

A LEGISLATIVE FRAMEWORK FOR A PAN CANADIAN SYSTEM OF CHILD CARE SERVICES

A DISCUSSION PAPER PREPARED FOR THE CHILD CARE ADVOCACY ASSOCIATION OF CANADA

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This paper was prepared for the Child Care Advocacy Association of Canada as the basis for a discussion on a legislative framework for a pan Canadian system of child care services. It takes as its starting point the desirability of a dedicated Act, a designated child care services transfer, and the importance of the accountability of the executive branch of government to the elected legislature for the expenditure of public funds. The focus is on accountability rather than funding issues. A subsequent discussion paper will explore revisions that might be made to the *Federal-Provincial Fiscal Arrangements Act* to provide for a pan Canadian system of child care services.

I. THE NEED FOR LEGISLATION

The fundamental accountability relationship

In public debates, the problem of accountability is often posed as the accountability of the provinces to the federal government. The provinces reject this as an interference with their jurisdiction over social services. Instead, within the language of the Social Union, they argue that they are accountable to their electorate. Posing the issue as accountability of one government to another or of the executive directly to the public misrepresents the problem. The central accountability relationship in the Canadian system of government is of the executive branch (the Cabinet) to the elected legislature -- the House of Commons federally and the provincial legislative assemblies (or national assembly, in the case of Quebec). In our system, unlike the American, the executive branch is not directly accountable to the people but is accountable through the legislature. The central accountability mechanism is the elected legislature. The Social Union agreements by-pass accountability to the legislature, replacing it with direct reporting by the executive branch to the public at large. Intergovernmental processes and bodies replace the House of

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Commons in monitoring the expenditure of federal funds and determining the violation of federal conditions.

A federal system in which large sums of money are transferred from the federal to the provincial governments for services under provincial jurisdiction poses a challenge to the democratic requirement of executive accountability to the elected legislature. This problem needs to be acknowledged and resolved in favour of an approach that strengthens the role of the elected legislature. If new intergovernmental institutions are created, they should support rather than replace the legislature.

Legislation is not optional – it is a constitutional requirement

The most effective mechanism for ensuring Cabinet accountability to the House of Commons is control of the public purse by the elected legislature. This permits the House to make sure that the Cabinet acts according to the purposes approved by Parliament. Under section 53 of the *Constitution Act, 1867*, The Cabinet cannot raise tax revenue or spend public money without the approval of the legislature. That approval takes the form of a statute (legislation). To satisfy this requirement, however, the legislation does not have to be very specific and may do little more than simply provide authorization for the expenditure of funds.

In the past, the legislative framework for social transfers to the provinces took the form of a dedicated piece of social legislation that clearly delegated authority to the Cabinet to enter into agreements with the provinces, specified the purposes of the transfer, and detailed the conditions that had to be met by the provinces. Increasingly, however, legislative approval is found in financial legislation that attaches few or no conditions to the social transfer and gives very general purposes for the transfer. The *Canada Health Act*, which is a dedicated statute covering the social transfer for health, is an exception to what has become standard practice. Authorization for the Canada Social Transfer – which amounts to \$8.5 billion a year in cash and much more when tax points are included -- is found in the *Federal Provincial Fiscal Arrangements Act*. The practice of using financial legislation instead of a dedicated piece of legislation increases the control of the Department of Finance over social policy. The generality of the purposes makes it difficult for Parliament, the Auditor General or the Courts to hold the executive accountable. For example, one of the purposes of the Canada Social Transfer is “financing social programs in a manner that provides provincial flexibility”.

The Existing Legislative Framework is Inadequate

There already is an existing legislative framework for a federal social transfer for child care services, which is found in the sections of the *Federal-Provincial Fiscal Arrangements Act* dealing with the Canada Social Transfer. Without new legislation, this will be the statutory framework authorizing the federal transfer.

This legislation is unsatisfactory because there is/are:

- o No serious statement of the purpose of the transfer
- o No conditions attached to the transfer
- o No enforcement mechanism
- o No requirement for provincial reporting on expenditures
- o No mandatory requirement that Cabinet to report to Parliament
- o No identification of the amount of the proportion of the total transfer that is directed specifically at child care.

We already have sufficient evidence that this framework is too weak to ensure that the federal transfer goes to child care services.

