NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ryan*, 2011 NSCA 30

Date: 20110329
Docket: CAC 327746
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Nicole Patricia Ryan

Respondent

Restriction on publication: Pursuant to s. 486.5(2) of the *Criminal Code of Canada.*

Judges: MacDonald, C.J.N.S.; Saunders and Oland, JJ.A.

Appeal Heard: January 25, 2011, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Oland, JJ.A. concurring.

Counsel: William D. Delaney, for the appellant
Joel E. Pink, Q.C. and Meredith Wain, for the respondent

Restriction on publication: Pursuant to s. 486.5(2) of the *Criminal Code of Canada.*

486.5(2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

Reasons for judgment:

OVERVIEW

[1] Ms. Nicole Doucet tried to take a contract out on her estranged husband's life. Fortunately, she failed because the man she approached to commit the crime was an undercover R.C.M.P. officer. She was charged with counselling to commit murder.

[2] At trial, Ms. Doucet admitted the accusation but claimed that she was acting under duress. Essentially, she asserted that she was the victim of years of abuse at the hands of her husband who threatened to kill her and their child. She believed that he would act on those threats and that the police, having been contacted on numerous occasions, would be unable to prevent it. This, she felt, left her essentially with no other reasonable option.

[3] Justice David P. S. Farrar of the Nova Scotia Supreme Court (as he then was), sitting without a jury, accepted her defence and entered an acquittal. His decision is reported as **R. v. Ryan (Doucet)** 2010 NSSC 114. The Crown now appeals to this court. For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[4] At the outset, it would be helpful to explore in some detail the events leading to this charge, with a view to understanding why a 37 year old school teacher would hire someone to kill her husband. The answer was provided by Ms. Doucet in her lengthy examination before the court. There, she chronicled a life of constant abuse at the hands of her husband, Michael Ryan. This included threats on her life and that of her young child should they divorce. In the end, she depicted a broken woman with no way out. Her troubling narrative was accepted by the judge without qualification:

> ¶53 ... I accept her evidence that the relationship she described and the events she has described relating to that relationship are true. Her evidence was corroborated, in certain respects, by other witnesses that will be detailed later in this decision.

. . .

> ¶56 I have no difficulty in concluding that Michael Ryan was a manipulative, controlling, and abusive husband, that sought at every turn to control the actions of his wife, be they social, familial or marital.

[5] Yet, at first blush, one might be highly sceptical of Ms. Doucet's assertion that she had no choice but to see her husband killed. After all, at the time of the offence, she was no longer living with him. In fact, they were in the throes of a divorce. Their emails appeared to be civil. She had a good job, custody of their child and the apparent support of family and friends. In fact, the last explicit threat was a couple of months before the "contract". Surely she had other avenues of escape. Surely she could have turned to the police. Surely she could have turned to family and friends. Surely she was motivated by something else, perhaps hatred, or perhaps jealousy. In any event, surely she was motivated by something other than an imminent fear of death. Not so, according to Ms. Doucet. Not so, according to the trial judge.

[6] Why then would a person with so many other apparent choices find herself with "no way out"? The answer is not simple. Instead it is embedded in the dynamics of this troubled relationship which converged to create a unique set of circumstances. In short, the answer can only be revealed through a detailed examination of this relationship upon which I will now embark. In so doing, I will rely almost exclusively upon Ms. Doucet's version of events because (a) as noted, the judge accepted her evidence without qualification; and (b) in any event, Mr. Ryan did not testify.

[7] I begin with the circumstances surrounding their marriage in the Spring of 1992. She was a 21 year old college student from Digby County, Nova Scotia. He was a 25 year old Canadian soldier from Niagara Falls, Ontario. They had met and began a relationship two years earlier at a summer leadership camp in Ontario. In this two year interval, they had little time together as she was living with her parents in Nova Scotia and he was in the military living in London, Ontario. They got married in London without Ms. Doucet's family knowing, because she felt they would not approve (given the couple's brief courtship and the fact she was still in college in Nova Scotia).

[8] Somewhat prophetically, she was motivated to marry Mr. Ryan in part to assist him with problems he was having in the military. He apparently had a troubled childhood and was having difficulty controlling his temper:

> Q. And why was it that he wanted to get married?
>
> A. He wanted to get married so it would look good on paper.
>
> Q. Was he having problems at that time, to your knowledge?
>
> A. He was having problems with the military, yes.
>
> Q. And are you aware ... And you have personal knowledge of the problems that he was having with the military?
>
> A. Yes, he was being recommended for release from the Canadian Armed Forces.
>
> . . .
>
> Q. Why did you marry him, Ms. Doucet?
>
> A. Because I felt sorry for him and I felt ... I felt sorry. He seemed to be a wonderful guy. He would always explain to me the ... what was occurring in his life. He had a very traumatic life according to him, and I felt sorry for him.

[9] Interestingly, they did not live together immediately after their marriage. Ms. Doucet returned to university in Nova Scotia and Mr. Ryan stayed in London. Then, later that Spring, she moved to Ottawa to continue her education and that Summer he was transferred to nearby Petawawa. It was not until then that they were able to live together. However, this lasted for only eight weeks until August when Ms. Doucet returned to Nova Scotia to continue her studies. Then, in the Spring of 1993, she returned to Petawawa and lived with Mr. Ryan until the Summer of that year when he was transferred to Edmonton. She returned to Nova Scotia to complete her education degree. Then at Christmas of 1993, she moved to Edmonton where they would live together for the next two and one-half years. It was there that the abuse began.

[10] Mr. Ryan began his reign of terror by making it clear that he would be in control of the relationship and she would be subservient:

> A. The first time was the neighbour and I, we had a discussion. The discussion was about the character of Pierre Elliott Trudeau.
>
> Q. And when was that?
>
> A. That would have been the first year that I had moved to Edmonton.
>
> Q. So that was in '93, '94?
>
> A. Yes.
>
> Q. So you and your neighbour were having this discussion about Pierre Elliott Trudeau. Was Mike there at that time?
>
> A. Yes, Mike was there.
>
> Q. And was he involved in the discussion?
>
> A. Yes. He did not agree with our philosophies.
>
> Q. And how long did this discussion take place between you and the neighbour?
>
> A. Approximately, I would say, 15, 20 minutes.
>
> Q. After the discussion, where did Mike go?
>
> A. After the discussion the neighbour went inside his house and we went inside the house.
>
> Q. What happened once you went inside the house?
>
> A. Mike started yelling and screaming because I had not agreed with him, I had agreed with the neighbour and that was not normal for a married couple to do that. When you are married you agree with your spouse. And he yelled and he screamed, he ranted, he raved, he pushed me against the hallway in the ... when you come in and he pushed me up against the ... the wall and he squeezed my neck with his hand and he started punching his fist against the wall and he kept

screaming and yelling and he kept saying, "You fucking bitch! You fucking bitch! Who the fuck do you think you are? You agree with me. That is what married people do. You do not agree with the neighbours."

Q. Now when he punched the wall, what happened?

A. It put holes in the walls.

Q. Now was this the first time, Nicole, that anything like this had happened to you and Michael Ryan?

A. Yes, it was.

Q. What effect did that have on you?

A. You ... I wasn't used to that type of behaviour. I just wasn't. And you just stand there. You don't move. You just freeze. You don't say anything. You don't look anywhere. You just do absolutely nothing. You just freeze there. And then you learn to keep your mouth shut or you agree with your husband. And if you don't agree, you keep your mouth shut. And you just become timid and afraid to express your opinions. You agree with his philosophy and that is all you can do. You're afraid.

Q. After this first incident, did you ever disagree with your husband again?

A. I did not. There were certain subjects that I knew to never bring up.

Q. Can you give us an example?

A. An example would be most of the majority ... minorities in Canada, you did not discuss those subjects. For example, you didn't discuss how Jews were treated in the concentration camps. You didn't discuss how black people are discriminated against here in Canada. You don't describe how native people are treated in Canada. You just don't discuss minorities. Acadians was another subject you didn't discuss.

Q. Did you ever try to discuss those issues with him?

A. Never.

Q. And why do you say that you cannot discuss those issues with him?

> A. Because when other people would discuss this, he would either ... If it was discussed when I was there, he would firmly affirm his point of view, and then when we would leave and we would be by ourselves he says ... he would say, "I know you agree with them. I know you agree with them. You're ... You're ..." It was, "You're fucking naive. You're a just fucking naive. You think that the whole world is nice and kind, but people are not nice and kind. When people are nice and kind there's a reason. It's because they want something. All these people, they just want to get away with things."

[11] To add further context to this encounter, it ought to be noted that Mr. Ryan was 6' 3" and 230 pounds, compared to Ms. Doucet's 5' 3" and 115 pound frame.

[12] While in Edmonton, these violent rants became frequent to the point where they occurred weekly:

> Q. Now how often, Ms. Doucet, would the pinning up against the wall with him squeezing you around the neck occur?
>
> A. It would occur once a week. You were lucky if it was one and a half weeks, but it was a regular basis thing.
>
> Q. Did he ever lose ... leave any bruises?
>
> A. Sometimes.
>
> Q. And where would those bruises be?
>
> A. On the side of my neck ... of my windpipe.
>
> Q. So how did you react to that?
>
> A. You learned to agree with him. You learned to keep your mouth shut. You pull away whenever you sense something is going to happen. Or if a discussion that you know is going to cause a disagreement you kind of pull away so you don't have to listen to the discussion. You retreat. You ... You fear saying anything. You just become passive and you isolate yourself when you know there is something that is going to un ... to happen that you are not going to feel safe.

