Court File No. 36585

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N

HER MAJESTY THE QUEEN

Appellant (Appellant)

– and –

MEREDITH KATHARINE BOROWIEC

Respondent (Respondent)

– and –

ATTORNEY GENERAL OF ONTARIO
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
WOMEN'S LEGAL EDUCATION AND ACTION FUND, INC.

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

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1. The Criminal Lawyers Association ("CLA") accepts the parties' summaries of the facts.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. This Crown appeal as of right raises important questions about the scope of the partial defence of infanticide in s. 233 of the *Criminal Code*.[1] Infanticide cases inspire strong passions, and the defence has long been controversial. The Appellant sides with commentators who have urged its abolition, but acknowledges that this would take an act of Parliament.[2] As a stopgap, the Appellant seeks to have this Court introduce new restrictions that would limit the defence's availability, arguing that "society's views have changed";[3] that the defence of infanticide has become "outdated";[4] that it would be better criminal law policy to punish women who kill their infant children more harshly; and that this what the public really wants.

3. The CLA's position is that the Appellant's proposed reinterpretation of the s. 233 defence cannot be justified as a legitimate exercise of statutory construction. The courts are the guardians of liberty, and in the absence of a *Charter* challenge it is not their proper function to read new restrictions into a statutory defence in order to limit its availability. In his judgment for the Ontario Court of Appeal in *R. v. L.B.*, *supra*, Doherty J.A. stated:

> [I]t is not for the court to decide whether that partial defence reflects sound criminal law policy or should be reconsidered in light of advancements in medical knowledge and/or changed social circumstances. Those are matters for Parliament.[5]

Likewise, the majority of the Alberta Court of Appeal in the case at bar stated:

> There has been considerable criticism of the infanticide provisions as being based upon outdated science. There may be some merit to such criticism. However, whether the infanticide provisions should remain as is, or be changed in some substantive manner, or indeed be abolished altogether are questions for Parliament, and not the courts, to determine.[6]

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[1] Although s. 233 also creates a free-standing criminal offence, the Appellant's proposed changes would only affect its operation as a defence. Neither the Appellant nor the dissenting judgment below challenge the Ontario Court of Appeal's conclusion in *R. v. L.B.*, 2011 ONCA 153 [APPELLANT'S AUTHORITIES, TAB 3] that s. 233 creates a partial defence to a charge of murder or manslaughter.
[2] Appellant's Factum, ¶73.
[3] Appellant's Factum, ¶70
[4] Appellant's Factum, ¶59, 69-70, 112.
[5] *R. v. L.B.*, *supra* at ¶50
[6] Reasons for Judgment of the Court of Appeal of Alberta, *Appellant's Record,* Vol. I, p. 57, ¶61

Recent law reform commissions in other jurisdictions with similar legislation have concluded that on balance the defence works well and needs no major overhaul. If Parliament thinks otherwise, it will be able to choose from a much broader range of policy alternatives than are available to the courts.

PART III: ARGUMENT

4. The Appellant seeks to introduce into the statutory infanticide defence two new and previously unrecognized legal elements. First, following the dissenting reasons of Wakeling J.A. in the Alberta Court of Appeal, the Appellant seeks to have the statutory requirement that the accused mother's mind be "disturbed" when she killed her child reinterpreted to require her "psychological health" to have been "substantially compromised".[7] Second, the Appellant proposes a new requirement that this mental disorder "must be seen to have objectively caused the wrongful act or omission that resulted in the death" of her child.[8]

5. These proposed new elements are both central components of the juristically distinct "diminished responsibility" defence that exists in some other common law jurisdictions, including the UK, Ireland and some parts of Australia. However, neither have previously been understood to be elements of the separate defence of infanticide. In essence, the Appellant seeks to have the s. 233 infanticide defence judicially rewritten to make it more closely resemble the more onerous defence of diminished responsibility. However, the Appellant makes no real case that this was what Parliament actually intended. Rather, the thrust of the Appellant's arguments is that in light of better medical knowledge and perceived changes in public opinion, the policy choice Parliament made more than sixty years ago should no longer be respected.

