Court File No. C49467/C49468

COURT OF APPEAL FOR ONTARIO

BETWEEN

HER MAJESTY THE QUEEN

Appellant

and

L.B.

Respondent

and

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Proposed Intervener

FACTUM OF THE PROPOSED INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)
(Motion for Leave to Intervene)

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PART I – INTRODUCTION

1. On September 11, 2008, Justice Herold of the Ontario Superior Court of Justice acquitted the accused, L.B., of first and second degree murder in connection with the deaths of L.B.'s firstborn, Alexander, on September 30, 1998, and her third infant, Cameron, on December 1, 2002. The infants were 48 and 69 days old respectively. L.B. was 17 years of age when Alexander died. In 2004, L.B. was charged with two counts of first degree murder. L.B. offered to plead to two counts of infanticide, but the Crown refused the plea. During the course of the trial the Court ruled that L.B. could raise infanticide as a defence to the murder charges, and ultimately convicted her on two counts of infanticide. The Crown has appealed this judgment.

2. The Crown describes the central issue in this appeal as "whether infanticide is a legally available defence to murder". The Crown acknowledges that "this important question has never been considered in any detail by any Canadian appellate court". This is a precedent setting appeal which raises issues of public importance and a novel question of law.

3. Section 233 of the *Criminal Code* creates a mitigated offence for women who, in many cases under extreme stress and other forms of severe psychological circumstances, kill their newly born children. Infanticide is one of the three forms of culpable homicide in the *Code*, punishable by a maximum 5 years imprisonment. Infanticide is a lesser included offence to murder. Unlike most included offences, however, the elements of infanticide include <u>all</u> the elements of murder <u>plus</u> an additional element that the willful killing must be related to a mental disturbance and the birth of the child.

4. In part due to the atypical nature of infanticide as an included offence which contains all of the elements of the more serious offence, the *Criminal Code* provisions relating to homicide and infanticide (ss. 222, 233, 662 and 663), when read together, are unclear and inconsistent. Specifically, section 662(3) of the *Code* appears to conflict with section 233 of the *Code*. Section 662(3) provides that a conviction for infanticide can only be entered where murder is "not proved". Yet murder will be proved in most, if not all, cases of infanticide, since it is an element of the offence that the killing be "wilful". A literal reading of section 662(3), therefore, renders section 233 of the *Code* meaningless.

5. As a result of the difficulty reconciling sections 233 and 662(3) of the *Code*, trial level courts, including the Court in the decision under appeal, have struggled to interpret and apply these provisions, resulting in conflicting decisions and approaches.[1]

6. The Women's Legal Education and Action Fund (LEAF) seeks leave to intervene in this appeal to offer the Court an analysis of the relevant sections of the *Criminal Code* relating to infanticide and murder guided by s.15 *Charter* equality principles. The conflicting *Code* provisions relating to infanticide and murder must be interpreted in a way that acknowledges that only women bear children and that it is women who are largely, if not entirely, responsible for caring for children. Further, the provisions must be interpreted having regard to the lived realities faced by the women most at risk of committing the offence of infanticide: women who are young, poor, socially isolated, mentally ill and/or otherwise without adequate social and economic supports and unable to cope with childbirth or caring for a child. An interpretation

[1] In *R. v. Effert*, [2009] A.J. No.689 (Q.B.); *R. v. Effert*, [2009] A.J. No.692 (Q.B.), the Alberta Court of Queen's Bench held that infanticide can be asserted as a defence to murder, but came to a different conclusion than the lower Court in this case on the burden of proof.

guided by substantive equality yields a coherent and principled approach to reconciling these otherwise inconsistent *Criminal Code* provisions.

7. This appeal is being heard at a time when there appears to be an increasing trend in Canada of charging women who kill their infants with murder as opposed to infanticide. The issues raised in this appeal were rarely in issue in the past, since until recently women in similar circumstances were almost always charged with infanticide instead of murder. The interaction of the murder and infanticide provisions in cases where women have been charged only with murder has accordingly received little judicial attention. The decision of this Court will be significant to future trials. Equally importantly, the judgment of this Court may guide the exercise of discretion by police and prosecutors in future cases involving these complex and conflicting *Criminal Code* provisions.