[13] Notice the reference to becoming isolated. Ms. Doucet was not allowed to have friends to her home when he was at home:

Q. Now did you have any friends in Edmonton?

A. I had a couple of coworker friends, yes.

Q. Would you ever socialize together?

A. On a few occasions.

Q. Did your friends ever come over to your house?

A. Yes.

Q. Was Mike at home?

A. No.

Q. Why not?

A. Because when Mike was at home, my time was to be spent with him and not with other people. I was not to have any friends if he was home.

Q. And who said that?

A. Mike did.

[14] To add to this isolation, Ms. Doucet would eventually be forced to have no contact with her family. I will discuss this in more detail later.

[15] With these outbursts also came threats; threats that Ms. Doucet took seriously:

A. He would throw things at my head. He said that ... that I was not to ever fucking test him. "Don't ever fucking test me." He would say that he would kill me. He threatened by his actions, that is how he threatened most of the time.

Q. You made mention in your evidence that he said he was going to kill you.

A. Yes.

Q. When would he say stuff like that?

A. He would say that if he was having an explosion.

Q. Did you believe him?

A. Yes, I did.

[16] In August of 1996, Mr. Ryan was transferred to Trenton, Ontario. Things got worse to the point where Ms. Doucet began to question her own identity:

A. In Edmonton, I did seem to exist as a person, as a human. In Trenton, I was treated as a servant. I was there to cook, clean, take the dog for a walk and to just remain in the house. I was told to leave because I was not working and he wasn't going to support me. And I was told to go home, to get a job in order to make money. I didn't really seem to exist as a person in Trenton.

Q. Did the physical acts towards you continue while you lived in Trenton?

A. Yes.

Q. Did he throw stuff at you while you lived in Trenton?

A. He threw stuff at me. He ranted and raved. He yelled. He screamed. He would have outbursts. He would have explosions. Everything remained the same.

Q. Did he still grab you by the throat?

A. Yes.

Q. Did he still damage the walls?

A. Yes.

[17] So why did Ms. Doucet not just leave him? Would the move to Trenton not be the opportune time? To understand why she stayed, a perspective on Ms. Doucet's background would be helpful.

[18] Growing up in a small Nova Scotia community in a rather large family, Ms. Doucet had a traditional view of marriage. Her vows meant that she would stay with her husband even in the face of ongoing abuse:

> A. We were married and we were going to stay married until one of us died. I truly believe in the contract of marriage.

[19] Furthermore, she would try to change him by showing him the love she felt he was denied as a child:

> A. Yes. I always thought that things would get better, he would change if he was only shown compassion and love.
>
> . . .
>
> Q. Did you ever think about leaving him?
>
> A. I did not, no.
>
> Q. Why?
>
> A. Because I felt sorry for my husband. My husband had always told me that he was abused physically and mentally as a child and that's why he had left the home and joined the military because he needed a way of escaping. He needed a family. And I always thought that if I would show him love, compassion, understanding, respect, that he would become a good person. Because when kids are loved, kids become good people in society. And I thought he would change once he learned to trust and to love.
>
> Q. So what did you decide to do?
>
> A. I decided to stay there and I was going to help him out because I thought that I was a great person and I had ... I thought I had the capabilities of making Mr. Ryan into a good human person.
>
> . . .
>
> A. Because I always thought that he would be able to change once again. People don't change overnight, but if you continually show them love, compassion, they will grasp that. They will grasp it almost by osmosis, at least that's how I thought that it would occur.

. . .

A. I always thought things would get better and I had married him and I was going to stick by him, just because he has a fault in character wasn't a legitimate reason to leave him. I mean, people have illnesses and he is ... has an illness. He cannot control it. He's ill with his anger. And I was married and I was going to stay married and I was going to support him.

[20] Meanwhile, Mr. Ryan drank daily and would often come home demanding sex against her will:

Q. At any time while you lived in Edmonton or in Trenton did he ever sexually assault you?

A. Yes.

Q. In what way?

A. He would come home after he had been drinking and he would come in the bedroom and he would crank my knee and I was forced to have intercourse.

Q. Did you ever refuse him?

A. I would say, "It hurts," or, "Do you have to ...", "Do you have to be so rough?" But he always had an answer, so ... an answer to that comment.

Q. And what was that?

A. "You like it that way."

Q. How often would that happen, Ms. Doucet?

A. Once a week, once every two weeks. It depended on the time. Sometimes it was more often, depending on how many times he had gone out.

[21] So why did Ms. Doucet not simply say “no” or report his actions to the police? In her view, that would be too risky. She had to protect not just herself but also their daughter, Aimee.

Q. Did you ever refuse him?

A. No, I did not.

Q. Why not?

A. Because I was afraid to.

Q. And why were you afraid?

A. I was afraid. I was afraid because of what he would do if I ever refused. I just had to protect Aimee. I had to protect myself. You keep the peace. If you don't disobey, you're keeping the peace. You don't know what to do. You feel helpless. You feel worthless. You don't even feel like a human being anymore, but you know that you have to do it in order to be safe.

. . .

Q. Did you ever consider reporting him?

A. Not in Trenton, no.

Q. Why?

A. Because I was afraid to.

Q. Why were you afraid?

A. Because if I would have reported him, my life wouldn't have been worth living, because the only thing that the RCMP officers would have done would have been to come and ask him, "Did you do that?" and he would deny everything, paint them a pretty picture like he always does and then they would just leave me alone there with him and that would have been too dangerous to take the chance.

[22] Mr. Ryan also frequently lost his temper in public, adding stress to the relationship. Bar fights would be a regular occurrence, as were incidents of road rage. In the following passage, she described several incidents of the latter:

A. Road rage occurred quite frequently. At first it ... it ... it increased more and more as time went by. There was one incident of road rage. We were going

to somebody's house for something and I can't remember where. We were in Millwood, Edmonton, and he got angry at a vehicle and he jammed the brakes and the person behind us they jammed their brakes as well. Mike always has a gun underneath the seat of the driver's seat at all times ... all the time, even if he changes vehicles, he takes that with him. And he put the gun in his sock and he went out to the guy in the back and he says something ...

Q. Now were you ... Now were you there at the time or could you hear the conversation?

A. Yes, you could hear the conversations because the conversations are very loud and clear when Mike speaks.

Q. What, if anything, did you hear?

A. Something, "Get the fuck out of your car," or, "Be a man. Get out. Get out of your car." And that was it. Then it ... it was for a few minutes. They went on. And then Mike got back in the car and then we left. Another incident would have been 2000 ... in the summer of 2000, we branched off in Berwick to go somewhere behind Camp Aldershot, because he needed to pick something up. And it was a branched off to Berwick and went on the side roads. And at that time Mike had a regular size truck and there was another great big regular size truck trying to pass us, and the roads were not very wide. Aimee was still in her bassinet carry thing and he had passed the driver and then the driver passed us and when the driver was passing us, Mike cranked on the wheel so the driver would end up taking the ditch, because the roads weren't very wide. But luckily the guy just put his foot under ... on the pedal and he went ahead. Afterwards there was another incident, I would say, 2004. We were in Digby. After you pass Digby there is a passing lane and there was a man ... a little Sundance. I remember the brand of the car because it was the same as I once had.

. . .

A. Sunfire ... Sundance. It was ... I had a little car like that at one time so I remember it was a Sundance or Plymouth Sundance. And Mike passed him and then he passed again, and then this man jammed his brakes and then we were ... we had to jam our brakes. Mike ... And Aimee was in the vehicle. We were going to Halifax. And Mike got angry again. He took ... take ... took the gun, put the gun ... not the gun, sorry, the knife ... put the knife in his sock and then walked to the car in front of us and, again, he's yelling, "What the fuck are you doing?" "Are you trying to cause a fucking accident?" "Drive like a fucking ..." "You're driving like a fucking hillbilly." And it went on and on. And then Mike kicked

> the car and then the guy just ... the guy just took off. He just took off. So Mike came back again in the car and we kept driving to Halifax.

[23] Again Ms. Doucet felt too afraid to do anything about this:

> Q. Did you say anything to Mike about that incident?
>
> A. No.
>
> Q. Why?
>
> A. Because you have to keep your mouth shut. He ... He's angry. He's fuming. You don't say anything. You learn to keep your mouth shut. Aimee, my daughter, knows the same thing. She doesn't say anything when that happens. We just don't say anything, because it will make him even angrier if it's even possible. ...

[24] As noted in an earlier passage, Ms. Doucet was unemployed while in Trenton. So Mr. Ryan told her to go back to Nova Scotia to earn money teaching. She did, returning in December of 1996. Mr. Ryan remained in Trenton until the Summer of 1997 when he was transferred to Gagetown, New Brunswick, for a year - six months of which was spent on duty in Bosnia. After that year, he was transferred to Camp Aldershot in Nova Scotia where he worked until his retirement from the military in 2004.

[25] During his time in Aldershot, the parties would see each other only on weekends because, during the week, Mr. Ryan remained on the base and Ms. Doucet lived in a home that had been purchased for them by her father.

[26] Their daughter, Aimee, was born in March of 2000 but that did not improve matters. When Mr. Ryan came home on weekends he would take control, and his contempt for her family led her to become more and more isolated from them:

> A. When he came home on weekends, the ... I always had to help him out with whatever chore he wanted to get done. I was always to be there as the helper and couldn't leave the house to go for coffee over my sister's house, for example. Or if they would phone and say, "We have a barbeque Sunday afternoon, can you come?" I was not permitted to go because when ... if Mike said, "Well, we're going to fix the bathroom," I had to be there with him from Friday to Sunday until

the time he left to help him out, fix the bathroom or whatever chores he had going.