6. The Appellant's contention that it would be better policy to have a narrower infanticide defence, or no defence at all, can only properly be assessed by Parliament. Law commissions and legislatures in many other jurisdictions have ultimately decided after careful consideration that the infanticide defence should be retained or expanded. It is far from apparent that Parliament or the Canadian public will disagree with the view of the Victorian Law Reform Commission that

[7] Reasons for Judgment of the Court of Appeal of Alberta, *Appellant's Record*, Vol. I, pp. 64, 78, 82; ¶98, 140, 150, *per* Wakeling J.A. (dissenting); Appellant's Factum, ¶82-89.
[8] Appellant's Factum, ¶90-97.

infanticide is "'a distinctive kind of human tragedy' which require[s] a distinctive response",[9] one that prioritizes mercy and compassion over retribution.

A. Infanticide vs. diminished responsibility

7. Canada's infanticide defence is modelled very closely on the English and Welsh *Infanticide Acts* of 1922 and 1938,[10] as are the similar defences in many other common law jurisdictions.[11] In a parallel legal development, UK legislators introduced a separate new partial defence of "diminished responsibility" into English and Welsh law in 1957,[12] based on a Scots common law defence. The original English diminished responsibility legislation, s. 2 of the *Homicide Act, 1957*, required the accused to have suffered from an "abnormality of the mind" that "substantially
10 impaired his mental responsibility for his acts and omissions in doing or being a party to the killing", and shifted the onus of proving these elements to the defendant. Statutory defences based closely on this English model and sharing these same elements were later enacted, *inter alia*, in four Australian jurisdictions.[13]

8. Although the statutory infanticide and diminished responsibility defences have some obvious similarities, a number of important differences between them have been identified:

i) Infanticide, unlike diminished responsibility, may only be raised by a mother charged with killing her own child under a certain age;[14]

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[9] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at ¶6.19 (p. 260) [CLA's AUTHORITIES, Tab 13].

[10] See *R. v. L.B.*, *supra* at ¶64-104.

[11] A non-exhaustive list of jurisdictions with similar infanticide defences to Canada also based on the English model include Northern Ireland, Ireland, New Zealand and the Australian states of New South Wales, Tasmania, and Victoria. Western Australia introduced a similar infanticide defence in 1986 but repealed it in 2008. [CLA'S AUTHORITIES, TABS 15-17, 22, 25-27]

[12] The *Homicide Act, 1957*, s. 2. The legislation was significantly amended in 2009, but the amended version retains the same basic structure [CLA'S AUTHORITIES, TABS 18 & 19].

[13] Specifically New South Wales, Queensland, the Northern Territory and the Australian Capital Territory. The New South Wales defence was amended in 1997 and renamed the "defence of substantial impairment". [CLA'S AUTHORITIES, TABS 21-24]. Ireland has also introduced a diminished responsibility defence based on the Scots and English models which does not track the 1957 English legislation as closely as the Australian statutes but shares similar elements, including the requirement that the accused's mental disorder "diminish substantially his or her responsibility for the act" [CLA'S AUTHORITIES, TAB 29].

[14] The age of the child varies in different jurisdictions. In most jurisdictions (including Canada) the deceased child must be under the age of 12 months. However, the age limit has been raised to 2 years in Victoria and to 10 years in New Zealand. The New Zealand legislation has also been extended to child homicides committed by women suffering from a disturbance of the mind arising from the birth of a different child.

ii) A defendant who successfully raises diminished responsibility as a partial defence to murder is found guilty of manslaughter, whereas infanticide is defined as a separate offence which in some jurisdictions (including Canada) has a lower maximum penalty;[15]

iii) Infanticide defences based on the English model require the accused mother's mind to have been "disturbed" when she killed her child.[16] In contrast, diminished responsibility defences require proof of that the defendant's mental processes were "substantially impaired". Some statutory versions of the diminished responsibility defence, including the legislation now in force in England and Wales, go further and expressly require proof that this "substantial impairment" results from a "recognised medical condition"; [17]

iv) Statutory defences of diminished responsibility, unlike the English-model infanticide defences, expressly require proof of a causal connection between the defendant's mental impairment and the homicide;

v) The burden of establishing the essential elements of the diminished responsibility defence is expressly shifted by statute to the accused, on the civil standard of proof. In contrast, the English-model infanticide provisions have no explicit reverse onus and have been understood as not reversing the ordinary burden of proof.[18]