PART II – THE FACTS

The Trial Judgment

8. L.B. confessed to killing her two children in December 2004 to staff at a hospital emergency ward. At trial, the defence largely conceded that the evidence established that L.B. was guilty of first degree murder, in that the deaths were caused by a willful act and were planned and deliberate, but argued that the defence of infanticide was available to the accused.

9. Since it is an element of the offence of infanticide under section 233 of the *Criminal Code* that the killing be "willful", proving infanticide will almost always involve proving murder. Section 233 provides as follows:

> 233. A female person commits infanticide when by a **wilful act or omission** she causes the death of her newly-born child[2], 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. (emphasis added)

10. The Crown argued at trial, as it does in this appeal, that pursuant to s.662(3) of the *Criminal Code*, if the offence of murder is "proved", the accused can only be convicted of murder, and not infanticide. Section 662(3) of the *Criminal Code* provides as follows:

> (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. (emphasis added)

11. Recognizing the intention of Parliament to create a mitigated offence where murder could otherwise be proved, the lower Court rejected the Crown's argument that s.662(3) should be read as precluding a conviction of infanticide where murder could be "proved" (given, as mentioned above, in most if not all cases of infanticide, murder will be proved):

> Notwithstanding what otherwise appears to be very clear wording in section 662(3), I remain of the view that a fair and liberal reading which would enure 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 or murder, even where murder is otherwise proven in appropriate circumstances.[3]

12. In convicting L.B. of infanticide, however, Herold J. relied on the availability of infanticide as a defence to murder rather than on the Court's jurisdiction to convict on the lesser

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[2] "newly-born child" is defined as "a person under the age of one year" in s. 1 of the *Code*.
[3] *R. v. L.B.*, [2008] O.J. No. 3504 (S.C.J.) at para.37 (Trial Judgment).

included offence of infanticide. It should be noted in this regard that unlike the recent decision of the Alberta Court of Queen's Bench in *R. v. Effert*, the lower Court ruled that the onus of establishing the elements of the defence should be borne by the accused. In *R. v. Effert*, where the Crown and the defence agreed that infanticide was a legally available defence to murder, the Court ruled that the accused need only raise an air of reality on each element of the defence, at which point the Crown must negate an element of infanticide beyond a reasonable doubt.[4]

13. The trial Judge held that L.B. had proved the elements of the defence of infanticide. He held that at the time of both killings, L.B. was suffering from a disturbed mind as a result of her not being fully recovered from the effects of giving birth and lactation. In determining the mental state of the accused, Herold J. held that the inquiry is not purely focused on biology, and that "biological, social and psychological factors all intersect".

14. In this appeal, the Crown asks this Court to rule on:

a. The definition, nature and degree of mental "disturbance" required to establish infanticide, including the role played by psychological and social factors;

b. Whether an accused may be found guilty of infanticide where murder has been "proved"; and

c. Whether infanticide is legally available as a defence to murder.

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[4] *R. v. Effert*, [2009] A.J. No.689 (Q.B.); *R. v. Effert*, [2009] A.J. No.692 (Q.B.)

Interest and Expertise of the Women's Legal Education and Action Fund (LEAF)

15. LEAF seeks leave to intervene to make submissions relating to all three of the above issues, informed by LEAF's expertise in:

a. substantive equality;

b. the application of equality principles in the context of criminal law;

c. statutory interpretation consistent with *Charter* values; and

d. the lived reality of women in Canada, in particular those most marginalized and isolated.

Affidavit of Audrey Johnson, sworn June 29, 2010, para.9

16. LEAF was founded as a national, not-for-profit organization in 1985. Since that time, LEAF has worked to secure substantive equality for women and girls in Canada. To this end, it engages in litigation, research and public education. LEAF has extensive experience as an intervener, having intervened in over 150 cases at all levels of court to advance equality rights jurisprudence. LEAF is recognized nationally and internationally as an expert in equality rights.

Affidavit of Audrey Johnson, sworn June 29, 2010, paras. 10-12

17. As a result of its litigation, public education and advocacy work, LEAF has developed expertise in articulating the relationship between law and the inequalities experienced by women and other historically disadvantaged groups in a variety of contexts, including contexts in which women and girls experience sexual inequality differently because of their race, religion, Aboriginal status, sexual orientation, poverty and/or disability.