Q. What was the relationship between you and your family after the year 2000?

A. Things started ... (speaks to interpreter) Yes. Sour? The relationship started to get sour as time went on. After my daughter, Aimee was born, there was a lot of animosity and hatred towards my family.

Q. By whom?

A. By Mike.

Q. And as a result of his hatred towards your family, how did that affect you?

A. Well, I learned not to give them a phone call. They didn't come to visit anymore. They came to visit up until, maybe, 2001, 2002 and afterwards they didn't visit anymore. But when they did visit around 2000 ... 2000, 2001, it was during the week when he wouldn't be at home. I kind of ... I had to obey. I couldn't just go hang around with my sisters, go to Frenchy's. I had to stay in the house when he was at home.

[27] In fact, Mr. Ryan's control increased after Aimee was born. Outbursts became more frequent, more severe, more threatening. Putting a pistol to Ms. Doucet's head, he referred to her as a "weak soldier":

Q. And could you give the Court an example of one of these outbursts that occurred at your residence between 2002 and 2004?

A. One example was he was zeroing in his rifle in the backyard. And there was a pop cans and pumpkins and he was ... he kept trying to ... he kept shooting and shooting and shooting at the pumpkins and the pop cans. And I said ... I went in the backyard and I said, "Mike, we have neighbours." And of course that was not the right comment to have said. I should have kept my mouth shut. And he got very mad. He started yelling and screaming. He put the gun to his head and he kept going on and on.

Q. What type of gun did he have?

> A. He had a pistol. And then he put the gun to my head and it went on and on. He was mad. And then he relaxed the mode. He laughed at me because I was afraid. He laughed at me because I ... I did fear him. And then he started laughing. He laughed. "You're ..." ... And saying things, like, "You're fucking weak. You are fucking weak. You're a weak soldier." And it went on. And then I kind of relaxed too, because he was laughing. I kind of felt safe, okay, well, I could kind of laugh a little bit and then run away from the situation. And after I laughed he put the gun to my head again and he says, "You're ..." And again, "You're fucking weak. I can do whatever I want, whenever I fucking want. You don't have the balls to do anything." And I just stayed there, not move, and then after I felt it was safe, I went back inside the house.

[28] Pathetically, Mr. Ryan appeared jealous of the attention Ms. Doucet paid to their daughter:

> A. There is a another incident when ... when Aimee was first born, the control increased after Amee's birth, because he was jealous of my family, because my daughter was brought up in the area and was being baby-sat by my sister. So whenever my daughter would have ... would see my dad, she would get all excited and that would piss him off and make him angry. And he started getting jealous around my daughter. And he always thought that I gave too much time to my daughter. He wasn't coming first. And I was sick. I was sick with the flu in the living room floor and I'm vomiting and I'm weak, and he's in the basement. My daughter is upstairs in her room in the crib. And she started crying because she woke up from her nap. And Mike came upstairs. He was ... He was fuming. You could hear it by the steps when he was walking up the steps. And he says, "Get up! Get up! You're not fucking sick. You're not fucking sick. You're fucking weak. Get that kid. Shut that fucking kid up." And he went in the kitchen, opened the fridge door, everything fell out of the fridge, it broke the fridge door, and I'm just lost and he walks ... and he's walking towards Aimee's room, and I can hear him, he's mad. And I hear him bending over the crib and I walked in the room. And I said, "Mike!" and he looked at me and he dropped the baby, just turned around and went back downstairs. What do you do?

[29] It becomes clear that as time progressed, Ms. Doucet became a woman living in constant terror. Here is one of the more poignant examples. Note the reference to her school and how it became her only refuge. This would take on added significance as events in Ms. Doucet's life unfolded:

> A. Well, you learn to keep your mouth shut. You become passive. You become timid. You're afraid to leave the house, because he tells you that you have to be in the house and at what time you have to be in the house. And you

> don't want people to know what is going on in the house. And whenever you leave the house you're afraid ... For example, in 2002, 2003, I was afraid to leave the house. Then I was afraid to come back to the house. My place of refuge was my school. I loved the kids at the school. They loved me. But you just become timid, passive, you isolate yourself, you don't want to talk too much with your friends because you don't want them to notice anything. And you always paint the pretty picture. You always make sure that when somebody says, "How are you doing today?" "Fine. Fine." You ... You perfect that smile to just pretend that everything is fine.

[30] Ms. Doucet again depicts the fear she felt not just for her life, but for that of her daughter:

> Q. Tell me, Ms. Doucet, did you ever cry?
>
> A. I have cried, but I never cried during the explosions or the outbursts. You cannot cry. You cannot show any emotion. You cannot show any feelings. You're hollow. You're empty. You're lost. And you can't cry, because the only thing that you think ... or that your brain thinks, if it can think, is, well, if you want to kill me, kill me. Well, am I going to live? Okay, there's another second, I'm still alive. Maybe it will blow over. Do I want to live? You don't know. You just don't know. And when you're alone and Mike is no longer present and you know you can hide. You know you can hide in your ... in your room. Then you can cry. You can cry for a little bit. And you cry ... I cried at first. And the more, and the more it occurred, the less I cried, because I became hollow. I became hollow, empty.
>
> Q. How many times while you lived in Little Brook, did things like you've described for His Lordship happen?
>
> A. Outbursts and explosions? Twice a week. Around 2002, 2003 it could be every day. Sometimes it was the morning. Sometimes it was the afternoon. Like I said, sometimes I was afraid to go to school. He always said that he was going to ... Up until 2002, 2003 he had always said that ... that he would kill Aimee and I if I ever tried to get a divorce. After 2002, 2003 he would say, "I will destroy you. I will destroy you."

[31] In the following passage, one again senses the terror of a person who had become “lost and isolated”:

> Q. And how did this affect you?

> A. You don't want to socialize too much. You isolate yourself. You just protect your daughter and I. That's ... I protected my daughter and I. That was the main thing, just survival. I was fearful of leaving the house. I was fearful of coming back. I didn't know if my days were numbered. I didn't know what to expect. Was it going to be today that Aimee and I were ... would ... would be gone. You just ... You just pull away and you distance yourself from the situation. And you just keep your mouth shut, hope that everything will be okay. Sometimes I would pray, not very much, because I didn't have as much hope as I used to in religion. Sometimes you would say a little prayer, not very often, but sometimes when you were in great desperate need you would. And you felt worthless, helpless. You questioned, "What can I do?" You start fighting what is right, what is wrong. Is it me? Is it him? You question your body. You question your mind. You question your soul. You don't even know if you're normal anymore. You become lost and isolated.

[32] Then, after Mr. Ryan retired in 2004, things became much worse. She would be trapped, not just on weekends but seven days a week:

> A. After 2004, things changed drastically. The control and the possessiveness became that it was ... that I was trapped 24 hours a day. My daughter starting talking. I ... And that limited the things that I could do. For example, if I would have wanted to have stopped at Frenchy's for five minutes, before Aimee started talking I would have been able to say ... to just drop in at Frenchy's. But after Aimee started talking I was very limited to what I could do. I couldn't stop at Frenchy's because she would mention it to ... to Mike and that would make him angry. Or if we had spoken to somebody for five, 10 minutes, sometimes she would mention that to Mike, and I ... I was trapped. Aimee and I were trapped. We were to stay in the house. We would go to work. I had to be in the house by 10 minutes to five and the duties had to be performed. I perfected the duties. I ... Everything was spotless. I just pretended that everything was perfectly okay, and I made sure that I painted a very pretty picture on the outside so people wouldn't question me. But I no longer had any contact with any members of my family and my friends, I had very little contact with them as well

[33] In fact, it reached the point where Ms. Doucet could actually predict a looming outburst. Specifically, the chilling image of Mr. Ryan sitting in a certain chair “stewing” came to symbolize imminent violence:

> ... And he sat in the living room chair. In the living room chair, the chair that sits in front of the window that divides the dining room and the kitchen. Whenever he sits in that chair you know that you’re getting it. You know and you’re

> guaranteed an explosion because he just sits in that chair and he stews. And then you know something is going to happen.

[34] This terror would be embedded deeper through Mr. Ryan's continued use of firearms. I have referred to one incident where he put a pistol to her head and called her a "weak soldier". There were at least three more. For example, she described this incident at her kitchen table:

> A. Okay. Angry, frustrated, and then he starts putting the gun ... assembling the pieces of the gun back together. And he's ... he's very loud, he's very boisterous. He's saying, "I can do whatever I want. This is my house." So he's still talking, talking away, yelling, screaming, and then I'm sitting by the window in the back by the window. And he comes around and he says, "You think I can't do it? I can do whatever I fucking want. You can't stop me. Don't test me." And it was ... Okay, well, you don't do anything, you don't say anything and you just wait. You wait.
>
> MR. PINK: And where is the gun at this time?
>
> A. At my temple on my head on the left hand ... When I was sitting in the kitchen, dining room table.

[35] There was a third incident very similar to the one just described. Then Ms. Doucet described a fourth incident which would be even more terrifying because he used his gun to control her and to deter her from socializing with others:

> ... And then the last time that it was done was May/June 2007. It was an NSTU party, a retirement that we attended ... Mike and I attended the party. Around 10 o'clock Mike came home.
>
> Q. Now once again, when was this again?
>
> A. It would have been May/June 2007.
>
> Q. Okay.
>
> A. That was the fourth and last time that it ever occurred to me.
>
> Q. Okay. So this was after the NSTU [Nova Scotia Teachers' Union] party?