Courts and commentators have recognized these differences as legally significant. In particular, law commissions in England and New South Wales, where both defences are statutorily recognized,[19] have concluded that the infanticide defence is broader and have recommended for this reason that it be retained as a separate defence.[20]

1) <u>The required degree of mental impairment</u>

9. The phrasing of the *Infanticide Acts* was designed to create a new partial defence that would be more readily accessible than the insanity defence, without automatically applying in every

[15] In some jurisdictions, including England and Wales, Northern Ireland, Ireland and New South Wales, infanticide is subject to the same punishment as manslaughter, although in practice it normally attracts lower sentences (usually non-custodial). In other jurisdictions, including Canada, New Zealand and Victoria, infanticide has a lower maximum sentence than manslaughter.

[16] Some jurisdictions, including Canada, have retained the traditional formulation that the "disturbance" must result from "the effects of giving birth to the child" or "the effects of lactation consequent on the birth of the child". Other jurisdictions have modernized or expanded this latter element of the test, while retaining the basic concept of a "disturbance" of the mind. For instance, the Australian state of Victoria now requires the "balance" of the accused mother's mind to have been "disturbed" because of "her not having fully recovered from the effect of giving birth to that child" or "a disorder consequent on her giving birth to that child".

[17] *Homicide Act, 1957,* s. 2 as amended by the *Coroners and Justice Act, 2009* [CLA'S AUTHORITIES, TAB 19].

[18] See, *e.g., R. v. L.B., supra* at ¶122-37; *R. v Gore*, 2007 EWCA Crim 2789 at ¶20(iii) [RESPONDENT'S AUTHORITIES, TAB 4]; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide* (2006), Law Com No. 304 at ¶8.9 (p. 157) [CLA'S AUTHORITIES, TAB 8].

[19] The other Australian jurisdictions that enacted diminished responsibility defences based on the English legislation did not previously have infanticide defences on their statute books.

[20] See ¶13(i), *infra*. Ireland also retained an infanticide defence based on the English model when it introduced diminished responsibility as a separate defence in 2006.

case.[21] The legislators in Canada and the other jurisdictions that adopted the same statutory language presumably agreed with the English policy and practice of extending leniency to mothers in these cases. Significantly, they did not seek to narrow the defence's scope by adding any language raising the threshold level of mental "disturbance" required.[22]

10. In contrast, the common law defence of "diminished responsibility" in Scots law was originally viewed as requiring "a state of mind which is bordering on, though not amounting to, insanity".[23] When the defence was legislatively introduced in England and Wales in 1957, the statutory test was framed to require "an abnormality of mind" that "substantially impaired" the accused's "mental responsibility". It is widely recognized that this is a different and more onerous
10 standard than the statutory test for infanticide. For instance, in 2006 the Law Commission (England and Wales) described "the phrase 'the balance of her mind was disturbed'" as "unique to infanticide" and "different to both the test for insanity and the test for diminished responsibility".[24] Similarly, the New South Wales Law Reform Commission declared in 2013 that "[i]nfanticide requires a lower threshold of impairment" than the defence of "substantial impairment" (as diminished responsibility is now called in NSW).[25]

2) Causal connection

11. The infanticide defences based on the English model, including s. 233 of the *Code*, do not expressly require any causal connection between the disturbance of the mother's mind and the death of her child. In *R. v. L.B.*, *supra* Doherty J.A. observed:

[21] The English legislative history and origins of the phrase "the balance of her mind was disturbed" are discussed in the Respondent's Factum at ¶36-38, 64-66. See also Boland, *Diminished Responsibility as a Defence in Ireland having Regard to the law in England, Scotland and Wales* (1996 doctoral thesis) [CLA'S AUTHORITIES, TAB 3].

