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(Some) Mothers Know Best: A Case Comment on *MM v TB* and the Plight of Indigenous Mothers in Child Welfare and Adoption Proceedings

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(SOME) MOTHERS KNOW BEST: A CASE COMMENT ON *M.M. v. T.B.* AND THE PLIGHT OF INDIGENOUS MOTHERS IN CHILD WELFARE AND ADOPTION PROCEEDINGS

Catherine Wang[*]

Over time, courts have come to acknowledge the significance of Indigenous identity when deciding custody disputes, but they continue to struggle with how much consideration should be given to the broader history involved, which can leave Indigenous mothers particularly disadvantaged in family law proceedings. Not only do Indigenous mothers have to contend with the law's general assumptions and expectations about mothers, they also have to endure the courts' often limited ability to situate mothers' individual actions in the wider context of structural barriers erected by government and societal forces. A close examination of the recent British Columbia Court of Appeal decision in M.M. v. T.B. provides a useful example of the challenges that Indigenous mothers can face, as well as the competing interests that courts must balance in these circumstances.

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INTRODUCTION

Family law is unsurprisingly fraught with tension between the parties and strong emotional investment in the outcomes of disputes. When children are present, this situation is complicated even further. One additional element that courts are continuously attempting to navigate is Indigenous identity and its impact on determining a child's best interests. Over time, courts have come to acknowledge the significance of Indigenous identity when deciding custody disputes, but they continue to struggle with how much consideration should be given to the broader history involved, which can leave Indigenous mothers particularly disadvantaged in family law proceedings. Not only do Indigenous mothers have to contend with the law's general assumptions and expectations about mothers, they also have to endure the courts' often limited ability to situate mothers' individual actions in the wider context of structural barriers erected by government and societal forces. A close examination of the recent British Columbia Court of Appeal decision in *M.M. v. T.B.*[1] provides a useful example of the challenges that Indigenous mothers can face, as well as the competing interests that courts must balance in these circumstances.

1 *MM v TB*, 2017 BCCA 296, 100 BCLR (5th) 286.

BACKGROUND

FACTS

On December 31, 2006, T.B. gave birth to R when she was 20 years old.[2] She had struggled with addiction for many years, and after cocaine was discovered in R's bloodstream when he was born, he was immediately taken into care by the Ministry of Children and Family Development. Two days later, R's maternal grandmother, B.B., applied for sole custody of R. T.B. supported her application and, five months later in 2007, B.B. was granted sole custody and guardianship of R.

B.B., her husband N.K., T.B., and R are all members of the Splatsin Band, which is part of the Shuswap Nation.[3] B.B. was suffering from poor health and depression, so in 2008 the Band arranged for M.M. and R.M. to provide assistance with caring for R and for T.B.'s first born, M.I., who was also in B.B.'s care. M.M. is a member of the Songhees First Nation and R.M. is not Indigenous; they had no children of their own but were interested in adopting Indigenous children. After B.B. met with M.M. and R.M. and agreed that they were suitable caregivers, they began taking care of R and M.I. on

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2 The facts in this section have been summarized from the trial decision: *British Columbia Birth Registration No XX-XX297 (Re)*, 2015 BCSC 1577, 71 RFL (7th) 432 at paras 6–31 [*BC Birth Registration*].

3 Note that the trial judge refers to the "Shuswap" Nation while the Court of Appeal refers to the "Secwepemc" Nation. "The Secwepemc People [are] known by non-natives as the Shuswap" (Secwepemc Cultural Education Society, *Our Story* (Kamloops), online: <http://www.secwepemc.org/our-story.html>).

weekends. In late 2008, B.B. asked M.M. and R.M. to take care of R full time for a few months and, with the Band's approval and funding, the couple began to do so. In 2009, B.B. asked the couple to keep R.[4] They agreed, and by the end of that year the Band had made its last payment and ceased to be involved.

For the next three years, B.B. visited R and the M family approximately every two months. During that time, T.B. made around seven to ten visits to R, which were always supervised by M.M. and R.M. T.B. was in and out of jail and continued to struggle with addiction until 2011, when she made significant changes in her life. That summer, B.B. began having overnight visits with R, and in August she requested all of his identification so that she could take him on an overnight trip across the border. After B.B. and T.B. refused to return R as promised, M.M. and R.M. applied for and were granted sole interim custody and guardianship of R, as well as a restraining and non-communication order against B.B. and T.B. Ten days later, R was removed from B.B. and T.B.'s care by the police. They have not seen him since that day in 2011.

Over the next year, T.B. and B.B. began and abandoned a number of applications to regain custody and guardianship of R. M.M. and R.M. made repeated offers for supervised visits, but B.B. and T.B. did not accept. The couple commenced a proceeding in 2012 seeking to adopt

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4 BB strongly denied that she had placed R for customary adoption with MM and RM, but the trial judge ultimately found that BB did indeed make such a request. See *BC Birth Registration*, *supra* note 2 at paras 16 and 35–47.

R, contrary to the wishes of B.B., T.B., and the Splatsin Band.

THE TRIAL DECISION

There were three main issues at trial:[5]

1. Does the Court have jurisdiction to make an adoption order when the petitioners have not met some of the requirements of the *Adoption Act*?[6]
2. If so, should the birth mother's consent be dispensed with and is the adoption in R's best interest?
3. If the adoption order is not made, should the respondents be awarded guardianship of R?

In regard to issue one, Madam Justice Fenlon concluded that there is a gap in the *Adoption Act*. She determined that this was "an appropriate case to exercise the *parens patriae* jurisdiction of the Court to fill the gap in the legislation and to consider the petitioners' application for adoption despite the absence of pre- and post-placement reports and notices".[7]

The second issue was the heart of the case and centered on a careful review of section three of the *Adoption Act*:

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5 *BC Birth Registration*, *supra* note 2 at para 4.