Affidavit of Audrey Johnson, sworn June 29, 2010, paras.11, 16, 19

18. This appeal concerns the interpretation of and meaningful access to a mitigated criminal offence available only to women and, in most cases, to young women who may be socially isolated and otherwise marginalized. If granted leave to intervene, LEAF will be the only party before the Court with expertise on the disadvantage suffered by women because of women's reproductive capacities.

Affidavit of Audrey Johnson, sworn June 29, 2010, para.23

19. LEAF has intervened in dozens of criminal appeals relating to a variety of areas of criminal law including:

- the development of sexual assault law, particularly with regard to the equality, privacy and other rights of sexual assault complainants (for example in *Seaboyer v. The Queen*, [1991] 2 S.C.R. 577; *R. v. M.L.M.*, [1994] 2 S.C.R. 356; *Whitley and Mowers v. The Queen*, [1994] 3 S.C.R. 82; *O'Connor v. The Queen*, [1995] 4 S.C.R. 411; *L.L.A. v.Beharriell*, [1995] 4 S.C.R. 536; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *L.C. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Shearing*, [2002] 3 S.C.R. 33);
- the criminal prohibition of hate speech (*The Queen v. Keegstra*, [1990] 3 S.C.R. 697);
- the criminal prohibition of pornography (*Butler v. The Queen*, [1992] 1 S.C.R. 452);
- the prosecution of midwives (*Sullivan v. The Queen*, [1991] 1 S.C.R. 489; and
- most recently LEAF was granted intervener standing by the Ontario Court of Appeal in *R. v. N.S.*, involving a *Charter* application by a sexual assault complainant for an Order entitling her to wear her niqab while testifying at the preliminary inquiry and trial of two men charged with sexually abusing her as a child.

Affidavit of Audrey Johnson, sworn June 29, 2010, para.17

20. LEAF's analyses in these interventions have considered and applied *Charter* rights and values in the interpretation, application and development of the *Criminal Code* and criminal law. In its numerous arguments before the courts, LEAF has analysed the relationship between equality guarantees, the guarantee of life, liberty and security of the person, reasonable limits under s.1, and other sections of the *Charter*.

Affidavit of Audrey Johnson, sworn June 29, 2010, para.18

21. LEAF develops its legal arguments in consultation and collaboration with leading academics and practitioners to ensure that its arguments are of the highest calibre and are informed by the diversity of women's experiences.

Affidavit of Audrey Johnson, sworn June 29, 2010, paras.19-21

PART III – LAW AND ARGUMENT

LEAF'S Proposed Arguments

22. If granted leave to intervene, LEAF will address the definition of mental "disturbance" under s.233 of the *Code* and the apparent conflict between ss.233 and 662(3) of the *Code*, with regard to the equality concerns raised by these significant issues of statutory interpretation and s.7 and s.15 *Charter* rights of accused women.

Disturbance of the Mind Not Limited to Biology and Hormones at the Time of the Birth

23. The lower Court acknowledged that the "disturbance of the mind" element of s.233 cannot be limited to a consideration of the accused woman's hormones or biology at the time of the offence. Herold J. held that:

> We know that disturbance of the mind, which sometimes affects new mothers, can have a variety of causes and it is almost certain that biological reasons related to hormonal changes are included therein. It would appear that biological, social and psychological factors all intersect and, depending on the severity of each and also depending on the predisposition of the mother whose actions are being considered, different consequences may follow.[5]

24. The lower Court decision in this regard is correct. LEAF will argue that the interpretation of "disturbed" mind in s.233 must be not be read narrowly so as to exclude the socio-economic, psychological, cultural and other factors and context which may contribute to the accused woman's state of mind.