[22] New Zealand legislators supplemented the English phrasing by adding that the mother's mind must have been "disturbed … to such an extent that she should not be held fully responsible", but did not specify how great a disturbance was required to meet this threshold.

[23] See Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, July 2004 at ¶3.1 [CLA'S AUTHORITIES, TAB 9]. The common law formulation of the defence in Scotland was later revised by the High Court of Justiciary (Full Bench) in *Galbraith v HM Advocate* 2002 JC 1, 2001 SCCR 551 [CLA'S AUTHORITIES, TAB 1] to no longer require mental impairment "bordering on insanity". Under the reframed test, which closely tracks the 1957 English legislation, there must now be a "substantial impairment" of the accused's "ability … to determine or control his actings" (*Galbraith*, ¶54).

[24] 2006 Law Com No. 304, *supra* at ¶8.11 (p. 158).

[25] New South Wales Law Reform Commission, *Report 138* (2013) at ¶5.35 (p. 119) [CLA'S AUTHORITIES, TAB 12]

> Unlike other mental states that may mitigate criminal responsibility, infanticide does not require any causal connection between the disturbance of the mother's mind and the decision to do the thing that caused her child's death…[26] [Citations omitted.]

Courts and commentators outside Canada have consistently reached the same conclusion, often contrasting the situation with diminished responsibility's explicit causation requirement. For instance, in *R. v. Gore, supra* the English Court of Appeal (Criminal Division) noted that:

> Unlike diminished responsibility, the wording of the *Infanticide Act* does not explicitly require any causal connection between the killing of the child and the necessary disturbance of the balance of the mind. The infanticidal mother need only produce evidence that at the time of the killing the balance of her mind was disturbed either by birth or by the effects of lactation.[27] [Emphasis added]

To the same effect, the Law Commission (England and Wales) observed in its 2006 Report that:

> A significant feature of section 1(1) of the *Infanticide Act 1938* is that there is no requirement of a causal link between the killing of the child and the disturbance of the mind suffered by the defendant. So, any murder of a child under the age of 12 months by its biological mother, whatever the reason, is capable of amounting to infanticide as long as at the time of the murder the balance of her mind was disturbed.[28]

Likewise, the New South Wales Law Reform Commission commented in 2013 that:

> The requirements of s 22A [the NSW infanticide defence] are less rigorous than substantial impairment. There is no need to show the disturbance of the mind be causally related to the killing, only that it is temporally related.[29] [Emphasis added.]

B. Section 233 cannot properly be reinterpreted to include key elements of the diminished responsibility defence

12. When the Canadian legislators who introduced the infanticide defence into the *Criminal Code* looked to the UK for guidance, they were presented with two alternative legal models: the English defence of infanticide and the more onerous Scots defence of diminished responsibility. They chose to adopt the more easily accessible English defence. The Appellant wishes they had made a different choice, and contends that the public would also now prefer a more harshly punitive legal response to infanticide. However, while changes in societal views can sometimes be appropriately considered when interpreting flexible legislative standards framed to reflect social norms,[30] the perception that public opinion has shifted does not give the courts a licence to undo

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[26] *R. v. L.B., supra* at ¶59. See also *R. v. Guimont* (1999), 141 C.C.C. (3d) 314 (Que. C.A.) [RESPONDENT'S AUTHORITIES, TAB 10]; Grant et al., *The Law of Homicide* (1994) at p. 4-91 [CLA'S AUTHORITIES, TAB 4].
[27] *R. v. Gore, supra* at ¶20(iv).
[28] 2006 Law Com 304, *supra* at ¶8.40 (p. 166).
[29] NSW LRC Report 138 (2013), *supra* at ¶5.42 (p. 121).
[30] Examples include the "ordinary person" test for provocation (see *R. v. Tran*, 2010 S.C.C. 58, [2010] 3 S.C.R. 350 [APPELLANT'S AUTHORITIES, TAB 16]) and the "undue exploitation of sex" test for obscenity (*CC* s. 163(8)).

a clear legislative policy choice. It is Parliament, not the courts, that must decide whether social views about the appropriate punishment for infanticide have truly changed as drastically the Appellant claims. In making this assessment, Parliament will be able to canvass a much wider range of viewpoints than are available to a court in a criminal case.

