

**ONTARIO COURT OF APPEAL**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

*Appellant*

**-and-**

**L.B.**

*Respondent*

**-and-**

**WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)**

*Intervener*

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**FACTUM OF THE INTERVENER**

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**PART I – OVERVIEW OF THE CASE**

1. By order of Justice MacFarland dated July 29, 2010, the Women's Legal Education and Action Fund (LEAF) was granted leave to intervene in this appeal in order to present argument on the proper interpretation and application of the infanticide provisions in the *Criminal Code*.
2. The crime of infanticide in s.233 of the *Code* creates a unique regime of reduced culpability for women who wilfully kill their newly born child when their mind is disturbed as a result of childbirth or lactation. The provision recognizes the reproductive

functions and caregiving roles of women and the unique stressors accompanying those roles. In this appeal, this Court is asked to determine a novel question of law relating to the operation of s.233 where the Crown has chosen to charge a woman with murder, as opposed to infanticide, for the killing of her newly born child. Specifically, the question is whether the Crown can effectively deny women access to the regime of reduced culpability and sentence under s.233 of the *Criminal Code* by charging women who kill their newly born children with murder instead of infanticide in circumstances where the elements of infanticide are present.<sup>1</sup>

3. Section 233 of the *Code* applies only to women who have recently given birth. Parliament has chosen to recognize the social, economic, psychological and medical effects of childbirth and lactation in the commission of a crime which would otherwise be murder. Women who kill newly born children tend to be young, poor, socially isolated, marginalized and/or without adequate social and economic supports to cope with childbirth or caring for a child. In other cases, as found by the trial judge in *L.B.*, the stresses and social, psychological and physical effects of childbirth and caring for a newly born child may interact with pre-existing conditions or disorders to cause a mental disturbance.
4. Until quite recently, women who killed their newly born children were most frequently charged with infanticide or, if they were charged with a more serious form of culpable homicide, a plea of infanticide was accepted by the Crown where the elements of the offence were met.<sup>2</sup> This appeal, and the appeal in *R. v. Effert* which will likely be heard by the Alberta Court of Appeal later this year, address the emerging question of the interplay between infanticide and the other homicide offences. Specifically: when the Crown proves murder, does infanticide remain an available verdict?

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<sup>1</sup> The maximum sentence for infanticide is 5 years, as compared to murder which carries a mandatory life sentence: *Criminal Code* ss. 233, 235.

<sup>2</sup> See Herold J.'s comment at para. 11 of his Reasons for Judgment. See also Emma Cunliffe, "Infanticide: Legislative History and Current Questions" (2009) 55 C.L.Q. 94.

5. The Crown in this appeal argues that infanticide is not an available verdict in cases of intentional killing. The Crown's argument hinges on a literal and narrow reading of s.662(3) which provides that where a count charges murder and the evidence proves infanticide "but does not prove murder", the jury may convict of infanticide. It is the Crown's contention that the underlined clause excludes a verdict of infanticide in all cases where murder is otherwise proved – i.e. where there has been an intentional killing. However, the Crown's reading of s.662(3) is not supported when s.662(3) is read in the context of all the *Code* provisions relating to infanticide and the language and purpose of s.233. Recently, in *R. v. Sarrazin*, Doherty J.A. considered the subsections of s.662 and determined that they merely "speak[] to liability for offences that are lesser and included in the offence with which the accused is charged either by virtue of the general language of s.662(1) or the specific provisions of ss. 662(2)-(6)."<sup>3</sup> They do not do anything to change the substance of the offences mentioned therein. In the Crown's interpretation, s.662(3) serves the substantive purpose of excluding intentional killings from the ambit of infanticide. However, consistent with *Sarrazin*, s.662(3) simply clarifies the application of s.662(1) as it pertains to homicide offences and does nothing more.
6. In other words, if the Court accepts the Crown's submission, a regime expressly intended by Parliament to apply to women who wilfully kill their newly born children while suffering from a mental disturbance caused by the effects of childbirth or lactation, will be rendered inoperative where the Crown chooses to charge murder. This would effectively repeal s.233 via the exercise of Crown charging discretion. LEAF submits that this cannot be correct.
7. The elements of infanticide engaged in this appeal are the *mens rea* of the offence, which requires that the killing be "wilful", and the *actus reus*, which requires a "disturbed mind". As will be elaborated on further below, LEAF's position with respect to interpreting "disturbed mind" is that s.233 applies to a range of disturbances caused by the complex interaction of social, economic, psychological, cultural, religious, biological, hormonal and other factors consequent upon childbirth or lactation. These disturbances

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<sup>3</sup> *R. v. Sarrazin*, 2010 ONCA 577, at para. 39

fall short of a “disease of the mind” or “mental disorder” pursuant to s.16 of the *Code* and cover a wide spectrum of women’s experiences and circumstances.

8. The decisive question on this appeal, however, is the *mens rea* of the offence. The Court’s answer to this question will determine the place of infanticide within the *Code*’s homicide scheme and, most importantly, whether infanticide is an available verdict in the kinds of cases in which Parliament intended it to apply. It is LEAF’s position that the relevant provisions of the *Criminal Code* must be interpreted in a manner which respects Parliament’s clear intention to create a mitigated culpable homicide offence, in circumstances that would otherwise be murder, applicable to women who wilfully kill their newly born child while suffering a mental disturbance. LEAF submits that the three forms of culpable homicide in the *Code* (murder, manslaughter and infanticide) must be interpreted so that each has its own sphere of operation and different level of culpability. The offence of infanticide must be given independent meaning as an offence. Well-established principles of statutory interpretation require a coherent reading of the relevant *Code* provisions, guided in this case by the s.15 *Charter* principle of women’s substantive equality and Parliament’s recognition of the interrelated and multifaceted consequences of women’s procreative role. A coherent reading of s.233 and s.662(3) in their full context requires that infanticide be an available verdict in every case where its elements are present – even where the evidence would also prove murder. In other words, it must be available in cases of intentional killing.
  