25. As noted by academic researcher Ania Wilczynski:

> Maternal filicides reflect women's positions of helplessness and powerlessness in society and it is now widely recognized that social, economic and psychological stresses play a dominant role in maternal infant-killings. These stresses include caring for an infant who may be unwanted or difficult, lack of social and/or spousal support, economic difficulties, unrealistic expectations of motherhood, and the stigma of an illegitimate child.[6]

26. Women in Canada have made some progress in terms of access to abortion and birth control. Nevertheless, many more women suffer from inadequate social and economic supports in their child-bearing and child-rearing, particularly where they are young, poor, socially isolated, have a history of abuse and are marginalized – whether or not they are married and have the support of the child's father. The element of "disturbed" mind must be interpreted to account for the inequalities experienced by women in their child-bearing and child-rearing roles

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[5] Trial Judgment at para. 66.

[6] Ania Wilczynski, "Images of Women Who Kill Their Infants: the Mad and the Bad" (1991) 2 Women & Criminal Justice 71 at 8

and the degree to which women's disadvantage can contribute to a mental disturbance after giving birth.

ss. 233 and 662(3) Must be Read to Allow Conviction for Infanticide Where Murder is Proven

27. Section 233 of the *Criminal Code* creates a mitigating regime for women who would otherwise be guilty of murder. The intention of Parliament in this regard is clear.

28. The offence of infanticide in Canada has been given significant academic and expert attention. The circumstances of many of the women who have committed infanticide in recent years underscores the ongoing relevance of this mitigated offence in a society where women continue to be overwhelmingly responsible for caring for children, in which there continues to be inadequate social, economic and other supports for women and children, and in which young women who are sexually active, and particularly where they become pregnant, are subjected to significant stigma, prejudice and even vilification. The Court appointed psychiatrist in *R. v. Effert* described the situation of many women accused of infanticide as follows:

> The offender is almost always an unmarried mother and is usually under the age of 25 years. The majority of the offenders are passive young women who have become pregnant and wish to get rid of the unwanted child because of shame and fear. Most are otherwise totally law abiding and indeed, it is their degree of conformity which inhibits their seeking an abortion or coming to terms with their pregnancy. They usually ignore the pregnancy and carry on with life as if nothing had happened. They often manage to hide the fact of their pregnancy completely from the family.[7]

[7] *R. v. Effert*, Appeal No. 0903-192-A, as cited in the Factum of the Appellant filed with the Alberta Court of Appeal on March 12, 2010 at para. 11.

29. The Crown's submission in this appeal that a conviction for infanticide can only be entered where murder has not been proved, effectively negates Section 233 of the *Criminal Code*. Since infanticide requires an act of "willful killing", murder will be proved in most if not all cases. The consequence is that women in often dire and personally tragic circumstances will, contrary to the intentions of Parliament, face mandatory life sentences with parole ineligibility, rather than a maximum five year prison term under the mitigated regime.

30. This interpretation of s.662(3) is not consistent with the intentions of Parliament or principles of statutory interpretation. Read together, sections 233 and 662(3) give rise to significant ambiguity. As discussed above, a literal reading of s.662(3) in isolation makes s.233 effectively redundant. Section 10 of the *Interpretations Act* R.S.C. 1985 c.I-1 requires that the homicide provisions of the *Code* (murder, manslaughter and infanticide) be given a harmonious and consistent interpretation, leaving a role for each of the three offences. Similarly the Supreme Court of Canada has repeatedly confirmed that "the words of an Act are to be read together in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act, and the intention of Parliament".[8] A reading of s.662(3) which essentially eliminates one form of culpable homicide cannot be correct.

31. To respect these principles of statutory interpretation and resolve the ambiguities inherent in the *Code,* infanticide must be distinguished from murder, based on the additional elements specified in s.233 (i.e. disturbance of mind, effects of childbirth or lactation, newly born child). LEAF will argue that where the elements of infanticide are met, an accused should be convicted of the offence of infanticide, and not murder.

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[8] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

32. Applied to the facts of this case, this means that if the trier of fact determined that the elements of the offence of infanticide were met, the convictions on charges of infanticide should be upheld. Section 233 should be read as requiring that where the elements of infanticide are present, the offence is infanticide and *not murder*. On this approach to s.233 and s.662(3), there is no reason to turn to infanticide as a defence to murder.

