# An Investigation Into The Development, Application, And Relevance Of The Infanticide Legislation in Canadian Law

By

Hannah Luttman

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Professor Doug King

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**Abstract**

The application and development of infanticide legislation in the Canadian justice system is a controversial topic among the legal community. Section 233 of the *Criminal Code* (1985) contains the infanticide provision in Canadian statute law. Section 233 Infanticide can be used both as a stand-alone charge, and as a partial defence in cases where murder is charged. This thesis provides a brief historical overview of the infanticide provision's legislative development. Since its enactment in 1948, the provision has undergone some revisions but has received little commentary from the courts. There is considerable confusion in the legal community surrounding some phrases in the provision and their legal meaning. Some argue the relevance of the provision in the context of modern Canadian society. In addition, this thesis discusses the various legal issues that have arisen from its application as well as the changes that have been made to the legislation as a result of prominent cases.

## Dedication and Acknowledgements

Firstly, I would like to extend my many thanks to my parents and sisters for their continued support throughout my educational career; it is all done with you in mind. Thank you for supporting me not only financially, but emotionally, and pushing me to do great things. Many thanks to my closest friends who I would have never known without this degree. I appreciate you beyond measure for creating the university experience I had always hoped for. To my partner and family: thank you for asking about what I was writing about even if your eyes glazed over during my answer – I know it was out of love.

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I would also like to extend a thanks to Dr. Kirsten Kramar for her assistance in this project. Thank you for always reading my (many) emails and providing me with feedback and instruction. Lastly, I would like to extend a special thank you to the faculty within the Criminal Justice Program for providing a rich, engaging, and fulfilling learning environment that is so dedicated to student learning. I will always speak highly of my education from Mount Royal University.

## Table of Contents

**Investigation into the Development, Application, and Relevance of Infanticide Legislation** Maternal filicide, or the act of a mother killing her infant is an issue that is transnational in nature (Friedman et al., 2005). As stated in Osbourne (1987), our society is particularly sensitive to the vulnerability of children. As such one can infer the notion that criminal cases involving the death of young children, particularly infants, receive plenty of attention and interpretation within the legal system. Despite this, infanticide in Canada has been considered seemingly insignificant to discussions of criminal law. So much so that there are some criminal law textbooks in which infanticide is not mentioned as an offence (Cunliffe, 2009).

Grant (2010) argues that infanticide is a crime that is intrinsic and is more a reflection of the societies in which these crimes occur. If this is the case, an investigation into Canadian society and how it perceives, prevents, and delivers justice in cases of infanticide is needed. This thesis will first give a brief overview of the infanticide provision in Canadian law, including its legislative history and development. This will be followed by a section on the legal issues that have arisen since the legislation was enacted.

## Methodology

The nature of this thesis project raises two main research questions. The first question to be explored is in regard to what is the legislative development surrounding the infanticide provision? This investigation into the development of the legislation in Canadian law is pertinent to understand the legal issues and applications that have arisen since its enactment. It is important to look historically to understand the context and legislative intent behind the provision. The second research question that will be addressed in this thesis is that of what are the debates surrounding the relevance of the provision in modern contexts? This question is

important to explore as it will highlight areas of research that require more attention and examination.

**Research Design**

This thesis primarily fits a descriptive research design. Outlined in Siedlecki (2020) the purpose of a descriptive design is to describe the characteristics of the subject, including identifying any issues or variations that exist. As this thesis examines the legislative development and issues surrounding the infanticide provision, this approach fits well. In addition, descriptive designs do not have specific hypotheses, but rather have specific aims or research questions (Siedlecki, 2020). As outlined previously, there are two specific research questions I intend to explore within this thesis.

This thesis does not involve the manipulation of an independent variable which aligns with the framework of descriptive research (Cantrell, 2011).

The descriptive design of this thesis will utilize both a historical comprehensive literature review and a case analysis. The literature review method that best fits this thesis is that of a semi-systematic literature review. The semi- systematic literature review is used to see how a topic has developed in research across multiple research fields (Snyder, 2019). As my research questions look at how the legislation has developed and how the legal community have completed research into this topic, the semi-systematic literature review is the best method to address my research questions.

The case analysis portion will use inclusion and exclusion criteria in a purposive sampling technique. Cases will be included if they led to changes in the statute or received a ruling/remedy from the Supreme Court of Canada. Cases will also be included if they are significant in the historical context (i.e., the first infanticide case brought to court).

**Data Collection Methods and Sources**

This thesis will utilize secondary data collection to provide an unobtrusive data collection method. The primary method of data collection will be through the collection of scholarly articles using a purposive sampling technique. The articles to be included will be selected if they are peer reviewed articles discussing infanticide in Canada and among other countries with a history of infanticide legislation. The articles selected also must relate to either the legislative development of the infanticide provision or argue for or against its relevance in Canadian law.

These primary sources will be supported using court cases that are also purposively selected. Cases will be included in this thesis that are either significant in their contexts or which have led to changes in the statute. Databases included in the search for sources include Mount Royal University database, and CanLii database.

As this project does not involve the use of primary data but rather the use of secondary data collections methods through historical case analysis and literature review, there is no need to secure ethics approval before data collection. These methods are unobtrusive in terms of data collection and do not involve interaction with individuals to do so.

**Possible Limitations**

When using a combination of historical literature review and case analysis, there are some possible limitations that need to be addressed. One such limitation being this thesis does not examine all possible cases relating to the infanticide provision, but instead focuses on those cases that lead to changes in the statue and/or common law. This may limit the interpretation of the scope of the provision as not all cases of infanticide result in reported decisions. In addition to this, qualitative studies are not generalizable, so the conclusions drawn from this

comprehensive analysis of the provision will not be applicable to any other provision (Denny & Weckesser, 2019).

**Conceptualization and Operation**

There are no variables being measured in this thesis that need to be operationally defined. There are concepts that should be defined to understand the scope of the literature. Infanticide must be defined in the ordinary and grammatical sense as an instance in which a mother kills her infant child (Kramar, 2021). Maternal neonaticide is used to refer to an instance in which a biological mother kills her newborn child on the first day of its life (Kramar, 2021). For the purposes of the sampling in the case analysis portion, "changes in statute" can be understood as instances when either the legal meaning, or legal language, in the provision were altered.