Intergovernmental agreements are not a substitute for legislation

There is something that looks somewhat like conditions in the 2003 Multilateral Framework on Early Learning and Care, and the November 2, 2004, preliminary agreement on a national child care system. These, however, are purely political commitments. Even if the child care movement succeeds in winning the exact wording it wants in an intergovernmental agreement, the conditions or standards would rest only on the goodwill of the Ministers who agreed to them. They do not bind their governments or legislatures.

Intergovernmental agreements are useful as a preliminary to legislation and in the past bilateral agreements between the federal and a provincial government have been important instruments for implementing legislation. They are not, however, a substitute for legislation. The problem with intergovernmental agreements is that they are simply political accords – essentially, they are “gentlemen’s agreements” that can be broken more easily than they are made. Under our system of government, agreements among governments are only binding if they are implemented through legislation.

Under the intergovernmental agreements, the only enforcement mechanism is reporting by the executive branch (Ministers or First Ministers) at the federal and provincial levels to the “public”. The reporting is on results or performance, not on the way that money has been spent. Few of the provinces take the reporting seriously. It is almost impossible for trained researchers with funds to employ research assistants to determine how the money is being spent, let alone individual members of the public or under resourced public interest groups.

II. A LEGISLATIVE FRAMEWORK FOR A CANADA-WIDE CHILD CARE SYSTEM

The most desirable situation would be to have a dedicated piece of legislation, which is what the child care movement is calling for in a *Canada Child Care Act*. Failing this, the *Federal-Provincial Fiscal Arrangements Act* would need to be amended to include some essential elements. This is definitely a second best option and would require significant changes to the Act. That option is not addressed in this background paper.

A tactical consideration to keep in mind while pursuing legislation (or amendments to existing legislation) is that under section 54 of the *Constitution Act, 1867*, all money bills have to be introduced into the House of Commons by the Cabinet. A private member cannot introduce such a bill. This is the corollary to the requirement that the Cabinet needs statutory approval by the House for expenditures. Even if a *Canada Child Care Act* did not specify the amount of money to be taken from the consolidated revenue fund and transferred to the provinces, the purpose of the Act would clearly identify it as a money bill.

A Canada Child Care Act

2005 is the thirty-fifth anniversary of the Report of the Royal Commission on the Status of Women, which first called for a National Child Care Act in 1970. The introduction of a *Canada Child Care Act* would be a fitting way to mark this anniversary!

The *Canada Health Act* has been pointed to as a model for a *Canada Child Care Act*. It has many of the elements identified above as missing in the sections of the *Federal Provincial Fiscal Arrangements Act* devoted to the CST. However, we know that there are weaknesses with the reporting and enforcement provisions of that Act, which would need to be addressed. More fundamentally, when the *Canada Health Act* (CHA) was enacted in 1984 a publicly-administered system of health insurance had already been established under earlier legislation (the *Hospital Insurance and Diagnostic Services Act, 1957*, and the *Medical Services Act, 1966*). The CHA does not contain some of the elements necessary to the launching of a new system that were contained in the Acts that provided the initial framework for the construction of a Canada-wide system of health insurance. Most importantly, it does not contain provisions for triggering the initial flow of resources to the provinces.

The discussion below assumes that there is a designated transfer for child care services. If it is not designated, then some other mechanism needs to be found. Recently in health renewal and other areas, the federal government has used trusts designated for specific purposes, with the terms of the trust being set by

the Cabinet and these govern the expenditure. The Auditor General has criticized this device as putting the public's money beyond the reach of Parliament. Someone from the Canada Health Coalition may be able to say how they have worked in health. This is a completely different approach than a dedicated *Child Care Act*, with significant democratic problems. It is more realistic to think in terms of a dedicated child care transfer. Keeping child care as part of a block grant that also covers post-secondary education and social assistance, as is the case with the CST, would make it more difficult to draft legislation with effective monitoring and enforcement mechanisms.

A *Canada Child Care Act* should include provisions:

- o Clarifying the purpose of the transfer:
A purpose section should clearly set out Parliament's intention to transfer funds to the provinces for the purpose of supporting the creation of a Canada-wide system of universally accessible (etc) child care services. Clauses and phrases that limit or undermine this objective need to be avoided (for example, the "provincial flexibility" phrase).

- o Specifying the Conditions :
The conditions attached to the transfer need to be clearly spelled out. The format for the "criteria" in the *Canada Health Act* is a good model and is what the child care movement has been using.

