Court File No. 36585

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

MEREDITH KATHARINE BOROWIEC [M.K.B.]

Respondent

- and -

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

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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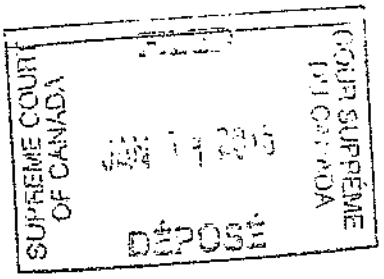

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PART I – OVERVIEW

1. Infanticide is one of only two offences in the *Criminal Code* that applies exclusively to women. By its very nature, the infanticide provision incorporates questions of social policy regarding the conditions affecting women during pregnancy, childbirth and child-rearing. An interpretation of infanticide that includes an assessment of the complex factors affecting a woman's state of mind after birth and/or lactation, including biological, social, economic, cultural, religious and psychological features, respects Parliament's original intention in creating the infanticide provision. Parliament's intention remains relevant today. The mitigating framework for infanticide in s. 233 reflects the principles of substantive equality, which provide that the law should not be interpreted or applied in a manner that exacerbates historical disadvantage or vulnerability.[1] Societal values and the conditions of many women may have evolved since the infanticide provision was first introduced, but the mitigating framework of infanticide, and the underlying concerns relating to the social context of women's inequality to which it responds, have relevance and application in the contemporary context.

2. The words "her mind is… disturbed" in the infanticide provision set a cognizable legal standard that was purposefully chosen by Parliament for its breadth and flexibility. It must not be interpreted in a manner that inappropriately medicalizes this *legal* standard simply because it is broad and flexible enough to allow for judicial interpretation and application in a wide range of circumstances. In the context of s. 233, substantive equality is best promoted by an interpretation that accords with Parliament's original intent of creating a flexible legal standard that accounts for the diverse array of factors – medical, social and economic – that may arise upon birth and/or lactation. LEAF submits that the Appellant's arguments in this appeal provide insufficient justification to reinterpret and restrict the availability of a statutory criminal law defence that operates to promote the substantive equality of women.

PART II – QUESTIONS AT ISSUE

3. LEAF takes the position that s. 233 of the *Criminal Code* sets an appropriate and cognizable legal standard for disturbance of the mind that properly integrates principles of

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[1] *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548 at para. 17, **LEAF's Book of Authorities ["BoA"], Tab 1**; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paras. 112-15 (per L'Heureux-Dubé J, concurring) ["*G. (J.)*"], **LEAF's BoA, Tab 2.**

substantive equality within the criminal law.

PART III – STATEMENT OF ARGUMENT

A. The mitigating framework for infanticide adopted and maintained by Parliament in section 233 of the *Criminal Code* has relevance and application in the contemporary context, and reflects the principles of substantive equality

4. The mitigating framework for infanticide has been part of Canadian criminal law since 1948. The version of the provision in force today has remained on the statute books in a form unchanged since 1954. The Appellant portrays the infanticide provision, and the underlying concerns that motivated its adoption by Parliament, as "outdated", and "unjust",[2] and goes so far as to suggest that the "problems" associated with it "will only be eliminated if infanticide were to be abolished".[3] While purportedly acknowledging that such a change in the law could only be accomplished by Parliament,[4] the Appellant's position on this appeal is evidently shaped and driven by its low opinion of the policy concerns that motivated Parliament's adoption and maintenance of the infanticide provision. In effect, through the guise of statutory interpretation, the Appellant seeks to restrict the availability of the mitigating framework for infanticide, and inappropriately substitute its own policy preference for that of Parliament.

5. Contrary to the Appellant's portrayal, LEAF submits that the mitigating framework for infanticide set out in s. 233 continues to have relevance and application in the current context, as it enables courts the flexibility and discretion to administer justice in a manner consistent with the principles of substantive equality. The restrictive interpretation of s. 233 advanced by the Appellant would undermine substantive equality, and is inconsistent with the statutory text and with Parliament's intent in enacting a mitigating framework for infanticide. Such an interpretation ought to be rejected.

6. The legislative record confirms that in enacting the mitigating framework for infanticide in 1948, Parliament sought to respond to the reality that women charged with murdering their newly born children were frequently acquitted by juries who were sympathetic to their social,

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2 Factum of the Appellant, at paras. 69-72.
3 Factum of the Appellant, at para. 73.
4 Factum of the Appellant, at para. 73.

economic, cultural and psychological circumstances.[5] As noted by Doherty JA in *L.B.*, "[i]n carving infanticide out from the definition of murder and treating it as a distinct and less culpable offence, Parliament attempted to bring the law into line with the community's sense of fairness and justice as expressed through the verdicts of numerous juries".[6] Parliament's choice to enact a mitigating framework of infanticide was not simply an expedient to enable a conviction to be achieved when a woman killed her newly-born child. Parliament also sought to fashion a homicide offence that would achieve principled and appropriate convictions and dispositions in certain cases that were judged by Parliament to be deserving of compassion and leniency.