## Defining Infanticide

The *Canadian Criminal Code* (1985) contains infanticide within s. 233 which reads,

> "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."

Infanticide is listed as a form of culpable homicide in addition to being one of two offences that pertain solely to women (Kramar, 2021). The infanticide provision is unique in Canada as it operates both as a stand-alone offence, but also as a partial defence to murder charges (Kramar, 2021).

### *Mens Rea* and *Actus Reus* Elements

Outlined in Kramar (2021), there are several elements that must be identified under the infanticide provision which will be discussed in this section. The legislation requires the relationship between the accused and the victim to be a biological mother and child. The infant must be within twelve months of age at the time of the homicide, and the accused's mental state must be disturbed as a result of the effects of giving birth or lactation. The *actus reus* for the infanticide provision requires that the act itself must cause the death of the child (Vallillee, 2015). In addition to this, the mens rea only requires that the act be intentional. The state of 'mental disturbance' is a part of the *actus reus* requirements, not the mens rea (Kramar, 2021).

The notion of mental disturbance being read into the *actus reus* requirements instead of the mens rea requirements has caused great confusion among the Canadian legal practice. Many prosecutors for the Crown have misinterpreted this element and have mistakenly brought in expert testimony to prove the accused was suffering from a mental disorder. (Kramar, 2021). As the mental disturbance is read into the *actus reus* framework, there is no requirement to prove a causal connection between the mental disturbance of the mother and the willful act or omission of the homicide (Anand, 2010). The only case in which evidence the accused was suffering from a mental disorder is needed is to establish that the act was not willful (Kramar, 2021). If this is the case brought to court, the onus is placed on the accused if they want to raise a defence that will resolve them of criminal liability (Kramar, 2021).

### Important Aspects in Section 233

When defining infanticide, there are certain words in the legislation that must be understood in order to appreciate the entire context of the provision. The words "newly-born"

contained in s. 233 can be legally understood as a person who is under the age of one year (Anand, 2010). It is also important to denote when a child becomes a human in terms of the law. Outlined in Anand (2010), in Canadian context a child becomes a human being if two conditions are met. First, the infant must have completely exited the body of the mother. It does not matter if the infant has taken a breath. Second, the umbilical connection must be detached, or the infant's circulation is independent of the mother.

Since its enactment, legislators have added additional sections to the *Criminal Code* that also relate to infanticide. One such section is s. 662(3) which states that infanticide is an included offence to murder. This section declares,

> "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".

This section states that in cases where the charges laid are murder, but the elements of infanticide exist, the accused can be convicted of infanticide if the Crown cannot prove murder. However, this relationship does not work in the reverse as murder is not an included offence to infanticide (Grant, 2010). Another section added to the *Criminal Code* (1985) that relates to infanticide is s. 663 "no acquittal unless act or omission not willful". Section 663 establishes a principle where an accused is charged with infanticide and the evidence shows that she caused the death of her child but does not show that she was not fully recovered from the effects of birth or lactation or that her mind was disturbed by the birth, she may still be convicted of infanticide. The only instance in which an acquittal would be granted is if the evidence establishes that the act or omission was not willful.

Discussed in Anand (2010) this section is applicable when the accused is charged with infanticide alone and is not applicable when the accused is charged with murder and using infanticide as a partial defense. The purpose of s. 663 is to avoid the possibility of an acquittal if the Crown fails to prove all the elements of infanticide (Grant, 2010). Without this section, a woman could escape criminal liability under the infanticide provision (Anand, 2010).

**Prevalence in Canadian Contexts**

Determining the exact rate of incidence of infanticide within Canada is quite onerous. There are several reasons for this burden. One reason for this is due to the fact that homicides in Canada have been steadily declining since the 1990's (Kramar, 2021). Kramar (2021) examined homicide statistics over a ten-year period to determine the rate of infanticide in Canada. Between 2007 and 2017 the total number of homicide incidents reported was 6,458. Of these incidents there were 13 child homicides reported to be motivated by concealment, making up 5% of total victims in the 0-17 age category over the ten-year period. Kramar (2021) infers that at least a few, if not all of these incidents could meet the legal standards under the infanticide provision. As such, on an aggregate level it can be ascertained that infanticide cases account for 0.2% of all homicides reported to the police.

Another factor that limits the ability to account for infanticide cases is the notion that the number of charges for infanticide will not always equal the number of successful verdicts (Cunliffe, 2009). This is due to the fact that the primary charge in this case may not always be infanticide. The accused may be charged with second degree murder and raise infanticide as a defense (Cunliffet, 2009). Additionally, there are cases in which instances of infanticide may go undetected. This is most likely due to misdiagnosis of death during autopsy, or cases where the concealment of birth has gone undetected (Kramar, 2021). Per the autopsy, there has been

evidence that Sudden Infant Death Syndrome (SIDS) and Sudden Unexplained Death Syndrome (SUDS) may be concealing instances of maternal filicide (Kramar, 2021).

**The Canadian Infanticide Offender**

Infants are particularly vulnerable during their first year of life, however the risk of maternal neonaticide is low unless the mother is younger (Kramar, 2021). The typical profile of an infanticide offender in Canada is a young woman who has denied the exitance of her pregnancy to herself and to her friends and family (Grant, 2010). Additionally, these women have little to no social support, often are without the support of the infant's father and give birth unassisted at their homes or in public washrooms (Grant, 2010). As the mother ages, the less chance of maternal filicide there is (Kramar, 2021). Some studies have also shown that women who commit neonaticide already have other children (Friedman et. al, 2012).

Friedman et. al (2012) discuss the occurrence of pregnancy denial in these infanticidal mothers. Denial of pregnancy can be classified into three categories: pervasive, affective, and psychotic. In pervasive denial, the woman refuses to acknowledge both the emotional significance and the physical existence of the pregnancy. In the case of an affective denial, the woman is aware they are pregnant, but chooses to ignore the emotional aspect of it. Psychotic denial is typically rare, usually only seen in women that have had a pre-existing condition (most likely schizophrenia). If a woman is experiencing any of the aforementioned types of pregnancy denial, prenatal care is rarely sought after (Friedman et. al, 2012).