6 *Adoption Act*, RSBC 1996, c 5.

7 *BC Birth Registration*, *supra* note 2 at para 77.

Best interests of child[8]

3 (1) All relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;
(b) the child's physical and emotional needs and level of development;
(c) the importance of continuity in the child's care;
(d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;
(e) the quality of the relationship the child has with a parent or other individual and the effect of maintaining that relationship;
(f) the child's cultural, racial, linguistic and religious heritage;
(g) the child's views;
(h) the effect on the child if there is delay in making a decision.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

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8 *Adoption Act*, *supra* note 6, s 3.

After considering the test for determining the best interests of the child;[9] the psychologist's assessment that R had bonded completely with M.M., R.M., and their other two adopted Indigenous children;[10] the M family's ability to teach R about his Indigenous heritage;[11] and R's own wishes,[12] Madam Justice Fenlon decided "that it is in R's best interest to remain with and to be adopted by the petitioners, with access to T.B." in the form of three supervised visits per year.[13]

Next, Madam Justice Fenlon looked to see if T.B.'s consent to the adoption should be dispensed with, and she found that of the possible reasons under section 17 of the *Adoption Act*, section 17(1)(d) was the applicable provision: "other circumstances justify dispensing with the consent".[14] In concluding that it was in R's best interest to dispense with T.B.'s consent to the adoption, Madam Justice Fenlon emphasized the lack of a meaningful parent-child relationship between T.B. and R, as well as R's own awareness of the adoption proceedings.[15]

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9 *BC Birth Registration*, *supra* note 2 at para 80.

10 *Ibid* at para 82.

11 *Ibid* at paras 84–86.

12 *Ibid* at para 91.

13 *Ibid* at paras 92, 103.

14 *Ibid* at paras 97–98.

15 *Ibid* at paras 100–01.

THE APPEAL DECISION

T.B. did not challenge Madam Justice Fenlon's findings of fact, and "[t]he single ground of appeal [she] advanced . . . is that the judge erred in law by failing to correctly interpret, and therefore to properly weigh, the s[ection] 3(2) factor".[16] In particular, T.B. submitted that "while the judge considered the child's Aboriginal heritage and the importance of preserving his cultural identity in general, she erred in failing to specifically consider the 'ameliorative' purpose of s[ection] 3(2)".[17] Although the statutory interpretation of section 3(2) was not raised at trial, the Court of Appeal addressed and ultimately rejected this argument, explaining that when "determining whether an adoption order should be made, a child's Aboriginal heritage and cultural identity does not attract a 'super-weight' over the other factors".[18] The Court concluded that such an expanded interpretation was not supported by the text of the statute, and that the trial judge made no error in regard to section 3(2) because "[t]he evidence overwhelmingly supported her decision that making the adoption order was in the best interests of the child".[19] In addition to dismissing the appeal, the Court clarified the analysis from another British Columbia Court of Appeal judgment, which was rendered in 2016 and concerned the

16 *MM v TB, supra* note 1 at para 11.

17 *Ibid* at para 12.

18 *Ibid* at para 15.

19 *Ibid* at para 96.

adoption of a Métis child by a couple who are not of Métis descent.[20]

ANALYSIS

M.M. v. T.B. vividly illustrates the disadvantages and obstacles that Indigenous mothers can encounter in child welfare and adoption proceedings. Explicitly and implicitly in both the trial judge's decision and the Court of Appeal's decision are references to the difficult circumstances against which T.B. and B.B. struggled—circumstances that were not solely the result of their individual choices, but rather situations linked to a much broader and heavier context. However, the judgments—particularly the judgment from the Court of Appeal—do not fully acknowledge that T.B. and B.B. were not wholly and personally responsible for the conditions that led to R's adoption. The object of this paper is not to prove that it was, in fact, in R's best interests to stay with T.B. and B.B. Instead, the aim is to highlight the Courts' failure to explore T.B. and B.B.'s identities as Indigenous mothers, whose lives have therefore been fundamentally impacted by colonialism and racial oppression.

THE DOMINANT IDEOLOGY OF MOTHERHOOD

A helpful starting point for effectively analyzing and understanding the key issues arising out of the case is Professor Marlee Kline's renowned 1993 article entitled "Complicating the Ideology of Motherhood: Child Welfare

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20 *Ibid* at para 61. The Court reviewed the analysis in *LM v British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367, 89 BCLR (5th) 362.

Law and First Nation Women".[21] Professor Kline discussed the meaning and implications of "the dominant ideology of motherhood", which she described as:

> . . . the constellation of ideas and images in western capitalist societies that constitute the dominant ideals of motherhood against which women's lives are judged. The expectations established by these ideals limit and shape the choices women make in their lives, and construct the dominant criteria of 'good' and 'bad' mothering. They exist within a framework of dominant ideologies of womanhood, which, in turn, intersect with dominant ideologies of family.[22]

Motherhood is viewed as the natural and desired goal for women.[23] They are expected to embrace primary responsibility for their children and operate as part of a heterosexual, nuclear, patriarchal family.[24] If mothers deviate from the ideals of motherhood, they are characterized as bad mothers, "thereby justifying their social and legal regulation, including regulation by child welfare law".[25] Unfortunately, Indigenous mothers are especially vulnerable to being marked as bad mothers and

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21 Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18:2 Queen's LJ 306.

22 *Ibid* at 310 [emphasis added].

23 *Ibid*.

24 *Ibid* at 310–11.

25 *Ibid* at 312.

losing custody of their children.[26] Although Professor Kline's article is over 20 years old, it provides a revealing lens with which to review *M.M. v. T.B.* The case, in turn, offers an opportunity to assess whether the law has moved in a more positive direction since the article's publication.