7. In defining the class of cases to which the new mitigating framework of infanticide would be available, Parliament expressly chose to adopt the concept of disturbance of the mind that had been employed in the English *Infanticide Act* of 1922.[7] The original U.K. parliamentary debates thus assist in illuminating the legislative intention underpinning this aspect of the infanticide provision. In the 1922 parliamentary debates, the Lord Chancellor, who proposed the wording of the 1922 Act, explained that these statutory words were intentionally "not terms of art":

> I came to the conclusion that there was more reason for misunderstanding by attempting to use the language which had been appropriated by prescriptive usage to insanity proper and to mental derangement produced by drunkenness, and that it was better to attempt a formula which might be the subject of reasonable judicial decision.[8]

The U.K. Parliament made a conscious choice to adopt a phrase that did not reflect the insanity defence, and did not have a technical medical meaning. The Canadian legislature followed this choice. As well, both the UK and Canadian legislative debates emphasized that the disturbance of the mind required for an infanticide conviction was to be distinguished from the normal physical challenges of childbirth, and on the other hand, from the rigorous requirements for the

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[5] House of Commons Debates, 20th Parl., 4th Sess., Vol. 5 (14 June 1948) at p. 5184 (Diefenbaker), 5185 (Ilsley), 5187 (Ilsley), 5187 (Diefenbaker), **Appellant's BoA, Tab 22**. Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada*, (1984) 34 U Toronto LJ 447 [Backhouse], **LEAF's BoA, Tab 12**; The Honourable Madam Justice B. M. McLachlin, *Crime and Women – Feminine Equality and the Criminal Law*, (1991) 25 UBC Law Rev 1 at 2-6, **Appellant's BoA, Tab 19;** Emma Cunliffe, *Infanticide: Legislative History and Current Questions*, (2009) 55 Crim L Q 94 at 96-99 [Cunliffe], **LEAF's BoA, Tab 13**.

[6] *R. v. L.B.*, 2011 ONCA 153 at para. 71 [*L.B.*], **Appellant's BOA, Tab 3**.

[7] House of Commons Debates, 20th Parl., 4th Sess., Vol. 5 (14 June 1948) at p. 5185 (Ilsley), **Appellant's BoA, Tab 22**; Cunliffe, *supra* at 97, **LEAF's BoA, Tab 13**.

[8] House of Lords, *Parliamentary Debates*, 5th ser. vol. 50, at 761-762 (25 May 1922) (Lord Chancellor), **LEAF's BoA, Tab 15.**

insanity defence.[9] The legislature also anticipated that medical evidence *might* be called regarding a woman's mental condition in the context of an infanticide trial, but intended that the trier of fact would ultimately determine whether her mind was then disturbed on the basis of all of the evidence – including that provided by medical experts.[10]

8. It must be acknowledged that while the use of the disturbance of the mind element within s. 233 appears to suggest a medical or scientific foundation for infanticide, the concerns that motivated legislators in creating the mitigating framework of infanticide were not medical. Contemporaneous medical knowledge at the time of the passage of the British and Canadian infanticide legislation did not extend to understanding the medical effects of childbirth or lactation on the mind.[11] LEAF submits that in adopting and maintaining the infanticide provision, Parliament has chosen to recognize the unique stressors accompanying the reproductive and caregiving roles ascribed to women.

9. Parliament's reasons for enacting the infanticide provision remain pressing social concerns. The motivating concerns that underpinned the enactment of s. 233 – based as they were upon a compassionate understanding of the unique inequalities experienced by women during pregnancy, childbirth and child-rearing – are not anachronisms out of step with contemporary social norms and values, as the Appellant asserts.[12] Women continue to disproportionately experience the negative effects of continuing inequality in relation to childbirth and child-rearing. Social, economic, cultural, psychological and biological factors intersect to cause some mothers of newly-born children to experience a disturbance of the mind. Single mothers still experience discrimination and social stigma related to family status.[13]

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[9] House of Lords, *Parliamentary Debates*, 5th ser. vol. 50, at 439 (16 May 1922) (Lord Phillimore), **LEAF's BoA, Tab 14;** House of Commons Debates, 20th Parl., 4th Sess., Vol. 5 (14 June 1948) at 5185 (Ilsley), **Appellant's BoA, Tab 22**.

[10] House of Lords, *Parliamentary Debates*, 5th ser. vol. 50, at 1098 (22 June 1922) (Lord Chancellor), **LEAF's BoA, Tab 16.**

[11] Kirsten Johnson Kramar & William D. Watson, *Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate* (2008) 33:2 Can J Sociology 237 at 245, **Appellant's BoA, Tab 18**; Tony Ward, *The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938* (1999) 8:2 Social & Legal Studies 163 at 174, **LEAF's BoA, Tab 19**.

[12] Factum of the Appellant, at paras. 69-70, 92-93.

[13] For example, as this Court has acknowledged, single mothers are disproportionately affected by child protection proceedings: *G. (J.)*, *supra* at para. 113 (per L'Heureux-Dubé J, concurring), **LEAF's BoA, Tab 2.** See also, more generally, Ontario Human Rights Commission, "Family status and other Code grounds", *The cost of caring: Report on the consultation on discrimination on the basis of family status*, November 2006, at p.8, available online at http://www.ohrc.on.ca/en/cost-caring-report-consultation-discrimination-basis-family-status, **LEAF's BoA, Tab 17**.

Women continue to be disproportionately responsible for the care of young children.[14] Access to safe abortions, birth control and adequate health care is by no means a guarantee, particularly for impoverished women and those in remote areas.[15]

10. LEAF submits that the test for disturbance of the mind advanced by the Appellant – substantially compromised psychological health, that is causally connected to the act or omission that resulted in the death[16] – is inconsistent with Parliamentary intent and substantive equality principles. Further, it oversteps the bounds of the courts' proper role in interpreting statutory provisions. Parliament deliberately chose to describe the constituent elements of infanticide using a broad, general and non-medical phrase, disturbance of the mind. The social context of women's inequality, and the role played by this social context in the disturbances of the mind experienced by some women who kill their newly born children, was a central aspect of the original legislative intention underlying the mitigating regime for infanticide, and remains an important part of the current justification for this lesser offence. Parliament has not seen fit to revisit this choice, and the infanticide provision reflects important substantive equality principles that remain relevant and applicable. In these circumstances, the Appellant has failed to demonstrate that the provision needs to be reassessed, or its availability restricted through the articulation of additional threshold requirements.

