

## ***R v Borowiec* On Infanticide: Does the Crime Fit the Times?**

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**Case Commented On:** *R v Borowiec*, [2015 ABCA 232](#)

In a few weeks the law school will be humming with activity as the newly admitted 1L students start learning the Law both in doctrine and in practice. One of the core first year courses is criminal law, which provides the future lawyer a realistic snapshot of the complexities of both areas. Here, in criminal law, they will not only gain knowledge of the prohibitions, rules, and procedures as found in the *Criminal Code* but also the interpretations and practices as found in Common Law. They will discover that criminal law is not about cut and dry legalese but is, at its core, about how we as a nation see ourselves and the kind of society we want to live in. It is also about ordinary people who are impacted by the decisions made by courts every day.

The key to understanding and appreciating criminal law is in the deeper discussion of the purpose of criminal law and why we as a society prohibit certain behaviors and not others. Sometimes this discussion of “why” is easy: we can agree that certain types of conduct such as stealing, murder, and assault are worthy of sanction. But we have a more difficult time in agreeing on *what* this prohibited conduct looks like and, therefore, what we should do about it. To answer these questions, criminal law jurisprudence considers all of these weighty issues in the context of the rule of law. It is this intersection of law and societal values, which makes criminal law so legally interesting and yet so socially conflicting. The recent decision in *R v Borowiec* from the Alberta Court of Appeal on infanticide is an excellent example of these tensions and the difficulty the courts have in harmonizing these issues. It is also a stark example of the reality that in some respects our criminal law is clinging to the past and in desperate need of reform.

Although homicide has been “on the books” so to speak since the inception of our *Criminal Code* [in 1892](#), infanticide came to us through a 1948 amendment, which mirrored earlier changes made to English law. The then s. 262(2), deemed a woman, who willfully caused the death of her newly-born child, not guilty of murder or manslaughter but of the newly created offence of infanticide if at the time of the act or omission “she had not fully recovered from the effect of giving birth” resulting in the “balance of her mind” being “disturbed.” Later, [in a 1954 amendment](#), the offence was broadened by offering another reason for the “mind being disturbed” by conceding infanticide could also occur when the “female person” was not fully recovered from “the effect of lactation consequent on the birth of the child.” Additionally, the word “balance” in the phrase “balance of her mind” was deleted.

The 1954 amendments also added the [now s. 663 of the \*Criminal Code\*](#), which was not found in the English legislation. This section ensures that if a woman was charged with infanticide but was not suffering from a mental disturbance and yet intentionally killed her child, she could still be convicted. This section is not in issue in the *Borowiec* case, however, as mentioned by Justice Doherty in *R v L. B.*, [2011 ONCA 153](#) (at paras 84 to 87), the constitutional implications of this section are troubling and worth noting. What is of import is the wording of s. 663, which still

retains the English legislative nomenclature requiring a disturbance of the “balance” of the mind. This slight but significant difference will be explored later as it impacts the *Borowiec* decision.

Infanticide is now one of the three ways homicide is culpable or blameworthy. Homicide or the killing of a human being is culpable when the conduct amounts to murder, manslaughter or infanticide as per the *Criminal Code* sections. Unsurprisingly, all three categories of homicide have similarities and differences in terms of: a) the conduct or *actus reus* required, b) the fault element or *mens rea* required, and c) the punishment imposed upon conviction. But, as with all related areas, it is difficult to parse the differences between them when the conduct is on the boundaries.

To assist in this discussion, lawyers and the courts look to the rule of law as established by precedent and informed by statutory interpretation. However, in the field of criminal law, this time-honoured legalistic approach must be further informed by the purpose or reason for using the criminal law in the context of the offence. In the case of infanticide, the conduct and fault element is difficult to ascertain and the section outlining the crime is mired in archaic language based on out of date policy and dated science. For instance, the concept of “lactational insanity,” which drove the English legislation as mirrored in our 1954 amendments, is straight out of the [Victorian Age](#) and is [no longer considered medically valid](#). When the crime does not fit the times it becomes hard to determine whether or not the crime reflects current societal interests and values.

These conflicting issues are clearly seen in the *Borowiec* case. According to the evidence, between 2008 and 2010, Meredith Borowiec was pregnant three times and each time she hid her true condition from her boyfriend, family and work colleagues. She gave birth, on her own, and subsequently abandoned each child in a garbage dumpster. Her actions came to the notice of the authorities when the last child was rescued from the dumpster. She was ultimately charged with two counts of second-degree murder and one count of attempted murder, to which she later entered a plea of guilty to the lesser offence of aggravated assault. At her murder trial, defence counsel raised infanticide as an alternative to murder, calling psychiatric evidence in support. The prosecutor also called psychiatric evidence to establish that the conduct did not amount to infanticide and was in fact murder. The trial judge reviewed the conflicting evidence in light of the *Code* provisions and case law and found Meredith Borowiec not guilty of murder but guilty of infanticide.