A requirement for provincial reporting should be specified as a condition. It would be better to specify at least some of the reporting requirements in legislation because if the requirements are left to the Cabinet to spell out in regulations, this might never happen. The Auditor General has complained about this with respect to the *Canada Health Act*, where provincial reporting is a condition but is not enforced and the Cabinet has not set out how it should occur.

- o Enforcing the conditions:
 - o The executive should be delegated the authority to withhold all or part of the transfer if the provinces violate the conditions (including the reporting criterion). Withholding money is ultimately the only enforcement mechanism available to the federal government under the Constitution and is an exercise of the federal spending power.
 - o Invoking the penalty of withholding funds should be mandatory for the Cabinet when there is a violation, not left up to the discretion of the Minister as in the *Canada Health Act*. This came up in the recent CUPE case where the Federal Court of Canada distinguished between the discretionary power of the Cabinet in the

Canada Health Act and the mandatory enforcement in *CAP*.² *CAP* stated that all payments were subject to the conditions in the Act being met. There was similar wording in the *Hospital and Diagnostic Services Act*.

- o Triggering the flow of funds:
 - o Will the federal government just begin the flow of funds on the expectation that the provinces will respect the conditions? They did this with the Social Union agreements with a notable lack of success. There needs to be a provision in the legislation to trigger the flow of funds.

The child care movement has talked about this in terms of the need for a provincial plan that leads to the creation of a system of child care. The way this was handled when Canada's post war social welfare programs were being put in place was through a requirement in the federal legislation that there be a provincial law that contained certain provisions specified in the federal statute. There were usually also bilateral agreements between the federal government and each province. This was the case with the *Hospital Insurance and Diagnostic Services Act, 1957*, and the *Canada Assistance Plan, 1966*, which outlined the terms to be included in the bilateral agreements in specific detail. With the *Medical Care Act, 1966*, there were no bilateral agreements but a requirement that a provincial law be in place that satisfied specific criteria, which were outlined in great detail in the federal Act. The criteria were basically those reproduced in the *Canada Health Act, 1984*, in different language. The *Medical Care Act* approach would be less cumbersome politically and could perhaps work in the case of child care services. However, if the child care movement wants quite specific plans to address provincial variation, then bilateral agreements might be used. Otherwise, some other mechanism is needed, which might include the requirement for certain procedures to permit participation by "stakeholder" groups provincially. This would require some thought.

- o Monitoring compliance:
 - o How will compliance be monitored? In the 1960s and 1970s, the federal public service played an active role in monitoring compliance. The *Hospital Insurance and Diagnostic Services Act, 1957* and the *Canada Assistance Plan, 1966*, both contained provisions that required the provinces to sign agreements committing themselves to maintaining records and accounts in a form satisfactory to the federal minister and permitting access to and auditing of the accounts by federal officials. Under *CAP*,

² *CUPE v. Canada (Minister of Health)* 2004 FCJ no. 1582.

programs had to be certified by federal officials before they could be listed for funding. The monitoring was administrative and quite intrusive, done by federal field staff located in the provinces and in Ottawa. While very bureaucratic, it was a less politicized process than under the *Canada Health Act* where, according to the Auditor General, violations only come to the attention of the Minister through news reports and individual complaints. Under administrative monitoring, the enforcement responsibility is legally in the hands of the Minister but the determination of compliance lies with public officials and the Minister acts based on their reports. This kind of monitoring, while effective, would not be politically acceptable to the provinces today. The federal government appears to be attempting to use third party bodies with provincial and expert representation to do the monitoring previously done by federal officials. The idea is that these will be more acceptable to the provinces. There are significant problems with determining the composition of such bodies and with their democratic accountability.

- Provincial reporting is potentially a useful tool for monitoring. However, such reports would have to present information in a way that made it possible for the House of Commons and interested members of the public to identify clearly where the federal dollars had gone. There has to be a link between the federal dollars and a specific provincial expenditure. The “performance reporting” under the Social Union completely side steps this issue. The provinces will object to reporting to another government but they are reporting on the expenditure of federal funds and the federal Cabinet is accountable to the federal House of Commons for the expenditure of those funds. Without the information from the provinces, the Cabinet cannot be accountable. The Auditor General has been making this point repeatedly. This is fundamental to respect for the principle of responsible government, which is the core democratic principle in the Canadian system of government. It is an unavoidable consequence of combining the principles of federalism and responsible government in one political system and we have to live with it.
- Triggering enforcement:
 - Who will determine that the conditions have been violated and make the decision to invoke the enforcement mechanism? This judgment is generally left legally to the discretion of the Minister, although under the administrative monitoring described above the Minister’s actions were based on the reports of officials. Waiting for the approval of

Parliament would be too cumbersome to be effective. If the provincial reports are good enough, then tabling them in the House of Commons with referral to a standing committee might have the effect of making the Minister more attentive to the responsibility of enforcing the conditions. At least, that would provide an opportunity for intervention by child care advocates. If the House is not up to it, then there could be a role for extra parliamentary (perhaps intergovernmental) monitoring institutions. Again, however, figuring out how these bodies would be appointed to ensure effective monitoring is very difficult and delegating significant powers to them could be problematic.

