



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Ryan, 2013 SCC 3

**DATE:** 20130118

**DOCKET:** 34272

**BETWEEN:**

**Her Majesty The Queen**

Appellant

and

**Nicole Patricia Ryan**

Respondent

- and -

**Attorney General of Ontario, Canadian Association of Elizabeth Fry Societies,  
Women's Legal Education and Action Fund and Criminal Lawyers' Association  
of Ontario**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,  
Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 85)

LeBel and Cromwell JJ. (McLachlin C.J. and Deschamps,  
Abella, Rothstein, Moldaver and Karakatsanis JJ.  
concurring)

**REASONS DISSENTING IN PART:**  
(paras. 86 to 90)

Fish J.

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R. v. RYAN

**Her Majesty The Queen**

*Appellant*

v.

**Nicole Patricia Ryan**

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**Attorney General of Ontario, Canadian Association of  
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File No.: 34272.

2012: June 14; 2013: January 18.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,  
Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

*Criminal Law — Defences — Duress — Abused wife paying “hit man” to murder husband who has threatened her life — Whether duress is available in law as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence — Statutory and common law parameters of defence of duress — Whether stay of proceedings is appropriate in circumstances of case.*

R was the victim of a violent, abusive and controlling husband. She believed that he would cause her and their daughter serious bodily harm or death and that she had no safe avenue of escape other than having him killed. She spoke to an undercover RCMP officer posing as a hit man and agreed to pay him \$25,000 to kill her husband. She gave \$2,000, an address and a picture of her husband to the officer. She was arrested and charged with counselling the commission of an offence not committed contrary to s. 464(a) of the *Criminal Code*. The trial judge was satisfied beyond a reasonable doubt that the requisite elements of the offence were established. The only issue at trial was whether the defence of duress applied. The trial judge accepted R’s evidence that the sole reason for her actions was intense and reasonable fear arising from her husband’s threats of death and serious bodily harm to herself and their daughter. The trial judge found that the common law defence of duress applied and acquitted R. On appeal, for the first time, the Crown argued that duress was not available to R in law. The Court of Appeal upheld the acquittal.

*Held* (Fish J. dissenting in part): The appeal should be allowed and the proceedings should be stayed.

*Per* McLachlin C.J. and **LeBel**, Deschamps, Abella, Rothstein, **Cromwell**, Moldaver and Karakatsanis JJ.: The defence of duress is only available when a person commits an offence while under compulsion of a threat made for the purpose of compelling him or her to commit the offence. This was not R's situation and the defence of duress was not available to her. If an accused is threatened without compulsion, his or her only defence is self-defence.

The Court of Appeal erred in law in finding that there was no principled basis upon which to exclude R from relying on the defence of duress. Although the defences of duress and self-defence are both based on the idea of normative involuntariness and both apply where the accused acted in response to an external threat, significant differences between these defences justify maintaining a meaningful juridical difference between them. The rationale underlying each defence is profoundly distinct. Duress, like the defence of necessity, is an excuse. The act, usually committed against an innocent third party, remains wrong but the law excuses those who commit the act in a morally involuntary manner, where there was realistically no choice but to commit the act. Self-defence, in contrast, is a justification based on the principle that it is lawful in defined circumstances to resist force or a threat of force with force. The victim, also the attacker, is the author of his or her own misfortune. Generally, the justification of self-defence ought to be more

readily available than the excuse of duress. Thus, if infliction of harm on a person who threatened or attacked the accused is not justified by the law of self-defence, it would be curious if the accused's response would nonetheless be excused by the more restrictive law of duress. Duress, which is an amalgam of statutory and common law elements, cannot be extended to apply where the accused meets force with force in situations where self defence is not available. Duress is, and must remain, an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm.

This appeal underlines the need for further clarification of the law of duress. The statutory version of the defence applies to principals and the common law to parties. The statutory version of the offence also excludes a long list of offences from its operation. Nonetheless, the defence of duress, in its statutory and common law forms, is largely the same and both forms share the following common elements: there must be an explicit or implicit threat of present or future death or bodily harm — this threat can be directed at the accused or a third party; the accused must reasonably believe that the threat will be carried out; there must be no safe avenue of escape, evaluated on a modified objective standard; there must be a close temporal connection between the threat and the harm threatened; there must be proportionality between the harm threatened and the harm inflicted by the accused, also evaluated on a modified objective standard; and the accused cannot be a party to a conspiracy or association whereby he or she is subject to compulsion and actually

knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

The circumstances of this case are exceptional and warrant a stay of proceedings. Although the appeal should be allowed, it would not be fair to subject R to another trial. The abuse she suffered and the protracted nature of these proceedings have taken an enormous toll on her. The law of duress was unclear which made resort to the defence at trial unusually difficult. Furthermore, the Crown changed its position about the applicable law between the trial and appeal process, raising a serious risk that the consequences of decisions made during the conduct of R's defence cannot be undone in the context of a new trial.

*Per* Fish J. (dissenting in part): The defence of duress was not available to R and the acquittal must be set aside. However, a judicial stay of proceedings is not warranted on the record. A stay is a drastic remedy of last resort and available only in the clearest of cases. These criteria are not satisfied. A new trial should be ordered, leaving it to the Crown to decide whether the public interest requires a new trial in the particular circumstances of the case.

## Cases Cited

By LeBel and Cromwell JJ.

**Explained:** *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687; **referred to:** *R. v. Hibbert*, [1995] 2 S.C.R. 973; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Provo*, [1989] 2 S.C.R. 3; *R. v. Power*, [1994] 1 S.C.R. 601; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Fraser* (2002), 3 C.R. (6th) 308; *Paquette v. The Queen*, [1977] 2 S.C.R. 189; *R. v. Howe*, [1987] A.C. 417; *R. v. Mena* (1987), 34 C.C.C. (3d) 304; *R. v. McRae* (2005), 77 O.R. (3d) 1; *R. v. Langlois* (1993), 80 C.C.C. (3d) 28; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Li* (2002), 162 C.C.C. (3d) 360; *R. v. Poon*, 2006 BCSC 1158 (CanLII); *R. v. M.P.D.*, 2003 BCPC 97, [2003] B.C.J. No. 771 (QL); *United States v. Burnes*, 666 F.Supp.2d 968 (2009); *United States v. Gamboa*, 439 F.3d 796 (2006); *United States v. Montes*, 602 F.3d 381 (2010).