Friedman et. al (2012) also discusses the most common motives behind filicidal and neonaticide mothers. The most common motive for neonaticide is the simple fact that the baby is not wanted, it is usually not related to mental illness. In some correctional studies highlighted by Friedman et. al (2012), it was discovered that those women who had killed their infants had been

suffering from socioeconomic stressors (i.e., abuse, poor, socially isolated) than those of mental illness.

Studies outlined by Friedman et al (2005) show there are common themes among those women who commit infanticide. These common themes include powerlessness, social alienation, and poverty. Denial is also noted to be a predictor of infanticide, along with the occurrence of previous psychiatric assessment, depression, and psychosis (Friedman et al., 2005).

## Overview of the Legislative Development of s. 233

Adopted from the *English Infanticide Act* (1922), the Canadian infanticide provision was enacted in 1948 (Kramar & Watson, 2008). Following its enactment, the use of the infanticide framework has been unequal in its development (Kramar, 2021). This section will discuss the main legislative developments of the infanticide provision and explore the legislative intent of Parliament in creating this clause.

### The Beginning of Infanticide: 19th Century Canada

In order to appreciate the development of the infanticide legislation, we must look at the societal conditions from which the statute was born. It was during the nineteenth century in Canada when the legislation first began to make the use of abortion and forms of birth control illegal (Backhouse, 1984). Outlined in an article examining the Canadian social context of infanticide during the nineteenth century, Backhouse (1984) highlights the use of infanticide by Canadian women as a last resort due to the harsh attitudes surrounding pregnancy out of wedlock.

The majority of the accused women in the nineteenth century hailed from lower class families and were young, working as domestic servants (Backhouse, 1984). In many cases, these young women became pregnant out of wedlock due to their sexual exploitation by their

employers and employers' sons (Backhouse, 1984). The realities of these women became very dangerous after they became pregnant. Often the woman would suffer the loss of her employment in addition to becoming ostracized by her family, friends, and community (Backhouse, 1984). The wages afforded these women in the nineteenth century were not enough to support themselves financially, let alone that of a child, often forcing them to seek help from charities or resort to sex work if charitable organizations turned her away (Backhouse, 1984).

During this time period, Canada used the English common law which treated the murder of a child in the same respect as other forms of murder which was punishable by death. However, in the very early cases of infanticide, murder was difficult to obtain a conviction as the death of a child it its infancy was common (Backhouse, 1984). The concealment of birth charge was added to the legislation to rectify this situation, making it so all the prosecution was required to prove was that the mother had recently given birth, the child had died, and that the mother had attempted to conceal the body (Backhouse, 1984). However, the juries during this time were still sympathetic towards these women as the concealment charge carried the death penalty in some provinces until 1810 (Backhouse, 1984).

It is interesting to note that this concealment of birth legislation only applied to those infants who were born out of wedlock and specified female infants were to be included under the scope of the legislation (Backhouse, 1984). Despite the possibility that married women might also be compelled to commit infanticide, they might not be compelled to conceal the pregnancy as they would suffer no social detriment or loss of livelihood (Backhouse, 1984). Later on in the century, the death penalty was reappealed the death penalty on the concealment charges and expanded to include children born in legitimate marriages (Backhouse, 1984).

When the federal government obtained control of the criminal legislation in 1867, the legislators revised offences against the person including infanticide. The new version of legislation pertaining to murder against children held the notion that a verdict of concealment could be entered if the accused had been acquitted for murder, but there was evidence sufficient for a concealment charge (Backhouse, 1984). Court archives show that concealment charges were laid more frequently than that of murder or manslaughter as these convictions were easier to obtain (Backhouse, 1984). Despite this, juries were still reluctant to convict these women, one possible explanation being the death of a child was considered different in social contexts than that of an adult (Blackhouse, 1984). As opposed to individuals with rights of their own, children were viewed as the property of their parents or guardians and again the high infant mortality rate contributed to the indifference of a child's death (Backhouse, 1984).

In some cases, mothers chose to abandon their infants born out of wedlock, leaving them at hospitals or firehalls, however these abandoment cases often had the same tragic ending as cases of infanticide (Backhouse, 1984). Towards and into the twentieth century up until the enactment of the current infanticide legislation, societal attitudes towards infant death have changed where children are perceived as more vulnerable and deserving of protection compared to adults (Backhouse, 1984). Rates of infant mortality have decreased, effectively making infant death less common and therefore less socially acceptable (Backhouse, 1984).

**Early Development**

Mentioned previously, the Canadian infanticide legislation was adopted in the twentieth century from the *English Infanticide Act of 1922*. Offering leniency to infanticidal mothers had been a subject up for debate for some time (Vallillee, 2012). The creation of this piece of British legislation was based on the societal ramifications (mostly social and economic) on unmarried

mothers during the 17th and 18th centuries (Vallillee, 2012). Mentioned previously in Backhouse (1984), these consequences included loss of potential marriage prospects, loss of income, and even social isolation. In turn, when drafting the new provision, the Canadian and British legislation both include the wording of 'disturbed mind' in reference to the effects of childbirth on these mothers, and this known as the medicalization of infanticide (Vallillee, 2012).

At the time of its enactment in Canada in the late 1940's, the infanticide legislation was considered ground-breaking (Kramar & Watson, 2008). Prior to the addition of the provision, Canadian courts relied on multiple charges to address mothers who had killed their infants. However, the courts at the time were reluctant to convict these mothers (Osbourne, 1987). This is due to the fact that the sentence attached to a murder conviction was execution, and jurors who held compassion for these mothers did not want to convict on a death sentence (Kramar, 2021). As such Parliament adopted the infanticide provision to provide a humanitarian approach to prosecutorial challenges that accompanied maternal neonaticide (Kramar, 2021). In doing so, Parliament provided a reduced punishment framework which recognized the socioeconomic conditions surrounding unwanted pregnancies (Kramar, 2021).

**Early Issues and Amendments**

When the provision was introduced, it contained the language "newly-born" which carried the meaning of an infant in the first few hours following its birth (Kramar & Watson, 2008). The legal meaning behind this first became an issue in *R. v. Marchello* (1951). In this case Justice McRuer ruled that a four-month-old infant could not be considered "newly born" under the legislation (Kramar & Watson, 2008). Issues from *R. v. Marchello* (1951) and later *R. v. Jacobs* (1952) led Parliament to make changes to the provision during the Criminal Code Amendment Act from 1953-1954 (Kramar, 2021).