B. Section 233 sets an appropriate and cognizable legal standard for mental disturbance that properly integrates principles of substantive equality

11. As this Court has held, "[s]ubstantive equality, as contrasted with formal equality, is grounded in the idea that: 'The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally

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[14] Statistics Canada, "Families, Living Arrangements and Unpaid Work", *Women in Canada 2010-2011 – A Gender-Based Statistical Report* (Ottawa: Social and Aboriginal Statistics Division, December 2011) at p. 20, **LEAF's BoA, Tab 18**.

[15] "Canadian Contraceptive Consensus", *Society of Obstetricians and Gynaecologists of Canada*, October 2015, at S7-S9, available online at http://sogc.org/guidelines/canadian-contraception-consensus-part-1-of-4-replaces-no-143-february-2004-no-174-april-2006-no-195-july-2007-no-219-november-2008-no-280-september-2012/, **LEAF's BoA, Tab 10**. See also the chart prepared by the Abortion Rights Coalition of Canada, which lists the clinics providing abortion services in Canada. Almost all of these clinics are located in urban centres, and there are no services available for women in Prince Edward Island: http://www.arcc-cdac.ca/list-abortion-clinics-canada.pdf (chart updated November 2015), **LEAF's BoA, Tab 11**.

[16] Factum of the Appellant, at paras. 82, 90-93.

deserving of concern, respect and consideration'".[17] Substantive equality recognizes that "the concept of equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality".[18] This Court has acknowledged that the principles of substantive equality provide an important interpretive lens when considering the content of criminal law defences.[19] In the context of s. 233, substantive equality is best promoted by an interpretation that accords with Parliament's original intent of creating a flexible legal standard that accounts for the diverse array of factors – medical, social and economic – that may arise upon birth and/or lactation.

12. LEAF submits that the statutory language of s. 233 sets an appropriate and cognizable legal standard that properly integrates principles of substantive equality within the criminal law. The provision requires a mental disturbance (unless s. 663 is applicable), and requires proof of a connection between childbirth and/or lactation and the disturbance. No causal link is required between the mental disturbance and the act that causes the child's death. There needs only to be a co-existence of the mental disturbance and the death. The statutory standard acknowledges that disturbances of the mind that may accompany childbirth and/or lactation, and that justify reduced culpability, may arise in a diverse array of circumstances. This reflects the complex interaction of social, economic, psychological, biological, and cultural factors that play a role in the mental state of the very few women who kill their newly born children. Nevertheless, not every killing of a newly born child by its mother will be an infanticide; contrary to the Appellant's assertion,[20] the provision creates no tendency to presume that every mother who kills her newly born child must have been disturbed. LEAF's submission that 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 creating disturbances of the mind in some women, does not lead to the proposition that every woman who kills a newly born child suffers a disturbance of the mind.

13. Both the Appellant's position before this Honourable Court and Justice Wakeling's dissent in the court below are predicated upon the misplaced assertion that the statutory language

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[17] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 15, citing *Andrews v. Law Society of British Columbia*, [1989]1 S.C.R. 143 at p. 181 (*per* McIntyre J.), **LEAF's BoA, Tab 4.**

[18] *Ibid.*

[19] *R. v. Lavallee*, [1990] 1 S.C.R. 852 at 874, 882-883 (*per* Wilson J. for the majority), **LEAF's BoA, Tab 5**.

[20] Factum of the Appellant, at para. 79.

of s. 233, as interpreted and applied by the courts since its enactment, fails to set an adequate standard for infanticide. The Appellant opines – as Justice Wakeling concluded – that the legal standard for disturbance of the mind must include a precise threshold, to guard against an imagined flood of women who might otherwise invoke the infanticide defence.[21] According to Justice Wakeling, in the absence of such "benchmarks", the statutory language of disturbance of the mind is a "void" with no "target" for triers of fact and experts.[22] The Appellant contends that triers of fact are "left with the instruction that 'disturbance' means whatever judges and juries think it means", and goes so far as to assert that s. 233 exhibits a degree of vagueness that "mocks the rule of law".[23] LEAF submits that these arguments do not withstand scrutiny.

14. In the context of a s. 7 *Charter* challenge, an impermissibly vague law is one that provides no "adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria".[24] This Court has drawn a distinction between impermissibly vague legislation and statutory concepts that may properly be framed in general terms in order to better achieve the legislator's objectives, warning that "[o]ne must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself".[25] Flexibility and vagueness are not synonymous.[26] Flexible, broad legal standards are common in Canadian law, and are frequently employed when bright-line tests or rigid rules might fail to capture adequately or appropriately the range of factual circumstances within the contemplation of the legislator.