A. No, this was ... Well, the NSTU party took place in the evening.

Q. Yes.

A. And then at 10 o'clock of the NSTU party Mike returned home.

Q. Did you stay at the party?

A. Yes. I stayed at the Little Brook Club ...

Q. Yes.

A. ... until one, 1:30. And I thought it was going to be okay. I ... I knew ... You know, I thought it was going to be okay that I would be allowed to stay because my friends were there. And he seemed okay with it. And I came home with my friend Lynn around 1:30 or so, and when I came home everything was quiet, everything was dark, so I just quietly get in the bed. And when I get in the bedroom and go to bed I notice that Mike is mad.

Q. How did you notice that?

A. You could sense it. I could feel it. It was not comfortable. I sensed that he was mad.

Q. Did you see him?

A. Well, it was dark. I know he was in the bed, but it was dark. I didn't put any lights on.

Q. What did you do?

A. I just laid down in the bed, not making any noise, because, you know, he was kind of pissed off, so you don't move too much. So I laid down and then we remained like that for a few minutes. And Mike got up and he was mad. I could tell he was mad by the ... the hearing of the pace, of his walk. He walked upstairs. I could hear him walking up the stairs. He came back down the stairs and he walked around my bed and he put the gun to my head again and he ranted and raved how much of a selfish bitch I was, and how arrogant I was, and, who the hell did I think I was, that I was a different person when I socialized with my friends, that I was happy, I was polite, I was kind, but I wasn't that way with him, that my friends were just using me, that I thought that people were naive, that,

you know, you just go ha, ha, ha whenever you're friends talk. You think that they like you. You think that everything is perfect.

Q. Now where is the gun at this time?

A. At this time it's on my head on the left-hand side and I'm just laying flat in the bed. And he goes ...

Q. And the gun that we have here is which gun?

A. The small gun, the revolver.

Q. Okay. And ... Okay, you've explained to His Lordship what he said. How long did it last?

A. I think approximately half an hour to 45 minutes.

Q. Was the gun loaded or not?

A. I have no idea. And after that he went upstairs, came back downstairs and went to bed. And that was it.

[36] Mr. Ryan also used his guns to kill their family dog as well as a neighbour's dog:

A. I have witnessed him being aggressive to the pets. I have witnessed him taking the ... the shotgun, the long gun and taking the pet in the backyard, hearing the ... the rifle bang. I've witnessed him taking a shovel and burying ... putting ... shoveling dirt. I didn't actually witness the actual killing of my dog, Bud, no. I witnessed the before and after. He has also killed another pet. It was not our pet. It was the lady that lived down the street. They had a pet and he came over and he didn't like the pet coming over on our property. And I witnessed him taking the gun, taking the dog, going for a walk in the back yard and him coming back, but the dog did not come back.

[37] By the Summer of 2007, Ms. Doucet seemed to be approaching the proverbial breaking point. By then, Mr. Ryan was living in a second house they had purchased as an investment. He was renovating it and in the process was taking things, including fixtures, from the family home where Ms. Doucet and their daughter would be staying. The threats continued. Her physical health was beginning to deteriorate. She was down to 96 pounds.

[38] Finally around this time, Ms. Doucet got up the courage to raise the issue of a divorce. It appeared that his relationship with his nineteen year old girlfriend was becoming more than his traditional fling. She had had enough:

> A. Well, my aunt ... my husband always had flings. And it was always okay. I was able to tolerate that, because they were never really flaunted in my face. That summer the fling kept coming to the house quite often and I said, You know, could you not ... ask ... Could you ask her not to come so often because Aimee is present. And I said, you know, I said I think we should get a divorce. I want a divorce. And I was quite sick that summer. I always felt like I had the flu. Every time I drank Pepsi I threw up. Every time I brushed my teeth I threw up. But somehow at the end of July I found strength. Somewhere I found strength and I said, "I want a divorce."

[39] Mr. Ryan's response was to repeat his threat to "destroy" her and their daughter:

> ... There was a patio and we were building a shed in the driveway. And those words were not ... I said, "I want a divorce." And I was getting quite firm. "I want a divorce. I've had enough." And he pushed me against the ... against the wall of the shed where the ... where the door is, and he said, "You're not getting a fucking divorce. Don't even think about it." And then he went on and on the same thing. "Don't test me. Don't test me. I will destroy you. I will destroy you before I give you a divorce." And he hit his fist against the plywood on the shed ...

[40] Furthermore, Mr. Ryan would accompany his terrorizing threats to destroy Ms. Doucet and their child with chilling details of how he would dispose of their bodies to avoid detection:

> Q. How was he going to destroy you?
>
> A. He says that he would take Aimee and I and he would kill us and he would bury us behind the piece of land where we lived. There is a fork in the road and the man that used to own that piece of land had put a whole bunch of gravel, so the gravel was loose. And he said that he was going to dig a trench and he was very well capable of digging trenches, because that's what he did in Petawawa as a soldier. He would dig up ... dig the hole. He would make sure that the hole was dug deeper than six feet. He would put us in there and behind the house there's like a garbage dump where people dump the ... a few things, and that's where he

> would bury Aimee and I, and he would just pile the garbage on top, so nobody would notice that any of the soil had been moved. And then he would go take the rock from where the gravel ... the "U" in the road was and put that on top of where he had dug the hole. And nobody would notice. Nobody would come looking for us because I didn't have any family and by the time that people noticed anything from work, everything would be done and there would be no evidence, no proof.
>
> Q. Did you believe him?
>
> A. Yes, I did.

[41] Thus, Ms. Doucet abandoned her thoughts of divorce but she began to think of alternatives. One alternative was suicide:

> ... At any time did you have any suicidal thoughts?
>
> A. Yes, I did.
>
> Q. When?
>
> A. In the summer. It started in May and it went on until finally I was able to get sleeping medication and they still occur. Suicidal thoughts went in my brain, but never ... they occurred once where I paid a lot of attention to it. And after that I said, No. I want to live. And then they only occurred again in July, August, 2007.

[42] Then in the Fall of 2007, Ms. Doucet noticed a subtle change in Mr. Ryan that caused her to be even more fearful. It involved money that belonged to her mother but was placed jointly with her for estate planning purposes. She felt forced by Mr. Ryan to withdraw it because he wanted to buy an investment property:

> A. I was afraid that Mike would hurt us, because when Mike gets angry, you can no longer trust him. And I know you may not understand this, because you're thinking a normal person gets angry and once they get frustrated, and that is true, that is how Mike works. But there are times when there is absolutely no frustrating factor to create an explosion. And when Mike explodes, he is no longer the same Mike Ryan. When he explodes, he becomes a different person. The look ... Even the look of his face, he becomes completely a different person. And he's ... Whatever his wavelength is, that's where he's headed. And he doesn't

> really realize what he is doing when he's exploding. And you fear getting caught in one of those explosions. He has always told Aimee and me that he would kill us if ... kill Aimee and I, up until the year 2002, 2003. Afterwards, he would ... He would use the words, "I will destroy you." Mike was angry all the time, and I felt I had no choice if I wanted to have a little bit of peace. I had to steal the money.

[43] This, not surprisingly, pushed Ms. Doucet even further from her family who actually took civil action against both of them to recover this money. In defending this action, Mr. Ryan wanted Ms. Doucet to lie to the court and to say it was a gift from her mother. She refused. As expected, Mr. Ryan responded with threats but this time she noticed something unusual. He acted differently. He did not hit or throw anything. She convinced herself that he was about to fulfill his threats to kill her and their child. She felt that “it was time for me to do something”:

> A. The ... Mike was ... Mike was angry, because maybe the day or two days prior I had spoken to Dan Oulton ... Dan Oulton was the lawyer that had been hired to represent Mike and I. And Mike had ... Dan Oulton had the paperwork done, stating that it was ... the money was a gift, that we hadn't stolen the money. And Dan Oulton spoke to me over the phone and I said, "Dan, I cannot sign that piece of paper that's going in a courtroom. I can't do that. I can no longer lie for him. I cannot. I'm done lying." And I spoke to Dan a little bit longer. He ... He, kind of, asked a few things and I answered and he said, "That's okay". He ... I said, "Well, could you tell Mike instead of me?" He says, "Yes, I will do that for you." So Mike had informed ... Dan had informed my husband, Mike, that I wasn't going to lie for him. So on the 23rd he phoned me. He was very polite, very kind. "Nicole, would you sign those papers?" You know? "You know the money was a gift. Your mom doesn't really need the money. Your mom is a 80 year old person. She doesn't need the money. You know that eventually if she died she'd want you to have the money. You know, stop thinking about her. You know, start thinking about Aimee. Aimee, and how we can benefit. Start thinking about the family, our family, how we can benefit from the money. Your mother doesn't need it. She's an 80 year old senile, old age person. She doesn't need it." And it was calm. Then it would become aggressive. "Sign the piece of paper", and on and on. And he phoned, I think, two or three times that morning. The last time he phoned, he said, "I will destroy you. I will fucking destroy you. I will burn the fucking house down and I don't care if you and Aimee are in the house. I'm going to phone Social Services and have Aimee removed from you and you will never see her again. And I can prove that you were mentally ill because I have a piece of paper here saying that you have overdosed on medication." Which was true. I had taken two pills of antidepressants instead of one. But he blew it way out of proportion. And he says, "You will be nothing.

> You will be a ..." "You will be nothing." And that day, on November 23rd I knew action had to be taken, and I knew because of an incident prior to November 23rd. November 11th weekend, when he had come to the house and he turned around and didn't hit anything, he just walked ... yelled at me and he had just walked straight to his truck. I knew something was wrong. I knew it was time for me to do something.
>
> Q. Why?
>
> A. Because that was not a normal behaviour of Mike Ryan. When Mike Ryan gets angry, he throws things, he yells, he screams and it goes on. And that November 11th weekend, he had just turned around and said, "No, I'm not giving you the fucking house key," and he had said something, I don't know how the conversation had gone to it, but he had said, "I will find you. If you ever try to run away, I will find you."

