Nowhere to turn: The Supreme Court of Canada’s denial of a constitutionally-based governmental fiduciary duty to children in foster care*

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What is the Fiduciary Responsibility of Provincial Government to Foster Children?

Foster children in Canada belong to that population of dispossessed children and youth, including street children, elsewhere referred to by this author as the “invisible constituency” (Grover, 2002 (a)). Foster children have been rendered socially invisible in Canada in that, in critical respects, this group is at present denied social justice. Most importantly, the legal guardian of this vulnerable group, the provincial government, has been relieved of its full fiduciary responsibility1 towards these youngsters due to recent rulings by the Supreme Court of Canada.2 Rather than being required to act in the best interests of children in foster care, the Supreme Court of Canada requires only, on the standard developed in these cases, that the government not seek to inflict harm nor act as to increase considerably the risk of harm due to its negligence nor put its own interests ahead of those of the child. This standard accords with a narrow definition of parental fiduciary duty arising from a private law duty.

It will be argued here, in contrast, that the provincial government’s fiduciary duty to children in foster care is a public duty arising both from statute and State constitutional obligations. The latter conception of fiduciary duty thus is broader and requires that government be proactive in doing all within its power to provide the best and safest care it reasonably can for children in foster care. Such a high standard is consistent with the requirements of the UN Convention on the Rights of the Child which requires that the State “ensures” that the rights protected in the Convention are met. This includes providing protection from all forms of abuse and neglect and the requirement that decision-making be based first and foremost on the child’s best interests (see Articles 2 (1) (2), 19(1), 37(a), 39) of the Convention). The Supreme Court of Canada, however, in recent rulings has negated any positive obligation upon government arising out of a fiduciary duty to prevent the abuse or neglect of
foster children. This has resulted in a legitimisation of the denial of equality rights for these children. Consider the following excerpts from one of these recent rulings regarding this point:

“The parties to this case do not dispute that the relationship between the government and foster children is fiduciary in nature. This Court has held that parents owe a fiduciary duty to children in their care... The government, through the Superintendent of Child Welfare, is the legal guardian of children in foster care, with power to direct and supervise their placement. The children are doubly vulnerable, first as children and second because of their difficult pasts and the trauma of being removed from their birth families. The parties agree that, standing in the parents’ stead, the Superintendent has considerable power over vulnerable children, and that his placement decisions and monitoring may affect their lives and well-being in fundamental ways.

Where the parties disagree is over the content of the duty that this fiduciary relationship imposes on the government – over what actions and inactions amount to a breach of this duty. The appellants argue that the duty is simply to act in the best interests of foster children. The government, on the other hand, argues for a more narrowly defined duty – a duty to avoid certain harmful actions that constitute a betrayal of trust, of loyalty and of disinterest. For the reasons that follow, I conclude that the government’s view must prevail” (K.L.B. v. British Columbia, at para. 38 and 39, emphasis added).

It is argued, in contrast to the majority in K.L.B. v. British Columbia, that a failure to act in the best interests of the child gives rise to an automatic harm that constitutes a breach of fiduciary duty – a betrayal of trust and disinterest. Children depend on their parents or those standing in loco parentis to protect their equality rights; not simply by avoiding an infringement but by actively advocating for such equality rights (compare Eaton where the Ontario Court of Appeal referred to the role of parents in advocating for their child’s constitutional right to equality in education as a vehicle for the expression of the child’s independent, affirmative s. 15 Charter equality rights). The parent’s advocacy thus gives expression to the child’s own struggle for equality. In the case of foster children in Canada, the provincial government is itself legal guardian acting in loco parentis. As the substitute parent, the provincial government must assume an affirmative responsibility for asserting and promoting the foster child’s independent equality rights on his or her behalf not just attempting to avoid infringements of those rights.

The failure actively to advocate for the equality rights of children in care such as foster children can in fact create as much harm as if the government itself took an action that directly infringed the children’s rights. For example, provincial governments in Canada and State governments in the US have not taken adequate positive steps to advocate for better educational attainment for children in care. This has significantly contributed to children in care on average falling appreciably behind their peers in educational achievement.