13. Parliament will also be able to choose between a broader range of legislative policy options. Law commissions have identified four main alternatives:

i) Retaining the existing English-model infanticide defence, either unchanged or with minor modifications. Variations on this approach have been endorsed in England and Wales by the Criminal Law Revision Committee (1980)[31] and the Law Commission (2006);[32] and in Australia by the Victorian Law Reform Commission (2004)[33] and the New South Wales Law Reform Commission (2013);[34]

ii) Subsuming the infanticide defence into the defence of diminished responsibility. This was proposed in England and Wales by the Butler Committee (1975)[35] and by the New South Wales LRC in 1997,[36] but later commissions in both jurisdictions rejected this approach;[37]

iii) Eliminating both the infanticide defence and the mandatory sentence of life imprisonment for murder. This was proposed by the Butler Committee in England in 1976[38] and by the Law Reform Commission of Canada in 1984,[39] but neither proposal was adopted by the legislature. Western Australia is the only jurisdiction to have adopted this approach;[40]

iv) Repealing the infanticide defence and retaining mandatory life imprisonment for murder. No law commission has recommended this approach.

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[31] The CLRC's 1980 proposals to significantly expand the defence are summarized by the Law Commission (EW) in its 2005 Consultation Paper 177 at ¶9.56 to 9.9.64]. [CLA'S AUTHORITIES, TAB 7].

[32] Law Com No. 304, *supra*, recommending that defence be retained unchanged. This advice has been largely followed by the UK Parliament, although the *Infanticide Act* was amended in 2009 to clarify that the defence is available to a charge of manslaughter (see CLA'S AUTHORITIES, TAB 17).

[33] Victorian LRC Report, *supra*. The Victorian legislature implemented the Victorian LRC's recommendation that the age limit be raised to two years and that the statutory test be modernised and expanded, but did not adopts its further proposal to extend the defence to the killing of an older child by a mother whose mind is disturbed by the birth of a younger sibling (as in New Zealand). See *Crimes Act 1958* [Victoria] and *Crimes Act 1961* [NZ] (CLA'S AUTHORITIES, TABS 26 and 30).

[34] New South Wales Law Reform Commission, Report 138 (2013) [CLA'S AUTHORITIES, TAB 12]

[35] Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244 [*Butler Committee Report*]. [CLA'S AUTHORITIES, TAB 5]. The Committee proposed in the alternative to its first choice of flexible sentencing, and its support was conditional on the reverse onus being eliminated from the diminished responsibility defence.

[36] New South Wales LRC, Reports 82 and 83 (1997) [CLA'S AUTHORITIES, TABS 10 & 11].

[37] See footnotes 31, 32, and 34 *supra*. The Victorian Law Commission also recommended against introducing a diminished responsibility defence into Victorian law, and instead proposed that the existing infanticide defence be retained and expanded (see footnote 33, *supra*).

[38] Butler Committee Report (1975), *supra*. This was the Committee's preferred option.

[39] Law Reform Commission of Canada, Working Paper No. 33 (1984) [APPELLANT'S AUTHORITIES, TAB 21]

[40] See Law Reform Commission of Western Australia, Project 97 Final Report (1997) [CLA'S AUTHORITIES, TAB 14]. Western Australia, a sparsely populated state, introduced the defence in 1986 before repealing it in 2008. In its 2007 Report the LRC noted that there had been only one infanticide conviction in WA in the past 10 years (p. 112).