[44] Ms. Doucet decided that day that she had to leave the family home. She had to run and hide. Her husband tried to call her repeatedly on her cell phone. She stayed initially with friends from school, and then in cottages. She was sure that he would find her:

> A. We had to hide ... Mike had always told me that he would find me. He knew where to find me. And if he found me, I ... our lives would have been in danger. If there's no witnesses, you can do whatever you want. That is Mike's philosophy and he has said that to me on numerous occasions. "I can do whatever I want. No proof, there's nothing you can do." And I always felt that if I was alone with nobody there that something would occur.

[45] It was around this time, the Fall of 2007, (although the record is unclear as to precisely when) that Ms. Doucet began to think of another alternative - having her husband killed.

[46] In any event, Ms. Doucet ended up staying with friends and then, eventually, to her sister's home. However, she believed that he was stalking her. She phoned the police at least nine times:

> A. I would see him on the Number One Road and it would occur around eight o'clock when I was on the road, because he knew my routine. I saw him on (Firmain Crosses?) Road and I would see him on 47 Schoolhouse Road.
>
> Q. And how did that affect you?

A. It scared the hell out of me.

Q. Why?

A. Because I knew he ... Mike knew me to a tee. He knew my routine. He knew my friends. He knew everything there is to know about me. And when I would see him I would freak out. I would freak out, just like the same time I freaked out on the 23rd. Just like the same way that I would freak out when he would become aggressive and violent. You ... You lose control and you become afraid because you say he knows me. He knows my routine. There's nothing I can do. Nobody is ... wants to help. Nobody wants to help. The police don't want to help. What the hell am I supposed to do? So you just ... You just freak out.

Q. Now you say that the police would not help. Did you ever call the police?

A. Yes.

Q. On how many occasions did you call the police?

A. I remember phoning them ... I remember phoning 9-1-1 once when he was in the (Firmain Crosses?) Road. And I remember another occasion phoning the police, but I didn't really like speaking to the police officers over the phone. I much preferred having facial contact with the police officers. And I spoke to the police officers a minimum of nine times that I can remember. I have spoken to every constable at the Meteghan detachment.

[47] However, she felt that there was nothing the authorities could do for her:

Q. So did you ever get any assistance from the police?

A. No. The police officer ... officers would always reply, "We don't get involved in civil matters. It's a family dispute. We don't get involved in that." One time ... One occasion, one police officer actually said, in the entrance way of the RCMP station, he said, "Well, phone the judge." I couldn't believe he had said that. I said, "Phone the judge?" And he goes, "Yeah." I said, "You just don't phone a judge." I just got nothing. They were there present and I would start talking and try to ask for help and try to tell them and explain to them why I wanted help, and I got politely pushed out of the ... out of the door. "Yeah, yeah. I understand. I understand. Yeah, yeah. I understand, Nicole. What do you want? What do you want us to do? What do you want us to do?" And I kept

saying, "I don't know, but do something." And, "Yeah, yeah. Calm down. Calm down." You know, "Calm down." And I always got politely pushed out of the door or whatever conversation I was with them, I politely get pushed out. "Go away. Go away." Because they could never answer my questions.

[48] She also approached *Victim Services* for help:

Q. Did you talk to anybody else?

A. I spoke to Victim Services. I spoke to Victim Services approximately 11 times. The conversations were around an hour, and the same thing happened there. She would say, "Well, what do you want me to do?" "Well, yeah, but what do you want me to do?" "Well, there's nothing we can do until something happens." "Well, if nothing happens then we can't do anything."

[49] Several weeks passed. Then came a troubling incident at Ms. Doucet's one "place of refuge" - the school where she taught. On February 17, 2008, Mr. Ryan showed up there unexpectedly:

Q. Okay. And what affect did it have upon you when you saw Michael Ryan at the school on February the 17th, 2008?

A. I freaked out. I went back in that same scared mode. I relived what I lived when Mike had control over me. He still had the control. He knew it would upset me by going to the school. The school was my safe haven. I always felt safe there. And after that I've never felt safe at school ever again. I freaked out. I wanted to run away. I wanted to run. It's storming. It's storming blue murder and I'm saying, Well, I got to run. I got to run. And, I got to drive. I got to drive. I got to hide. We got to hide. And I didn't know what to do. I was lost. It was ... You relive the same thing as if Mike was sitting right beside me.

Q. And what, in fact, were you reliving on February the 17th, 2008?

A. I relived the threats that he had made to Aimee and I and my family.

Q. After that incident at the school, did you, in fact, see him again?

A. I would see him on the road, on the Number One Road. I saw him in Dartmouth on one occasion. He was behind me at the set of lights. And he would still drive by Louise's house at 47 Schoolhouse Road.

[50] Shortly after that, she was informed rightly or wrongly that a peace bond she was seeking would be “useless”. This increased the pressure:

> Q. You've told His Lordship about Victim Services. Did you call anybody else to try to get help?
>
> A. I spoke with the Crown Attorney, with Victim Services in Digby. I spoke of ... with a couple of lawyers in order to try to protect my daughter, Aimee. I spoke with Madeline, a counsellor.
>
> Q. Now I just want to stop you there. At any time did you try to get a peace bond?
>
> A. Yes.
>
> Q. What happened?
>
> A. The RCMP officer had told me to get a peace bond, so I did, and I came here in Digby, I got the peace bond, and then I told Victim Services and Rosalind Michie and they said, "Well, why did they tell you to get a peace bond?" I ... "I don't know. I got a peace bond because the RCMP told me to get a peace bond." "Well, it's not valid. It's not worth anything. There's an undertaking. It doesn't mean anything. So just ... just don't go to court when that comes ... when the court date is for the peace bond. It's ... It's worthless."
>
> Q. And did you go?
>
> A. No, I did not go, because they told me it was worthless.

[51] It was at this stage that she felt she had no escape:

> Q. And what effect did Michael Ryan's actions have upon you?
>
> A. A feeling of worthlessness, hopelessness, despair. Please help me. Please help me. Just a desperation to live and to be safe and to have peace.
>
> Q. At any time while you lived with Michael Ryan, at any time did you see an escape away from him?
>
> A. There was no escape. Mr. Ryan knew me to a tee. He knew everything about me. He knew how I behaved. He knew my routine. I knew when he said

> something, he always acted upon it. I was trapped. I was trapped and I had no way out, none. Nobody wanted to help.

[52] It appears that, around that time, Ms. Doucet made a failed attempt to hire a killer, although again the record is not clear just exactly when this would have been. This came to the attention of the R.C.M.P. They set up a sting operation. It was by then late March 2008 when, as the trial judge concluded, Ms. Doucet was "at her weakest". An undercover police officer called her and offered to "do the job". She took the bait. She was then arrested, charged and remanded for a mental assessment.

[53] Perhaps the most insightful passage from Ms. Doucet's testimony is when she described how nice it felt to be incarcerated and to know that her daughter was in the care of community services:

> Q. Okay. After you were arrested for hiring an undercover police officer to kill your husband, you were placed in the Nova Scotia Hospital for a period of time for assessment, is that correct?
>
> A. That is correct.
>
> Q. How did you feel there?
>
> A. Wonderful, grateful. I would really like to thank the justice system for giving ... have given me the opportunity to stay there.
>
> Q. Why?
>
> A. It was ... I could breathe, number one. I could breathe. The sheriffs had told me, "You will be okay here," and they were right. I was okay there.
>
> Q. Did you feel safe there?
>
> A. I felt very safe. Everybody was wonderful. The staff was above superior quality. I ... I could almost say that I was treated like a queen. It was a good feeling. I asked the doctor if I could stay longer, but I was not permitted to stay longer. I got the chance and the opportunity to ... to breathe, to ... to breathe, to calm down, to become and find Nicole.

[54] With this background, I now turn to the issues raised by the Crown.

THE ISSUES ON APPEAL

[55] The Crown lists several issues in its factum:

> 1. Did the learned trial Judge err in law in considering that the defence of duress was applicable in the circumstances of this case?
>
> 2. Did the learned trial Judge err in law in holding that the safe avenue of escape element of the defence of duress was based on evidence which could meet the air of reality test?
>
> 3. Alternatively, in considering whether the Respondent had introduced evidence on each of the necessary elements of duress such that she met an air of reality standard, did the trial Judge err in law in adopting a deficient legal test for the defence of duress?
>
> 4. Did the learned trial Judge err in law by failing to consider the element of proportionality in relation to the defence of duress?
>
> 5. Did the learned trial Judge err in law in failing to consider the element of temporal connection in relation to the duress defence?
>
> 6. In the event that it is found that the learned trial Judge erred in law with respect to one or more of the above matters, has it been established that such error or errors affected the verdict?
>
> 7. If question number 6, above, is answered affirmatively, should a new trial be ordered or should a verdict of guilty be imposed?