By Fish J. (dissenting in part)

*Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. O'Connor*, [1995] 4 S.C.R. 411.

## Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, ss. 1, 7.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 2 “bodily harm”, 8(3), 17, 34(1), 464(a), 695.

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Stuart, Don. *Canadian Criminal Law: A Treatise*, 6th ed. Scarborough, Ont.: Thomson Reuters Canada, 2011.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Saunders and Oland J.J.A.), 2011 NSCA 30, 301 N.S.R. (2d) 255, 953 A.P.R. 255, 269 C.C.C. (3d) 480, 84 C.R. (6th) 249, [2011] N.S.J. No. 157 (QL), 2011 CarswellNS 177, affirming an acquittal entered by Farrar J., 2010 NSSC 114, 289 N.S.R. (2d) 273, 916 A.P.R. 273, [2010] N.S.J. No. 154 (QL), 2010 CarswellNS 182. Appeal allowed, Fish J. dissenting in part.

*William D. Delaney, Q.C., and Jennifer A. MacLellan, for the appellant.*

*Joel E. Pink, Q.C., Brian H. Greenspan, Andrew Nielsen and Naomi M. Lutes, for the respondent.*

*John Corelli and Holly Loubert, for the intervener the Attorney General of Ontario.*

*Christine Boyle, Q.C., for the interveners the Canadian Association of Elizabeth Fry Societies and the Women’s Legal Education and Action Fund.*

*Susan M. Chapman and Howard Krongold, for the intervener the Criminal Lawyers’ Association (Ontario).*

The judgment of McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

LEBEL AND CROMWELL JJ. —

## I. Introduction

[1] This appeal raises a novel question: may a wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him

murdered? The Nova Scotia courts concluded that she may and acquitted the respondent, Nicole Ryan, of counselling the commission of her husband's murder. The Crown appeals.

[2] As we see it, the defence of duress is available when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it. That was not Ms. Ryan's situation. She wanted her husband dead because he was threatening to kill her and her daughter, not because she was being threatened for the purpose of compelling her to have him killed. That being the case, the defence of duress was not available to her, no matter how compelling her situation was viewed in a broader perspective. It is also our view, however, that the uncertainty surrounding the law of duress coupled with the Crown's change of position between trial and appeal created unfairness to Ms. Ryan's defence in this case. As a result, we would allow the appeal and enter a stay of proceedings.

[3] The appeal presents an opportunity to bring more clarity to the law of duress in Canadian criminal law. Some of the relevant law is statutory, but aspects of the provisions have been found to be unconstitutional. Other aspects of the relevant law are judge-made. The patchwork quilt nature of the present law has given rise to significant uncertainty about the parameters of both the statutory and common law elements of the defence and the relationship between them. In relation to this larger issue, our view is that the common law and statutory versions of the defence may be substantially harmonized in the manner we will set out in detail later in our reasons.

## II. Overview of Facts and Proceedings

### A. *Facts*

[4] The respondent, Nicole Ryan, has been the victim of a violent, abusive and controlling husband. She believed that he would cause her and their daughter serious bodily harm or death as he had threatened to do many times.

[5] In September of 2007, she began to think about having her husband murdered. Over the course of the next seven months, she spoke to at least three men whom she hoped would kill him. In December 2007 or January 2008, she paid one man \$25,000 to carry out the killing, but he then refused, demanding more compensation. She approached another person and was contacted by a third, an undercover RCMP officer, posing as a “hit man”. On March 27, 2008, she met with this individual and agreed to pay him to kill her husband. The agreed upon price was \$25,000, with \$2,000 paid in cash that day. The killing was to take place the coming weekend. Later that same night, she provided an address and a picture of her husband to the “hit man.” Shortly after, she was arrested and charged with counselling the commission of an offence not committed contrary to s. 464(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[6] At trial, there was no issue that the elements of the offence had been proved and the trial judge, Farrar J. (as he then was), indicated that he was satisfied beyond a reasonable doubt that the requisite elements of the offence of counselling

the commission of an offence had been established. He based this conclusion on the respondent's admission that the Crown had proved a *prima facie* case and on the audio and video tapes of recorded conversations with the undercover officer and a statement made on arrest: trial judge's reasons, at paras. 4-6. The only issue at trial was whether the respondent's otherwise criminal acts were excused because of duress. The accused had raised that the common law defence of duress applied. The Crown argued that *on the facts of this case*, the components of duress were not present. But it did not argue at trial, as it did later on appeal, that the defence of duress was not available *in law* to the respondent (transcript, at pp. 22-23; trial judgment, 2010 NSSC 114, at paras. 7-8).

[7] The trial judge accepted the respondent's evidence that the relationship and the events she had described relating to that relationship were true. For example, Mr. Ryan's violent and threatening behaviour included outbursts at least once a week, where he would throw things at the respondent's head, physically assault her and threaten to kill her (trial judgment, at para. 17). The respondent testified that Mr. Ryan often told her that he would kill her and their daughter if she ever tried to leave him (at para. 33), and that he would "burn the fucking house down" while she and her daughter were inside (para. 45).

[8] The trial judge had no difficulty in concluding that Mr. Ryan was a manipulative, controlling and abusive husband who sought to control the actions of the respondent, be they social, familial or marital. The judge found that the

respondent's sole reason for her actions was her fear of her husband which arose from his threats of death and serious bodily harm to herself and their daughter: paras. 149-52. He also was satisfied that the respondent had led evidence to the requisite standard that she reasonably believed that Mr. Ryan would cause her and her daughter serious bodily injury and that there was no safe avenue of escape other than having him killed.

[9] The judge concluded that the respondent was in a very vulnerable state, had lost a considerable amount of weight, was dissociated and despondent. She had an intense and reasonable fear of Mr. Ryan, was feeling helpless, felt she had lost control and felt she was threatened with annihilation. While she had engaged the police and other agencies in an effort to assist her in the past, the evidence was that her problems were viewed as a "civil matter". She felt so vulnerable that the phone call of the undercover police officer appeared to her as the solution to all her problems (para. 73). On the basis of these findings, the trial judge found that the common law defence of duress applied, and acquitted the accused.