14. It must also be emphasized that even those commissions that recommended eliminating the infanticide defence were not apparently proposing changing the existing "tendency to impose compassionate and lenient sentences in cases of infanticide".[41] As the Law Commission (EW) noted 2005, the Butler Committee had proposed discretionary sentences for murder and:

> … envisaged that each case would attract appropriate and individualized penalties. There was not a rejection of the underlying purposes of the [*Infanticide*] *Act* and there was no criticism of the sentences that the judiciary had been imposing.[42]

Likewise, in its 1984 Working Paper the Law Reform Commission of Canada explained that it believed discretionary sentencing for murder and a separate defence of diminished responsibility would make it "unnecessary" to retain a separate defence of infanticide, but did not indicate that it favoured higher sentences in infanticide cases.[43] In New South Wales, the LRC proposed repealing the separate infanticide defence in 1997 because it believed "the defence of diminished responsibility [would] apply to those child killings currently falling within the legal definition of infanticide",[44] but changed its position in 2013 when it concluded that:

> [T]he infanticide provisions respond appropriately to a particular set of circumstances that may not, in all cases, be adequately dealt with by the partial defence of substantial impairment.[45]

15. A further recurring theme in these reports is that a majority of consultees in England and Australia consistently favoured retaining or even expanding the infanticide defence, sometimes "strong[ly]" or "overwhelming[ly]".[46] While it is possible that Canadians would now take a different view, the only evidence the Appellant offers for its claim that "society's views have changed" is that in a different Alberta case, *R. v. Effert*, [47] two juries initially convicted a young mother of murder. However, the first verdict was set aside on appeal after the Crown conceded errors in the jury charge, while the second verdict was unanimously quashed as unreasonable. The

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[41] Law Commission (EW) CP 177, *supra* at ¶9.93.
[42] The Butler Committee had observed that "in practice the mother who has killed her child is almost invariably treated very leniently" (at ¶19.22). See also Criminal Law Review Committee, *Working Paper on Offences against the Person* (1976), at pp. 26-27 [CLA'S AUTHORITIES, TAB 6].
[43] LRCC Working Paper 33, *supra* at p. 77. The LRC WA likewise noted that the infanticide defence had been rarely used in WA and explained its proposal to introduce discretionary sentencing for murder would "allow for a show of mercy where circumstances demand it".
[44] NSW LRC Report 83, *supra* at ¶3.7 (p. 103).
[45] NSW LRC Report 138, *supra* at ¶5.49.
[46] See, *e.g.*, 2006 Law Com No. 304 *supra* at ¶8.17; NSW LRC Report 138 (2013) at ¶5.49; Vic. LRC Report (2004) at ¶6.20. Even in Western Australia, where the LRC recommended repeal, it acknowledged "that a majority of submissions received on this question supported the retention of infanticide in some form" (LRC WA Final Report (2007), *supra* at pp. 114-15).
[47] 2007 ABCA 284 at ¶1 [CLA'S AUTHORITIES, TAB 2]; 2011 ABCA 134 [APPELLANT'S AUTHORITIES, TAB 6]

apparent inability or unwillingness of twelve Alberta jurors to properly apply the law is hardly proof of a sea change in national opinion[48] or evidence that the law itself needs changing.

16. It is also noteworthy that these reports continue to accept the view that the women most deserving and in need of a special defence are those charged with neonaticides (killing a child within 24 hours of birth). For instance, the Law Commission (EW) noted in 2005 that:

> … it is arguable that the offence/defence of infanticide should be limited to cases of neonaticide, or at least "newly born" as it was originally in the 1922 *Act*.[49]

In its 2006 Report the Commission noted that some medical consultees had "

> … expressed concern that neonaticide cases must be covered by a special defence because the mother's culpability is very low.[50]

To the same effect, the New South Wales LRC noted in 2013 that preserving the infanticide defence "is arguably particularly important in neonaticide cases".[51] Indeed, the original *Infanticide Act, 1922* and 1948 *Criminal Code* defences applied only to the killing of "newly born" infants, and were only later extended to older children. In view of this legislative history, the fact that Wakeling J.A.'s proposed new test would seemingly bar most women charged with neonaticides from raising the defence[52] is a serious defect as a matter of statutory construction, whatever merits it might have as a matter of policy. An interpretation that excludes the core group the statutory defence was designed to protect cannot sensibly be reconciled with the requirement that legislation be construed "harmoniously with … the intention of Parliament".