[56] Having had the benefit of oral argument, I would distill these issues down to two. The first issue is raised for the first time on appeal. It questions whether the defence of duress could even be raised in this fact scenario. That plea, the Crown asserts, applies only when an accused is forced by threats to commit an offence against a third party. Here the targeted victim was not a third party, but the person allegedly uttering the threats. That, the Crown says, represents a backdoor plea of self-defence which, in these circumstances, could never be successful. Relying on the Supreme Court in **R. v. Hibbert**, [1995] 2 S.C.R. 973, the Crown explains it this way in its factum:

> ¶50 In **R. v. Hibbert**, [1995] 2 S.C.R. 973 (tab 2) Lamer C.J., for a unanimous Supreme Court, discussed the similarities and differences with respect to the defences of self-defence, necessity, and duress. He indicated, at para. 50:
>
> > 50 . . . 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 (bearing in mind, of course, that the victim's threats may themselves have been provoked by the conduct of the accused). In this sense, he or she is the author of his or her own desserts, a factor which arguably warrants special consideration in the law. In cases of duress and necessity, however, the victims of the otherwise criminal act (to the extent that a victim can be identified) are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused's actions. . . .
>
> ¶51 In the circumstances of this case, where the alleged threats of harm by Michael Ryan against the Respondent are said to have led to the Respondent paying money in an effort to have Mr. Ryan killed, duress cannot apply. To accept the common law defence of duress as applicable in these circumstances is to accept a form of anticipatory self-defence, unconstrained by the provisions of the **Criminal Code** which pertain to self-defence.
>
> ¶52 To put it another way, the defence of the Respondent at trial was essentially an attempt to extend the boundaries of self-defence in a manner that has never been recognized in Canadian jurisprudence. ...

[57] The second issue involves the Crown's alternative submission that the judge erred in finding that the accused's defence of duress had an air of reality. This submission has two prongs. Firstly, the Crown asserts that the judge applied a deficient legal test when considering the air of reality question. Secondly, the Crown asserts that the judge erred in concluding that this defence had an air of reality based on the evidence presented. In this regard, it essentially raises the same questions that I asked rhetorically at the outset. In other words the Crown asserts that surely, as a professional woman with the support of family and friends, she had other options. Surely the law of duress cannot be stretched this far.

[58] In my analysis that follows, I will address each issue in order.

ANALYSIS

Does The Defence of Duress Apply in this Case?

[59] As noted, the Crown asserts that the accused's plea of duress is no more than an inappropriate back-door plea of self-defence. To resolve this issue, I will therefore consider the following:

1. I will first determine whether this is actually a case of self-defence as opposed to duress.

2. Then should self-defence be ruled out, I will consider whether duress could still be available as a residual defence despite the fact that the accused targeted her aggressor as opposed to a third party. This will require a close examination of the defence of duress and how the law in this area has evolved.

3. I will conclude my analysis with a summary of the essential ingredients that make up the defence of duress with a view to determining whether or not it can accommodate the unique circumstances of this case.

Self-Defence v. Duress

[60] The Crown is quite correct to suggest that, intuitively, Ms. Doucet's plea resembles self-defence as opposed to duress. Yet Ms. Doucet did not plead self-defence, relying instead exclusively on the defence of duress. Despite this fact, I feel compelled to explore whether self-defence ought to have been considered by the trial judge. This calls for a closer look at this defence, which is now codified in Canada. Here are the relevant provisions:

> Self-defence against unprovoked assault
>
> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> Extent of justification
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. R.S., 1985, c. C-46, s. 34; 1992, c. 1, s. 60(F).

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose. R.S., c. C-34, s. 35.

. . .

Preventing assault

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

> Extent of justification
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent. R.S., c. C-34, s. 37.

[61] In my view, none of these provisions would apply. Specifically, s. 34 has two parts. Section 34(1) envisages a situation where death is not intended. Here death was the objective. Section 34(2) applies only when the result is death or grievous bodily harm. Here, fortunately, there were no physical injuries.

[62] Turning to s. 35, it covers situations where, unlike here, the accused was the initial aggressor.

[63] The final potential provision is s. 37. Unlike here, it envisages a situation where the accused applies direct force to the victim. Indeed, this is consistent with all aspects of self-defence. Here the accused was not even in the presence of the targeted victim when the offence was committed.

[64] Therefore, in my view, none of the *Criminal Code* self-defence provisions would apply in this case.

[65] Furthermore, a closer look at the rationale for this defence also supports its exclusion. Specifically, self-defence is a plea for *justification* where the accused is seen as blameless. For example, we are *justified* in using reasonable force to protect ourselves against aggression. This is something society supports and might even applaud.

[66] That said, for self-defence to apply, the danger posed does not have to be imminent in the sense of an “uplifted knife or a pointed gun”. For example in **R. v. Lavallee**, [1990] 1 S.C.R. 852, a battered spouse was justified in shooting her husband in the back of the head not long after he threatened her life. I will have more to say about **Lavallee** later because, in my view, its impact reaches beyond the law of self-defence.

[67] On the other hand, the rationale for the defence of duress is quite different. It is instead a plea for absolution where the accused’s actions are considered blameworthy but forgivable because the accused’s only reasonable avenue of

escape was to commit the crime. In other words, the defence of duress is rooted in compassion. It involves excusing a wrongdoing in circumstances where the accused is left with no other alternative. Therefore, unlike self-defence, it is not the type of action society would support, let alone applaud.

[68] This difference between *excuse* and *justification* (albeit in the context of the defence of necessity; a close sibling to duress) was explained by the Supreme Court in **Perka v. The Queen**, [1984] 2. S.C.R. 232 at p. 246 and pp. 248-49. Dickson, J. (as he then was) explains:

> Criminal theory recognizes a distinction between "justifications" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider *rightful*, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer.
>
> In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who labours under a mistake of fact, the drunkard, the sleepwalker: these are all actors of whose "criminal" actions we disapprove intensely, but whom, in appropriate circumstances, our law will not punish.
>
> . . .
>
> Conceptualized as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in the *Nicomachean Ethics*, *supra*, at p. 49, "overstrains human nature and which no one could withstand".

[69] Thus, duress and necessity are excuse-based defences that seek to absolve otherwise blameworthy conduct. Furthermore, the only difference between the two is that, with necessity, the accused reacts to unavoidable circumstances while, with duress, the accused reacts to human threats. Therefore, on this basis, it might even be argued that duress is a subset of necessity. In any event, the two are based on the same "juridical foundation" as Lamer, C.J. explained in **Hibbert**, *supra*:

> ¶54 As I noted earlier, the common law defences of necessity and duress apply to essentially similar factual situations. Indeed, to repeat Lord Simon of Glaisdale's observation, "[d]uress is...merely a particular application of the doctrine of "necessity"". In my view, the similarities between the two defences are so great that consistency and logic requires that they be understood as based on the same juristic principles. Indeed, to do otherwise would be to promote incoherence and anomaly in the criminal law. In the case of necessity, the Court has already considered the various alternative theoretical positions available (in *Perka, supra*), and has expounded a conceptualization of the defence of necessity as an excuse, based on the idea of normative involuntariness. In my opinion, the need for consistency and coherence in the law dictates that the common law defence of duress also be based on this juridical foundation. If the defence is viewed in this light, the answers to the questions posed in the present appeal can be seen to follow readily from the reasons of Dickson J. in *Perka*.

[70] At this stage I should note that this justification-excuse dichotomy is not without its critics. In fact, some scholars feel that it should be viewed as a distinction without a difference. For example, in **Stuart**, *Canadian Criminal Law*, 5th ed. (Scarborough: Thomson Canada Ltd., 2007) at 470-71:

> There is ample room for considerable skepticism. Even for a theorist as accomplished as [Professor George] Fletcher, the classification of one of the traditional defences such as self-defence as a justification or an excuse is not clear-cut. When the Supreme Court of Canada adopted Fletcher's dichotomy in Perka (1984), the Court split in dramatic fashion on the question of classification. Chief Justice Dickson for the majority held that the common law defence of necessity was an excuse, while Wilson J. in dissent held that necessity was properly classified as a justification in those cases where the accused was operating under a conflicting legal duty. Both judges easily classify self-defence as a justification. Chief Justice Dickson regards mistake of fact, intoxication, sleep-walking and insanity as excuses. However, Wilson J. assigns defences of lack of *mens rea*, mistake of fact, automatism and even provocation, to the label of justification. If theorists and leading judges are having considerable difficulty in a distinction, it strains credulity to imagine that lawyers and judges at all levels will be able to cope. There is also the pragmatic point that, once a defence has

> been classified authoritatively as either an excuse or justification, the only legal focus will be on what criteria were announced as to the defence's ambit.

[71] Nonetheless, in my view, this distinction remains relevant to Ms. Doucet's predicament. At least, it should serve to rule out the availability of self-defence. After all, her conduct is not the type that we would expect to justify, let alone the type that we would "praise" or "assist", as Dickson, J. envisioned in **Perka**. In short, it is hard to *justify* someone hiring a hit man.

[72] Therefore, in my view, this is not a case for self-defence. Instead, if Ms. Doucet is to avoid penal consequences, her actions will have to be *excused* as opposed to *justified*. She will have to be absolved as opposed to praised. Applying further deductive reasoning, because she responded to a human threat as opposed to unavoidable circumstances, duress as opposed to necessity would represent her only potential avenue of defence.

[73] Of course, the nagging question remains. In the unique circumstances of this case, can the defence of duress go where it has never gone before? Can it apply where the targeted victim is the aggressor as opposed to a third party? Here, I agree with the Crown that such a venture would look a lot like the conflation of two distinct defences - self-defence and duress.

[74] Yet if Ms. Doucet truly had "no way out," would it be just to deny her a defence simply because her circumstances did not fit neatly into the traditional parameters of one of our enumerated defences. In other words, must the defence of duress be limited to those situations where the victim is a third party? If so, would there be a principled basis for such a prerequisite? To answer these questions, I harken back to Dickson, J. in **Perka**, where he invites us to concentrate on the *rationale* of such defences, which is to excuse *involuntary* conduct.

[75] Thus, my inquiry should focus less on who did what to whom in who's presence and more on the accused's predicament and whether or not her actions were truly *involuntary*. In other words, did Ms. Doucet have an avenue of escape short of the "crime" she committed? On this basis, should it matter that Ms. Doucet targeted her assailant as opposed to the conventional third party? One would think not, but yet a closer look at this defence is in order.