[10] The Crown appealed but the Court of Appeal unanimously upheld the trial judge's verdict of acquittal. On the appeal, for the first time, the Crown took the position that duress was not available in law as a defence to the respondent on these facts. Duress, the Crown contended, applies only when an accused is forced by threats to commit an offence against a third party (2011 NSCA 30, 301 N.S.R. (2d) 255, at para. 56). MacDonald C.J.N.S. (Saunders and Oland J.J.A. concurring) rejected the

Crown's submission. Simply put, the Court of Appeal found that the focus of the defence of duress is to absolve an accused of criminal liability when his or her conduct is morally involuntary. Therefore, the analysis should focus on the accused's predicament and not on who did what to whom in who's presence. It followed that the respondent should not be denied the defence of duress simply because the victim was not a third party, but the aggressor. The court saw no principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim.

[11] The court reviewed the case law in this area which emphasizes the need for triers of fact to fully understand the plight of battered spouses who, having reacted to threats from their abusive partners, rely on the defence of duress. MacDonald C.J.N.S. also highlighted the need for the defence to be sufficiently flexible, when appropriate, to accommodate the dark reality of spousal abuse.

### III. Analysis

#### A. *Issues*

[12] The appeal raises three issues:

1. Is duress available in law as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence?

2. If not, and the appeal must therefore be allowed, what order should be made and, in particular, in the unusual circumstances of this case, should a stay of proceedings be entered?

3. Can the law of duress be clarified and how?

*B. Is Duress a Possible Defence?*

[13] The Crown asserted that the defence of duress is not open to the accused, on the facts of this case. The Court of Appeal reasoned that, if the respondent had herself attacked her husband, self-defence would represent a potential avenue of defence: para. 99. The court saw “no principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim”: para. 99. In other words, while duress has traditionally applied where the person making the threat and the victim are different, this fact does not justify restricting duress to that sort of situation. As the Court of Appeal commented, it would be “ironic” that the respondent might have a defence of self-defence if she had attacked her husband herself, but no defence where she responded to the same threat by hiring someone else to kill him: para. 99. In short, the Court of Appeal thought it appropriate to develop the common law of duress in order to fill a gap in the law of self-defence.

[14] The Crown argues that the Court of Appeal wrongly held that there was no principled basis for refusing to extend the defence of duress to cover these facts. In order to address this argument, we need to review the state of the common law defence of duress.

[15] We begin our analysis with *R. v. Hibbert*, [1995] 2 S.C.R. 973 which touched on the question of the differences and relationship between duress, necessity and self-defence. One of the issues in *Hibbert* was whether the common law defence of duress incorporated the requirement that no “safe avenue of escape” be available to the accused. Lamer C.J. approached this question by examining the juristic nature of the defence of duress and its relationship to other common law defences: para. 46. This led him to consider the relationship between self-defence, duress and necessity.

[16] In this case, unlike in *Hibbert*, we must resolve the question of whether the differences between duress and self-defence justify maintaining a meaningful juridical difference between them. In our view, and with great respect to the contrary view of the Court of Appeal, they do. In other words, we conclude that the Court of Appeal erred in law when it found that there is “no principled basis” upon which the respondent should be excluded from relying on the defence of duress.

[17] With respect to the relationship between duress and necessity, Lamer C.J. in *Hibbert* concluded that the “the similarities between the two defences are so great that consistency and logic require that they be understood as based on the same juristic principles” and that to do otherwise “would be to promote incoherence and

anomaly in the criminal law”: para. 54. Their common foundation is that both are excuses, “based on the idea of normative involuntariness”: para. 54, as Dickson J. (as he then was) had found in the case of the defence of necessity in *Perka v. The Queen*, [1984] 2 S.C.R. 232. The relationship among duress and necessity on one hand and self-defence on the other was less clear. All three apply in “essentially similar” situations: each is concerned with providing a defence to what would otherwise be criminal conduct because the accused acted in response to an external threat: para. 60. As the then Chief Justice explained in *Hibbert*,

The defences of self defence, necessity and duress all arise under circumstances where a person is subjected to an external danger, and commits an act that would otherwise be criminal as a way of avoiding the harm the danger presents. [para. 50]

[18] However, there are also significant differences among the defences. As Lamer C.J. explained,

[A] distinction can be drawn between self-defence, on the one hand, and duress and necessity, on the other, that might well provide a basis for a meaningful juridical difference. In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide .... In this sense, he or she is the author of his or her own deserts, a factor which arguably warrants special consideration in the law. In cases of duress and necessity, however, the victims of the otherwise criminal act ... are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused’s actions.” [Emphasis in original; para. 50.]

[19] In this passage, the Chief Justice alludes to two differences that “[may] well provide a basis for a meaningful juridical difference” between duress and self-defence: para. 50.

[20] First, self-defence is based on the principle that it is lawful, in defined circumstances, to meet force (or threats of force) with force: “an individual who is unlawfully threatened or attacked must be accorded the right to respond”: M. Manning and P. Sankoff, *Manning Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 532. The attacker-victim is, as the Chief Justice put it, “the author of his or her own deserts”: para. 50. On the other hand, in duress and necessity, the victim is generally an innocent third party: see D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 511. Second, in self-defence, the victim simply attacks or threatens the accused; the motive for the attack or threats is irrelevant. In duress, on the other hand, *the purpose of the threat* is to compel the accused to commit an offence. To put it simply, self-defence is an attempt to stop the victim’s threats or assaults by meeting force with force; duress is succumbing to the threats by committing an offence.

[21] However, these are not the only differences between duress and self-defence. It seems to us that there are two other significant differences which must be taken into account.

[22] One is that self-defence is completely codified by the provisions of the *Criminal Code*. Thus, Parliament has established the parameters of self-defence in

their entirety. They are no longer found, even in part, in the common law. Duress, on the other hand, is partly codified and partly governed by judge-made law as preserved by s. 8(3) of the *Code*.