There were three main legislative changes to the infanticide provision which resulted from this Parliamentary session. First, Parliament altered the meaning of "newly-born" to include infants up to the age of one year (Cunliffe, 2009). Secondly, the provision was changed so that the mental disturbance could result from the effects of giving birth or lactation (Cunliffe, 2009). The last change resulted in a new section (s. 663) which eliminated the onus on the Crown to prove that the accused had not yet been fully recovered from the effects of giving birth (Cunliffe, 2009). During this revision the sentence for a conviction for infanticide was also altered, increasing the maximum sentence from three years to five years (Cunliffe, 2009).

Later following the decision in *R. v. Swain* (1991) an assessment order provision was added to the *Criminal Code* (1985) allowing assessment orders in cases involving infanticide (Kramar, 2021). Under s. 672.11(c), the court can order an assessment of the accused's mental condition if they find cause to believe expert testimony is needed to establish disturbance of the mind. However, this provision may have provided additional confusion for the courts regarding "disturbance of the mind" as an element of infanticide. The trial courts often sought these assessments using expert medical testimony for cases of infanticide to obtain a conviction, leading to the misunderstanding of mental disturbance within the mens rea framework (Kramar, 2021). However, all that is required to obtain a conviction in infanticide is to establish the sequence of events laid out by the provision (Kramar, 2021).

**Recent Commentary and Updates**

The Supreme Court of Canada only recently clarified elements of the infanticide framework. In *R. v. Borowiec* (2016), the Supreme Court of Canada provided a definition for the phrase "her mind is then disturbed" and also affirmed the intent of Parliament in creating the legislation (Kramar, 2021). The Court's definition of "disturbed" can include synonymous

phrases such as “mentally unstable” or “mentally agitated” (Kramar, 2021). The Supreme Court also settled debates around the medico-legal aspect of the “disturbed” part of the provision stating that the words of the legislation should be understood in their ordinary and grammatical sense (Anand, 2010). The ruling from the Supreme Court in *R. v. Borowiec* (2016) makes it clear that the mental disturbance laid out in the legislation was not meant to be psychologically assessed and rather the intended purpose of the entire provision is meant to address the range of socio-economic factors that surround childbirth (Kramar, 2021).

## Legal Issues in the Provision

Infanticide is a rare occurrence; thus, infanticide trials and appeal cases are also few and far in between (Grant, 2010). Despite this, there have been issues with the provision and its use in the Canadian criminal justice system. Infanticide is not usually the first charge laid in cases of maternal neonaticide which proves difficult when reviewing cases as not all of these cases will lead to decisions (Cunliffe, 2009). This section will review the main legal issues which arose during the development of the infanticide provision and the relevant decisions held by courts in the Canadian justice system.

### Initial Issues

Several issues arose following the enactment of the provision in 1948. One such issue was that the original provision did not explicitly define the age limit in the language of “newly-born” (Kramar, 2021). The legal implications of this were seen in *R. v. Marchello* (1951). As mentioned previously the judge in this case found that a four-month-old infant could not be considered newly born under the legislation (Kramar & Watson, 2008). This issue was clarified during the Parliamentary amendments to the *Criminal Code* (1985) in 1954 (Cunliffe, 2009).

Another important issue was that the infanticide provision was imported as a stand-alone charge (Kramar, 2021). This created prosecutorial issues with securing a conviction. As outlined in Kramar (2021), the standalone charge allowed for a situation in which an accused mother could be acquitted on a charge of infanticide if the Crown could not prove the mental disturbance of her mind beyond a reasonable doubt. If the accused was found to have a sound mind at the time of the act or omission, they would be acquitted of the charge and face no further legal consequences. The problem with the stand-alone charge was later addressed after *R. v. Jacobs* (1952) when Parliament introduced s. 663 the "no acquittal unless act or omission not willful".

**Definition of Disturbed Mind**

A division among the legal community exists in regard to the definition of disturbed mind with some focusing on mitigated circumstances for the mother, while others advocate for the victim (Vallillee, 2012). Cunliffe (2009) outlines that according to section 663 of the Criminal Code, the evidence must present that the accused became mentally disturbed as a result of the process of giving birth or lactation. This has been criticized by many in the legal community as it is vague (Cunliffe, 2009).

According to Gus (2013) there are concerns with the vagueness of the wording in the provision, as it is not understood if even the baby blues could be considered as mental disturbance. One concern is that the baby blues is the mildest form of a postpartum depression disorder which can affect anywhere between thirty to eighty percent of new mothers. The baby blues disorder includes some symptoms such as tearfulness and irritability. These symptoms usually end in the two weeks after the birth of the child (Gus, 2013). Despite this, those mothers who suffer from the baby blues are not considered to be mentally ill (Gus, 2013). Due to the

scope of the baby blues, Gus (2013) argues this allows for the potential to be included as a 'disturbance of the mind' under s. 233 as the ruling on the wording was quite limited. However, the Supreme Court provided a definition of mental disturbance in the case of *R. v. Borowiec* (2016). In this case (discussed more in depth below) it was determined that the original intent of Parliament when drafting the infanticide legislation was to make a clear division in that the disturbed mind was not a form of mental disorder and was also different from non-insane automatism (Kramar, 2021). The judge ruled that the words in the provision "mentally disturbed" should not be understood as a medical term but understood in its ordinary and grammatical context (Kramar, 2021). In addition, the terms "mentally unstable", "mentally agitated", and "mental discomposure" could also be included in the context to understand the term of mental disturbance (Kramar, 2021). Lastly, the Supreme Court in *R. v. Borowiec* (2016) held that the disturbance did not need to meet a defined mental condition under s. 16 of the *Criminal Code* but must occur at the time of the act which causes the death of the infant.