9. In interpreting and applying infanticide as an offence, one must recognize its anomalous nature, which poses unique challenges for classifying, interpreting, and applying it as an offence and/or defence. Infanticide is one of only two gender-specific crimes in the *Code*.<sup>4</sup> It is the only crime that includes mitigating mental factors as elements of the offence itself. It is known to be a “lesser included” offence to murder, yet contains a number of elements not present in the ostensibly “greater” offence of murder. It is clearly legislated as a distinct homicide offence – complementing murder and manslaughter in the *Code*’s tripartite scheme for culpable homicide – and yet, in practice, operates much like a partial defence. These peculiarities mean that analogies to other offences and

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<sup>4</sup> Neglecting to obtain assistance in childbirth (s.242) is the other.

defences must be made with more than the usual degree of caution. The provision, therefore, should be interpreted purposively in a manner that accomplishes the legislative intent of making this mitigated regime available to women who intentionally kill their newly born children while experiencing a mental disturbance consequent on childbirth or lactation. LEAF's position is that the infanticide offence under s.233 of the *Code* must be interpreted so that where the elements of infanticide are present, the appropriate verdict is infanticide and not murder.<sup>5</sup>

10. Procedurally this means that where a woman has been charged with murdering her newly born child, the trial judge must determine whether there is an air of reality to the exculpatory elements of infanticide. If the air of reality is met, the trier of fact must first determine whether the Crown has disproved one or more of these exculpatory elements beyond a reasonable doubt, prior to considering murder. If none of the elements of infanticide have been disproved, infanticide is the proper verdict. In this sense, while infanticide is enacted as a stand-alone offence, it operates procedurally as a partial defence when the Crown charges murder.

## PART II – FACTS

11. LEAF takes no position on the facts.

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<sup>5</sup> Isabel Grant, "Desperate Measures: Rationalizing the Crime of Infanticide", (2010) 14 Can Crim L.R. 253

## PART III – ISSUES AND LAW

### I. The Ongoing Relevance of Infanticide as a Discrete Homicide Offence

#### A. The social context of infanticide – past and present realities

12. The offence of infanticide was enacted for a number of reasons. In the 19<sup>th</sup> century, women charged with killing newly born children were often working class, frequently impregnated by their employers (or other men with power over them), and had no means of supporting themselves or their child due to the intense social stigma of illegitimacy. Other cases involved women who faced various forms of social and cultural disadvantage and typically desperate circumstances. Juries and judges were historically sympathetic to these women and were reluctant to convict them of murder, which was then punishable by death. Reflecting this sympathy, women were often acquitted outright of murder, or in the first place were charged with manslaughter or concealing the body of a child (now s.243) as opposed to murder.<sup>6</sup>
  
13. The desire to create a lesser offence which reflected the true nature of the crime, and on which juries could convict in circumstances where women killed their newly born children while suffering from a mental disturbance, helps explain the introduction of infanticide as a mitigated offence. The decision to introduce a reduced-culpability homicide offence specifically for infanticide also stemmed in part from a recognition of the relative powerlessness of the women charged, and the social and economic imposition on them alone of the stigma and responsibility for pregnancy and child-rearing.<sup>7</sup>
  
14. The social context of inequality, and the role played by this social context in the mental disturbance experienced by women who kill their newly born children, forms part of both

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<sup>6</sup> Constance Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada” (1984) U.T.L.J. 447; Cunliffe (2009), *supra*

<sup>7</sup> *House of Commons Debates* (14 June 1948), at 5184-5

the historical legacy and current justification for this lesser offence. As observed by Michelle Oberman, a researcher on infanticide:

The infanticide statutes from around the world evidence a shared sense that it is both legally and morally wrong for a mother to kill her infant. At the same time, they evince an equally powerful consensus that, both in terms of its genesis and in terms of maternal culpability, infanticide is a far different crime from other homicides.<sup>8</sup>

15. Similarly, the New South Wales Law Reform Commission has underscored the continuing need for mercy in these circumstances:

The Commission considers that women who kill their children in states of significant mental disturbance should not be convicted of murder. It is appropriate that, given the usually tragic circumstances which characterize infanticide cases, the law should treat such women with leniency. This leniency should not be reflected simply in a reduced sentence for murder, but in conviction for a lesser offence which conveys a lesser degree of culpability.<sup>9</sup>

16. The Appellant Crown portrays the mitigated offence of infanticide, and the concerns addressed by it, as antiquated, “outdated” and irrelevant to or unreflective of contemporary society. Although societal values and the conditions of women have evolved since the offence was first introduced, s.233 continues to reflect the conditions of inequality in which the offence tends to arise today. It is broad enough to take into account current understandings of how socio-economic, cultural, and psychological factors play a role in determining the effect of childbirth on the mental state of the very few women who kill their newly born children.<sup>10</sup>
17. Many of the fundamental socio-economic disparities underpinning the offence persist. Women continue to be overwhelmingly responsible for the care and rearing of children,

<sup>8</sup> Michelle Oberman, “Mothers Who Kill: Coming to terms with modern American infanticide” (1997) 34 Am. Crim. L. Rev. 2 at 19

<sup>9</sup> New South Wales Law Reform Commission, Report 83, *Partial Defences to Murder: Provocation and Infanticide* (Sydney, 1997), at p. 108. Note that while the Commission recommended abolishing infanticide, it made that recommendation conditional on the existence of a generalized “diminished responsibility” defence, which would reduce murder to manslaughter in circumstances previously covered by infanticide.