The case was followed closely in the media and attracted much attention. Upon her conviction for infanticide and the imposition of the total sentence before credit for time served of four and a half years, there was a public outcry with [one journalist opining that it was “open season” on unwanted infants](#). Still other views [showed sympathy](#) for the accused, citing her mental health issues and lack of support while pregnant as mitigating factors. In fact, infanticide, according to the literature in the area (see for example, Chapter 7 of the 2013 book entitled [History of Infanticide in Britain, C. 1600 to the Present](#) by Professor [Anne-Marie Kilday](#)), does provoke very stark conflicting public emotions and has done so for hundreds of years. In this context, the *Borowiec* decision provides a glimpse into the legal response to a very provocative social issue.

The Crown appealed the infanticide convictions and in a split decision, the Alberta Court of Appeal upheld the decision. On appeal, the court considered three grounds of appeal. Remember, this was a Crown appeal and according to [s. 676](#) of the *Criminal Code* a Crown appeal can be based only upon issues of law. The first issue asked whether or not the trial judge erred in law in his application of the law of infanticide. The second somewhat related issue asked whether the

trial judge erred in his assessment of the conflicting expert evidence. The third issue, which will not be discussed in this commentary, is whether or not the reasons of the trial judge were sufficient. Justice Cote and Justice MacDonald for the majority found that the trial judge did not err in his application of the law of infanticide pursuant to the requirements of the section. Although they found some problems with the assessment of the conflicting evidence of the expert witnesses, in their view the error was not a question of law but of fact and therefore could not form the basis of a Crown appeal. The dissent, authored by Justice Wakeling, disagreed with the majority on the first issue finding that in law the trial judge did err in his appreciation and application of the infanticide requirements as required by section 233.

The majority reviewed the history of section 233 and the roots of the offence in English law. In their view, Parliament enacted the section as a legal and social compromise. Prior to legislating the offence, a mother charged with the death of her newly born child would be charged with murder and faced a possible death sentence. As a result, specious acquittals occurred as the members of the jury were not prepared to send a mother to death for the crime, particularly if there were extenuating circumstances. However, these circumstances fell short of a disease of the mind and therefore could not amount in law to a valid [s. 16](#) or insanity defence. In response, England initially enacted the *Infanticide Act, 1922* and then after subsequent amendments, enacted the *Infanticide Act, 1938*, which carved out a singular offence within the homicide spectrum. For an excellent and erudite discussion of infanticide's historical beginnings, see Justice Doherty's opus in *R v L.B.* (at paras 64 to 104). In this historical survey Justice Doherty explains the intricate Canadian infanticide experience by tracking the various amendments made to the now [s. 233](#) and the other complimentary sections such as [s. 663](#).

Upon review of the historical purpose and changes to the section, the majority listed the applicable elements of the offence or as in the *Borowiec* case, what was raised by the defence as a possible lesser verdict predicated on the evidence. The court described the requirements of the section that the accused a) be "not fully recovered," b) that "her mind was then disturbed," and c) that the disturbance be from the "effects" of childbirth or by the reason of "lactation" as "extremely woolly" (at para 31) and not representing "established" medical terminology.

It is in the legal application of the section, specifically the requirement the accused's mind be "disturbed," which the Court of Appeal focused on in addressing the first issue. In other words, does this term "disturbed" reflect an articulable standard and if it does, what does that standard look like as a legal principle? Put another way, what is the extent to which the accused must be "disturbed" in order to fulfill the prerequisites of the section? This problem – where to draw the line in criminalizing conduct – is a familiar one in criminal law. For instance, in the case of negligence based crimes, the courts spent decades trying to determine the appropriate level to which an accused must be negligent, finally coming to the "substantial and marked departure" from the norm as the test for the offence of [criminal negligence under s. 219](#) but preferring a lesser standard of "marked departure" for other negligent based offences. But where does infanticide reside in the continuum of murder, manslaughter, criminal negligence and accident? More specifically, how does the "disturbed mind" requirement impact this discussion?

Added to the difficulties of delineating boundaries between differing conduct is the argument made by the Crown on appeal that what infanticide requires is not just evidence that the accused mind is disturbed but rather evidence that the "balance" of her mind was disturbed, which, in the submission of the Crown, suggests a higher standard than a mere disturbance. This argument is based on a rather puzzling aspect of the infanticide related sections. Although the infanticide section itself, pursuant to s. 233, refers to "disturbed" only, other related sections such as s. 663,

the assessment order [section 672.11\(c\)](#), under the “Mental Disorder” Part XX.1, and [s. 672.21\(3\)\(d\)](#), also under Part XX.1, refer to the “balance of the mind” in relation to infanticide. Although the Part XX.1 sections are fairly recent, in the *Criminal Code* sense, having been enacted in 1991, s. 663 was added to the *Criminal Code* in the 1954 amendments, which also deleted the reference to “balance of her mind” in the infanticide section s. 233.