**Murder versus Infanticide**

As discussed in Grant (2010), there has been an emerging trend in the prosecution pursuing murder charges in cases where the evidence fits infanticide. This section will discuss this issue outlined in Grant (2010). There is a great overlap between these offences and can be argued the elements of murder can be seen in most infanticide cases. As noted, infanticide is an included offence to murder, and it is argued that the difficulty of interpreting the infanticide provision as a defence arises from this inclusion. When the criteria for an infanticide are met Grant (2010) suggests the trier of fact in the case should be compelled to consider a verdict of infanticide before considering a verdict of murder. If this interpretation of the provision were to be recognized, it would give both murder and infanticide separate rolls under the culpable homicide

framework. Cunliffe (2009) states if the prosecutorial practice of charging murder before infanticide is to continue, there is the likelihood emerging cases will be questioned and require interpretation from the courts.

### Establishing a Live Birth

Another prominent issue arose when determining the cause of death of the infant at autopsy. This was important in determining if a live birth had occurred which was required for a homicide charge used during the time (Kramar, 2021). This proved to be a significant prosecutorial challenge, as these women who gave birth alone often claimed the infant had been still born (Kramar, 2021). In addition, pathologists faced difficulties determining whether the marks on the infant's bodies occurred as a result of birth or if they were the result of criminal acts of the mother (Osbourne, 1987). Cunliffe (2009) furthers this by asking the important medico-legal question of whether the complications associated with giving birth caused the infant's death, or the deliberate actions of the mother. Also outlined in Cunliffe (2009), pathologists and pediatricians have stated that SIDS (sudden infant death syndrome) and smothering are identical on autopsy.

## Case Reviews

This section presents the most prominent cases of infanticide that have been heard in Canadian courts. It will explore both Supreme Court of Canada decisions as well as those provincial decisions in which important issues first arose with the infanticide provision. It will include cases of significance such as the first case reported after the enactment of the legislation.

***R. v. Marchello* (1951)**

The first reported case of infanticide after the legislation was enacted was that of *R. v. Marchello* (1951). Marchello was tried for murder of an infant who was four and a half months old at the time of their death. The case facts outlined by Kramar (2021) show that the scenario met all the elements of infanticide according to the provision at the time, however the defendant was tried for murder.

According to Kramar (2021), the trial judge did not allow the jury to consider a verdict of infanticide due to the issue surrounding the words "newly-born" in the provision. The trial judge reasoned that a four-and-a-half-month-old infant could not be considered newly born, and the jury ended up acquitting Marchello on account of insanity (now known as NCRMD). This acquittal was likely due to the fact that a guilty verdict for murder carried the death penalty at the time (Kramar, 2021). Kramar (2021) states that if the Crown had pursued an infanticide charge rather than a murder charge, there might have been a successful conviction in this case. However, the issue of defining "newly born" would still have caused an issue as there was no legal definition.

Judge McRuer addressed this issue following *R. v. Marchello* (1951). Outlined in Cunliffe (2009), McRuer clarified elements of infanticide that have help up to present but did not add a legal definition to the words "newly born". McRuer ruled that when an accused is charged with infanticide, it is the burden of the Crown to prove the following elements:

a) The accused must be a woman
b) The woman must have caused the death of the child
c) The child must be newly born
d) The child must have been the biological child of the accused

e) The death must have been caused by a willful act or omission

f) The accused must not have been fully recovered from the effects of giving birth at the time of the act or omission

(Cunliffe, 2009).

***R. v. Jacobs* (1952)**

The next case that will be discussed is *R v. Jacobs* (1952). In the following case facts outlined by Kramar (2021), this case was the very first reported where the first charge laid against the accused was infanticide. However, during the trial the court would not convict the accused because the Crown had indeed established the accused had acted of her own free will, misunderstanding the infanticide provision. The Crown in *R. v. Jacobs* (1952) mistakenly believed that a conviction for infanticide required them to prove the mental health and stability of the accused as opposed to the mental disturbance (Kramar, 2021). Due to the presence of prosecutorial double jeopardy, the accused could not subsequently be charged and tried for murder. R v. Jacobs (1952) is important as the resolution of this case ultimately led to the amendment of the Criminal Code legislation for infanticide in 1954 and the creation of the 'no acquittal unless act or omission not willful' clause (Kramar, 2021).

***R. v. L.B.* (2011)**

The next case of importance to be discussed is that of *R. v. L.B.* (2011). In this case, the accused was a seventeen-year-old charged with the murders of her two infants born four years apart, forty-eight days and sixty-nine days old respectively (Grant, 2010). Now this case is unique as both these infant deaths were originally investigated, but their causes of death were declared due to SIDS/SUDS (Kramar, 2021). L.B. was charged with the infant deaths more than two years later, as she confessed to the deaths while being treated in a psychiatric facility (Grant,

2010). It is also important to note that the accused had two other surviving children. This case is important to consider as it again involves the interpretation of the mens rea within the infanticide legislation.

Outlined by Kramar (2021), the Crown argued for a first-degree murder conviction arguing that her confessions to the deaths of the infants met the requirements (p. 77). The trial judge disagreed and followed previous case law that under the correct circumstance that infanticide serves as a partial defense to murder (p. 77). The trial judge found that if it were not for the infanticide legislation, L.B would have been convicted of murder, ruling that murder was certain but the requirements for first degree were not met (Grant, 2010). The trial judge then chose to reflect on whether a conviction of infanticide is a legitimate legal procedure in those cases where murder is first proven (Grant, 2010).

The greatest hindrance to this speculation is the wording in s. 662(3) of the *Criminal Code* which reads, "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 account find the accused guilty of any other offence". The Crown in *R. v. L.B.* (2011) argued that the phrase "but does not prove murder" in the provision meant that if murder is indeed proven then infanticide as a defense should not be valid (Grant, 2010). The Crown appealed unsuccessfully with the Alberta Court of Appeal reaffirming the notion that infanticide does indeed serve as a mitigating offense (Kramar, 2021).

**Possible Implications of *R. v. L.B.* (2011)** Gus (2013) argues that in ruling that infanticide is both a mitigated offense and partial defence to murder, the courts create a concerning precedent that confers the idea that a woman who kills their infant will not be

convicted of murder if she meets the requirements for mental disturbance. The judge in the L.B trial did not set a specific threshold requirement behind the meaning of mental disturbance, opting for an unclear statement along the lines of not too low, but not too high (Gus, 2013). Furthermore, under this ruling even mild postpartum conditions such as the baby blues might allow the charge to be reduced from murder to infanticide (Gus, 2013). In Gus (2013) it is argued that the vagueness is too ambiguous and could lead to uneven application of the infanticide provision throughout the provinces. However, in the appellate case, the Ontario Court of Appeal worked around the issue of defining what constitutes a mental disturbance by just removing the threshold condition altogether (Gus, 2013).