<sup>10</sup> Ania Wilczynski, “Images of Women Who Kill Their Infants: the Mad and the Bad” (1991) 2 Women and Criminal Justice 71, at pp. 76 and 85; Cunliffe (2009), *supra*, at pp. 111-113

which has direct economic and emotional effects.<sup>11</sup> The adverse consequences of pregnancy and parenting can particularly impact young women.<sup>12</sup> In many communities today, the social stigma of pregnancy before marriage continues to be devastating for the woman. For cultural or religious reasons, many women find that abortion is not an option. Even for women who might choose to terminate an unwanted pregnancy, abortion is not meaningfully accessible across Canada.<sup>13</sup> Compounding problems of access to termination, many infanticidal women convince themselves, and others, that they are not pregnant.<sup>14</sup>

18. The present day social context of women's inequality has a direct connection to the original legislative intent in creating a mitigating regime for infanticide. Social, economic, cultural, religious, psychological and other factors continue to work together to cause individual women to experience a disturbed mind following child-birth.
19. These conditions of persistent inequality must inform the current understanding and interpretation of this mitigated offence. Those who commit infanticide in Canada, particularly where the offence is committed within 24 hours of giving birth, are likely to be unmarried young women, under the age of 25, who are socially isolated and who frequently hide the pregnancy from their families and friends and often themselves. They

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<sup>11</sup> See, for example, Statistics Canada, *Women in Canada, 5th Edition: A Gender Based Statistical Report*, (Ottawa: Social and Aboriginal Statistics Division, March 2006), p. 109 (women are more likely to work part-time than men because of childcare responsibilities); p. 132 (lone-parent families headed by women have the lowest incomes of all family types); pp. 138-139, 144 (the average earnings of women are substantially lower than men); and p. 63 (the high rates of mood disorders among women may be linked to women being largely responsible for caring for their children and families at the same time as having the responsibilities of full-time employment).

<sup>12</sup> For example, see Statistics Canada, *ibid.*, at p. 139, which correlates higher educational level of women with increased income.

<sup>13</sup> There are no abortion clinics in Prince Edward Island and women may only access in-hospital abortions if referred by a physician; women in New Brunswick can only obtain a publicly funded abortion if they have the approval of two physicians and the abortion is performed in a hospital; women in Saskatchewan can only access abortions in hospitals, although due to the problem of access to services, the Saskatchewan health plan will cover the cost of abortions performed at clinics in Alberta. Significant barriers to accessing abortion exist for rural women across Canada. The limited, public funding for abortions in certain provinces and the requirement in certain provinces that women obtain the approval of a physician present obvious significant barriers, particularly for young, poor, isolated or otherwise marginalized women. See chart available at <http://www.prochoice.org/canada/regional.html>.

<sup>14</sup> Oberman (1997), *supra*, at pp. 23-24; Margaret G. Spinelli, "A Systematic Investigation of 16 Cases of Neonaticide" (2001) 158 *American Journal of Psychiatry* 811; Michael Craig, "Perinatal Risk Factors for Neonaticide and Infant Homicide" (2004) 97 *Journal of the Royal Society of Medicine* 57, at p. 58; Cheryl Meyer and Michelle Oberman, *Mothers Who Kill Their Children* (New York: New York University Press, 2001) at pp. 42-

tend to have little social support and the father is rarely involved. They generally give birth alone, often at home or in a public washroom. They often have no history of mental illness and it is not uncommon for them to be in a state of panic, intense pain, exhaustion, disassociation and alienation. Women who kill their child later in the first year, as in the case of L.B., are more likely to be suffering a post-partum disorder, sometimes related to a pre-existing condition or predisposition. One or more of the factors of youth, emotional immaturity, economic instability, isolation and inability to cope, are also often present in these cases of killings later in the first year, and were present in L.B.'s case.<sup>15</sup>

20. In addition to the socio-economic consequences of pregnancy, childbirth and child-rearing which are borne only or largely by women, other aspects of women's inequality are also relevant, whether or not the accused is young and socially isolated or there is a father present. Crimes of sexual abuse and violence are suffered disproportionately by women and girls, resulting in a correlation with higher rates of certain mental illnesses among women.<sup>16</sup> A history of abuse is another element not infrequently experienced by women who commit infanticide.<sup>17</sup>

**B. Social context of inequality and the "disturbed mind"**

21. At paragraph 54 of its factum, the Crown argues that the offence of infanticide is based on incorrect medical assumptions and stereotypical views of women (as being controlled by their hormones) by "presuming" that women who kill their children must have a mental disturbance. However, not every killing of a newly born child by the mother will be an infanticide. Rather, s.233 requires proof of a causal link between childbirth or lactation and the mental disturbance. LEAF's submission that some women disproportionately experience negative effects of continuing social inequality in relation to childbirth and child-rearing, and that these effects may play a role in the mental

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<sup>15</sup> Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver, UBC Press, 2005), at pp. 113-134; Ken Alder and Christine Polk, *Child Victims of Homicide* (Cambridge: Cambridge University Press, 2001) at Chapter 4; Michael Craig, *supra*

<sup>16</sup> Statistics Canada (2006), *supra*, at pp. 67, 68; Status of Women Canada, *Assessing Violence Against Women A Statistical Profile* (1993); Statistics Canada, *Sexual Assault in Canada, 2004* (Ottawa: Centre for Canadian Justice Statistics, 2008)

<sup>17</sup> Alder and Polk (2001), *supra*, at Chapter 4

disturbance, does not lead to the proposition that every woman who kills a newly born child suffers a disturbance of the mind.