More recent scholarship in the area of child welfare law demonstrates how Professor Kline's analysis continues to be a relevant and appropriate tool for studying cases such as *M.M. v. T.B.* In 2013, Professor Susan Boyd wrote that "[b]ecause ideological expectations have shifted over time, any clear dichotomy between good and bad mothers is now difficult to sustain".[27] For instance, "equality has become a dominant norm", and fathers are more engaged with their children's lives than they once were.[28] Nevertheless, she argued that "motherhood remains an institution that contributes to women's systematic inequality",[29] and "[m]others who are already marginalized, notably as a result of poverty, race or aboriginality, are most vulnerable to being labelled 'unfit'".[30] Similarly, a recent examination of how courts in British Columbia adjudicate applications by the state to permanently remove children from their mothers found that, in the cases that were reviewed, "the most dominant theme . . . is that women are blamed and

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26 *Ibid* at 340.

27 Susan B Boyd, "Motherhood and Law: Constructing and Challenging Normativity" in Vanessa E Munro & Margaret Davies, eds, *The Ashgate Research Companion to Feminist Legal Theory* (Farnham: Ashgate Publishing Ltd, 2013) 267 at 271.

28 *Ibid*.

29 *Ibid* at 280.

30 *Ibid* at 269.

found responsible for the desperate social circumstances in which they find themselves".[31] The dire situations described in these decisions were "often related to poverty, mental disability/addiction, homelessness, male violence, the intergenerational impact of the child protection system, and the tragic legacy of residential schools and the removal of Indigenous children from their families".[32]

From the opening paragraphs of both the trial and appeal decisions, it is evident that T.B. is someone who has not adhered to the dominant ideology of motherhood. In contrast, R's adoptive mother, M.M., largely meets the supposed criteria of a good mother according to the ideology. Rather than accepting motherhood as her ultimate objective, T.B. lost custody of her son when he was born, after which she supported the child's grandmother in her application to become his primary caregiver instead.[33] She also allowed M.M. and R.M. to take over this role later on, and failed to maximize her opportunities to visit R.[34] Furthermore, R's biological father was not involved in his life,[35] and prior to R's birth, T.B. had already surrendered her first born child to her parents' custody.[36] By comparison, M.M. had been married to R.M. for 22 years at the time of the trial, and she was

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31 Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC L Rev 435 at 501.

32 *Ibid*.

33 *BC Birth Registration*, *supra* note 2 at paras 6–7.

34 *Ibid* at para 19.

35 *MM v TB*, *supra* note 1 at para 5.

36 *BC Birth Registration*, *supra* note 2 at para 6 and 22.

eager to bring children into her life.[37] She and her husband adopted another boy and girl, meaning R would be joining a quintessential family unit where he would have two parents and siblings.[38]

M.M.'s ability to care for and love R is not in dispute, but the Courts do not adequately reflect on the factors that may have prevented T.B. from wanting or trying to do the same in R's earliest years. T.B.'s deviation from the expectations demanded by the dominant ideology of motherhood are not specifically recognized as being the consequence of a longer narrative. For example, the trial decision mentions in one line that T.B.'s mother, B.B., had her own experiences with the child welfare law system, when "the Band's social workers removed some of B.B.'s and N.K.'s children from their care".[39] At some point in the past, B.B. was also categorized as an unfit mother; this is an event that adds another dimension to T.B. and B.B.'s personal histories, since "[t]he effects of child welfare involvement are felt multi-generationally".[40] The Courts' decisions regarding R, however, do not make enough room to consider the reasons beyond B.B. and T.B.'s control for why they found themselves in a position where the state felt that intervening in their lives was justified. As

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37 *Ibid* at para 12.

38 *Ibid* at para 82.

39 *Ibid* at para 10.

40 Pivot Legal Society, *Broken Promises: Parents Speak about BC's Child Welfare System* (Vancouver: Pivot Legal Society, 2008) at 10, online: <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/82/attachments/original/1345747631/BrokenPromises.pdf?1345747631>.

Professor Kline observed, by presenting the expectations that constitute good mothering as "natural, necessary, and universal", bad mothering is constructed as the opposite, "with the operation of racism and other such factors rendered invisible. Moreover, the realities of poverty, racism, heterosexism, and violence that often define the lives of mothers who do not conform to the ideology are effectively erased."[41] In *M.M. v. T.B.*, the erasure takes place when the Court neglects to connect T.B. and B.B.'s individual problems to the surrounding colonial context.

THE LONG SHADOW OF COLONIALISM

A quarter of a century after Professor Kline's article was published, the devastating impact of colonial oppression on Indigenous peoples can still be seen in every aspect of society. For instance, in 2015-16 Indigenous adults accounted for 26 percent of admissions to provincial and territorial correctional services, despite representing about 3 percent of the Canadian adult population.[42] Indigenous peoples are also "disproportionately homeless and inadequately housed",[43] less likely to graduate from high

41 Kline, *supra* note 21 at 315 [emphasis added].

42 Statistics Canada, *Adult Correctional Statistics in Canada, 2015/2016* (Statistics Canada, 2017), online: <www.statcan.gc.ca/pub/85-002-x/2017001/article/14700-eng.htm> [Statistics Canada, *Adult Correctional Statistics*].

43 Carly Patrick, *Aboriginal Homelessness in Canada: A Literature Review* (Toronto: Canadian Homelessness Research Network Press, 2014) at 10, online: <www.homelesshub.ca/sites/default/files/AboriginalLiteratureReview.pdf>.

school,[44] and at particular risk for substance abuse and addiction compared to the non-Indigenous population.[45] In addition, Indigenous women generally fare even worse than Indigenous men. Overrepresentation in admissions to provincial and territorial correctional services is more pronounced for Indigenous women than for their male counterparts,[46] and "there are disproportionately more Indigenous women . . . living in poverty and facing hunger and homelessness".[47] These facts are a backdrop for the challenges that B.B. and T.B. encountered as Indigenous mothers.