The majority deftly rejected this argument, finding, in paragraph 50, it was “unlikely that Parliament intended any significant difference” between the two phrases. In the Court’s opinion, it would make no sense to require a different standard for these sections and as Parliament has had ample opportunity to fix the difference in language, it must mean there is no difference.

Although the Court does not delve into the niceties of the difference in language found in the various sections, still a more robust application of the principles of statutory interpretation would have been in order. For example, the word “balance” does connote an ability to remain in control or have “mental and emotional steadiness” as per the Merriam-Webster [definition](#) and as understood by the related term of being “[off-balanced](#).” Additionally, the UK legislation retains the phrase “balance of her mind.” The Court did not discuss the significance of this or the impact of this phrase in the English context.

Of course, besides the possible different legal meaning the addition of the word “balance” could have produced, it is likely the Crown had another reason to pursue the importance of the word. The Crown’s forensic psychiatrist at trial relied upon the term, “balance of her mind,” and the trial judge pointedly corrected the nomenclature as not consistent with s. 233. No doubt the psychiatrist was more comfortable with the usage of the phrase as it related to the assessment sections of the *Criminal Code* rather than the offence section and does illustrate the confusion the different wording invokes.

In any event, the majority preferred to defer to Parliament to lend any further guidance on the issue. The best the majority could do was recognize the “need for some standard” (at para 53) and quote approvingly from a 2003 Alberta Queen’s Bench decision in *R v Coombs*, [2003 ABQB 818](#) at para 37, wherein the trial judge found that Parliament set “a very low threshold, certainly far below ... not criminally responsible.”

Although the Court recognized the imperfections of the offence/defence of infanticide, in the majority’s view it was Parliament’s responsibility to create criminal law and not the courts’ purview even where the law in the area was “woolly.” In fact, the Court suggests the use of “vague language” in the section assists the trier of fact in coming to a “just” decision as the ambiguity gives the trier of fact and the Crown “elbow room and several hints.” Indeed, the majority opined at paragraph 88 that:

The only way to find an error which “involves a question of law alone” would be to make new law and interpret one or more of the woolly words or phrases in section 233 more narrowly, injecting a good deal of the Court of Appeal’s own analysis and philosophy. In view of the history, that would override Parliament’s decision to do the opposite.

Clearly, the Court was unable (or unwilling) to reconcile the social, political, and policy issues with the rule of law.

Justice Wakeling’s dissent, on the other hand, does attempt to articulate a judiciable standard. He set the standard, using child welfare nomenclature, requiring (at para 98) the disturbance to be at

a point where the woman's "ability to make rational decisions which promote the best interests of her newly born child is substantially impaired." He came to this "benchmark" by also recognizing that a "disturbed" mind provided an unclear marker for infanticide. In his view, (at para 140), as infanticide was a form of homicide and therefore a serious offence, "Parliament intended infanticide to assist only mothers who have a substantial psychological problem." He too recognized that this degree of mental disturbance must be less than the level required for a finding of not criminally responsible, yet more than a mother who is merely facing "problems which most mothers of newborns face" (at para 140).

In coming to the standard as earlier stated, Justice Wakeling "considered a number of possible solutions" (at para 148) and found, based on his review of the *Code*, two controlling "traits" of women "with a disturbed mind" (at para 149). First, commensurate with the classification of the offence as a homicide, the "mental health" of the woman must be "substantially compromised" (at para 150). Applying this, Justice Wakeling came to the decision, in paragraphs 151 and 152, that therefore "baby blues" or "postpartum blues syndrome" as a transient and "mild" form of depression would not fulfill this first trait. At the other end of the spectrum, a woman suffering from postpartum psychosis would fulfill this requirement. Within this range, would be postpartum depression. According to Justice Wakeling, "Some women with the more severe presentation of this mental health condition may meet the first test" (at para 155).

Second, Justice Wakeling requires the "substantial" mental health condition to "substantially impair the mother's ability to make rational decisions which promote the best interests of her infant" (at para 157). As previously mentioned, this part of the test seems to be based upon a common consideration in the child welfare or family law arenas (see [Young v Young, \[1993\] 4 SCR 3](#)). Whether such a concept or test is appropriate in the criminal law context highlights the difficulty in crafting a rule based on impermissibly vague legislation. In any event, Justice Wakeling gave no indication as to the genesis of this part of the test.