15. While there is no constitutional challenge before this Court in this appeal, these insights from the vagueness jurisprudence are apposite when considering the criticisms leveled by the Appellant. LEAF submits that the breadth and flexibility of the statutory standard for disturbance of the mind within s. 233 reflects Parliament's deliberate choice, and properly allows for the integration of the principles of substantive equality. If further interpretive guidance regarding the

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21 Factum of the Appellant, at paras. 81, 89, 93; *R. v. Borowiec*, 2015 ABCA 232 at paras. 146-147, especially fn 52 (*per* Wakeling J.A., dissenting) [*Borowiec*], **Appellant's Record ["AR"], Vol. 1, Tab 10.**

22 *Borowiec*, *supra* at para. 100 (*per* Wakeling J.A., dissenting), **AR, Vol. 1, Tab 10**.

23 Factum of the Appellant, at para. 80.

24 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639-640, **LEAF's BoA, Tab 6**.

25 *Ibid* at 642.

26 *Ibid* at 622, citing *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 107 (*per* Beetz J.).

statutory concept of disturbance of the mind is required, this ought to be done in a manner that respects Parliament's original intention in creating a mitigating framework for infanticide based upon a broad, *legal* standard that avoided medical categories.

16. In effect, the Appellant is trying to mount a constitutional challenge to s. 233 in the absence of the ability to do so. LEAF submits that the test proposed by Justice Wakeling and the modified version advanced by the Appellant both overstep the bounds of the courts' proper role in interpreting legislation, by inappropriately medicalizing and restricting the legal standard for infanticide. According to Justice Wakeling, only "abnormal" psychological ailments capable of substantially impairing the mother's ability to make rational choices about the best interests of her child ought to meet the threshold of a disturbance of the mind.[27] The Appellant, while rejecting the "ability to make rational choices" and the "best interests of the child" portions of Wakeling J.A.'s test, argues that a benchmark of substantially compromised psychological health ought to be imposed, and that a causal connection between the compromised psychological health and the decision to do the act that caused the child's death ought also to be required.[28] These additional elements are necessary, it is said, to ensure that infanticide is available only when the woman's "moral culpability" is appropriately diminished.[29] The Appellant's formulation seeks to have this Court inject into the legal standard for disturbance of the mind the restrictive medico-legal categories that Parliament deliberately eschewed, and to substitute for Parliament's chosen formulation the Appellant's views regarding the circumstances that ought to determine the appropriate disposition in such cases.

17. The test proposed by the Appellant conflates a disturbance of the mind with mental disorder. This discloses a serious misunderstanding of the law. The interpretation of disturbance of the mind advanced by the Appellant is entirely unsupported by the text of s. 233 or its legislative context. The language of s. 233 does not require proof of mental disorder or a disease of the mind, or that expert evidence of a diagnosis of mental illness be adduced at all.[30] The text of s. 233 also does not include any requirement that the disturbance of the mind be causally linked to the act that caused the child's death; while such a requirement forms an express part of

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[27] *Borowiec*, *supra* at paras. 149-158 (*per* Wakeling J.A., dissenting), **AR, Vol. 1, Tab 1B**.
[28] Factum of the Appellant, at paras. 83-84, 90-93.
[29] Factum of the Appellant, at paras. 93, 95, 97.
[30] *R. v. Coombs*, 2003 ABQB 818 at para. 36, **Appellant's BoA, Tab 5**; *R. v. Leung*, 2015 BCSC 558 at paras. 34-35 (oral ruling on air of reality to defence of infanticide), **Respondent's BoA, Tab 9.**

other defences,[31] Parliament set no such restriction on the availability of the mitigating framework of infanticide. Furthermore, while the statutory wording of s. 233 makes clear that a disturbance of the mind must have a mental component, the text of s. 233 provides no support for the artificial parsing of non-psychological factors proposed by the Appellant. To the contrary, the statutory language indicates that the nature of the connection between birth and/or lactation and a disturbance of the mind may encompass a range of causal pathways associated with birth and/or lactation – including biological, social or environmental, or a combination thereof. The use of the phrase "by reason thereof" in combination with "the effects of giving birth… or of the effect of lactation" signals the possibility of a *flexible* link, that might include a temporal or proximate relationship, rather than solely physical or medical causation.[32]

18. Allowing women who have experienced a disturbance of the mind after childbirth and/or lactation to avail themselves of the defence of infanticide, or be convicted of infanticide as opposed to murder or manslaughter, whether or not they can demonstrate a diagnosed psychological condition, appropriately recognizes the unique social roles ascribed to women as mothers and care-givers, and the complex, interacting stressors that may arise. The cognizable legal standard for infanticide, as applied by triers of fact since its inception, is one that respects the principles of substantive equality, and ought to be maintained.

C. The legal standard for infanticide is consistent with criminal law principles regarding the interpretation of legal standards relating to the accused's mental condition

19. The flexible legal standard for a disturbance of the mind set by s. 233 of the *Criminal Code* is consistent with prevailing criminal law principles regarding the interpretation of legal standards relating to the accused's mental condition. It is well-established that the concept

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[31] For example, the wording of the provocation defence in s. 232 of the *Criminal Code* includes express reference to a requirement of a causal link between the provocation and the criminal conduct that would otherwise be murder. Similarly, the statutory defence of diminished responsibility under the U.K. *Homicide Act 1957* includes an express requirement of connection between the accused's "abnormality" of mind and his mental responsibility for his acts and omissions in doing or being a party to the killing (see original *Homicide Act, 1957*, c. 11, s. 2(1) and current version amended by *Coroners and Justice Act 2009*, c. 25, s. 52(1)). No such causal requirement appears in the text of the infanticide provision, and none ought to be read in.