The Court of Appeal noted that T.B. "struggled with addiction issues and lived on the street between the ages of 17 and 24. During that time, she was in and out of jail for various matters".[48] T.B.'s difficult journey cannot be divorced from the barriers facing Indigenous peoples as

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44 Statistics Canada, *Aboriginal Victimization in Canada: A Summary of the Literature* (Statistics Canada, 2017), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html>.

45 Library of Parliament, *Current Issues in Mental Health in Canada: Directions in Federal Substance Abuse Policy* (Parliamentary Information and Research Service, 2014) at 2.2.1.2, online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201406E>.

46 Statistics Canada, *Adult Correctional Statistics*, *supra* note 42.

47 Dawn Memee Lavell-Harvard & Jeannette Corbiere Lavell, "What More Do You People Want? The Unique Needs of Aboriginal Mothers in a Modern Context" in Andrea O'Reilly, ed, *What Do Mothers Need? Motherhood Activists and Scholars Speak Out on Maternal Empowerment for the 21st Century* (Bradford, ON: Demeter Press, 2012) 107 at 107.

48 *MM v TB*, *supra* note 1 at para 16.

a whole, but the judgment does not acknowledge how her addiction, homelessness, and incarceration were tied to a broader picture. While the Court does not engage in overt mother-blaming of the type Professor Kline identified in her article,[49] the omission of context for T.B.'s circumstances still implies that she failed to be a suitable mother, when in fact the odds were stacked against her from the beginning. Similarly, when M.M. and R.M. began providing weekend respite care for R, it was because B.B. was experiencing what the Court of Appeal called "health problems".[50] The trial decision is more specific and transparent: B.B. was simultaneously caring for R and T.B.'s first born child, and she was "suffering from poor health and depression at that time".[51] These details allow connections to be drawn between B.B.'s individual need for assistance and the obstacles facing Indigenous peoples, who are more likely to experience physical and mental illness than non-Indigenous people.[52] Unfortunately, the trial judge does not explicitly make the link between B.B.'s health troubles and the disadvantages plaguing Indigenous communities.

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49 See e.g. Kline, *supra* note 21 at 321.

50 *MM v TB*, *supra* note 1 at para 18.

51 *BC Birth Registration*, *supra* note 2 at para 11.

52 See Naomi Adelson, "The Embodiment of Inequity: Health Disparities in Aboriginal Canada" (2005) 96:2 Can J Public Health 45 & see Laurence J Kirmayer, Gregory M Brass & Caroline L Tait, "The Mental Health of Aboriginal Peoples: Transformations of Identity and Community" (2000) 45:7 Can J Psychiatry 607.

THE LACK OF FOCUS ON BIG PICTURE SOLUTIONS

In making her determination that it would be in R's best interests to be adopted by M.M. and R.M., and that the Court should dispense with T.B.'s consent, Madam Justice Fenlon wrote that "there is in this case effectively no existing parent-child relationship between T.B. and R".[53] It can be argued, however, that the state's actions—or rather, lack of actions—played a significant role in jeopardizing the parent-child relationship between mother and son from the outset.

In her article, Professor Kline observed that "[c]hild protection workers are directed to identify and design treatment for the problematic behaviours of *individual* caregivers, not to document and develop responses to problems of poverty, racism, and violence, and the way these affect women's lives".[54] More than 20 years later, government focus on addressing larger, overarching problems remains deficient. The reality is still that "more attention needs to be paid to the possibility of support systems that might allow more mothers to be parents to their children".[55] In 2008, Pivot Legal Society published a report on the child welfare system in British Columbia and the inadequacies of current child protection practices, despite legislative reform and other changes.[56] One of the report's conclusions was that:

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53 *BC Birth Registration*, *supra* note 2 at para 100.

54 Kline, *supra* note 21 at 320 [emphasis in original; footnote omitted].

55 Mosoff et al, *supra* note 31 at 502.

56 Pivot Legal Society, *supra* note 40.

> Approaches to protecting children remain individualistic, crisis driven and devoid of a real commitment to supporting universal public programs that would reduce poverty and the social and economic stresses on all parents. Although the colonial history of this province and ongoing discrimination against Aboriginal people are well recognized, comprehensive attempts to address the economic, social and cultural impacts of this legacy have not been forthcoming.[57]

Furthermore, the 2015 Truth and Reconciliation Commission of Canada's 94 calls to action illustrate the breadth of areas in which more work is required to ameliorate the harms caused by the residential school system.[58] The first section features five calls to action that concern child welfare, including a call for "the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families".[59] The state's unwillingness so far to prioritize solutions that target the consequences of colonial oppression has created conditions that enable desperate and tragic situations to arise.

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57 *Ibid* at 119 [emphasis added].

58 Canada, Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

59 *Ibid* at number 5.

In *M.M. v. T.B.*, the facts highlight how issues such as T.B.'s addiction and B.B.'s health troubles were dealt with reactively, as problems appeared; had there been greater effort in the past by the state to invest in and implement meaningful programs aimed at improving the circumstances of Indigenous peoples, T.B. may have been more ready and capable of caring for R when he was born. Instead, when cocaine was discovered in R's system at birth, he was removed from T.B.'s custody and "[h]e remained in the Ministry's care for five months" until B.B. was able to obtain legal custody and guardianship of her grandson.[60] Time and money were used to remove R from T.B., and to resolve B.B.'s application to gain custody of him, when perhaps those resources would have been better spent on tackling the root issues. Dr. Dawn Memee Lavell-Harvard and Dr. Jeannette Corbiere Lavell wrote that "[a]lthough billions of dollars are allocated each year for programs and support services, clearly the funding allocations and priorities have failed to acknowledge, much less actually address, the unique needs of Aboriginal women in a modern context".[61] They argued that, in light of how Indigenous women are disproportionately marginalized, "rather than continuing to funnel money into social assistance programs, child welfare agencies, correction systems, and emergency shelters, targeted funding is necessary to provide Aboriginal women with sufficient personal safety and appropriate social supports" so that they are empowered to care for their families and themselves.[62]

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60 See *MM v TB*, *supra* note 1 at para 6.