[23] Another is that the underlying rationales of the defences are profoundly distinct. The rationale underlying duress is that of moral involuntariness, which was entrenched as a principle of fundamental justice in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 47: “It is a principle of fundamental justice that only voluntary conduct — behaviour that is the product of a free will and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability.” It is upon this foundation that we build the defences of duress and necessity. As Lamer C.J. put it in *Hibbert*, the underlying concept of both defences is “normative involuntariness”, in other words, that there is “no legal way out”: para. 55. While the test to be met is not dictated by this generally stated rationale underlying the defence, its requirements are heavily influenced by it. As was discussed in *Perka*, defences built on the principle of moral involuntariness are classified as excuses. The law excuses those who, although morally blameworthy, acted in a morally involuntary manner. The act remains wrong, but the author of the offence will not be punished because it was committed in circumstances in which there was realistically no choice: *Ruzic*, at para. 34; *Perka*, at p. 248. The principle of moral involuntariness is “[a] concessio[n] to human frailty” in the face of “agonising choice”: *Ruzic*, at para. 40; *Stuart*, at p. 490. The commission of the crime is “remorselessly compelled by normal human instincts”: *Perka*, at p. 249. As LeBel J.

put it in *Ruzic*: “Morally involuntary conduct is not always inherently blameless” (para. 41).

[24] Despite its close links to necessity and duress, self-defence, on the other hand, is a justification: *Perka*, at pp. 246 and 269. It “challenges the wrongfulness of an action which technically constitutes a crime”: *Perka*, at p. 246 (see also H. Parent, *Traité de droit criminel* (2nd ed. 2005), vol. 1, *L'imputabilité*, at pp. 587-88). For different views, see S.G. Coughlan “Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?” (2002), 7 *Can. Crim. L.R.* 147, at p. 158; see also Manning and Sankoff, at p. 342; see K. Roach, *Criminal Law* (4th ed. 2009), at p. 294). In determining whether the defence is available, less emphasis is placed on the particular circumstances and concessions to human frailty and more importance is attached to the action itself and the reason why the accused was justified in meeting force with force.

[25] We do not, for the present purpose, need to delve too deeply into the distinction between justifications and excuses and questions of exactly how and when the distinction is to be drawn in all cases. For the purposes of this appeal, the distinction simply expresses an underlying difference in principle between the two defences: while in a case of duress we excuse an act that we still consider to be wrong, the impugned act in a case of self-defence is considered right. The question then, is whether these differences support a principled distinction between duress and self-defence. In our view they do, for two main reasons.

[26] Given the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress. And so it is. Unlike duress, self-defence does not require that any course of action other than inflicting the injury was “demonstrably impossible” or that there was “no other legal way out.” Under the former self-defence provisions, for example, a person who is the victim of an unprovoked unlawful assault is entitled to use as much force as is necessary to defend himself, provided he does not intend to cause death or grievous bodily harm: S. 34(1) (see Parent, pp. 605-606). Under the recently adopted provisions in Bill C-10, self-defence is available in circumstances in which a person believes on reasonable grounds that force is being used against him or her and responds reasonably for the purpose of self-defence: s. 34(1).

[27] Thus, if infliction of harm on a person who threatened or attacked the accused is not justified by the law of self-defence, it would be curious if the accused’s response would nonetheless be excused by the more restrictive law of duress. For the sake of the coherence of the criminal law, the defence of self-defence ought to be more readily available, not less readily available, than the defence of duress in situations in which the accused responds directly against the source of the threat.

[28] These distinctive underlying principles of self-defence and duress take on added significance when we remember that in Canadian law, self-defence is exhaustively codified, whereas duress is an amalgam of statutory and common law elements. This means that the courts must take care not to use the flexibility of the

common law to develop duress in ways that circumvent limitations and restrictions imposed by Parliament on the defence of self-defence. This would amount to judicial abrogation of parts of the *Criminal Code*. The courts intervene to interpret and apply the statutory rules governing self-defence, not to set them aside in the absence of a constitutional challenge.

[29] Duress cannot be extended so as to apply when the accused meets force with force, or the threat of force with force in situations where self-defence is unavailable. Duress is, and must remain, an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm. This clearly limits the availability of the offence to particular factual circumstances. The common law elements of duress cannot be used to “fill” a supposed vacuum created by clearly defined statutory limitations on self defence.

[30] This is even clearer when one considers — as explained above — the fundamental distinctions between both defences. Not only is one a justification and the other an excuse, but they also serve to avoid punishing the accused in completely different situations. If, for example, the accused was threatened with death or bodily harm without any element of compulsion, his or her only remedy is self-defence. If, on the other hand, the accused was compelled to commit a specific unlawful act under threat of death or bodily harm, the available defence is duress. In a case where there was a threat without compulsion, the accused cannot rely on duress simply because he or she did not employ direct force and thus, was excluded from relying on the self-

defence provisions of the *Code*. As Glanville Williams' latest editor, Dennis J. Baker, wrote about the availability of "pure" duress (as opposed to duress of circumstances, which is an entirely different defence): "On principle, the offence must be one expressly or impliedly ordered by the villain, the order being backed up by his threat. (Or the defendant must have believed that.) ... As a matter of justice the defence should only be available where the defendant commits a crime that he has been directly coerced to commit" (*Textbook of Criminal Law* (3d ed., 2012), at paras. 25-037 and 25-039).

[31] Consider the result arrived at by the Court of Appeal in this case. The respondent responded to threats against her and her child of bodily harm and death in ways which, in the view of the Court of Appeal, would not entitle her to rely on the defence of self-defence. We add that the appeal to the Court was also presented on the assumption that self-defence was not potentially open to the respondent on these facts. For the purposes of these reasons, we do not need to decide this point. If this is the case, the extension of the law of duress to meet the respondent's situation has made the law incoherent at the level of principle. Following the logic of the Court of Appeal's conclusions, duress, which deals with wrongful but excused conduct would be more readily available than self-defence, which addresses rightful conduct, in a situation in which the accused responded to threats by trying to eliminate them. And yet, according to the underlying rationale, excuses ought to be more restrictively defined than justifications: see e.g. *Stuart* at p. 511.

[32] The difficulty that this creates is not, in our view, limited to a lack of analytical tidiness. The result of this case is in effect a judicial amendment of the law of self-defence. This point is underlined by the fact that neither in the sources cited by the parties nor in our own research has duress been extended to a case in which the threat was not made for the purpose of compelling the commission of an offence and the victim was the person making the threat.

[33] In our opinion, the Court of Appeal erred in law in finding that duress is a legally available defence on these facts. Duress is available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence.