[32] For example, Parliament could have chosen to use the phrase "by reason *only*" – a phrase used in many places throughout the *Code* to exclude certain types of causal relationships – instead of "by reason thereof" if it had intended to impose a restriction with respect to the nature of the required connection. A full list of the sections of the *Criminal Code* employing the phrase "by reason only" is included in Appendix A. All of the sections in the Criminal Code that use the phrase "by reason only" were reviewed, and each use is restrictive and/or explicitly excludes various causative factors. Procedural sections that include this phrase are not included in Appendix A.

"disease of the mind" under s. 16 of the *Criminal Code* is a *legal* standard and not a medical term of art, and that while it contains a substantial medical component, it also involves consideration of questions of social policy.[33] Judges must not rely exclusively on medical evidence, but rather must apply the standard of mental disorder in line with its *legal* meaning and purpose.[34] Thus, while judicial interpretation has delineated how the legal concept of mental disorder is to be applied, courts have resisted interpretations that would restrict mental disorder by linking it to specific medical impairments.[35]

20. LEAF submits that the restrictive and medicalized approach to the interpretation of the disturbance of the mind requirement under s. 233 advanced by the Appellant in this case is inconsistent with these accepted criminal law principles. Setting a test of "substantially compromised psychological health" as the threshold requirement for a disturbance of the mind inappropriately and unjustifiably restricts a concept that Parliament intended to incorporate a wide variety of social policy factors, not just medical evidence. The breadth and flexibility of the concept of disturbance of the mind within s. 233, as enacted by Parliament and as applied by trial courts, appropriately ensures that the mitigating framework of infanticide reflects and promotes substantive equality.

PARTS IV & V – COSTS & ORDER REQUESTED

21. LEAF does not seek its costs, and asks that no costs be ordered against it.

22. LEAF respectfully requests that the appeal be determined in accordance with the above submissions. LEAF seeks permission to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Ottawa, Ontario, this 11th day of January, 2016.

for **Jessica Orkin** for **Kim Stanton** for **Frances Mahon**
Counsel for the intervener, LEAF

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[33] See, e.g. *R. v. Bouchard-Lebrun*, [2011] 3 S.C.R. 575 at ¶58-60 [*Bouchard-Lebrun*], **LEAF's BoA, Tab 3**; *R. v. Stone*, [1999] 2 S.C.R. 290 at ¶59-60, **LEAF's BoA, Tab 9**; *R. v. Parks*, [1992] 2 S.C.R. 871 at 898-900 (*per* La Forest J) [*Parks*], **LEAF's BoA, Tab 7**; *R. v. Rabey*, [1980] 2 S.C.R. 513 at 519, **LEAF's BoA, Tab 8**. The social policy considerations that form part of the s. 16 standard are of course different than those contemplated by s. 233.

[34] *Parks*, *supra* at 899 (*per* La Forest J.), **LEAF's BoA, Tab 7**.

[35] *Bouchard-Lebrun*, *supra* at para. 60, **LEAF's BoA, Tab 3**.

PART VI – TABLE OF AUTHORITIES

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Kahkewistahaw First Nation v. Taypotat, [2015] 2 SCR 548	1
New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46	1, 9
R. v. Borowiec, 2015 ABCA 232	13, 16
R. v. Bouchard-Lebrun, [2011] 3 S.C.R. 575	20
R. v. Coombs, 2003 ABQB 818	17
R. v. Kapp, [2008] 2 S.C.R. 483	11
R. v. Lavallee, [1990] 1 S.C.R. 852	11
R. v. L.B., 2011 ONCA 153	6
R. v. Leung, 2015 BCSC 558	17
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606	14
R. v. Parks, [1992] 2 S.C.R. 871	19
R. v. Rabey, [1980] 2 S.C.R. 513	19
R. v. Stone, [1999] 2 S.C.R. 290	19
SECONDARY SOURCES	
"Canadian Contraceptive Consensus", *Society of Obstetricians and Gynaecologists of Canada*, October 2015, available online at http://sogc.org/guidelines/canadian-contraception-consensus-part-1-of-4-replaces-no-143-february-2004-no-174-april-2006-no-195-july-2007-no-219-november-2008-no-280-september-2012/	9
Abortion Rights Coalition of Canada, Chart of Clinics Providing Abortion Services in Canada: http://www.arcc-cdac.ca/list-abortion-clinics-canada.pdf (chart updated November 2015)	9
Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada*, (1984) 34 U Toronto LJ 447	6
Emma Cunliffe, *Infanticide: Legislative History and Current Questions*, (2009) 55 Crim L Q 94	6, 7
House of Commons Debates, 20th Parl., 4th Sess., Vol. 5 (14 June 1948)	6, 7

House of Lords, *Parliamentary Debates*, 5th ser. vol. 50 (16 May 1922)	7
House of Lords, *Parliamentary Debates*, 5th ser. vol. 50 (25 May 1922)	7
House of Lords, *Parliamentary Debates*, 5th ser. vol. 50 (22 June 1922)	7
Kirsten Johnson Kramar & William D. Watson, *Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/ Autopoiesis Debate*, (2008) 33:2 Can J Sociology 237	8
The Honourable Madam Justice Beverly M. McLachlin, *Crime and Women – Feminine Equality and the Criminal Law*, (1991) 25 UBC Law Rev 1	6
Ontario Human Rights Commission, "Family status and other Code grounds", *The cost of caring: Report on the consultation on discrimination on the basis of family status*, November 2006, available online at http://www.ohrc.on.ca/en/cost-caring-report-consultation-discrimination-basis-family-status	9
Statistics Canada, "Families, Living Arrangements and Unpaid Work", *Women in Canada 2010-2011 – A Gender-Based Statistical Report* (Ottawa: Social and Aboriginal Statistics Division, December 2011)	9
Tony Ward, *The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938*, (1999) 8:2 Social & Legal Studies 163	8

PART VII – STATUTORY PROVISIONS

Criminal Code, R.S.C., 1985, c. C-46

DEFENCE OF MENTAL DISORDER

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Burden of proof

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. R.S., 1985, c. C-46, s. 16; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1991, c. 43, s. 2.