61 Lavell-Harvard & Corbiere Lavell, *supra* note 47 at 107.

62 *Ibid* at 119.

"In 2013, after the commencement of the underlying adoption proceeding, [T.B.] deposed that she had been clean and sober for two years",[63] but by that point her son had already lived with M.M. and R.M. for several years. The relationship had been fundamentally changed. During the years of turmoil, when she struggled with addiction, homelessness, and incarceration, T.B. nonetheless visited R a handful of times and maintained a degree of connection.[64] Despite successfully turning her life around later on, T.B. had already lost the "privilege" of motherhood.[65] Had there been more effective support from the state earlier in her life, the situation could have been avoided altogether. Dr. Lavell-Harvard and Dr. Corbiere Lavell asserted that funding for better programs is "not only an investment in individual women", but a venture that creates "ripples . . . in the larger communities".[66] The empowerment of Indigenous women "will generate stronger heathier families, improved circumstances for future generations of Aboriginal children and grandchildren, and ultimately stronger healthier Aboriginal communities".[67]

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63 *MM v TB*, *supra* note 1 at para 22.

64 *Ibid* at para 21.

65 See Kline, *supra* note 21 at 313 for her discussion of motherhood being better conceptualized as a "privilege that can be withheld" from mothers who have been labelled unfit, rather than as a right.

66 Lavell-Harvard & Corbiere Lavell, *supra* note 47 at 119.

67 *Ibid*.

THE IMPORTANCE OF PRESERVING INDIGENOUS IDENTITY

As discussed above, Professor Kline's article revealed that the first way in which the dominant ideology of motherhood affects Indigenous women in child welfare proceedings is by blaming them as individuals and obscuring the true roots of their difficulties: a long history of colonialism and oppression.[68] She argued that the second impact of the ideology is that it "impose[s] dominant cultural values and practices relating to child care upon First Nations. Correspondingly, it devalues First Nations child care ethics and practices, as well as First Nation communities as places to raise children".[69]

Given that the reasons in *M.M. v. T.B.* are largely preoccupied with how much and how best to preserve R's Indigenous heritage and cultural identity, Professor Kline's second observation is perhaps an imperfect tool for analyzing this case. For example, she suggested that the dominant ideology of motherhood leads to insufficient recognition by the courts for collective child-raising methods; in Indigenous communities, collective child-raising is a common approach where extended family members actively participate in caregiving.[70] This is not a core issue in *M.M. v. T.B.* The suitability of B.B., R's grandmother, assisting T.B. with his upbringing is not questioned, and indeed, M.M. and R.M. shared child-raising responsibilities for R with B.B. prior to the

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68 Kline, *supra* note 21 at 318.

69 *Ibid* at 331.

70 *Ibid*.

breakdown of their friendship.[71] The problem is less that the trial judge and the Court of Appeal failed to appreciate the value of Indigenous identity and practices, and more that their actual understanding of Indigenous identity was flawed and incomplete. In the years since Professor Kline's article was published, the courts have learned to show greater consideration for Indigenous culture, and the legislature has placed increased and explicit emphasis on respecting Indigenous heritage.[72] *M.M. v. T.B.* is evidence that the need to preserve Indigenous identity receives attention from the courts, but the case also illustrates the shortcomings of the courts' overall perspective on Indigenous culture, which can disadvantage Indigenous mothers in child welfare and adoption proceedings.

At the Court of Appeal, counsel for T.B. raised a number of concerns about the trial judge's account of Indigenous identity, arguing in particular that:

> . . . the judge's observation that the respondent mother [M.M.] is Indigenous, and that the child can learn about First Nations through the respondents' weekly activities with the child and his siblings at a First Nations association in their community, amounts to insufficient consideration of the s[ection] 3(2) factor as the child would not learn about the Secwepemc culture. Counsel submits that the judge's observation is "indicative of an outdated and colonial

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71 *MM v TB*, *supra* note 1 at para 18. BB was caring for R during the week, and MM and RM were caring for him over the weekends.

72 See e.g. *Adoption Act*, *supra* note 6, s 3(2).

> characterization of all Indigenous Nations being alike, regardless of the differences among the 198 First Nations in British Columbia."[73]

It is troubling how comfortably the Court dismissed this critique. First, they noted that neither B.B. nor T.B. speaks the Shuswap language and that T.B.'s eldest daughter is teaching herself via the internet, but they did so in a noticeably less sensitive manner than the trial judge did in her decision.[74] Madam Justice Fenlon commented that "it is sadly the case that the respondents [T.B. and B.B.] do not speak Shuswap either, other than a few words. N.K. attributed this to the removal of his generation to residential schools".[75] By not acknowledging the painful history underlying the loss of language, the Court of Appeal failed to appropriately recognize the gravity of T.B.'s argument.

The Court also concluded that "the adoptive parents have done everything they could reasonably have done to ensure that the child learns about, participates in, and appreciates the significance of his Aboriginal heritage and culture. The evidence is clear that the child knows about his particular Band and First Nation, and speaks with pride about being Aboriginal".[76] As such, even if the Court agreed that section 3(2) deserves more weight than the other factors listed in section 3(1),[77] M.M. and R.M.'s

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73 *MM v TB*, *supra* note 1 at para 13 [emphasis added].