Although Justice Wakeling does attempt to create an articulable test, he does so by changing the legal test into a medical one. In fact, he relied heavily upon the DSMR or the [Diagnostic and Statistical Manual of Mental Disorders](#), which attracts much controversy and criticism within the medical and psychological professions. (For example – see Chapter 7 of [Clinical Psychology](#) by [Andrew M. Pomerantz](#)). As a result, this test as fashioned necessitates a trial by experts and puts too much faith in the infallibility of science. As a stark reminder of the fallacy of this belief, we need only look to the Goudge Report ([Inquiry Into Pediatric Forensic Pathology In Ontario Report](#) authored by Justice Goudge and released October 1, 2008) and the miscarriage of justice occasioned by the courts accepting an expert's evidence on the ultimate issue of guilt or innocence.

Further, this medically driven test seems contrary to the development of the law in the area of not criminally responsible, where the courts, starting with *R v Stone*, [\[1999\] 2 SCR 290](#), so carefully crafted a holistic test based on legal principle and factual findings and not on a closed compendium of "established" medical disorders. Finally, Justice Wakeling's test imposes a much too stringent standard. By using the qualifier "substantial," the test does not reflect the *mens rea* required for the offence, which according to Justice Doherty's well-reasoned comments in *R v L.B.* (at para 121) must include an objective foreseeability of bodily harm. In Doherty J.A.'s view, it is the "unique *actus reus*" which distinguished infanticide from murder or manslaughter. To imbue the *actus reus* with such a high threshold would be inconsistent with Justice Doherty's conclusion.

In the final analysis, what is clear from this case is that it is an example of a law which needs to be clarified by the Supreme Court of Canada, not because the ultimate decision of the majority in the Court of Appeal was in error and not because the reasons in dissent were correct, but because “woolly” laws, whatever the underlying social issues may be, are not legally valid. Although, in this case, the accused was acquitted of murder at first instance, which went a long way in ensuring the appeal would be dismissed, imagine a different scenario, where a woman is convicted of infanticide on the basis of an ambiguous law, clearly contrary to the crucial principle of legality so finely defined and generously applied by the Supreme Court of Canada, not to mention the *Charter* values at risk. This risk is most palpably seen in the majority’s final statement on the issue at paragraph 89 when they state the ultimate reason for leaving the offence “as is” was because to do otherwise might “simply produce more outright acquittals, either directly or via fewer charges of infanticides. That result would be as paradoxical as the pre-1948 situations and following much the same route.” Never mind this position reflects a state of the law and the state of science and social policy long since gone, but by failing to address the real legal issues arising from infanticide on this basis, the court is not simply deferring to Parliament but deferring to the *status quo*. On the other end of the spectrum, the dissent offers an alternate reading, which is too categorical to meet the “unique” needs of the section.

As Justice Fish stated in the *Levkovic* decision, [\[2013\] 2 SCR 204](#), a case considering the related offence of concealing a body of a child, (at para 32):

“The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness is a critical component of a society grounded in the rule of law.”

The *Borowiec* decision is unsatisfactory precisely for this reason: uncertainty and arbitrariness, for whatever reason, should not be the basis of a criminal conviction. Although criminal law provides a glimpse into society’s concerns, it also highlights the enormous burden the law may shoulder in order to ensure a fair and just community. Difficult questions such as what kind of society we want may not be easily or fully answered by the rule of law but at the very least it can provide a safe place, a fair forum, in which we can test the boundaries.

True, the original rationale for legislating infanticide was based on spurious decisions driven by the harsh realities of the death penalty. The courts must step away from the past and take a hard look at the viability of the offence given the present state of the law and the societal values we share. A lesson may be drawn from England, where there have been a number of court-driven law reform initiatives on the subject from both the legal (see the [1975 Butler report on Mentally Abnormal Offenders](#) from 1975 and the more recent Law Commission report on [Murder, Manslaughter and Infanticide from 2006](#)) and medical perspective (see the Royal College of Psychiatrists Working Party on Infanticide from 1978). Other Commonwealth countries have joined this movement towards change in this area, such as Australia (see the [1997 Report on Partial Defences to Murder: Provocation and Infanticide](#)). Indeed, new research suggests that there is not one category of infanticide but many subcategories such as [neonaticide](#), typically committed by sexually inexperienced teenagers. Furthermore, the gender specificity of the

offence, unique in the *Criminal Code*, lends more voices to the discussion as some critics of the law pan the offence as criminalizing motherhood while other critics suggest the offence [fails to adequately address those unique gender issues](#). Throughout this discourse, one thing is clear, we need the courts and our lawmakers to take a hard look at infanticide and provide legal and social guidance. Who knows, this may even be an opportunity to look deeper into the “why” of our *Criminal Code* with a critical eye to reform. Nevertheless, infanticide is just one example of the need to reform our laws to align with our present and act as a model for our future. Indeed, society expects the crime to reflect the times.

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