22. The Crown's assertion that the offence rests on an "incorrect medical assumption" is also misplaced. Rather, the offence requires a mental disturbance, but is worded flexibly enough to incorporate contemporary understandings that such disturbance may be caused by the unique pressures facing women who have recently given birth and the complex interaction of biology, psychology and social circumstances, and to allow for reduced culpability in light of this knowledge. The complexity of factors that can lead to mental disturbance in new mothers was testified to by the psychiatric experts at L.B.'s trial.<sup>18</sup>
23. The fact that English law has retained infanticide in the face of calls for reform further supports the contention that the offence has not outlived its social usefulness. Indeed, the UK Law Commission's major 2006 report *Murder, Manslaughter and Infanticide*, while recommending other significant changes to the law of homicide, strongly recommended retaining the offence of infanticide in its traditional form. The Commission rejected the complaint that infanticide "pathologizes" women or motherhood, finding instead that the offence "recognizes that some women do suffer from psychiatric disorders triggered by childbirth" and concluding that infanticide in its current form is a "practicable legal solution to a particular set of circumstances."<sup>19</sup>
24. In short, Parliament's reasons for enacting a separate offence of infanticide remain pressing social concerns. Parliament has chosen to leave the offence on the statute books, in a form unchanged since 1954. As will be argued below, it is not the role of the courts or the Crown to effectively repeal the offence via the exercise of charging discretion.

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<sup>18</sup> Trial transcript, Dr. Gojer (evidence in chief), 29 July 2008, at p. 13; Trial transcript, Dr. Klassen (evidence in chief), 25 July 2008 at pp. 42-3

<sup>19</sup> The Law Commission, *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (London, 2006), pp. 156, 165. See also: The Law Commission, "A New Homicide Act for England and Wales?: Consultation Paper No. 177" (London, 2005).

## II. Interpreting the “Disturbed Mind” Requirement

25. The context of inequality that informs the infanticide offence, the current state of knowledge of the social and other factors that affect mental health, and the principles of substantive equality also assist in understanding the “disturbed mind” requirement of s.233. LEAF submits that the “disturbed mind” language supports a broad and liberal understanding of the range of disturbances that a woman may experience after giving birth and the variations in contributing factors THAT may have played a role in the disturbance. In assessing the mental disturbance, it is essential to look at the circumstances in which the individual accused found herself and which shaped the effects of childbirth on her mental state.
26. A broad and liberal approach accords with the spectrum of disturbances that may be experienced by women following childbirth and is necessary to distinguish mental disturbance in infanticide from the “mental disorder” required for a s.16 “not criminally responsible verdict”. The legislative debates in Canada and England<sup>20</sup> emphasized that the degree of disturbance of the mind required for a mother to be convicted of infanticide was mild relative to that required for what is now the mental disorder defence in s.16 of the *Code*. For example, the Honourable James Ilesley, then Canadian Minister of Justice (later Chief Justice of Nova Scotia), explained that the legislation would apply to a “slightly deranged, distressed mother” who would otherwise technically be guilty of murder.<sup>21</sup>
27. The legislative history of the phrase “her mind was then disturbed” has been traced to the English *Infanticide Act* 1922, which preceded the Canadian provision.<sup>22</sup> The Lord Chancellor, introducing the English legislation, explained that the words were “not terms of art. ... [I came to the conclusion that] it was better to attempt a formula which might be the subject of reasonable judicial decision.”<sup>23</sup> The United Kingdom Parliament made a

<sup>20</sup> The Canadian s.233 was modeled on English legislation, and although its operation is somewhat different, the language of disturbance is common to both jurisdictions.

<sup>21</sup> *House of Commons Debates*, (14 June 1948) at 5187

<sup>22</sup> Cunliffe (2009), *supra*

<sup>23</sup> House of Lords, *Parliamentary Debates*, 5<sup>th</sup> ser. vol. 50, at 761 – 2 (25 May 1922) (The Lord Chancellor)

conscious choice to adopt a phrase that did not have a technical medical meaning. The Canadian legislature closely followed the relevant English phrasing.<sup>24</sup>

28. The Crown asserts that to qualify as a disturbance of the mind under s.233, the relevant disturbance must be caused by biological and hormonal factors alone. Section 233 does not specify the types of effects that may be considered in establishing a relevant disturbance of the mind. The Crown's position is inconsistent with Parliament's deliberate choice of general and non-medical language in s.233 and with the current expert understanding of emotional states and mental disorders. For example, leading authorities suggest that many types of disorder are captured within the omnibus phrase "postpartum depression".<sup>25</sup> In the context of s.233, one cannot understand the effects of giving birth without examining the context in which the individual woman gave birth. Any ensuing disturbance of the mind will be a function of all these factors, biological, hormonal, social, psychological, economic and familial.<sup>26</sup>
29. The expert evidence adduced at trial confirmed that mental disturbances may have their origins in a variety of factors that might subsist after a woman has given birth. A proper account of the origin of these disorders extends well beyond biology and hormonal changes, paying close attention to social factors. The evidence given at trial by both experts and accepted by the trial judge was that biological (including hormonal), psychological and social factors are inextricably bound together.<sup>27</sup> Each of these factors may be properly understood as an effect of giving birth or of lactation.
30. The Crown's proposed limitation on the type of effects that are legally relevant to infanticide therefore runs contrary to the expert evidence as well as the broad legislative wording chosen by Parliament. Based on the testimony of the experts, it is impossible on the current state of medical knowledge to distinguish between the relative contributions

<sup>24</sup> House of Lords, *Parliamentary Debates*, 5th ser. vol. 50, at 1097 – 1098 (22 June 1922) (Lord Parmoor)

<sup>25</sup> Ian Brockington *Motherhood and Mental Health* (Oxford: Oxford University Press, 1998) at p. 181; Michael Gelder, Richard Mayou & Philip Cowan, *Shorter Oxford Textbook of Psychiatry* (Oxford: Oxford University Press, 2001), at pp. 501-2; Joan Busfield, *Men, Women and Madness: Understanding Gender and Mental Disorder* (Basingstoke: MacMillan Publishing, 1996)

<sup>26</sup> See authorities at note 22 *supra*; see also Statistics Canada (2006), *supra*, at p. 53

<sup>27</sup> Trial transcript, Dr. Gojer (evidence in chief), 29 July 2008, at p. 13; Trial transcript, Dr. Klassen (evidence in chief), 25 July 2008 at pp. 42-3

of each type of effect (hormonal, biological, or social) in any given case. Accordingly, LEAF respectfully submits that it would be inappropriate to confine the test for a disturbance of the mind to a subset of potential psychiatric disorders, or to crystallize the permitted range of disorders according to the (necessarily contingent and evolving) state of contemporary psychiatric knowledge.