74 *Ibid* at para 14.

75 *BC Birth Registration*, *supra* note 2 at para 85.

76 *MM v TB*, *supra* note 1 at para 15.

77 *Adoption Act*, *supra* note 6.

actions still would have adequately preserved R's cultural identity.[78] Similarly, the trial judge emphasized that M.M. is Indigenous and therefore "well-able to maintain the contact between R and his First Nations heritage".[79] The trial judge listed evidence of M.M.'s extensive involvement with her community and highlighted the M family's "weekly activities at the Lake Country Native Association, including smudging, drumming and powwows. . . . [M.M.] practic[es] First Nations spirituality at home, tell[s] traditional stories, and engag[es] in First Nations crafts and artwork".[80] The trial judge ultimately determined that "[w]hile, as Chief Christian testified, there are unique aspects of the Shuswap traditions, it is clear that there are also many similarities".[81]

Both the trial decision and the appeal decision seem to reveal a problematic willingness to accept that different First Nations are, to some degree, interchangeable. The Court of Appeal insisted that R's knowledge of the Splatsin Band and Shuswap Nation are satisfactory, and that M.M. and R.M. did a perfectly reasonable job with teaching him, thereby implying that there is no need to consider whether a member of the Shuswap Nation may have had more insight to offer. The trial judge was even more blunt, concluding that there are plenty of similarities between Shuswap traditions and those of other First Nations. As a result, *M.M. v. T.B.* works to reinforce the harmful idea that all First Nations are one homogenous group. Contrary to

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78 *MM v TB*, *supra* note 1 at para 15.

79 *BC Birth Registration*, *supra* note 2 at para 84.

80 *Ibid*.

81 *Ibid*.

the suggestion in the trial decision, different First Nations practice different spirituality, tell different traditional stories, and craft different artwork. It is vital that "Aboriginal people [be] . . . understood in their own contexts. Non-Aboriginal people often fail to understand the sheer diversity and multiplicity and shifting identities of Aboriginal people."[82] In *Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook*, Ardith Walkem—a lawyer and member of the Nlaka'pamux Nation—wrote that "[e]fforts to maintain a child's Aboriginal cultural heritage are often generic, reflecting a failure to understand the child's unique cultural identity. . . . Pan-Aboriginal daycares, play groups or cultural events should not be read as sufficient".[83] The courts should be working to show greater respect for the diversity within the Indigenous population, and to acknowledge that each culture is distinctive and important. As Professor Hadley Friedland cautioned, there is a "difficulty [to] outside legal decision-makers, who are embedded in a context that has historically devalued Aboriginal peoples and culture,

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82 Ute Lischke & David T McNab, eds, *Walking a Tightrope: Aboriginal People and Their Representations* (Waterloo, ON: Wilfrid Laurier University Press, 2005) at 1.

83 Ardith Walkem, *Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook* (ShchEma-mee.tkt Project, 2015) at 89. The *Guidebook* contains compelling recommendations for best practices and innovative solutions in the area of child welfare.

evaluating the cultural connections of Aboriginal children".[84]

The Chief of the Band and the Director of Band Services testified at trial that, "while [the Band] supported the child residing with the respondents [M.M. and R.M.], they were opposed to the respondents' adoption of the child as in principle they opposed any adoption to persons outside of the Band."[85] The Band's reluctance to support the new and permanent legal relationship that would be created by R's adoption must be viewed in light of their history, but once again the Court of Appeal did not comment on context. The trial judge, at the very least, recognized that "[t]he Splatsin Band was decimated by the removal of children to residential schools and the '60s scoop,' the adoption of Aboriginal children into Caucasian homes".[86] As Justice Belobaba stated in *Brown v. Canada (Attorney General)*, "[t]here is . . . no dispute about the fact that great harm was done [by the Sixties Scoop]. The 'scooped' children lost contact with their families. They lost their aboriginal language, culture and identity".[87] He added that "the loss of their aboriginal identity left the children fundamentally disoriented".[88] The absence of explicit appreciation that "historical injustices are a significant factor in [the Band's] pursuit of R's return to his

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84 Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children" (2009) 25:2 Can J Fam L 223 at 233.

85 *MM v TB*, *supra* note 1 at para 38.

86 *BC Birth Registration*, *supra* note 2 at para 9.

87 2017 ONSC 251, 136 OR (3d) 497 at para 6.

88 *Ibid* at para 7.

birth family and community" in the Court of Appeal's decision is unfortunate because these past wrongs are related to the Band's specific identity and journey.[89] If Indigenous cultures are essentially the same, as *M.M. v. T.B.* inappropriately implies, then Indigenous mothers are even more disadvantaged in adoption proceedings, as it is therefore easier to discount the need for the mother to be a link to a particular First Nation.

THE BEST INTERESTS OF THE CHILD

The Court of Appeal accepted that "the child has no sense of loss about not being with his biological family".[90] R's contentment with his adopted parents and siblings is unsurprising, given that he has resided with M.M. and R.M. since he was less than two years old. However, the possibility remains that he will experience repercussions later in his life. As Professor Raven Sinclair noted, "[a]djustment to adoption in Aboriginal children appears to deteriorate as the children get older, with a reported adoption breakdown rate of 85% (McKenzie and Hudson, 1985) with Adams (2002) noting that rate is as high as 95%".[91] Professor Sinclair was writing about "transracial

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89 *BC Birth Registration*, *supra* note 2 at para 9.

90 *MM v TB*, *supra* note 1 at para 34.