### *C. Remedy*

[34] The next issue is what order should be made, given our conclusion that the Court of Appeal erred in law and the appeal of the Crown should be allowed. In our view, the interests of justice require that a stay of proceedings be entered as the Court is authorized to do in the clearest of cases by s. 695 of the Code: see, e.g., *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 23; *R. v. Provo*, [1989] 2 S.C.R. 3, at pp. 18-23.

[35] It is apparent that the law of duress was unclear, which made resort to it as a defence unusually difficult. Coupled with that consideration is the problem in this case that the Crown changed its position about the applicable law between the trial and the appeal process. The trial proceeded on the basis that duress was available as a

matter of law to Ms. Ryan if the facts supported it. She therefore went to trial on the basis that the issues were mainly the factual ones relating to whether she had pointed to evidence capable of raising a reasonable doubt about the various components of duress. Presumably, decisions about the conduct of the defence were made on this basis and might have been made differently had the legal position later adopted by the Crown on appeal, that duress was not open to her in law, been known at the time of trial. There is therefore a serious risk that some of the consequences of those decisions could not be undone in the context of a new trial and this raises concern about the fairness of ordering a new trial. In addition, the abuse which she suffered at the hands of Mr. Ryan took an enormous toll on her, as, no doubt, have these protracted proceedings, extending over nearly five years, in which she was acquitted at trial and successfully resisted a Crown appeal in the Court of Appeal. There is also the disquieting fact that, on the record before us, it seems that the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her. A stay of proceedings is warranted only in the clearest of cases: see *R. v. Power*, [1994] 1 S.C.R. 601, at p. 615. In our opinion, Ms. Ryan's case falls into the residual category of cases requiring a stay: it is an exceptional situation that warrants an exceptional remedy. In all of the circumstances, it would not be fair to subject Ms. Ryan to another trial. In the interests of justice, a stay of proceedings is required to protect against this oppressive result: see *Power*, at pp. 615-16; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91.

#### D. *Can the Law of Duress be Clarified?*

[36] This appeal underlines the need for further clarification of the law of duress. The statutory version of the defence applies to principals and the common law to parties. Important aspects of the statutory version were found to be unconstitutional in *Ruzic*, and the provision remains in place with two significant deletions as a result. The statutory version of the defence excludes a long list of offences from its operation, but various courts have found some of these exclusions to be unconstitutional. For example, in *R. v. Fraser* (2002), 3 C.R. (6th) 308, the Nova Scotia Provincial Court declared the following:

*s. 17 of the Criminal Code in so far as it eliminates the defence of duress and/or necessity in offences concerning robbery is of no force and effect as being contrary to the Canadian Charter of Rights and Freedoms and in particular s.7 of the Charter. [para. 5]*

There is uncertainty about the similarities and differences between the common law and the statutory versions of the defence. Within the limits of the judicial role, in the development of the law, additional clarification is needed.

[37] In our view, after the decision of the Court in *Ruzic*, some reappraisal and some adjustment of both the interpretation of the statutory version of the defence and of the common law seems necessary. We begin with a recapitulation of what was decided in *Ruzic* and then address the various components of the statutory and common law versions of the defence.

(1) An Overview of *Ruzic*

[38] In *Ruzic*, the Court dealt with the constitutionality of parts of the statutory defence of duress, located in s. 17 of the *Criminal Code*. The accused in *Ruzic* admitted importing heroin from Serbia into Canada. She argued that she should be excused from criminal liability because a third party in Serbia had threatened to harm her mother unless she committed the offence, and the Serbian police would not have been able to protect her mother. The accused conceded that her claim of duress did not satisfy the immediacy and presence preconditions of the statutory defence. She challenged the constitutionality of s. 17, which reads as follows:

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

[39] In upholding the accused's acquittal based on the defence of duress, a unanimous Court in *Ruzic* held that portions of s. 17 violated s. 7 of the *Canadian Charter of Rights and Freedoms* and were not saved by s. 1.

[40] In its analysis, the Court first addressed the question of whether it is a principle of fundamental justice that morally involuntary conduct should not be punished. The principle of moral involuntariness recognizes that “[a] person acts in a morally involuntary fashion when, faced with perilous circumstances, she is deprived of a realistic choice whether to break the law” (*Ruzic*, at para. 29). In concluding that the principle of moral involuntariness was indeed a principle of fundamental justice, the Court noted that the treatment of criminal offenders as autonomous and freely choosing agents is a key organizing principle of criminal law. As a result, it is a violation of s. 7 of the *Charter* to convict a person who has no realistic choice and whose behaviour is, therefore, morally involuntary.

[41] The Court then considered whether the immediacy and presence requirements in s. 17 infringe the fundamental principle of moral involuntariness by limiting the defence of duress to a person who commits an offence under a threat of immediate bodily harm from a person present when the offence is committed. The Court concluded that the immediacy and presence requirements, taken together, preclude threats of future harm and thereby infringe the *Charter*. The underinclusiveness of s. 17 violates the liberty and security interests protected under s. 7 because of the potential to convict persons who, placed under duress by threats of future harm, have not acted voluntarily. This violation is not justifiable under s. 1.

[42] The Court clarified that s. 17 requires only that the threat be made *to* the accused, not that the *object* of the threatened harm be the accused herself. Therefore,

under s. 17, the threat of harm need not be directed at the accused personally but may be directed against a third party. Additionally, the Court confirmed its previous decisions in *Paquette v. The Queen*, [1977] 2 S.C.R. 189, and *Hibbert*, which held that s. 17 applies only to persons who commit offences as principals, while the common law defence of duress remains available to parties to an offence. Finally, the Court declined to address the question of whether the list of excluded offences in s. 17 violates the *Charter*, as none of the offences at issue in the appeal was contained in the list: para. 19.

(2) The Statutory Defence of Duress Post-*Ruzic*

[43] What, therefore, remains of s. 17 after *Ruzic*? The Court did not strike down s. 17 in its entirety; it was found unconstitutional only “in part” (para. 1). As a result, the following four requirements of the statutory defence remain intact after the Court’s ruling in *Ruzic*:

1. there must be a threat of death or bodily harm directed against the accused or a third party;
2. the accused must believe that the threat will be carried out;
3. the offence must not be on the list of excluded offences; and
4. the accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion.