31. LEAF further submits that the Crown’s assertions that “mental disturbance” should now fall under s.16 is incorrect. Parliament’s intent was to make the lesser verdict of infanticide available to women suffering a mental disturbance well short of the “mental disorder” threshold. Infanticide is a mitigated form of culpable homicide; however, it is a form of culpable homicide all the same. Interpreting “mental disturbance” as “mental disorder” would risk making an infanticide verdict unavailable in the very cases where it was meant to apply: those in which the accused woman suffered a mental disturbance capable of affecting her judgment and behaviour but insufficient to render her not criminally responsible under s.16 of the *Code*. Requiring a degree of mental disturbance approaching s.16 “mental disorder” would do violence to Parliamentary intent in enacting s.233 and specifically using the language of “mental disturbance” instead of “mental disorder”. As Veit J. held in *R. v. Coombs*, “[i]n order to be entitled to the diminished responsibility offered by Parliament in the crime of infanticide, the issue is not whether there is a mental disorder, but whether the mind was disturbed”.<sup>28</sup>

### **III. The Mens Rea of Infanticide – Intentional killings are captured by s. 233**

32. LEAF submits that a contextual reading of the relevant provisions, together with an appreciation of the legislative history, support the statement by McLachlin J. (as she then was) in *Creighton* that infanticide applies to the “intentional killing of a child” (emphasis added).<sup>29</sup>

<sup>28</sup> *R. v. Coombs*, 2003 ABQB 818, at para. 69

<sup>29</sup> *R. v. Creighton*, [1993] 3 S.C.R. 3, at para. 71 (Q.L.)

**A. Parliamentary intent – To create a lesser form of intentional homicide**

33. The offence of infanticide was introduced into the *Code* in 1948. The offence was modeled on the *English Infanticide Act, 1922*, which, in amended form, is still the law in England today. However, the Canadian and English provisions operate somewhat differently from one another. *The Infanticide Act, 1922* establishes infanticide as a partial defence to murder, confirming that “but for this Act” the offence of infanticide “would have amounted to murder”. The Canadian Parliament chose to enact an offence of infanticide rather than a defence.
34. Following the English example, the law enacted by the Canadian Parliament in 1948 provided that “A woman who by wilful act or omission causes the death of her newly born child shall be deemed not to have committed murder or manslaughter if.....” the elements of infanticide are present. In the House of Commons, Minister Ilsley identified the inadequacy of the then available alternative charges, including manslaughter and concealment of birth, insisting that “the offence is murder; that is, unless the woman is insane”. The Parliamentary intention to create infanticide as a form of intentional killing was plain from these debates.<sup>30</sup>
35. In 1954, a number of changes were made to the *Code*, including to the infanticide provisions. “Newly born child” was defined as a child under one year of age, the cause of the mental disturbance for the purposes of the offence was expanded to include the effects of lactation as well as childbirth, and what is now s.663 was added to the *Code* in order to prevent unjustified acquittals. These three changes responded to the concerns raised by McRuer C.J.H.C. in *R. v. Marchello*.<sup>31</sup>
36. The 1954 revisions also removed the deeming language (“shall be deemed not to have committed murder or manslaughter”) which mandated an infanticide conviction if the requisite elements were met, and added what is now s.662(3). These amendments to the infanticide provisions were introduced as part of a comprehensive project of rationalizing the *Code*, which also included standardization of sentences (the sentence for infanticide

<sup>30</sup> *House of Commons Debates*, 14 June 1948, at 5185

<sup>31</sup> *R. v. Marchello* (1951), 100 C.C.C. 137 (Ont. H.C.); see also Cunliffe (2009), *supra*, at pp. 100-103.

was increased from three to five years) and dropping the language of “deeming” from what is now s.233 of the Code. The changes were described at the time as being “intended to be a change in form” and not substance.<sup>32</sup> This makes sense, since the language of “deeming” in s.233 was redundant: what is now s.233 clearly created a third culpable homicide offence, in addition to murder and manslaughter. LEAF submits that removal of the “deeming” language was not intended to effectively repeal s.233 or otherwise make infanticide available only in cases where the elements of murder were not present. The legislative intent that infanticide apply in cases which would otherwise be murder has remained unchanged since 1948.<sup>33</sup>

**B. The meaning of “wilful” in s. 233**

37. Section 233 provides that the “act or omission” that caused the death must be “wilful”. LEAF submits that a “wilful” killing under s.233 includes killings that would otherwise be murder under s 229(a)(i) (intentional murder) and those under s 229(a)(ii) THAT requires a combination of intention and recklessness.
38. The only Supreme Court of Canada judgment in which the *mens rea* of s.233 has been considered is *Creighton*, where McLachlin J. described the *Code*’s homicide scheme as follows:
- The *Criminal Code* defines three general types of culpable homicide. There is murder, the intentional killing of another human being. There is infanticide, the intentional killing of a child. All other culpable homicides fall into the residual category of manslaughter (s.234, *Criminal Code*).<sup>34</sup>
39. LEAF submits that this statement, albeit in *obiter*, is correct and should be adopted by this Court.