91 Raven Sinclair, "Identity Lost and Found: Lessons from the Sixties Scoop" (2007) 3:1 First Peoples Child & Fam Rev 65 at 69 citing B McKenzie & P Hudson, "Native Children, Child Welfare and the Colonization of Native People" in Kenneth Levitt & Brian Wharf, eds, *The Challenge of Child Welfare* (The University of British Columbia Press, 1985) at 245 & citing Marie Adams, *Our Son a Stranger: Adoption Breakdown and Its Effects on Parents* (Quebec: McGill-Queen's University Press, 2002) at xxvii.

adoption" specifically—"adoption of a child from one ethnic group into another ethnic group"[92]—but her observations may nonetheless be relevant, given that M.M. belongs to a different First Nation than R and R.M. is not Indigenous at all. Complications and harm that are not immediately apparent may manifest in the future.

Despite the logical and laudable rationale behind prioritizing the child's best interests, there are also other losses resulting from R's adoption that merit at least some attention. As Professor Friedland argued, "the best interests of Aboriginal children *are* inseparable from the best interests of their community, *and* . . . their individual losses are equally inseparable from the larger community's losses. . . . [I]n the imperfect present, our concerns over one type of loss must not silence or subordinate our concern over another."[93] Considering the long history of colonialism and racial oppression of Indigenous peoples, as well as the role that child removal has played throughout the years, decisions such as *M.M. v. T.B.* have a deep impact on communities as a whole. Furthermore, as Professor Mosoff and her colleagues observed in their article, "[i]deologically, mothers' rights are often constructed as oppositional to the rights of their children, which undermines the connection that exists between them".[94] Rather than conceptualizing child welfare proceedings as situations that mothers must lose so that their children may triumph, the legal system should work

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92 *Ibid* at 65.

93 Friedland, *supra* note 84 at 225–26 [emphasis in original; footnotes omitted].

94 Mosoff et al, *supra* note 31 at 440.

on understanding how their interests interact, and how they both affect the broader community's wellbeing.

In her decision, the trial judge included a reference to *Racine v. Woods*, a case from the Supreme Court of Canada.[95] As part of her reasoning for why the adoption order should be granted, Madam Justice Fenlon drew on the point from *Racine* that the "significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes."[96] Counsel for T.B. submitted that *Racine* is outdated and "demonstrate[s] a lack of understanding of the importance of Indigenous culture to Indigenous children", but the Court of Appeal rejected this claim, holding that *Racine* was still good law and that the comment used by the trial judge is "simply a matter of common sense".[97] In doing so, the Court of Appeal affirmed a disappointingly unthoughtful view of the relationship between Indigenous children and Indigenous communities. Not only is a diminishing awareness of Indigenous identity, in fact, very consequential for a child, it also has a serious effect on the community that has lost that child. Ardith Walkem noted that "Aboriginal communities have consistently argued that the *Racine* analysis fails to adequately or fully reflect the life-long importance of cultural identity and connections".[98] In

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95 *BC Birth Registration*, *supra* note 2 at para 88, citing *Racine v Woods*, [1983] 2 SCR 173, [1984] 1 WWR 1 at 187–88 [*Racine*].

96 *Ibid* [emphasis added].

97 *MM v TB*, *supra* note 1 at paras 97–98.

98 Walkem, *supra* note 83 at 31.

addition, Professor Annie Bunting wrote that "[p]reserving connections between children and their Aboriginal heritage may be crucial for communities whose traditions, languages, and survival can be at risk after years of removal of children from Aboriginal homes."[99] The reasoning in *M.M. v. T.B.* ignores the trauma Indigenous communities have endured, and their resulting need to ensure that future generations are able to help protect the communities' continued existence.

Despite the efforts of T.B.'s counsel to frame "the present case as 'an opportunity for the Court to right an historical wrong' by refusing to remove [R] from his birth family the way so many First Nations children were removed from their families and communities and sent to residential schools and non-aboriginal homes", the Court of Appeal agreed with the trial judge that "it is neither appropriate nor possible for this Court in an adoption proceeding to right historical wrongs. [R] is not a symbolic figurehead. He is a real little boy."[100] However, all adoption proceedings—as well as child welfare proceedings—involve real little children. The cases cannot and should not undervalue the importance of the colonial context. Even if the children are not symbolic figureheads, the outcomes in their cases have symbolic meaning to the Indigenous communities from which they are too often disconnected.

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99 Annie Bunting, "Complicating Culture in Child Placement Decisions" (2004) 16:1 CJWL 137 at 163.

100 *MM v TB*, *supra* note 1 at para 42, citing *BC Birth Registration*, *supra* note 2 at para 81 [emphasis added].

The Court of Appeal did not accept counsel for T.B.'s submission that "s[ection] 3(2) should be interpreted for the purpose of ensuring 'substantive equality' and 'amelioration' of the historical injustices to Indigenous peoples".[101] They determined that the provision of the *Adoption Act* does not attract a "super-weight" over the other factors, and that the text of the section does not allow for an expanded interpretation.[102] But as Professor Bunting observed, "factors such as stability, bonding, and economics have tended to trump a child's connection to her or his cultural heritage".[103] In other words, it is hard for Indigenous identity to play as significant a role in the assessment of a child's best interests as the rest of the factors listed in the *Adoption Act*. Moreover, "[t]he weight the judge attaches to preserving the child's Aboriginal heritage and culture, along with the relevant factors under s[ection] 3(1), is an exercise of discretion based on the evidentiary record".[104] As such, "absent a failure to consider a relevant factor, failure to give any weight or sufficient weight to a relevant factor, or where the decision is clearly wrong", the judge's decision is entitled to substantial deference.[105] This means that Indigenous mothers who wish to challenge a trial judge's consideration of section 3(2) face an even more difficult battle.

Given that Indigenous communities need greater emphasis to be placed on a child's cultural identity, but

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101 *MM v TB*, *supra* note 1 at para 96.

102 *Ibid* at para 15.