MURDER REDUCED TO MANSLAUGHTER

232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

What is provocation

(2) Conduct of the victim that would

TROUBLES MENTAUX

16. (1) La responsabilité criminelle d'une personne n'est pas engagée à l'égard d'un acte ou d'une omission de sa part survenu alors qu'elle était atteinte de troubles mentaux qui la rendaient incapable de juger de la nature et de la qualité de l'acte ou de l'omission, ou de savoir que l'acte ou l'omission était mauvais.

Présomption

(2) Chacun est présumé ne pas avoir été atteint de troubles mentaux de nature à ne pas engager sa responsabilité criminelle sous le régime du paragraphe (1); cette présomption peut toutefois être renversée, la preuve des troubles mentaux se faisant par prépondérance des probabilités.

Charge de la preuve

(3) La partie qui entend démontrer que l'accusé était affecté de troubles mentaux de nature à ne pas engager sa responsabilité criminelle a la charge de le prouver. L.R. (1985), ch. C-46, art. 16; L.R. (1985), ch. 27 (1er suppl.), art. 185(F); 1991, ch. 43, art. 2.

MEURTRE RÉDUIT À UN HOMICIDE INVOLONTAIRE COUPABLE

232. (1) Un homicide coupable qui autrement serait un meurtre peut être réduit à un homicide involontaire coupable si la personne qui l'a commis a ainsi agi dans un accès de colère causé par une provocation soudaine.

Ce qu'est la provocation

(2) Une conduite de la victime, qui constituerait

constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

un acte criminel prévu à la présente loi passible d'un emprisonnement de cinq ans ou plus, de telle nature qu'elle suffise à priver une personne ordinaire du pouvoir de se maîtriser est une provocation pour l'application du présent article si l'accusé a agi sous l'impulsion du moment et avant d'avoir eu le temps de reprendre son sang-froid.

Questions of fact

(3) For the purposes of this section, the questions

> (a) whether the conduct of the victim amounted to provocation under subsection (2), and
>
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Questions de fait

(3) Pour l'application du présent article, les questions de savoir :

> a) si la conduite de la victime équivalait à une provocation au titre du paragraphe (2);
>
> b) si l'accusé a été privé du pouvoir de se maîtriser par la provocation qu'il allègue avoir reçue,

sont des questions de fait, mais nul n'est censé avoir provoqué un autre individu en faisant quelque chose qu'il avait un droit légal de faire, ou en faisant une chose que l'accusé l'a incité à faire afin de fournir à l'accusé une excuse pour causer la mort ou des lésions corporelles à un être humain.

Death during illegal arrest

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.
R.S., 1985, c. C-46, s. 232;
2015, c. 29, s. 7.

Mort au cours d'une arrestation illégale

(4) Un homicide coupable qui autrement serait un meurtre n'est pas nécessairement un homicide involontaire coupable du seul fait qu'il a été commis par une personne alors qu'elle était illégalement mise en état d'arrestation; le fait que l'illégalité de l'arrestation était connue de l'accusé peut cependant constituer une preuve de provocation pour l'application du présent article. L.R. (1985), ch. C-46, art. 232;
2015, ch. 29, art. 7.

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. R.S., c. C-34, s. 216.

INFANTICIDE

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. S.R., ch. C-34, art. 216.

***Coroners and Justice Act 2009* (U.K.), c. 25, s. 52(1)**

CRIMINAL OFFENCES:
MURDER, INFANTICIDE AND SUICIDE

52. Persons suffering from diminished responsibility (England and Wales)(1) In section 2 of the *Homicide Act 1957* (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute –

"(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –

(a) arose from a recognised medical condition,

(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are –

(a) to understand the nature of D's conduct;

(b) to form a rational judgment;

(c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

Homicide Act, 1957 **(U.K.), c. 11, s. 2(1) (original version, now amended by** ***Coroners and Justice Act 2009*** **(U.K.), c. 25, s. 52(1))**

2. Persons suffering from diminished responsibility

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

APPENDIX "A"

Section	Text
ss. 52(3) and (4)	**Sabotage** 52. (1) Every one who does a prohibited act for a purpose prejudicial to (a) the safety, security or defence of Canada, or (b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. Definition of "prohibited act" (2) In this section, "prohibited act" means an act or omission that (a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing; or (b) causes property, by whomever it may be owned, to be lost, damaged or destroyed. Saving (3) No person does a prohibited act within the meaning of this section **by reason only** that (a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment; (b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or (c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees. Idem (4) No person does a prohibited act within the meaning of this section **by reason only** that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