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<sup>32</sup> A.J. MacLeod and J.C. Martin, “Offences and Punishments Under the New Criminal Code” (1955) 33 Can. Bar Rev. 20 at 40

<sup>33</sup> Cunliffe (2009), *supra*, at pp. 113-116; *House of Commons Debates* (10 March 1954), at pp. 2864-6

<sup>34</sup> *R. v. Creighton*, *supra*, at para. 71

40. This Court has observed that the concept of “wilful” has “different meanings and is used inconsistently in statute and case law”.<sup>35</sup> Accepted principles of statutory interpretation dictate that each word of an enactment must be given some meaning, where practicable. As the Supreme Court has stated, “the legislator does not speak in vain”.<sup>36</sup> In the case of s.233, reading “wilful” to refer only to the act or omission would render this word superfluous because the criminal law presumes that an act must be wilful to attract criminal liability. An accidental or involuntary act or omission will not be criminal.<sup>37</sup> Section 233 would be interpreted to require an intentional act even if the word “wilful” were not present. By including the word “wilful”, Parliament must have intended it to have some meaning beyond the standard common law presumption. This meaning can only be found if “wilful” refers to the consequence, the causing of death.
41. Additional support for this interpretation is given by comparison with manslaughter. As McLachlin J. explains in the passage from *Creighton* quoted above, manslaughter is a residual category covering culpable homicides that are “not murder or infanticide”. The *Code* contemplates a clear distinction between the three homicide offences, with each having a distinct sphere of operation. The Crown’s interpretation, which would confine infanticide to non-intentional killings, would blur these clearly codified lines by limiting infanticide to a subspecies of manslaughter. This result flies in the face of s.234, which clearly stipulates that manslaughter and infanticide are distinct, non-overlapping offences. It also renders s.233 redundant, there being little need for the provision to cover cases which would otherwise be manslaughter (and not murder), given the sentencing discretion available on a manslaughter conviction.<sup>38</sup>
42. It is therefore not surprising that judicial authority has tended to support the proposition that s.233 requires an intentional killing. In *Smith*, the Newfoundland District Court accepted the view that the *mens rea* for infanticide requires not just a wilful act but a

<sup>35</sup> *R. v. Harding* (2001), 160 C.C.C. (3d) 225 (Ont. C.A.), at para. 56, citing *R. v. Buzzanga and Durocher*, (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at p. 717

<sup>36</sup> *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 37, quoting *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838

<sup>37</sup> See also: Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Scarborough: Carswell 1994, looseleaf updated to 1999) at s. 4.3(c)(ii)(B).

<sup>38</sup> Grant (2010) *supra*, at p. 261; Cunliffe, *supra*, at pp. 114-115

“bad motive” – in effect, a wilful killing.<sup>39</sup> A version of this reasoning was adopted by the Ontario High Court in *Del Rio*, and more recently by the Court of Quebec in *Lucas*.<sup>40</sup>

**C. Section 662(3) does not alter the nature of infanticide**

43. Section 222(4) sets out the three culpable homicide offences known to Canadian law: “[c]ulpable homicide is murder or manslaughter or infanticide.” The offence of infanticide is created by s.233. Section 234 stipulates manslaughter as the residual category: “Culpable homicide that is not murder or infanticide is manslaughter.”
44. Section 662(3) provides that infanticide is a lesser included offence to murder, stipulating as follows:

**Conviction for infanticide or manslaughter on charge of murder**

(3) Subject to subsection (4), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

45. As mentioned above, infanticide is an anomalous kind of included offence, making this specific provision necessary. The common law rule is that the “greater” offence must include all the elements of the lesser offence, such that it is impossible to commit the former without also committing the latter.<sup>41</sup> Normally, the greater offence includes all the elements of the lesser and adds something more. For example, aggravated assault includes all the elements of simple assault, plus serious injury or endangerment to the victim. In the case of murder/infanticide, by contrast, the lesser offence contains a number of elements not present in the greater: the accused must be a woman, she must not yet have recovered from the effects of giving birth, she must have a disturbed mind, and the disturbed mind must be a consequence of the effects of giving birth or lactation.

<sup>39</sup> *R. v. Smith* (1976), 32 C.C.C. (2d) 224 (Nfld. Dist. Ct.), at p. 231

<sup>40</sup> *R. v. Del Rio*, [1979] O.J. No. 16 (H.C.), at paras. 45-46 (Q.L.); *R. c. Lucas*, 1999 CanLII 7042 (QC C.Q.). See also the review of case law in Cunliffe (2009), *supra*, at pp. 115-116.

<sup>41</sup> *R. v. G.R.*, [2005] 2 S.C.R. 371, at paras. 25-26

It is also significant – and unusual – that the additional elements of the lesser included offence of infanticide are exculpatory.

46. Without s.233, the “wilful” killing of the newly born child would, by definition, be murder. Parliament would not have included the word “wilful” in s.233 if s.662(3) were meant to exclude a verdict of infanticide for intentional killings.
47. A literal and narrow reading of s.662(3) suggests that a conviction for infanticide cannot be entered where murder is proved (“where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder”). Yet due to the atypical nature of infanticide as a lesser included offence which contains all of the elements of the greater offence, murder will almost always be proven in cases of infanticide. On the one hand, s.662(3) seems to suggest that murder and infanticide are mutually exclusive. On the other, Parliament’s intent to legislate infanticide as a mitigated form of culpability for intentional killings – which would otherwise be murder – is clear.
48. The Supreme Court of Canada has formulated the modern approach to statutory interpretation on numerous occasions in the following manner:

“[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” [citations omitted] This means that “statutory interpretation cannot be founded on the wording of the legislation alone” (*Rizzo Shoes*, para. 21).

Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.<sup>42</sup>

49. The words “but does not prove murder” in s.662(3) give rise to a latent ambiguity when read in the context of s.233 and other homicide provisions of the *Code*. The Crown

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<sup>42</sup> *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, at paras. 9-10; See also: ss. 10 and 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which require that particular words in a statutory provision be interpreted harmoniously with the “true spirit” of the Act and that legislation be accorded such “fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

argues that no real ambiguity exists: s.662(3) means that a conviction for infanticide cannot be entered where murder is proven. This interpretation, however, cannot be sustained when s.662(3) is read in the entire context of the culpable homicide provisions of the *Code*, as is required by the modern approach to statutory interpretation.