- o Due to the problem that the House of Commons is too often subservient to the Cabinet, it is important that there be a procedure for individuals to trigger enforcement through the courts when the federal government is failing to enforce the conditions of the legislation. This means securing in legislation the gain made by the social assistance recipient who won the right to challenge federal enforcement of the CAP conditions in the 1986 case *Finlay v. Canada (Minister of Finance)*. Putting it in legislation would make this a matter of right rather than a matter of judicial discretion, as decided in that case.

- o Reporting to Parliament
 - o Annual reporting by the Minister to Parliament should be mandatory, not discretionary, as is the case with the Canada Social Transfer under the *Federal-Provincial Fiscal Arrangements Act*.
 - o Given the results of the recent CUPE court case on the *Canada Health Act*, the legislation should set down some requirements for this reporting. Without this, any kind of report at all by the Cabinet will meet the reporting obligation.

- o Opting Out
 - o The fundamental question around opting out is whether the framework will be a recognition of Quebec's distinctiveness or "provincial equality" (i.e. provincial sameness). The statement on asymmetry in the recent health agreement is a provincial sameness framework. The most desirable approach is an explicit recognition of the distinct status of Quebec with respect to social programs. However, the current Quebec government of Jean Charest seems to be satisfied with an approach where all provinces have the same option as Quebec to opt out. The approach may well be the only politically feasible one at this time.

- o If a provincial sameness framework is adopted, then the SUFA formula of “leveling up” should be used. Under this, provinces are only entitled to use the federal money for other purposes if they have programs in place already that meet the agreed upon conditions.
- o In the long term, there is a problem of who determines whether or not provincial programs meet the Canada-wide standard but that isn’t such a big issue when it comes to Quebec child care because it is so clearly superior to that in the rest of the country and, provided the conditions in the legislation are at all rigorous, none of the other provinces would be in a position to opt out and demand compensation.
- o Dealing with intergovernmental agreements
 - o If intergovernmental agreements are used as an instrument to implement the legislation, then the authority to negotiate them should be expressly delegated to the executive by Parliament according to terms in the legislation. This has always been the practice in the past and the current Cabinet practice of negotiating formal (even if non binding) agreements without the delegation of power amounts to usurping the powers of Parliament. (They are acting as if what in the past was a delegated authority is now a prerogative one, derived from the ancient powers of the Crown rather than from Parliament).
 - o Intergovernmental agreements should be tabled in the House of Commons with an automatic referral to a Standing Committee. (This is the procedure now in place for regulations). They should be easily accessible to the public. Currently, the federal government treats multilateral intergovernmental agreements as executive instruments of no concern to Parliament and bilateral agreements as private agreements, between itself and the province that is party to it.

Throughout these notes, the attempt has been to strengthen the role of the House of Commons in monitoring executive (Cabinet) action to ensure that federal funds are spent according to the purposes approved by Parliament. It would be possible to design a regime of accountability in which there was a role for intergovernmental institutions, including provincial and third party (“stakeholder”) representation. As indicated in the notes, there are significant challenges in designing such bodies so that they are effective monitoring bodies and adequately contribute to enforcement. However, this approach could be more attractive to politicians in light of the Social Union approach and could be acceptable if the bodies reinforced rather than replaced the role of the elected

legislature. Quite a bit of thought would need to go into the design of such institutions, if that is a route child care advocates wish to pursue.

The matter of disputes resolution has not been raised in these notes. There are problems with subjecting the interpretation of federal legislation to an intergovernmental body even when, as in the recent intergovernmental agreements on the disputes resolution procedure for the *Canada Health Act*, the final determination rests with the federal Cabinet. An important weakness of the *Canada Health Act* is the lack of clarity on the issue of non-profit delivery and it would be best to have very clear language in a federal *Child Care Act* than to give the provinces a role in interpreting conditions which express the purposes of the federal Parliament.