s. 60	**Exception** 60. Notwithstanding subsection 59(4), no person shall be deemed to have a seditious intention **by reason only** that he intends, in good faith, (a) to show that Her Majesty has been misled or mistaken in her measures; (b) to point out errors or defects in (i) the government or constitution of Canada or a province, (ii) Parliament or the legislature of a province, or (iii) the administration of justice in Canada; (c) to procure, by lawful means, the alteration of any matter of government in Canada; or (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.
s. 63(3)	**Exception** (Unlawful Assembly) (3) Persons are not unlawfully assembled **by reason only** that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.
s. 108(3)	**Exception** (Tampering with Serial Number) (3) No person is guilty of an offence under paragraph (1)(b) **by reason only** of possessing a prohibited firearm or restricted firearm the serial number on which has been altered, defaced or removed, if that serial number has been replaced and a registration certificate in respect of the firearm has been issued setting out a new serial number for the firearm.
s. 117.07	**Public officers** 117.07 (1) Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the *Firearms Act* **by reason only** that the public officer (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment; (b) manufactures or transfers, or offers to manufacture or transfer, a

	firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of the public officer's duties or employment; (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of the public officer's duties or employment; (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer's duties or employment; (e) in the course of the public officer's duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger; (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer's duties or employment or the destruction of any such thing in the course of the public officer's duties or employment; or (g) alters a serial number on a firearm in the course of the public officer's duties or employment.
s. 117.08	**Individuals acting for police force, Canadian Forces and visiting forces** 117.08 Notwithstanding any other provision of this Act, but subject to section 117.1, no individual is guilty of an offence under this Act or the Firearms Act **by reason only** that the individual (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance, (b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition, (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm, (e) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging

	projectiles in rapid succession during one pressure of the trigger, (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or the destruction of any such thing, or (g) alters a serial number on a firearm, if the individual does so on behalf of, and under the authority of, a police force, the Canadian Forces, a visiting force, within the meaning of section 2 of the Visiting Forces Act, or a department of the Government of Canada or of a province.
s. 117.09	**Employees of business with licence** 117.09 (1) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is the holder of a licence to possess and acquire restricted firearms and who is employed by a business as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence that authorizes the business to carry out specified activities in relation to prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition is guilty of an offence under this Act or the *Firearms Act* **by reason only** that the individual, in the course of the individual's duties or employment in relation to those specified activities, (a) possesses a prohibited firearm, a prohibited weapon, a prohibited device or any prohibited ammunition; (b) manufactures or transfers, or offers to manufacture or transfer, a prohibited weapon, a prohibited device or any prohibited ammunition; (c) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger; or (d) alters a serial number on a firearm. **Employees of business with licence** (2) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a business as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* **by reason only** that the individual, in the course of the individual's duties or employment, possesses, manufactures or transfers, or offers to manufacture or transfer, a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or

	death to a person. **Employees of carriers** (3) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a carrier, as defined in subsection 2(1) of the *Firearms Act*, is guilty of an offence under this Act or that Act **by reason only** that the individual, in the course of the individual's duties or employment, possesses any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or prohibited ammunition or transfers, or offers to transfer any such thing. **Employees of museums handling functioning imitation antique firearm** (4) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* **by reason only** that the individual, in the course of the individual's duties or employment, possesses or transfers a firearm that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm if the individual has been trained to handle and use such a firearm. **Employees of museums handling firearms generally** (5) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* **by reason only** that the individual possesses or transfers a firearm in the course of the individual's duties or employment if the individual is designated, by name, by a provincial minister within the meaning of subsection 2(1) of the *Firearms Act*.
s. 117.14	**Amnesty period** 117.14 (1) The Governor in Council may, by order, declare for any purpose referred to in subsection (2) any period as an amnesty period with respect to any weapon, prohibited device, prohibited ammunition, explosive substance or component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm. **Purposes of amnesty period** (2) An order made under subsection (1) may declare an amnesty period for the purpose of (a) permitting any person in possession of any thing to which the order relates to do anything provided in the order, including, without restricting

	the generality of the foregoing, delivering the thing to a peace officer, a firearms officer or a chief firearms officer, registering it, destroying it or otherwise disposing of it; or (b) permitting alterations to be made to any prohibited firearm, prohibited weapon, prohibited device or prohibited ammunition to which the order relates so that it no longer qualifies as a prohibited firearm, a prohibited weapon, a prohibited device or prohibited ammunition, as the case may be. **Reliance on amnesty period** (3) No person who, during an amnesty period declared by an order made under subsection (1) and for a purpose described in the order, does anything provided for in the order, is, **by reason only** of the fact that the person did that thing, guilty of an offence under this Part.
s. 121.1	**Selling, etc., of tobacco products and raw leaf tobacco** 121.1 (1) No person shall sell, offer for sale, transport, deliver, distribute or have in their possession for the purpose of sale a tobacco product, or raw leaf tobacco that is not packaged, unless it is stamped. The terms "tobacco product", "raw leaf tobacco", "packaged" and "stamped" have the same meanings as in section 2 of the *Excise Act*, 2001. **Exceptions — subsections 30(2) and 32(2) and (3) of *Excise Act*, 2001** (2) Subsection (1) does not apply in any of the circumstances described in any of subsections 30(2) and 32(2) and (3) of the *Excise Act*, 2001. Exception — section 31 of *Excise Act*, 2001 (3) A tobacco grower does not contravene subsection (1) **by reason only** that they have in their possession raw leaf tobacco described in paragraph 31(a), (b) or (c) of the Excise Act, 2001.
s. 222	**Exception** (Homicide) (6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act **by reason only** that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.
s. 232(4)	**Death during illegal arrest** (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter **by reason only** that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.
s. 303(3)	**Selling newspapers**