50. This Court's very recent judgment in *R. v. Sarrazin* sheds light on the proper interpretation of s.662 and, in LEAF's submission, demonstrates that it cannot have the meaning ascribed to it by the Crown. That case dealt with the interaction between murder and attempted murder. The Respondent Crown contended that the homicide-specific language of s.662(2) supersedes the general provision on attempts as included offences (s.660) and means that attempted murder is not a lesser and included offence to murder. Doherty J.A. (Epstein J.A. concurring, and Moldaver J.A. concurring on this issue) rejected the "technical" argument put forward by the Crown, finding that it "reads too much into" s.662.<sup>43</sup> The provision simply "speaks to liability for offences that are lesser and included in the offence with which the accused is charged either by virtue of the general language of s.662(1) or the specific provisions of ss.662(2)-(6)".<sup>44</sup> Doherty J.A. held that the ambiguous language in s.662 does not displace the general proposition that a person can be convicted of an attempt when charged with the complete offence. Section 662 has a very limited function, designating certain offences as lesser and included, but leaving intact the substance of the offences.

51. With specific reference to s.662(3), Doherty J.A. explained:

Section 662(3) is part of s. 662 and must be read in that context. I think s. 662(3) serves to limit the general language of s. 662(1) by providing that only manslaughter or infanticide are available lesser and included offences. Thus, for example, an accused cannot be convicted of assault causing bodily harm on a murder charge even though the charge of assault causing bodily harm might have been an included offence in the murder charge under the general language of s. 662(1): see *R. v. Chichak* (1978), 38 C.C.C. (2d) 489 (Alta. Sup. Ct. (App. Div.)).<sup>45</sup>

<sup>43</sup> *R. v. Sarrazin*, *supra*, at paras. 27, 35

<sup>44</sup> *Ibid.*, at para. 39

<sup>45</sup> *Ibid.*, at para. 38

Section 662(3) stipulates that (other than attempts) only infanticide and manslaughter are lesser included offences to murder. The remaining question is what meaning to ascribe to the words “but does not prove murder”.

52. LEAF submits that the Court’s contextual reading of s.662 in *Sarrazin* is instructive in the case at bar. It is necessary to rationalize the words of s.662(3) with s.233 and the homicide provisions generally. The de-contextualized reading of s.662(3) proposed by the Crown, which would render s.233 of the *Code* generally inoperative, cannot be correct. Indeed, Herold J. in the present case recognized this problem and refused to give a rigid, literal interpretation to s.662(3). The literal approach advocated by the Crown would negate the plain intention of Parliament to provide a separate regime for women who, often in dire and personally tragic circumstances, kill their newly born children while suffering from a disturbance of the mind caused by the effects of giving birth or lactation. Instead, the infanticide provisions should be read in a manner that preserves Parliament’s deliberate choice to provide for a mitigated form of culpability for intentional killings in the circumstances stipulated by s.233. Basic principles of statutory interpretation, Parliamentary intent in enacting this unique offence and the *Charter* value of substantive equality each support resolving the latent ambiguity within these provisions in this manner.
53. The Crown’s preferred interpretation of the infanticide provisions would have the effect of repealing Parliament’s enactment in relation to the very kinds cases these provisions were meant to cover: intentional killings of a newly born child by a mother with a mental disturbance consequent on birth or lactation. As held by Dickson C.J. in *Morgentaler*:

One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.<sup>46</sup>

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<sup>46</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at para. 48 (Q.L.)

LEAF submits that this is just as true when Parliament has created a mitigated offence like infanticide. Judicial interpretation must not vitiate the intent of Parliament to prescribe a lower degree of culpability by way of this separate offence.

54. LEAF also disputes the Crown's contention that the social ills addressed by the infanticide provision have all but disappeared, rendering the provision otiose. In relation to the Crown's policy-based concerns with infanticide, it is the role of Parliament and not to the courts to amend or abolish the provisions as it sees fit. As observed by Lamer C.J. in *McIntosh*, statutory interpretation can only go so far:

This principle was eloquently stated by La Forest J.A. (as he then was) in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, at p. 210:

There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.

This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.<sup>47</sup>

LEAF submits that the Crown's concerns about infanticide should be left to be addressed by Parliament if and when it sees fit.

55. Consistent with the modern approach to statutory interpretation, LEAF submits that the ambiguity between s.233 and s.662(3) must be resolved in favour of preserving the

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<sup>47</sup> *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 28-29. Lamer C.J. went on to note that "[i]t is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. By this same reasoning, where such a provision is, on its face, favourable to an accused, then I do not think that a court should engage in the interpretive process advocated by the Crown for the sole purpose of narrowing the provision and making it less favourable to the accused."

possibility of an infanticide conviction in cases of intentional killing. Given Parliamentary intention, LEAF is in respectful agreement with Herold J.'s conclusion that "a fair and liberal reading which would inure to the benefit of the accused would be to allow (unlike the usual practice when dealing with included offences) a finding that a verdict of infanticide may be substituted for a verdict of guilty of murder, even where murder is otherwise proven in appropriate circumstances".<sup>48</sup> Only this reading will ensure that infanticide is left to the trier of fact in appropriate circumstances regardless of the Crown's charging discretion. This interpretation would vindicate Parliament's intent to create three distinct homicide offences (s.222) and have infanticide function as a lesser included offence to murder (s.662(3)). Only this reading would allow proper scope for each of the three forms of culpable homicide to operate in the circumstances it was intended to cover.<sup>49</sup>

56. The latent ambiguity in s.662(3) at the heart of this appeal appears to have arisen in 1954 when the deeming language was removed from the precursor to s.233. LEAF submits that the ambiguity was an unintended consequence of standardization. It was not intended to effect a fundamental redefinition of infanticide from a crime of intent to one of negligence, or from a mitigated form of murder to an alternate version of manslaughter.<sup>50</sup>
57. Herold J. was alive to the contemporary trend of the Crown increasingly charging murder where the evidence suggests infanticide.<sup>51</sup> The Crown is correct (at para. 68) that its charging decision is generally not interfered with by courts. But the Crown's charging discretion does not extend so far as rendering inoperative an offence that Parliament has chosen to create and maintain.