The Defence of Duress

[76] Presently, in Canada, the defence of duress represents a rather confusing amalgam of statutory and common law. Beginning with the statutory provision, the *Criminal Code excuses* would be offenders in certain prescribed circumstances.

> Compulsion by threats
>
> 17. 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). R.S., 1985, c. C-46, s. 17; R.S., 1985, c. 27 (1st Supp.), s. 40.

[77] However, this provision does not subsume the centuries old common law defence of duress. Instead, the Supreme Court has limited its reach in two important aspects. The first involves s. 17's long list of offences where the defence of duress is unavailable. The Supreme Court has held that this provision serves to exclude only principals (as opposed to parties) who commit one of the listed offences. So, for example, an alleged party to a murder is not caught by this provision and can therefore rely on the common defence of duress which is preserved by s. 8(3) of the *Code*:

> (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament. R.S., 1985, c. C-46, s. 8; 1993, c. 28, s. 78; 2002, c. 7, s. 138.

[78] See **Paquette v.The Queen**, [1977] 2 S.C.R. 189.

[79] The second limitation involves s. 17's requirement that the accused must act "... under compulsion by threats of immediate death or bodily harm from a person

who is present when the offence is committed ...". In other words, for the defence to be available, the threat must pose an "immediate" peril with the assailant uttering the threat being "present" at the scene. At common law, these conditions were not required. Therefore, not surprisingly, the Supreme Court concluded that these statutory limitations offended an accused's s. 7 of the *Charter* rights. Again, focussing on the accused's predicament as opposed to who may or may not have been present, the Court in **R. v. Ruzic**, [2001] 1 S.C.R. 687 concluded:

> ¶ 88 Nevertheless, s. 17's reliance on proximity as opposed to reasonable options as the measure of moral choice is problematic. It would be contrary to the principles of fundamental justice to punish an accused who is psychologically tortured to the point of seeing no reasonable alternative, or who cannot rely on the authorities for assistance. That individual is not behaving as an autonomous agent acting out of his own free will when he commits an offence under duress.
>
> ¶89 The appellant's attempts at reading down s. 17, in order to save it, would amount to amending it to bring it in line with the common law rules. This interpretation badly strains the text of the provision and may become one more argument against upholding its validity.
>
> ¶90 The underinclusiveness of s. 17 infringes s. 7 of the *Charter*, because the immediacy and presence requirements exclude threats of future harm to the accused or to third parties. It risks jeopardizing the liberty and security interests protected by the *Charter*, in violation of the basic principles of fundamental justice. It has the potential of convicting persons who have not acted voluntarily.

[80] In this case, Ms. Doucet is the principal to this offence as opposed to a party. Therefore, s. 17 applies to her situation. Furthermore, her offence is not on s. 17's excluded list. Specifically, while attempted murder remains on the list, Ms. Doucet was charged with the stand alone offence of "counselling [an indictable] offence that is not committed":

> Counselling offence that is not committed
>
> 464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
>
> > (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence

> and liable to the same punishment to which a person who attempts to commit that offence is liable;

[81] Thus, s. 17 does not bar Ms. Doucet from raising this defence. However, what about the common law which until now limits it to third party victims? Will it accommodate Ms. Doucet's plight? To answer these questions, I return to the relevant jurisprudence.

[82] In **Perka**,, Dickson, J. at pp. 250-51, laid the Canadian common law foundation for this type of defence - excusing actions that are "involuntary":

> If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.

[83] Then, in **Ruzic**, as noted, the Supreme Court considered the *Charter*'s influence on s. 17. The result was to bring s. 17 in line with the more flexible common law. In the process, the Court offered some important guidance.

[84] The facts in **Ruzic** are interesting. A native of Belgrade in the former Yugoslavia, Ms. Ruzic smuggled drugs into Canada using a false passport. However, she claimed that she was ordered to do so (on fear of death) by a street "warrior" back in her home country. Furthermore, given the lawlessness existing in Belgrade at that time, she felt she could not turn to the police for help.

[85] At trial, Ms. Ruzic relied on the defence of duress but was caught by the strict conditions of s. 17 because the "warrior" was not *present* at the time of the offence; nor was the threat *immediate*. This prompted her constitutional challenge to these two prerequisites. Otherwise, a person with "no way out" would be denied a legitimate defence. In upholding the challenge, LeBel, J. wrote for a unanimous Supreme Court.

[86] Of particular relevance to our case, the Court concluded that morally involuntary conduct should not be the subject of criminal sanction:

¶34 Even before the advent of the *Charter*, it became a basic concern of the criminal law that criminal responsibility be ascribed only to acts that resulted from the choice of a conscious mind and an autonomous will. In other words, only those persons acting in the knowledge of what they were doing, with the freedom to choose, would bear the burden and stigma of criminal responsibility. Although the element of voluntariness may sometimes overlap both *actus reus* and *mens rea* (see *R. v. Daviault*, [1994] 3 S.C.R. 63, at pp. 73-75, *per* Cory J.), the importance of *mens rea* and of the quality of voluntariness in it underscores the fact that criminal liability is founded on the premise that it will be borne only by those persons who knew what they were doing and willed it. In a recent essay, Professor H. Parent summed up the nature of what has now become a guiding principle of Canadian criminal law:

> [TRANSLATION] What is meant by a so-called "moral" or "normative" voluntary act is nothing more or less than a voluntary act taken in its accepted meaning of a free and thought out action. At the semantic level, adding the attributes "moral" and "normative" to the expression "voluntary act" has become necessary in light of the state of confusion that currently arises from the coexistence of the materialist and intellectualist approaches to the voluntary act in English and Canadian criminal law. In short, the requirement of a free and thought out act is still a fundamental axiom of our criminal law system. Although the moral element attached to the individual is not, as a general rule, formally expressed in the academic literature or in reported cases, its presence can be deduced from the standard application of criminal responsibility and the various causes of exoneration. (Emphasis added [by the author].)
>
> *(Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien (1999), at p. 271.)*

See also: H. Parent, "Histoire de l'acte volontaire en droit pénal anglais et canadien" (2000), 45 *McGill L.J.* 975, at pp. 1013 ff. On the notion of *mens rea* generally, see G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. 1998), at pp. 357 ff.

. . .

¶46 Punishing a person whose actions are involuntary in the physical sense is unjust because it conflicts with the assumption in criminal law that individuals are autonomous and freely choosing agents: see Shaffer, *supra*, at pp. 449-50. It is similarly unjust to penalize an individual who acted in a morally involuntary fashion. This is so because his acts cannot realistically be attributed to him, as his will was constrained by some external force. As Dennis Klimchuk states in

> "Moral Innocence, Normative Involuntariness, and Fundamental Justice" (1998), 18 C.R. (5th) 96, at p. 102, the accused's agency is not implicated in her doing. In the case of morally involuntary conduct, criminal attribution points not to the accused but to the exigent circumstances facing him, or to the threats of someone else. Klimchuk explains at p. 104:
>
> > In short, normatively involuntary actions share with actions that are involuntary in the sense relevant to negating *actus reus* the exculpatorily relevant feature that renders the latter immune from criminal censure, namely, that involuntary actions resist imputation to the actor putatively responsible for their commission.
>
> ¶47 Although moral involuntariness does not negate the *actus reus* or *mens rea* of an offence, it is a principle which, similarly to physical involuntariness, deserves protection under s. 7 of the *Charter*. 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. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice. The ensuing deprivation of liberty and stigma would have been imposed in violation of the tenets of fundamental justice and would thus infringe s. 7 of the *Charter*.

[87] In reaching this important conclusion, LeBel, J. built on the foundation constructed by Dickson, J. in **Perka** and enhanced by Lamer, C.J. in **Hibbert**. In doing so, he focussed on the accused's predicament and specifically whether she had a "safe avenue of escape". In this way, the timing of the threat could become more flexible:

> ¶63 Lamer C.J.'s reasons in *Hibbert* followed closely the thrust of the analysis of the defence of necessity by Dickson J. in *Perka, supra*. Dickson J.'s comments remain particularly relevant. They emphasize the seriousness of the threat to the integrity of the person that is necessary to open the defence of necessity to an accused. In the assessment of the nature of the circumstances that may trigger the defence of necessity, while writing for the majority of the Court, Dickson J. held that in order to apply the defence of necessity, evidence should be introduced of a clear and imminent peril at the point in time where complying with the law becomes demonstrably impossible (p. 251).
>
> ¶64 According to Lamer C.J. in *Hibbert*, the defences of duress and necessity share the same juristic principles. Nevertheless, they target two different situations. In the case of necessity, the accused is a victim of circumstances. Duress finds its origin in man's wrongful acts. Moreover, Lamer C.J. drew some

> distinctions between the conditions of the defences of duress and of necessity. More particularly, Lamer C.J.'s reasons do not seem to have imported into the defence of duress an absolute immediacy requirement that would entirely duplicate the contents of s. 17 of the *Criminal Code*.
>
> ¶65 The analysis in *Hibbert* remains focused on the concept of a safe avenue of escape. Although the common law defence traditionally covers situations of threats susceptible of "immediate" execution by the person present and uttering threats, this immediacy requirement has been interpreted in a flexible manner by Canadian jurisprudence and also as appears from the development of the common law in other Commonwealth countries, more particularly Great Britain and Australia. In order to cover, for example, threats to a third person, the immediacy test 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. A threat that would not meet those conditions, because, for example, it 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.