	(3) No person shall be deemed to publish a defamatory libel **by reason only** that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper.
s. 304(1)	**Selling book containing defamatory libel** 304. (1) No person shall be deemed to publish a defamatory libel **by reason only** that he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains defamatory matter, if, at the time of the sale, he does not know that it contains the defamatory matter.
s. 305	**Publishing proceedings of courts of justice** 305. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes defamatory matter (a) in a proceeding held before or under the authority of a court exercising judicial authority; or (b) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province.
s. 306	**Parliamentary papers** 306. No person shall be deemed to publish a defamatory libel **by reason only** that he (a) publishes to the Senate or House of Commons or to the legislature of a province defamatory matter contained in a petition to the Senate or House of Commons or to the legislature of a province, as the case may be; (b) publishes by order or under the authority of the Senate or House of Commons or of the legislature of a province a paper containing defamatory matter; or (c) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (a) or (b).
s. 307(1)	**Fair reports of parliamentary or judicial proceedings** 307. (1) No person shall be deemed to publish a defamatory libel **by reason only** that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or the legislature of a province, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment on any such proceedings.

s. 308	**Fair report of public meeting** 308. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes in good faith, in a newspaper, a fair report of the proceedings of any public meeting if (a) the meeting is lawfully convened for a lawful purpose and is open to the public; (b) the report is fair and accurate; (c) the publication of the matter complained of is for the public benefit; and (d) he does not refuse to publish in a conspicuous place in the newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamatory matter.
s. 309	**Public benefit** 309. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.
s. 310	**Fair comment on public person or work of art** 310. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes fair comments (a) on the public conduct of a person who takes part in public affairs; or (b) on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.
s. 312	**Publication invited or necessary** 312. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes defamatory matter (a) on the invitation or challenge of the person in respect of whom it is published, or (b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person, if he believes that the defamatory matter is true and it is relevant to the invitation,

	challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances.
s. 313	**Answer to inquiries** 313. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if (a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries; (b) the person who publishes the defamatory matter believes that it is true; (c) the defamatory matter is relevant to the inquiries; and (d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.
s. 314	**Giving information to person interested** 314. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if (a) the conduct of the person who gives the information is reasonable in the circumstances; (b) the defamatory matter is relevant to the subject-matter; and (c) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true.
s. 315	**Publication in good faith for redress of wrong** 315. No person shall be deemed to publish a defamatory libel **by reason only** that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has, the right or is under an obligation to remedy or redress the wrong or grievance, if (a) he believes that the defamatory matter is true;

	(b) the defamatory matter is relevant to the remedy or redress that is sought; and (c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.
s. 333	**Taking ore for scientific purpose** 333. No person commits theft **by reason only** that he takes, for the purpose of exploration or scientific investigation, a specimen of ore or mineral from land that is not enclosed and is not occupied or worked as a mine, quarry or digging.
s. 353	**Selling, etc., automobile master key** 353. (1) Every one who (a) sells, offers for sale or advertises in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province, or (b) purchases or has in his possession in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. Exception (1.1) A police officer specially authorized by the chief of the police force to possess an automobile master key is not guilty of an offence under subsection (1) **by reason only** that the police officer possesses an automobile master key for the purposes of the execution of the police officer's duties.
s. 354(4)	**Possession of property obtained by crime** 354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from (a) the commission in Canada of an offence punishable by indictment; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment. ***

	Exception (4) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under this section **by reason only** that the peace officer or person possesses property or a thing or the proceeds of property or a thing mentioned in subsection (1) for the purposes of an investigation or otherwise in the execution of the peace officer's duties.
s. 366(5)	**Exception** (Forgery) (5) No person commits forgery **by reason only** that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government.
s. 422(2)	**Criminal breach of contract** 422. (1) Every one who wilfully breaks a contract, knowing or having reasonable cause to believe that the probable consequences of doing so, whether alone or in combination with others, will be (a) to endanger human life, (b) to cause serious bodily injury, (c) to expose valuable property, real or personal, to destruction or serious injury, (d) to deprive the inhabitants of a city or place, or part thereof, wholly or to a great extent, of their supply of light, power, gas or water, or (e) to delay or prevent the running of any locomotive engine, tender, freight or passenger train or car, on a railway that is a common carrier, is guilty of (f) an indictable offence and is liable to imprisonment for a term not exceeding five years, or (g) an offence punishable on summary conviction. **Saving** (2) No person wilfully breaks a contract within the meaning of subsection (1) **by reason only** that (a) being the employee of an employer, he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment, or,

	(b) being a member of an organization of employees formed for the purpose of regulating relations between employers and employees, he stops work as a result of the failure of the employer and a bargaining agent acting on behalf of the organization to agree on any matter relating to the employment of members of the organization, if, before the stoppage of work occurs, all steps provided by law with respect to the settlement of industrial disputes are taken and any provision for the final settlement of differences, without stoppage of work, contained in or by law deemed to be contained in a collective agreement is complied with and effect given thereto.
ss. 430(6) and (7)	**Saving** (Mischief) (6) No person commits mischief within the meaning of this section **by reason only** that (a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment; (b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or (c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees. **Idem** (7) No person commits mischief within the meaning of this section **by reason only** that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.
s. 466(2)	**Conspiracy in restraint of trade** 466. (1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade. **Trade union, exception** (2) The purposes of a trade union are not, **by reason only** that they are in restraint of trade, unlawful within the meaning of subsection (1).
s. 467	**Saving** 467. (1) No person shall be convicted of the offence of conspiracy **by reason only** that he

	(a) refuses to work with a workman or for an employer; or (b) does any act or causes any act to be done for the purpose of a trade combination, unless that act is an offence expressly punishable by law.