***R. v. Borowiec* (2016)**

In the case of *R. v. Borowiec* (2016), the accused Borowiec was convicted of infanticide after a baby was discovered crying in a dumpster in 2010 (Kramar, 2021). The following case facts are discussed in Kramar (2021). Meredith Borowiec was between the ages of twenty-six and twenty-nine when she had given birth to three infants unassisted during that time period. Borowiec admitted that two of the infants were placed in garbage bags and left in dumpsters following their births. Borowiec also admitted to having birthed the child that was found alive in 2010. Borowiec was then charged with two counts of second-degree murder.

During the trial the prosecution included expert medical testimony under s. 672.11 of the *Criminal Code* in an attempt to disprove infanticide in hopes for a conviction. The testimony given by the prosecution's expert witness stated the accused had not suffered a mental disorder at the time of the act, while the defenses' witness claimed the accused had indeed been suffering from a mental disturbance (Kramar, 2021). However, according to Kramar (2021), the Crown

was trying to prove the wrong standard as the mental disturbance is a part of the *actus reus* and not the *mens rea*.

The Attorney General first appealed to Court of Appeal for Alberta, but the application was rejected, reaffirming that the trial judge had interpreted the provision upon conviction for infanticide (Kramar, 2021). Then, the Attorney General appealed to the Supreme Court of Canada, seeking to have the Court create a new definition for the standard of mental disturbance and include it in the *mens rea* requirements (Kramar, 2021). Additionally, the Crown advocated for a more restrictive medico-legal category which required a more substantial proof in regard to the mental disturbance aspect (Kramar, 2021).

In a unanimous 7-0 decision, the Supreme Court dismissed the appeal, and held that the original trial judge interpreted the original intent of parliament. The Court held that the original intent behind Parliament in their creation of the infanticide legislation was to make a distinction of a disturbed mind that was not either a mental disorder, or non-insane automatism (Kramar, 2021). The Supreme Court did outline a definition for 'disturbed mind' in *R. v. Borowiec* (2016) which includes the following points:

A) The word "disturbed" is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense

B) In the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mental discomposure"

C) The disturbance need not constitute a defined mental or psycho-logical condition or mental illness. It need not constitute a mental disorder under s. 16 of the *Criminal Code* or amount to a significant impairment of the accused's reasoning faculties.

D) The disturbance must be present at the time of the act or omission causing the newly born child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or lactation.

E) There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide, not the *mens rea*.

It is clear from this decision by the Supreme Court in R. v. Borowiec (2016) that the infanticide legislation is not intending to equate the element of a disturbed mind with a condition in need of assessment in order to secure a conviction (Kramar, 2021).

## Discussion: Is the Provision still Relevant?

A large portion of the debate surrounding the relevance of the infanticide provision in Canadian law seems to stem from biological elements associated with pregnancy and lactation. The premise of the legislation rests on the biological process of childbirth inherently causing a disturbance of the mind in mothers. Some argue there is no biological basis to these claims, but rather the issue lies in socioeconomic stressors that accompany child-rearing lay a claim to infanticidal tendencies. This section will explore the various opponents and proponents of the infanticide debate. It will consider arguments such as biological versus psychological factors in determining the legal validity of the infanticide framework, not only in Canadian contexts, but in general morality. This section will also explore the background of postpartum mental illnesses and their relevance in the application and interpretation of the infanticide laws.

### Postpartum Mental Illnesses

There are several postpartum disorders of the mind that have the potential to qualify as mental disturbance under the legislation (Gus, 2013). For the purposes of this thesis we will limit

our discussion to three main postpartum disorders: baby blues, postpartum depression, and postpartum psychosis.

The baby blues is the mildest, and most common of the postpartum disorders (Gus, 2013). The typical symptoms of the baby blues include tearfulness and irritability, and these usually disappear in the following two weeks after the birth of the child (Gus, 2013). This condition can affect between thirty and eighty percent of new mothers and does not classify these mothers as mentally ill (Gus, 2013). Postpartum depression or PPD, is a form of depression that typically presents in the weeks after a birth but can also appear during the pregnancy (Friedman et. al., 2012). The symptoms of PPD include a sudden onset of mania, depression, and in some cases even deliriousness (Friedman et al., 2012). The prevalence rate for PPD is about one in seven women and if left untreated it could further develop into postpartum psychosis, and a four percent risk of ending in infanticide (Friedman et al., 2012).

Postpartum psychosis is another issue altogether. Postpartum psychosis is very rare, with only 0.2% of women suffering from it (Mason, 2021). Interestingly, postpartum psychosis is the only psychiatric disorder specifically associated with infanticide, and carries a 4% of infanticide (Laufer, 2021). Outlined by Laufer (2021), psychosis can set in anywhere from two days following the birth, up to two months postpartum. Typically, those mothers who do suffer from postpartum psychosis already have a history of psychosis or bipolar disorder and are at an increased occurrence of hospitalization after their pregnancy (Laufer, 2021). Despite this, postpartum psychosis is not considered an official diagnosis in the *Diagnostic and Statistical Manual-IV* (Laufer, 2021).

Mason (2021) argues that postpartum disorders like PPD lie more in socio-psychological factors as opposed to the biological changes associated with the transition after birth. The

biological process of lactation causing a disturbed mind is outlined in the legislation, however there is little biological support for the claim that this process contributes to postpartum mental illness (Mason, 2021). The majority of evidence points to social and psychological stressors which make up the primary factors of postpartum depression (Mason, 2021). These socio-psychological factors include but are not limited to low socioeconomic status, single parenthood, and even pre-existing mental illness (Mason, 2021). How the infanticide provision relates to these disorders is simple. The infanticide provision simplifies the convoluted relationship and places a 'band aid' over the issue of jury reluctance.