C. The *mens rea/actus reus* distinction and causation

17. In addition to its arguments from policy, the Appellant also relies on what might be characterized as an argument from legal aesthetics. In *R. v. L.B.*, *supra* Doherty J.A. held that:

> Because the mother's mental "disturbance" is not connected to the decision to kill, that "disturbance" is better considered as part of the *actus reus* and not a *mens rea* component of the crime of infanticide.[53]

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[48] Indeed, a law review article published before the second appeal decision notes that "some people" supported the jury's guilty verdict but that "[m]any individuals assert[ed] that [she] should not have been convicted of second degree murder" rather than infanticide. (S. Anand, "Rationalizing Infanticide", (2009-10) 47 Alta. L. Rev. 705 at p. 706, APPELLANT'S AUTHORITIES, Tab 27).
[49] 2005 Law Com CP 177, *supra* at ¶9.46.
[50] 2006 Law Com No. 304, *supra* at ¶8.37.
[51] NSW LRC Report 138, *supra* at ¶5.41.
[52] See dissenting reasons of Wakeling J.A. p. 156.
[53] *R. v. L.B.*, *supra* at ¶59.

The Appellant argues that it "does not accord with the notions of basic criminal law" to have a mental state classified in this way, and seeks to avoid this displeasing asymmetry by reading into the s. 233 defence a new and previously unrecognized causation requirement.[54] This would stand the law on its head. Subject to constitutional constraints, Parliament is entitled to legislate as it sees fit, even if its choices do not fit neatly into the law's usual organizational system. The *actus reus/mens rea* distinction is a useful analytic tool, but it is the law's servant, not its master.

18. Moreover, the Appellant's argument for a new causation requirement is substantially undercut by its concession that s. 233 does not reverse the onus of proof.[55] As a practical matter, it is hard to see how a prosecutor who cannot show that an accused mother *was not* suffering from a "disturbance" of her mind would ever be able to prove beyond a reasonable doubt that this disturbance played no causal role in her killing her child. While the Appellant criticizes s. 233's "implicit assumption that if a woman with disturbed mind kills her child, the disturbance is what led to the killing"[56] as "a disturbing tautology untethered to logic",[57] Parliament's drafting choice simply reflects the practical implications of the burden of proof. In any event, it is not for the courts to unmake Parliament's legislative choice by reading into the defence an element the legislature consciously chose not to include.

PARTS IV & V: SUBMISSIONS RE COSTS AND ORAL ARGUMENT

19. The CLA does not seek costs and asks that none be awarded against it. The CLA seeks leave to make oral submissions of not longer than 10 minutes.

20 ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF JANUARY, 2016.

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JONATHAN DAWE and MICHAEL DINEEN
COUNSEL FOR THE INTERVENER
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[54] Appellant's Factum, ¶90-97.
[55] Appellant's Factum, ¶87.
[56] *R. v. Guimont, supra* at ¶12, quoting Grant, Chunn and Boyle, *supra* at p. 4-91.
[57] Appellant's Factum, ¶90.

PART VI: LIST OF AUTHORITIES

Paragraphs

Cases

Texts and Academic Articles

Law Commission Reports

Canada

United Kingdom

England and Wales

PART VII: LIST OF RELEVANT STATUTES

Criminal Code, R.S.C. 1985, c.C-46, s. 233	**Code criminel, L.R.C. (1985), ch. C-46, s. 233**
INFANTICIDE	INFANTICIDE
233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.	**233.** Une personne du sexe féminin commet un infanticide lorsque, par un acte ou une omission volontaire, elle cause la mort de son enfant nouveau-né, si au moment de l'acte ou de l'omission elle n'est pas complètement remise d'avoir donné naissance à l'enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l'enfant, son esprit est alors déséquilibré.
R.S., c. C-34, s. 216.	S.R., ch. C-34, art. 216