[44] However, the Court in *Ruzic* did not leave the statutory defence in place simply stripped of its unconstitutional portions. The Court supplemented the interpretation and application of s. 17 with elements from the common law defence of

duress, which it found to be “more consonant with the values of the *Charter*” (para. 56). In other words, the Court in *Ruzic* used the common law standard to interpret the affirmative requirements of the statute: see D. M. Paciocco, “No-one Wants to Be Eaten: The Logic and Experience of the Law of Necessity and Duress” (2010), 56 *Crim. L.Q.* 240, at p. 273.

[45] Where ambiguities or gaps exist in the partially struck-down s. 17, the common law defence of duress operates to clarify and flesh out the statutory defence:

The analysis of duress in common law will also be useful as it will shed some light on the appropriate rules which had to be applied to the defence of the accused in the case at bar and which will now be applied in all other cases, once s. 17 of the *Criminal Code* is partially struck down. [Emphasis added; *Ruzic*, at para. 55.]

[46] In *Ruzic*, the Court articulated and analyzed the following three key elements of the common law defence of duress, which now operate in s. 17 cases alongside the four requirements remaining in the statutory defence: (1) no safe avenue of escape; (2) a close temporal connection; and (3) proportionality (see Parent, at pp. 549-50).

(a) *No Safe Avenue of Escape*

[47] The defence of duress “focuses on the search for a safe avenue of escape” (*Ruzic*, at para. 61). Following the decision in *Hibbert*, the Court in *Ruzic* concluded that the defence does not apply to persons who could have legally and safely

extricated themselves from the situation of duress. In order to rely on the defence, the accused must have had no safe avenue of escape, as measured on the modified objective standard of the reasonable person similarly situated.

(b) *A Close Temporal Connection*

[48] There must be “a close temporal connection between the threat and the harm threatened” (*Ruzic*, at para. 96). The close connection between the threat and its execution must be such that the accused loses the ability to act voluntarily. The requirement of a close temporal connection between the threat and the harm threatened is linked with the requirement that the accused have no safe avenue of escape. As the Court in *Ruzic* indicated, a threat that is “too far removed in time . . . would cast doubt on the seriousness of the threat and, more particularly, on claims of an absence of a safe avenue of escape” (para. 65).

[49] As long as the immediacy and presence requirements in s. 17 remained intact, the safe avenue of escape and close temporal connection factors had little relevance. A threat of immediate death or bodily harm which the recipient believes will be carried out by a person present ensured a close temporal connection and would most likely leave no safe avenue of escape. However, once the immediacy and presence requirements were struck from s. 17, the common law requirements of no safe avenue of escape and the close temporal connection became a critical means of assessing whether the accused’s actions were morally involuntary.

[50] In addition, once the immediacy and presence requirements were struck, it followed that the accused's belief that the threat would be carried out must be evaluated on a modified objective standard of the reasonable person similarly situated. Section 17 provides that a person will be excused "if the person believes that the threats will be carried out". On its face, therefore, the section requires a purely subjective belief, a lower standard that made sense when the threat was clearly immediate and the threatener physically present on the scene. Once the immediacy and presence requirements are removed, however, measuring the accused's belief that the threat will be carried out necessarily demands a higher standard of evaluation. In other words, the accused's actual belief must also be reasonable.

[51] By reading in the requirements of safe avenue of escape and close temporal connection, the purely subjective standard becomes an evaluation based on a modified objective standard. These two elements, in conjunction with the belief that the threat will be carried out, must be analyzed as a whole: the accused cannot reasonably believe that the threat would be carried out if there was a safe avenue of escape and no close temporal connection between the threat and the harm threatened.

[52] The addition of the common law requirements to replace the now defunct immediacy and presence elements of s. 17 thus act to temper the once purely subjective belief as to the threat. Furthermore, they bring the statutory provision in line with the principle of moral involuntariness. Considering that society's opinion of the accused's actions is an important aspect of the principle, it would be contrary to

the very idea of moral involuntariness to simply accept the accused's subjective belief without requiring that certain external factors be present. Citing *R. v. Howe*, [1987] A.C. 417 (H.L.), at p. 426, Baker agrees that "[t]he threat 'must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist'" (para. 25-015). He specifically mentions that there must be reasonable grounds for the accused's belief that the threat would be carried out: Baker, at paras. 25-015 and 25-016.

(c) *Proportionality*

[53] The defence of duress requires proportionality between the threat and the criminal act to be executed. In other words, the harm caused must not be greater than the harm avoided. Proportionality is measured on the modified objective standard of the reasonable person similarly situated, and it includes the requirement that the accused will adjust his or her conduct according to the nature of the threat: "The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat" (*Ruzic*, at para. 62).

[54] Proportionality is a crucial component of the defence of duress because, like the previous two elements, it derives directly from the principle of moral involuntariness: only an action based on a proportionally grave threat, resisted with normal fortitude, can be considered morally involuntary. Furthermore, since the principle of moral involuntariness was judged to be a principle of fundamental justice

in *Ruzic*, it must be read into s. 17 in order to comply with the statutory interpretation rule that courts must prefer the constitutional interpretation of a statute.

(3) The Common Law Defence of Duress Post-*Ruzic*

[55] Following this Court's analysis in *Ruzic*, we can conclude that the common law of duress comprises the following elements:

- an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm. Although, traditionally, the degree of bodily harm was characterized as "grievous", the issue of severity is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm;
- the accused reasonably believed that the threat would be carried out;
- the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
- a close temporal connection between the threat and the harm threatened;
- proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;

- the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[56] We will discuss these elements in turn.

(a) *Threat of Death or Bodily Harm*

[57] For an accused to be able to rely on the common law defence of duress, there must have been a threat of death or bodily harm. This threat does not necessarily need to be directed at the accused: *Ruzic*, at para. 54. It can be either explicit or implied: *R. v. Mena* (1987), 34 C.C.C. (3d) 304 (Ont. C.A.), at p. 320; see also *R. v. McRae* (2005), 77 O.R. (3d) 1 (C.A.).

[58] The strict immediacy or imminence requirement found in the defence of necessity was not imported into the common law defence of duress. Rather, this immediacy requirement is “interpreted as a requirement of a close connection in time, between the threat and its execution in such a manner that the accused loses the ability to act freely”: *Ruzic*, at para. 65. This position was also held in *Langlois*, where Fish J.A. (as he then was) held that the issue is not the immediacy or imminence of the threat, but whether “the accused failed to avail himself or herself of

some opportunity to escape or to render the threat ineffective”: *R. v. Langlois* (1993), 80 C.C.C. (3d) 28 (Que. C.A.), at p. 50. The lack of a strict immediacy requirement not only strengthens the assertion that threats can be made to third parties, but also supports the conclusion in *Ruzic*, at para. 86, that the threats made can be of future harm.