**Proponents of the Infanticide Provision**

Cunliffe (2009) argues it is time to evaluate the role infanticide has in the criminal justice system, especially during the concerning emerging practice of 'over charging' to murder despite the standards for infanticide being met. If this phenomenon is to continue, perhaps we should be focusing more on the relevance of infanticide as it might increase the number of contested court cases (Cunliffe, 2009). Grant (2010) agrees admitting that while the historical justifications for infanticide may not have complete merit, "societal ambivalence still exists about this form of homicide" (p. 256). Grant (2010) argues that first degree murder charges place an unprecedented amount of pressure on accused women to accept guilty pleas in lesser offences in order to avoid the harsher penalties that come with a first-degree murder charge.

Grant (2010) also argues the legislation for infanticide could be beneficial, if it is understood in the context that recognizes the role in pregnancy and child-rearing which is unique to women. It must also be acknowledged in a way that realizes the situational reality these poor, young, and marginalized women face with unwanted pregnancies. The understanding of the

infanticide legislation should be informed in the cultural implications surrounding childbirth and pregnancy and to the extent that they constitute a mental disturbance (Grant, 2010).

Laufer (2021) would also agree, arguing that there is more to the issue of infanticide than only pathologizing women and their hormonal functioning as a result of biological processes. Laufer (2021) goes on to argue that society reinforces beliefs about motherhood that put mothers and their infants at risk. When faced with becoming pregnant and entering motherhood, these young women are bombarded with societal beliefs that motherhood is fulfilling and the peak of femininity (Laufer, 2021). Such ideas are reinforced not only by pop culture in the form of media, literature, and film, but also in the opinions of friends and family (Laufer, 2021). Grant (2010) reinforces this stating there is stigma that still surrounds women who are sexually active, and those single mothers. Laufer (2021) also offers the idea that those fathers who kill their children are not as vilified by these social opinions because they are not expected or painted as the unconditional lovers of children that mothers are expected to be.

Overall, Laufer (2021) offers a somewhat feminist opinion that infanticide legislation should be relevant, but based on cultural, familial, and socioeconomic circumstances that look at how societal systems intersect and are mostly likely a better estimate of a mother's propensity to commit infanticide, rather than her biology. For example, the pressure and stress imposed on mothers today have increased due to the increase in the expectation of these mothers (Laufer, 2021). Children today are expected to reach developmental milestones faster, to be smarter, and physically advanced, and if they do not reach this goal it is seen as a reflection of the mother (Laufer, 2021).

Grant (2010) does concede that there have been efforts to reduce certain risk factors (i.e., no access to birth control), but despite this there has been insufficient attention to providing

socioeconomic support to the younger, poorer women whose access to these services is limited than non-marginalized peoples. Although these authors are not directly supporting s.233 specifically, they support the notion that an updated section on infanticide should exist which reflects current contextual socioeconomic evidence, and societal attitudes.

Outlined in Friedman et al (2012) some proponents of the infanticide legislation agree the biological basis may no longer be valid, but also agree that socioeconomic factors should be considered as mitigating factors. Vallillee (2015) also argues that if the infanticide framework does not provide an outlet for juries to be sympathetic, it could result in more acquittals and jury nullifications.

**The Need for A Legislative Makeover**

Vallillee (2015) states there is a clear need for the infanticide legislation, however it is need of a thorough revision. Other scholars like Gus (2013) agree. Gus (2013) proposes a legislative makeover that introduces a “but- for" causation clause between the act of killing the infant, and the mental disturbance. In this proposed model outlined by Gus (2013) there would be a threshold that asks if not for the mental disturbance, would the killing have occurred. If the answer to this question is no, this would then theoretically leave out the cases in which the mothers whose moral culpability would not be reduced by the presence of a mental disturbance (Gus, 2013). Gus (2013) also goes on to outline several justifications for this, one being that it has been historically observed that a mother who kills her baby deserves a more lenient punishment framework due to the mental disturbance.

Brennan (2018) would agree that the provision needs revision, but in the social context surrounding the crime of infanticide and how it informs criminal justice response to it. As the social context surrounding a phenomenon shifts, so does the criminal justice response (Brennan,

2018). Today, infanticide is considered somewhat rarer, this social context has the potential to affect the legal response with an increased need to prosecute these cases (Brennan, 2018). Also affecting the criminal justice response to infanticide is that women have now achieved reproductive autonomy, effectively losing their status as a victim deserving of sympathy (Brennan, 2018).

**Opponents of the Infanticide Provision**

A critic for the legislation**,** Anand (2010) argues when interpreting legislation, it is important to consider the legislative intent of the drafters. At the time the legislation was first drafted there is no evidence to indicate that there was any concern for the validity of the scientific basis regarding childbirth and postpartum effect on which they based the provision (Anand, 2010). Other critics argue that the infanticide framework allows for a more lenient punishment for a crime that alludes to premeditated murder by nine months (Kramar, 2021).

Osbourne (1987) argues there are aspects to the provision which are irrational such as the twelve-month age threshold. There is no concrete evidence to allude to the notion that the mental effects that arise because of childbirth should disappear after the child is twelve months of age (Osbourne, 1987). Such a threshold begs the question of if the provision in question should be applicable then if the mother were to kill the eldest child, while appearing to suffer from the mental effects of having given birth to the youngest infant (Osbourne, 1987). Osbourne (1987) continues to offer criticism of the provision by stating that not only does the legislation hold a sexist idea that women are not held responsible for the criminality, but that the medical basis informing the offence was not credibly established to begin with.

Mason (2021) would seem to agree with this argument that the statute is sexist, but for the reason that the provision legitimizes the idea that women are inherently unstable due to their

biology, which has social implications for women outside of pregnancy and childbirth. The infanticide provision fails to recognize the socioeconomic circumstances that more likely surround the development of postpartum mental illnesses. For this Mason (2021) would also argue that the provision labels mothers as 'mad' and does nothing to distinguish them from those other homicidal individuals who are seen as full rational beings and held responsible for their criminal actions. Mason (2021) argues this was done so as to skirt around acknowledging the role socioeconomic factors play in the propensity for infanticide. If this is the case, then it raises the concerns surrounding why the provision is only available to women. Studies have shown that males also enter a postpartum depression state in similar prevalence rates to females (Mason, 2021). Mason (2021) states the focus on men experiencing this low-level distress that would satisfy the criteria is important, as more and more fathers are beginning to take on the role of primary caregiver. If the adjustment to childhood, paired with other risk factors, then the provision should apply to adoptive parents, or fathers as well (Mason, 2021).

