *Established Programs (Interim Arrangements) Act*, S.C. 1964-5, c. 54.
- 15 Yves Vallancourt, "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 at 172.
- 16 *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), http://www.socialunion.ca/news/020499_e.html (4 May 2004).
- 17 Honourable A. Anne McLellan to Honourable Gary Mar, 2 April 2002, http://www.hc-sc.gc.ca/hcs-ss/medi-assur/avoid-prevent/index_e.html (3 October 2006); and Premier Ralph Klein to Prime Minister Jean Chrétien, 24 April 2002, http://www.gov.ab.ca/premier/Archived_Stories.cfm?Year=2002 (3 October 2006).
- 18 The multilateral framework agreements related to persons with disability cover programs previously funded through the federal Vocational Rehabilitation of Disabled Persons program, rather than the CAP. Now called "employability" programs, they continue to be cost-shared, and there are bilateral agreements that incorporate the provisions of the current *Multilateral Framework for Labour Market Agreements for Persons with Disabilities*, http://www.socialunion.ca/pwd/multi2003_e.html (3 October 2006). Labour market projects previously funded under the work activity provisions of the CAP are now included under bilateral labour market development agreements with most provinces and are not treated by the governments, or for purposes of this chapter, as part of the Social Union approach.
- 19 Québec has only associated itself with the 2000 *Health Renewal Accord*, which came with significant federal funding for the provinces; the 2003 *First Ministers' Accord on Health Care Renewal*, when it agreed to adapt the mandate of its existing Council on Health and Welfare to collaborate with the planned Canada Health Council; and with the "Ten Year Plan to Strengthen Health Care," which resulted from the 13-16 September 2004 First Ministers' Meeting on Health Care, at which Québec released a separate statement on asymmetrical federalism. These documents are available at the Canadian Intergovernmental Conference Secretariat, http://www.scics.gc.ca/confer04_e.html#September04 (23 September 2004).
- 20 *NCB Governance and Accountability Framework* (12 March 1998), National Child Benefit website, http://www.nationalchildbenefit.ca/ncb/geston3_e.shtml (4 May 2004).
- 21 *Ibid.* at para. 2.
- 22 *Communiqué on Early Childhood Development* (11 September 2000), Social Union website, http://www.socialunion.ca/news/110900_e.html (25 September 2005) [CECD].
- 23 *Multilateral Framework on Early Learning and Child Care* (November 2003), Social Union website, http://www.socialunion.ca/ecd-framework_e.htm (22 September 2005) [MFELCC].
- 24 The MFELCC funding, *supra* note 23, covers the period 2003-4 to 2007-8 and in the first three years overlapped with the CECD money, *supra* note 22. Furthermore, the 2004 federal budget increased funding under the MFELCC by \$75 million annual in 2004-5 and 2005-6, bringing the total funding under this agreement to \$1.050 billion. The 2005 federal budget announced a further \$5 billion over five years for early learning and childcare.
- 25 *Canada Health Act*, R.S.C. 1985, c. C-6.
- 26 *Income Tax Act*, 1985, R.S.C. 1985, c. 1 (5th Supp.).
- 27 *Canada Health Care, Early Childhood Development and Other Social Services Funding Act*, 2000, S.C. 2000, c. 35.

- 28 *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.
- 29 *Agreement on Internal Trade* (Ottawa: Government of Canada, 1994); Stephen A. Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Co-operation in Environmental Assessment" (1993) 31 *Alberta Law Review* 644; G. Bruce Doern and Mark MacDonald, *Free Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: University of Toronto Press, 1999).
- 30 Federal-Provincial-Territorial Meeting of Ministers Responsible for Social Services (2 November 2004), untitled news release (Ref: 830-828/004), http://www.scics.gc.ca/cinfo04/830828004_e.html (18 September 2005).
- 31 Federal-Provincial-Territorial Meeting of Ministers Responsible for Social Services (11 February 2005), *Federal-Provincial-Territorial Social Services Ministers Reach Consensus on Early Learning and Child Care* (Ref: 830-840/004), http://www.scics.gc.ca/cinfo05/830840004_e.html (18 September 2005).
- 32 CECD, *supra* note 22.
- 33 First Ministers, *Accord on Health Care Renewal* (5 February 2003), http://scics.bc.ca/confer03_e.html (16 September 2006).
- 34 *Asymmetrical Federalism That Respects Quebec's Jurisdiction* (15 September 2004), www.pm.gc.ca/gvrfx/docs/QuebecENG.doc (23 September 2004).
- 35 *A Ten Year Plan to Strengthen Health Care*, verbatim transcript (unrevised) from the press conference (16 September 2004) and first ministers' meeting, http://www.scics.gc.ca/confer04_e.html#September04 (23 September 2004).
- 36 Secrétariat aux affaires intergouvernementales canadiennes, Québec, Direction des politiques institutionnelles et constitutionnelles, Ministère du conseil exécutif, *Quebec's Historical Position on the Federal Spending Power 1944-1998* (July 1998), http://www.ligr.ca/pdf/documents/760_Quebecs_Historical_Posit.pdf (22 September 2005).