[59] The harm threatened must be death or bodily harm. Traditionally, courts have qualified this bodily harm as needing to be “grievous” or “serious” (see, for example, *Hibbert*, at paras. 21 and 23). However, this higher threshold is not necessary in light of the existence of the proportionality requirement — inherent in the principle of moral involuntariness — which acts as the ultimate barrier for those who seek to rely on the defence.

[60] At s. 2, the *Criminal Code* defines the term “bodily harm” as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”. Removing the “grievous” or “serious” element of the bodily harm requirement and dealing with the requisite degree of harm at the proportionality stage will not unduly broaden the common law defence of duress. The two-pronged nature of the proportionality requirement, a concept which we will more fully develop below, will prevent such an outcome. First, the harm caused must be measured against the harm threatened. Second, the accused must meet society’s standards for the reasonable person similarly situated, which includes a capacity to resist the threat to some degree.

[61] Theoretically, it could be possible to have caused less harm than threatened, yet still not be afforded the defence of duress because the behaviour and reaction of the accused as a whole is judged unacceptable for that individual in that particular circumstance. For example, inflicting quite minor harm in reaction to the threat of quite minor harm might fulfill the “equal or lesser harm” requirement, but would certainly not constitute a situation where society would be ready to excuse the act as morally involuntary.

[62] If the threat is of insufficient seriousness, the offence committed in reaction to that threat cannot be proportional. The voluntariness of an act depends on its proportionality: an individual cannot claim to have lost the ability to act freely when the harm threatened does not meet society’s threshold. For these reasons, the degree of bodily harm that will make the defence available is best dealt with at the proportionality stage.

[63] Therefore, in order to fulfill this first requirement of the common law defence of duress, there must have been an explicit or implicit, present or future threat of death or bodily harm, directed at the accused or a third person.

(b) *Reasonable Belief that Threat Will Be Carried Out*

[64] In addition, the accused must have reasonably believed that the threat would be carried out. This element is analyzed on a modified objective basis, that is, according to the test of the reasonable person similarly situated.

(c) *No Safe Avenue of Escape*

[65] This element of the common law defence was specifically addressed in *Ruzic*, at para. 61. Once again, the test, evaluated on a modified objective basis, is that of a reasonable person similarly situated:

The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.

In other words, a reasonable person in the same situation as the accused and with the same personal characteristics and experience would conclude that there was no safe avenue of escape or legal alternative to committing the offence. If a reasonable person similarly situated would think that there *was* a safe avenue of escape, the requirement is not met and the acts of the accused cannot be excused using the defence of duress because they cannot be considered as morally involuntary.

(d) *Close Temporal Connection*

[66] The element of close temporal connection between the threat and the harm threatened, mentioned above, serves to restrict the availability of the common law defence to situations where there is a sufficient temporal link between the threat and the offence committed.

[67] This requirement in no way precludes the availability of the defence for cases where the threat is of future harm. For example, the accused in *Ruzic* was able to rely on the defence even though the threat was to harm her mother in the event that she did not smuggle the drugs from Belgrade to Toronto as ordered, a task that would take several days to accomplish.

[68] The first purpose of the close temporal connection element is to ensure that there truly was no safe avenue of escape for the accused. If the threat is too far removed from the accused's illegal acts, it will be difficult to conclude that a reasonable person similarly situated had no option but to commit the offence. The temporal link between the threat and the harm threatened is necessary to demonstrate the degree of pressure placed on the accused.

[69] The second purpose of the close temporal connection requirement is to ensure that it is reasonable to believe that the threat put so much pressure on the accused that between this threat and the commission of the offence, "the accused los[t] the ability to act freely": *Ruzic* at para. 65. It thus serves to determine if the accused truly acted in an involuntary manner.

(e) *Proportionality*

[70] Proportionality is inherent in the principle of moral involuntariness. "[T]his involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure": *Perka*, at p. 259. Part of the analysis

involves making a determination of whether the harm threatened is equal to or greater than the harm caused.

[71] The test for determining whether an act was proportional is therefore two-pronged, and was set out by Dickson J. in *Perka*, at p. 252:

There must be some way of assuring proportionality. No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. ... According to Fletcher, this requirement is also related to the notion of voluntariness ([G. P. Fletcher, *Rethinking Criminal Law* (1978)], at p. 804):

... if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable. ... Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action. [Emphasis added.]

[72] In other words, the “moral voluntariness” of an act must depend on whether it is proportional to the threatened harm. To determine if the proportionality requirement is met, two elements must be considered: the difference between the nature and magnitude of the harm threatened and the offence committed, as well as a general moral judgment regarding the accused’s behaviour in the circumstances. These elements are to be evaluated in conjunction on a modified objective basis.

[73] The first element of proportionality requires that the harm threatened was equal to or greater than the harm inflicted by the accused: *Ruzic*, at para. 62; also see *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 31. The second element of proportionality requires a more in-depth analysis of the acts of the accused and a determination as to whether they accord with what society expects from a reasonable person similarly situated in that particular circumstance. It is at this stage that we examine if the accused demonstrated “normal” resistance to the threat. Given that the defence of duress “evolved from attempts at striking a proper balance between those conflicting interests of the accused, of the victims and of society” (*Ruzic*, at para. 60), proportionality measured on a modified objective standard is key.

[74] The evaluation of the proportionality requirement on a modified objective standard differs from the standard used in the defence of necessity, which is purely objective. While the defences of duress and necessity share the same juristic principles, according to Lamer C.J. in *Hibbert*, this does not entail that they must employ the same standard when evaluating proportionality. The Court in *Ruzic* noted that the two defences, although both categorized as excuses rooted in the notion of moral or normative involuntariness, target different types of situations. Furthermore, the temporality requirement for necessity is one of imminence, whereas the threat in a case of duress can be carried out in the future. It is therefore not so anomalous that the courts have attributed differing tests for proportionality, especially when we consider that the defences may apply under noticeably different factual circumstances.