Cunliffe (2009) outlines another common critique: the notion in the provision that the evidence of the disturbed mind need not show that it specifically led to the killing is scientifically vague. Mason (2021) agrees stating studies have shown the scientific rationale informing the legislation is not as valid as once thought. The legislation is based on the idea that childbirth and lactation affect the mental well-being of the mother, which then would provide a mitigating factor against the culpability for her actions (Mason, 2021). The infanticide legislation therefore denies the agency of those violent women which permits them to pathologize their actions as no fault of their own (Mason, 2021). This however, as Mason (2021) argues, is no new phenomenon, violence from women is seen as a result of madness and traditionally violence was seen as masculine. This response to female violence is irrelevant now today as women do

commit a number of violent crimes within the home (Mason, 2021). When men engage in violence, it is seen as expected or typical from their gender and as a result, they receive harsher penalties when convicted (Mason, 2021). As such, Mason (2021) argues that the infanticide provision should be adapted to encompass a diminished responsibility, as by not doing this the criminal justice system cheapens the value of life to the victims of these crimes. As a result of this, Mason (2021) recommends the removal of the infanticide provision as the benefits of the legislation are outnumbered by its detriments.

Friedman et al (2012) present several weaknesses to the infanticide provision in argument for its removal. Firstly, that the infanticide framework is gender biased, which like in an argument previously mentioned earlier, creates a disadvantage as men are also able to go through periods of postpartum depression and also shown to have similar motives for infanticide. Secondly, the Friedman et al. (2012) article outlines the notion that most instances of neonaticide are not directly related to mental illness, but rather are associated with the motive for infanticide in which they are simply not wanted. This again brings up the relevance of how women are perceived in terms of the role of caregiver; she must have been suffering from some sort of insanity if she were to end the life of her child (Friedman et al. 2012). Friedman et al (2012) also further argue that the act of killing itself should not constitute as defining an illness, as there is also the defence of Not Criminally Responsible Due to Mental Disorder (NCRMD) which would provide a mitigating circumstance. The NCRMD provision does have a higher threshold in order to exculpate the accused, but it applies to both men and women. Friedman et al (2012) would agree with Mason (2021) in creating an act of diminished responsibility which would allow for a mitigated punishment framework that does not lead to full exculpation unlike the NCRMD defence.

In addition, mitigating circumstance are taken into consideration during the sentencing hearings, so if the goal of the infanticide legislation is to provide mitigating circumstances this becomes redundant (Friedman et al., 2012).

**Untested Argument: Constitutionality**

Outlined by Kramar (2021), most critics of the infanticide legislation in Canada are focused solely on the way these laws offer differential treatment to women, basing their argument on the constitutional framework regarding equal treatment regardless of sex. One such contester of the infanticide provision is Mair (2018). Mair (2018) offers an uncontested argument that the infanticide legislation violates the *Canadian Charter of Rights and Freedoms*. He argues that the infanticide provision specifically violates the equality rights of newborns under the *Charter*, stating that the mitigated punishments under the infanticide framework places a lesser value of human life on infants under the age of one year.

Mair (2018) states that the threshold for the definition of a disturbed mind is much lower than is required for NCRMD, which he attributes to the socioeconomic circumstances which informed the provision when it was first drafted under the guise of biological pathology. Essentially, Scott (2018) argues that the true socioeconomic circumstances were given a psychiatric appearance in order to fit the law to socially acceptable contexts. Section 233 of the *Criminal Code* violates equality rights under Section 15 of the *Charter* according to Mair (2018). Under the Charter, all persons are guaranteed equal treatment under the law and the infanticide provision treats both the offender and the victim differently (Mair, 2018). Mair (2018) offers an example relating to the relational status between offender and victim. If the infant and the perpetrator are not related (i.e., if a stranger were to kill an infant unrelated to them in any way) then the death would be considered murder. However, if the infant's mother were to commit the act, the partial defence of infanticide would be available to her use.

Mair (2018) follows the example with the statement that the Supreme Court of Canada has already recognized that different punishments for murder of specific groups of Canadians does amount to differential treatment based on the enumerated grounds of age. The case Mair (2018) mentions in which this is conveyed is that of the murder of a police officer in Miller et. al. v. The Queen. Under this reasoning, one can argue that the differential treatment afforded to women under the partial defence of infanticide is based on the mental disturbance element, the defence is not available unless the victim is under the age of one year (Mair, 2018). How this is discriminatory in nature according to Mair (2018) can be seen when examining sentencing practices. When setting penalties for crimes, the legislators in Parliament cannot set sentences more harshly for crimes committed by men, but it can set criminal penalties where the offender's actions do not carry full criminal culpability. However, Mair (2018) argues that Parliament does not have the right to pass legislation that deem certain offender actions to be less morally culpable due to the age of the victim involved. Osbourne (1987) would most likely concur. Osbourne (1987) states that the universal application of the tenets of law is fundamental, and that treating individuals differently is a practice that should be closely monitored.

## Conclusion

It is clear from the evidence presented in this thesis that there are still great concerns surrounding the infanticide provision. The tumultuous evolution and application of the provision in Canadian history sets a tone of concern among the criminal justice community, especially in regard to future interpretations. This is seen especially in the emerging trend of the prosecution favoring murder charges over infanticide discussed in Grant (2010). While the infanticide provision provides a mitigated punishment framework, it seems that the legislation would benefit from a more clear and comprehensive revision, especially in regard to the medio-legal aspect of

'her mind is then disturbed'. As examined in this thesis, the biological principles informing the legislation seem not valid. A revision of the legislation that includes socioeconomic stressors associated with child rearing (as this seems the more likely cause for infanticide) would clear the ambiguity surrounding the infanticide provision. The Supreme Court's decision in *R. v. Borowiec* (2016) may provide guidance on any revision of the current legislation.

While the occurrence of infanticide in Canada is rare, it may not seem like a pressing matter. Perhaps the justice system would do well to closer inspect those socioeconomic circumstances in which the typical infanticide offender finds themselves, as that seems to speak more to the issue of infanticide rather than its interpretation and adjudication within Canadian law.

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