103 Bunting, *supra* note 99 at 153.

104 *MM v TB*, *supra* note 1 at para 94 [emphasis added].

105 *Ibid*.

courts are unable and unwilling to put more weight on that factor when deciding adoption cases, perhaps there should be a change to the legislation in British Columbia so that a super-weight for Indigenous heritage and cultural identity is formally recognized. This would not be a novel idea. As the Court of Appeal noted in *M.M. v. T.B.*, "the Nova Scotia Legislature did 'super-weight' the factor in s[ection] 47(5) of the *Children and Family Services Act*":[106]

> Permanent care and custody order[107]
>
> 47 (5) Where practicable, a child, who is the subject of an order for permanent care and custody, shall be placed with a family of the child's own culture, race, religion or language but, if such placement is not available within a reasonable time, the child may be placed in the most suitable home available with the approval of the Minister.

This kind of explicit legislative direction could help strengthen Indigenous communities, which could, in turn, make adoption cases with Indigenous children less common.

However, it is worth noting that T.B., B.B., and the Splatsin Band were unable to prevent R's adoption despite the unique legislative advantage that the Splatsin Band already has in the realm of Indigenous child welfare. In

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106 *Ibid* at 91.

107 *Children and Family Services Act*, SNS 1990, c 5, s 47(5) [emphasis added].

1980, the Splatsin Band passed *A By-law for the Care of Our Indian Children: Spallumcheen Indian Band By-law #3-1980*,[108] which "gives to the Band exclusive jurisdiction over any proceeding involving the removal of a child from their family".[109] The bylaw applies "to all Splatsin . . . [children] no matter where they are living, even if they do not live on Splatsin reserve".[110] It is recognized by both the provincial government and the federal government,[111] and "[i]t is the only child welfare bylaw which has been allowed under s[ection] 81 of the *Indian Act*".[112] But nevertheless, this seemingly powerful resource was ultimately ineffective at stopping R's adoption into a family outside of the Splatsin Band. In fact, the bylaw receives little mention in either the trial or appeal decisions. As seen from the Truth and Reconciliation Commission's calls to action, there must be greater empowerment and respect for Indigenous peoples in every aspect of life—not just piecemeal solutions—in order for Indigenous mothers and their children to thrive.

CONCLUSION

This paper did not set out to argue that the outcome in *M.M. v. T.B.* was incorrect. Rather, the purpose has been to

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108 *A By-law for the Care of Our Indian Children: Spallumcheen Indian Band By-law #3-1980*, 3 June 1980.

109 Walkem, *supra* note 83 at 19.

110 Splatsin, "Splatsin Stsmamlt Services", online: <www.splatsin.ca/departments/splatsin-stsmamlt-services>.

111 See *M (M), Re*, 2013 ABPC 59, 558 AR 136 at paras 86–87 for more details about the bylaw.

112 Walkem, *supra* note 83 at 19, citing *Indian Act*, RSC 1985, c I-5, s 81.

explore the analysis in both the trial decision and the appeal decision in hopes of uncovering insights about the experiences of Indigenous mothers in child welfare and adoption proceedings today. Professor Marlee Kline's groundbreaking article on the dominant ideology of motherhood served as a springboard for understanding how Indigenous women are more vulnerable to being characterized as unfit mothers, and more recent scholarship confirms that unfortunately Professor Kline's observations about the expectations of mothers are still true. The law has not changed dramatically from when she published her article. Also, although the courts are paying more attention to Indigenous identity when considering a child's best interests, the judgments from *M.M. v. T.B.* demonstrate how the courts' perspective in this area can lack depth and nuance. While there may be acknowledgment of the wrongs done to Indigenous peoples in general, individuals' actions and behaviour are still not being understood in relation to the broader context of colonial oppression.

In April of 2018, the Ministry of Children and Family Development introduced Bill 26: the *Child, Family and Community Service Amendment Act*.[113] The aim is to ensure that "Indigenous communities will have greater involvement in child-welfare decisions to help keep their children out of care, safe in their home communities, and connected to their cultures".[114] The government's news release states that:

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113 Bill 26, *Child, Family and Community Service Amendment Act*, 3rd Sess, 41st Parl, British Columbia, 2018.

114 Government of British Columbia, "Province proposes changes to improve Indigenous child welfare" (24 April 2018), online: <https://news.gov.bc.ca/releases/2018CFD0015-000722>.

> If approved by the legislature, the proposed changes will allow MCFD to share more information with Indigenous communities right from the start to keep children from coming into care in the first place, and will give the ministry more opportunities to work collaboratively on planning and caring for Indigenous children . . .[115]

The news release acknowledges that "[t]he proposed changes are an interim step", and that work on "systemic reform and jurisdiction, including consideration of [the] United Nations Declaration on the Rights of Indigenous Peoples . . . and the Truth and Reconciliation Commission Calls to Action", must continue.[116] It remains to be seen whether Bill 26 will be effective at improving the lives of Indigenous mothers and their children.[117] If Indigenous communities are to be truly supported so they encounter less friction with the court system, the government will still need to commit to wide-ranging, substantial changes and invest in comprehensive, meaningful social programs aimed at addressing the legacy of colonialism.

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115 *Ibid*.

116 *Ibid*.

117 The BC Aboriginal Justice Council has already expressed concerns about the proposed amendments, stating that the changes "were developed unilaterally, with limited opportunities for Indigenous comments, rather than meaningful active involvement of Indigenous Nations in authoring the legislation". See: BC Aboriginal Justice Council, "Statement from the BC Aboriginal Justice Council on Bill 26 (2018) Child, Family and Community Service Amendment Act" (26 April 2018), online: <http://bcajc.ca/wp-content/uploads/2018/04/BCAJC-Bill-C-26-Press-Release-final.pdf>.