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<sup>48</sup> Reasons for Judgment, para. 37

<sup>49</sup> During Parliamentary debate on the 1954 *Criminal Code* standardization, one stated intention of the revision was to eliminate "overlapping and repetition": see The Honourable Mr. Garson, *House of Commons Debates* (15 December 1953), at p. 943.

<sup>50</sup> *House of Commons Debates* (10 March 1954), at pp. 2446-7 and 2864-6. Sections in relation to which substantive reform was proposed were specifically debated (for example, clause 570 which became s. 663, at pp. 2864-6). Substantive amendments were also listed in parliamentary debate: *House of Commons Debates* (15 December 1953), at p. 946 and *Royal Commission on Revision of Criminal Code: Report* (Ottawa, 1952), at pp. 7-12 and 17. See also Cunliffe (2009), *supra*, at pp. 102-3.

<sup>51</sup> Reasons for Judgment, at para. 11

#### **IV. Procedural Implications: Burden and standard of proof**

58. The burden and onus of proof will differ depending on whether the charge is infanticide or murder.

##### **A. Where the charge is infanticide**

59. As with any offence, the Crown has the burden of proving each element beyond a reasonable doubt. If the Crown is unable to prove the exculpatory elements of non-recovery from childbirth and the mental disturbance, s.663 still permits a conviction for infanticide. Section 663 applies only where the Crown charges infanticide. It prevents the accused from securing an unjustified acquittal if the Crown fails to demonstrate that the accused's mind was disturbed by the effect of having given birth; or that she had not yet recovered from giving birth – in essence, it prevents an accused from arguing for an acquittal on infanticide on the basis that she was in fact guilty of murder. Where the Crown actually charges murder, this provision has no application.

##### **B. Where the charge is murder**

60. This is where, by necessity, the separate offence of infanticide takes on certain qualities of a defence. As observed by Grant et. al., “[m]any of the difficulties in interpreting the section relate to the fact that, while s.233 is an offence-creating provision, in practical terms it operates more as a defence”.<sup>52</sup>

61. The inculpatory elements of infanticide – i.e. the causing of death and the intent to kill – overlap with those of murder. As always, they must be proven by the Crown beyond a reasonable doubt.

62. However, because it is not an ordinary lesser included offence – where all the elements would already be in play under the Crown's burden of proof for the greater offence – it is necessary to implement some additional criterion upon which the trial judge can decide whether to put infanticide to the trier of fact. LEAF submits that the proper criterion is

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<sup>52</sup> Grant et al. (1994), *supra*, at s. 4.3(c)(ii)

the “air of reality” or “some evidence” test commonly applied when an affirmative defence is raised.<sup>53</sup>

63. Where the evidence discloses an air of reality to the exculpatory elements of infanticide – a killing of a child under a year of age by a mother who had not recovered from the effects of childbirth or lactation and whose mind was consequently disturbed – then infanticide must be left to the trier of fact. If this air of reality is met, then the Crown must disprove at least one exculpatory element of infanticide beyond a reasonable doubt .
64. This has procedural implications for the conduct of a jury trial as well. Typically, a jury will be instructed to consider the more serious charged offence first and then, only if it finds that the offence is not proven, proceed to consider whether any included offence has been proven. However, this procedural model is inappropriate in the case of infanticide. Rather, in order to ensure that an infanticide conviction is available in cases which would be murder but for the mitigating factors stipulated by s.233, the trial judge should instruct the jury to consider infanticide first if there is an air of reality to the additional elements. The jury should be instructed to return a conviction for infanticide if the Crown has been unable to negate one of these elements beyond a reasonable doubt.
65. If the jury is instructed to consider murder first and not go on to consider infanticide if murder is proven – as the Crown urges – then Parliament’s intent to create a mitigated offence applicable in the prescribed circumstances would be severely compromised. Its availability as a verdict would in most cases be illusory.

## **V. Conclusion**

66. The infanticide provisions in s.233, s.662 (3) and s.663 are ambiguous at best and may well not be the best way of recognizing the reduced culpability of women who kill their newly born children while suffering from a mental disturbance. For example, removing the mandatory minimum sentences for murder would make the inclusion of infanticide in the *Code* less necessary. However, the issue before this Court is not how to reform the

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<sup>53</sup> *R. v. Cinous*, [2002] 2 S.C.R. 3, at paras. 49, 83

law so as to best provide a just regime for these women but rather how to interpret the regime Parliament has chosen to enact and maintain for many decades. LEAF's position is that this interpretation must take into account the reasons for enacting the crime of infanticide and the systemic equality dimensions of reproduction for women who find themselves in these circumstances. A properly contextual interpretation of the provisions dictates a generous reading in which the lesser verdict of infanticide would continue to be realistically available to women who commit this rare and tragic act.

#### PART IV – COSTS

67. LEAF seeks no costs and asks that no costs be awarded against it.

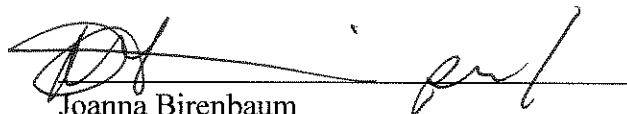
**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of September, 2010.



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