33. This interpretation of ss.233 and 662(3) is also guided and supported by the principles of substantive equality. Where the *Criminal Code* establishes a mitigated regime for women, at least in part in recognition of the unique gendered circumstances in which the offence arises, the *Criminal Code* should not be interpreted to allow the Crown or the Court to circumvent the regime contrary to the intention of Parliament.

34. Equality principles further support the courts insisting that women be charged with the offence of infanticide where there is evidence supporting all the criteria of s.233. If infanticide is interpreted as a defence, the trend of charging women with murder will almost certainly continue, significantly altering the mitigating regime and reducing its intended reach. Women who kill their babies and are charged with murder will be under tremendous pressure to plead guilty to manslaughter in order to avoid mandatory minimum sentences for murder. To date manslaughter convictions in such cases have received longer prison sentences than where the conviction is for infanticide.[9]

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[9] Grant, Chunn & Boyle, *The Law of Homicide* (Scarborough: Carswell, 1994) at 7-90 and 7-91.

In the Alternative, Infanticide Can Be Raised as Defence

35. In the event that this Court does not accept LEAF's submission that s.233 should be read to exclude a murder conviction where the elements of s.233 are met, LEAF will argue in the alternative that infanticide is available as a defence to murder.

36. LEAF will further argue that the lower Court erred in shifting the onus to the accused to establish the defence on a balance of probabilities and that the position taken in *Effert*, requiring the accused only to raise an air of reality on each element, is the correct one.

Law and Argument for Intervener Standing

37. In determining a motion for leave to intervene, the factors to be considered are the nature of the case, the issues which arise and the likelihood of the intervener being able to make a useful contribution to the appeal without causing injustice to the immediate parties.

> *Zoe Childs v. Desormeaux*, 2003 Canlii 47870 (ON C.A.), citing *Peel (Regional Municipality) v. Great Atlantic and Pacific Company Limited* (1990), 74 O.R. (2nd) 164, at para. 15

38. Interventions are more likely to be granted in cases of significant public importance, such as constitutional cases. The burden on the moving party is heavier in cases involving a private dispute between litigants.

> *Ontario Human Rights Commission v. Christian Horizons*, 2008 Canlii 68129 (On. S.C.D.C.) at para. 4; *Zoe Childs v. Desormeaux, supra,* at para. 3

39. It is respectfully submitted that this case raises issues of public importance beyond the interests of the parties to the appeal. It is also noted that cases involving infanticide charges are rarely brought before appellate level courts. This appeal, therefore, represents a unique opportunity for the Court to consider and resolve the issues raised.

40. It is respectfully submitted that LEAF is uniquely able to offer a gendered and equality rights expertise and perspective in this appeal. LEAF will bring a contextual equality analysis to the issues under appeal with attention to the social reality of pregnancy and childbirth, particularly for young and marginalized women in Canada. In an appeal involving a *Criminal Code* offence which applies only to women, the Court will benefit from LEAF's submissions which will focus on the gendered context and implications.

41. In addition, as far as LEAF is aware, it will be the only party to argue that s.233 and s.662(3) of the *Code*, together, must be read to exclude a murder conviction where the elements of infanticide are met.

42. It is accordingly submitted that LEAF should be granted leave to intervene.

43. LEAF will take no position on the facts or outcome of the appeal and will not seek costs against any party.

ORDER REQUESTED

44. LEAF requests an Order that it:

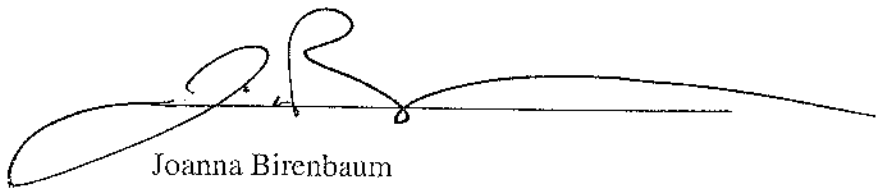
a. be granted leave to intervene;

b. file a factum not exceeding 30 pages; and

c. be granted leave to make oral argument of 45 minutes in length.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 29, 2010



Joanna Birenbaum

Court File No.: C49467/c49468

HER MAJESTY THE QUEEN - and - L.B.

APPELLANT RESPONDENT

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE PROPOSED INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND

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