(f) *Participation in a Conspiracy or Criminal Association*

[75] This statutory element has been recognized as also relevant to the common law. Recent jurisprudence has concluded that those who seek to rely on the common law defence of duress cannot do so if they knew that their participation in a conspiracy or criminal association came with a risk of coercion and/or threats to compel them to commit an offence: see *R. v. Li* (2002), 162 C.C.C. (3d) 360 (Ont. C.A.), at paras. 20-33; *R. v. Poon*, 2006 BCSC 1158 (CanLII), at para. 7; *R. v. M.P.D.*, 2003 BCPC 97, [2003] B.C.J. No. 771 (QL), at para. 61.

[76] In *Li*, the Ontario Court of Appeal stated that voluntarily joining a conspiracy or criminal organization also has an impact on whether there was a safe avenue of escape. In that case, the accused persons had approached a criminal organization of their own volition and had later been threatened by this same group. In its analysis on the presence of an air of reality, the court stated the following:

As can be seen, the Supreme Court [in *Ruzic*] recognized the juxtaposition between a safe avenue of escape and the voluntary assumption of the risk in the first place. Both are front and centre in the case in appeal. In considering the appellants' claim that calling the local police would have been ineffective because they not only feared for themselves but also for their families in China and elsewhere, the court should be reminded of their initiative in approaching the Snakeheads in the first place, and the fact that the threats of retaliation against them and their families was sweetened by the inducement of retiring their debts to this organization [Emphasis added; para. 32.]

[77] The Court of Appeal's conclusion stands for the proposition that courts must take into account the accused's voluntary assumption of risk, a natural corollary of the unavailability of the defence of duress to those who wilfully engage in criminal conspiracies or organizations. This is consistent with the principle of moral involuntariness. An accused that, because of his or her criminal involvement, knew coercion or threats were a possibility cannot claim that there was no safe avenue of escape, nor can he or she truly be found to have committed the resulting offence in a morally involuntary manner.

[78] Therefore, to rely on the common law defence of duress, the accused must not be a party to a conspiracy or association whereby he or she is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association. In *Ruzic*, at para. 70, LeBel J. states: "Like s. 17 of the *Criminal Code*, the English jurisprudence has precluded resort to the defence where the threats are made by a criminal organization which the accused voluntarily joined and knew might pressure him to engage in criminal activity (*R. v. Lewis* (1992), 96 Cr. App. R. 412; *R. v. Heath*, [1999] E.W.J. No. 5092 (QL))" (emphasis added).

[79] There is division of opinion as to whether the accused's knowledge of potential threats or coercion is evaluated on a subjective or objective standard. According to Yeo, the above-cited conclusion in *Ruzic* is consistent with Australian law, which only denies the defence of duress to those who were actually aware of the

risk of being coerced by the criminal association: S. Yeo, “Defining Duress” (2002), 46 *Crim. L.Q.* 293, at p. 315. A subjective standard is also applied in the United States: *United States v. Burnes*, 666 F.Supp.2d 968 (D. Minn. 2009); *United States v. Gamboa*, 439 F.3d 796 (8th Cir. 2006); *United States v. Montes*, 602 F.3d 381 (5th Cir. 2010). Baker, however, seems to reject a purely subjective standard. According to him, the test should be whether the accused “recklessly or negligently placed himself in a situation in which it was probable that he would be forced to commit a criminal act” (at para. 25-044).

[80] We think that the subjective standard is more in line with the principle of moral involuntariness. If the accused voluntarily puts him or herself in a position where he or she could be coerced, then we cannot conclude that there was no safe avenue of escape and that the ensuing actions were morally involuntary.

#### IV. Summary

[81] The defence of duress, in its statutory and common law forms, is largely the same. The two forms share the following common elements:

- There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.

- The accused must reasonably believe that the threat will be carried out.
- There is no safe avenue of escape. This element is evaluated on a modified objective standard.
- A close temporal connection between the threat and the harm threatened.
- Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
- The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[82] Certain differences remain.

[83] The first is that, as was established in *Paquette* and confirmed in *Ruzic*, the statutory defence applies to principals, while the common law defence is available to parties to an offence. The second is that the statutory version of the defence has a lengthy list of exclusions, whereas it is unclear in the Canadian common law of duress whether any offences are excluded. This results in the rather incoherent situation that principals who commit one of the enumerated offences cannot rely on the defence of duress while parties to those same offences, however, can.

[84] This is an unsatisfactory state of the law, but one which we think we are not able to confront in this case. Although we had the benefit of extensive argument about the parameters of the common law and statutory defences of duress, understandably no argument was presented about the statutory exclusions. In addition, some courts have found some of these exclusions to be constitutionally infirm. We accordingly leave to another day the questions of the status of the statutory exclusions and what, if any, exclusions apply at common law.

#### V. Disposition

[85] We would allow the appeal and enter a stay of proceedings.

The following are the reasons delivered by

FISH J. —

[86] I agree with Justices LeBel and Cromwell, for the reasons they have given, that the defence of duress was not available to the respondent in this case. As a result, the respondent's acquittal must be set aside.

[87] With respect, however, I am not persuaded that a judicial stay of proceedings is warranted on the record before us.

[88] The criteria for granting a stay — a drastic remedy of last resort — are well-established: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at paras. 75-76; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 53-54; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at paras. 53 and 86; and *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 82. The Court has made clear that a stay of proceedings is available only in “the clearest of cases”: *Charkaoui*, at para. 76; *O'Connor*, at para. 82.

[89] These criteria, in my view, are not satisfied in this case.

[90] Accordingly, I would instead order a new trial, leaving it to the Crown to determine, in the exercise of its discretion, whether the public interest requires that a new trial be had. In making this determination, the Crown should bear in mind the particular circumstances of the case: On one hand, the trial judge's factual findings favourable to the respondent; on the other, uncontested evidence that the respondent considered for seven months having her husband killed, paid a “hit man” \$25,000 to

do the job and, when that failed, attempted twice more to arrange for her husband's demise.

*Appeal allowed, FISH J. dissenting in part.*

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*Solicitors for the respondent: Pink Larkin, Halifax; Greenspan Humphrey Lavine, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

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*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Ursel Phillips Fellows Hopkinson, Toronto; Webber Schroeder Goldstein Abergel, Ottawa.*