[88] Further, LeBel, J. drew from the analysis of Laskin, J.A. of the Ontario Court of Appeal, who penned the judgment under appeal. See: **R. v. Ruzic**, [1998] O.J. No. 3415. Prophetically, we see a reference to the plight of battered women who might have to rely on the defence of duress:

> ¶87 At the heart of Laskin J.A.'s decision is a concern that the immediacy and presence requirements are poor substitutes for the safe avenue of escape test at common law. In his view, their focus on an instantaneous connection between the threat and the commission of the offence misses the point in a number of special cases. *He highlights two situations in particular. The first is the battered woman who is coerced by her abusive partner to break the law. Even though her partner is not present when she commits the offence and is therefore unable to execute it immediately, a battered woman may believe nonetheless that she has no safe avenue of escape. Her behaviour is morally involuntary, yet the immediacy and presence criteria, strictly construed, would preclude her from resorting to s. 17.* There may also be other situations in which a person is so psychologically traumatized by the threatener that he complies with the threat, even though it was not immediate and to the objective observer, there was a legal way out. The second scenario described by Laskin J.A. is the case of a person like Ms. Ruzic, for whom effective police protection was unavailable. Do the immediacy and presence requirements demand that a person go to the authorities if he has the opportunity to do so, even when he believes it would be useless or even dangerous to do so? It should be noted that in this second scenario, a court might face a delicate task in assessing the validity of a claim that, in a foreign land, no police protection was available. It illustrates some of the difficulties in the

> practical implementation of a defence of duress which involves a risk of abuse through unverifiable assertions of danger and harm.
>
> [Emphasis added.]

[89] This same concern for abused women pleading duress was also made forcefully by Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999) 4 Can. Crim. L. Rev. 271 (WL Can.) at pp. 329-330:

> An examination of the experiences of battered women who are forced by their abusers to commit offences reveals serious inadequacies in the existing law of duress from the standpoint of gender equality. It demonstrates that section 17 of the *Criminal Code* is unable to accommodate the legitimate duress claims of battered women, primarily because of its presence and immediacy requirements, but also because of the large number of offences it excludes from the defence. It also demonstrates that the common law defence, which turns upon the availability of a reasonable avenue of escape, offers greater possibilities of responding to the coercion women face, provided that the defence is interpreted in a way that is sensitive to the reality of battered women's lives. Thus, the experiences of battered [women] reveal that section 17 should be abandoned in favour of the common law defence, or a codified version that incorporates aspects of the common law.
>
> The experiences of battered women also demonstrate that gender should be a key consideration in assessing existing *Criminal Code* provisions and in reforming them. As feminists have frequently argued, all too often the law is drafted against the backdrop of a male norm. Thus, where women's experiences differ from those of men, the law may be incapable of responding to the realities of women's lives. The stories of battered women coerced into crime show how this has occurred in the context of the defence of duress. They also underscore the need for a new law of duress that is responsive to the legitimate claims of *both* men and women.

[90] Furthermore, concern for the plight of abused women was expressed in **R. v. Malott**, [1998] 1 S.C.R. 123, which was decided by the Supreme Court in the wake of **Lavallee**. There, Justices L'Heureux-Dubé and McLachlin (as she then was) expressed concern for abused women not just in the context of self-defence, but for other defences including duress:

> ¶ 36 ... The expert evidence is admissible, and necessary, in order to understand the reasonableness of a battered woman's perceptions, which in *Lavallee* were the

> accused's perceptions that she had to act with deadly force in order to preserve herself from death or grievous bodily harm. *Accordingly, the utility of such evidence in criminal cases is not limited to instances where a battered woman is pleading self-defence, but is potentially relevant to other situations where the reasonableness of a battered woman's actions or perceptions is at issue (e.g. provocation, duress or necessity). See* ***R. v. Hibbert****, [1995] 2 S.C.R. 973, at p. 1021.*
>
> [Emphasis added.]

[91] In my view, this case law and academic commentary is instructive. It highlights the need for triers of fact to fully understand the plight of battered spouses (most often women) who, having reacted to threats from their abusive partners, must rely on the defence of duress. In turn, it also highlights the need for this defence to be sufficiently flexible to, when appropriate, accommodate the dark reality of spousal abuse. At the same time, it will oblige the courts to ensure that reliance upon such a defence will be "strictly controlled and scrupulously limited" (**Perka**, above at ¶ 80).

[92] That said, a battered spouse must do more than simply assert that she thought there was no other choice (but to commit the crime). A defence resting only on a subjective belief would clearly represent too much flexibility. Thus, there must also be an additional objective element commanding the accused to act as a "reasonable person" in the circumstances. LeBel, J. explains:

> ¶61 This particular excuse focuses on the search for a safe avenue of escape (see *Hibbert, supra*, at paras. 55 and 62), but rejects a purely subjective standard, in the assessment of the threats. The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but 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. A similar approach is also to be used in the application of the defence of necessity (see *Latimer, supra,* at paras. 26 ff.).
>
> ¶62 The common law of duress, as restated by this Court in *Hibbert* recognizes that an accused in a situation of duress does not only enjoy rights, but also has

> obligations towards others and society. As a fellow human being, the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes a requirement of proportionality between the threat and the criminal act to be executed, measured on the objective-subjective standard of the reasonable person similarly situated. The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person. In addition, it must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated.

[93] Yet, some scholars still question the need for this objective element in light of the literal wording of s. 17. For example, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed. (Markham: LexisNexis Canada Inc., 2009) at p. 483, notes:

> For a person to be acting under duress, it is imperative that the threat be taken seriously. Section 17 makes this an explicit requirement, and one that is measured from the subjective viewpoint of the accused, "if [he] believes that the threats will be carried out". In *Mena*, the Ontario Court of Appeal held that the language of the section is quite clear and that it was not permissible to read into it limitations requiring that the accused's belief be reasonable or that the threats must be such that a person of reasonable firmness could not be expected to resist them.

[94] However, as the authors go on to conjecture, it is not surprising that the law makers would require only a subjective element when one considers the entire provision as originally drafted. After all, this defence was to be available only when the aggressor was present and making threats of immediate peril. In those circumstances, one would not have to worry about an objective test. That would have been implied. It is only with **Ruzic**'s removal of the timing and presence requirements that an objective test became necessary. Therefore, for good reason, an objective element is now fundamental to this defence.

Conclusion on this Issue

[95] In summary, I would distill the following principles from the jurisprudence:

1. The defence of duress, like necessity, is rooted in the age old premise that in a civilized society, it is sometimes unjust to attach criminal liability to someone who has violated the law. In other words, sometimes breaking the law can represent the lesser of two evils.

2. Thus, the accused's actions would be *excused* as opposed to *justified*. In other words, the actions remain blameworthy but would not attract penal consequences. As LeBel, J. said nicely in **Ruzic (**at p. 40): "The law is designed for the common [person], not for a community of saints or heroes".

3. Therefore, rooted in compassion, this defence targets actions that are *morally involuntary* where the accused sees no reasonable avenue of escape but to commit the offence charged.

4. The threat acted upon must be serious and it must attack the accused's personal integrity.

5. When the accused is a battered spouse, (most often women) her perspective must be understood by the trier of fact. This normally involves the use of expert evidence.

6. At the same time, this defence entails both a subjective and an objective component. Specifically, the accused must subjectively see no safe avenue of escape; nor would a "reasonable person" in the accused's circumstance.

7. The time between the threat and the illegal act remains highly probative but it does offer some flexibility, depending upon the circumstances.

8. Finally, as with defences generally, the presumption of innocence will be honoured. In other words, if the defence has an air of reality, then the Crown must establish beyond a reasonable doubt that it does not apply.

[96] Therefore, with this backdrop, I ask - could the defence of duress be available to a wife who tries to hire someone to kill her husband? For the following reasons, I believe that it could.

[97] At the outset, I note that there is one Canadian case almost on point. In **R. v. Cozzi**, [2000] O.J. No. 5157, the accused, like Ms. Doucet, attempted to hire a hit man to kill her husband. She too failed, fortunately, because she also unwittingly approached undercover police officers to perform the "contract". While this defence failed on its merits (with an appeal to the Ontario Court of Appeal

dismissed; [2005] O.J. No. 1402), there appeared to be no issue with it being considered in these very similar circumstances.

[98] Yet again, **Cozzi** fell into the conventional mould for duress because the accused wife acted not on threats from her husband (the aggressor), but from her third party boyfriend.

[99] However, I return to the rationale for this defence - to excuse morally involuntary conduct. Viewed in this light, I can see no principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim. After all, had Ms. Doucet attacked her husband directly, self-defence would represent a potential avenue of defence (based on **Lavallee**, *supra*). Therefore, it would be ironic indeed to see her denied a defence for an indirect attack.

[100] For all these reasons, I would not exclude the defence of duress in the circumstances we face.

Air of Reality Analysis

[101] This takes me to the Crown's alternative submission - that the trial judge erred in his *air of reality* analysis by either, (a) applying a deficient legal test; or (b) finding that the test had been met on the facts of this case.

Air of Reality - The Appropriate Test

[102] The Crown asserts that the judge applied a deficient legal test when considering the *air of reality* question. Specifically, it says that the judge ignored the need for, (a) a close temporal link between the threat and the offence; and (b) proportionality between the offence committed and harm sought to be avoided. As I will now explain, I disagree with both assertions.

[103] At the outset, let me say that the judge was well aware of his task:

> ¶6 I am satisfied based on the admissions and by listening to and viewing the materials attached to court ex. 1 (Agreed Statement of the Facts), that the requisite elements of the offence have been established by the Crown beyond a reasonable doubt.

¶7 Therefore, the only issue for me to determine is whether the common law defence of duress is available to the accused.

¶8 ... Cacchione J. in *R. v. Stephen*, [2008] N.S.J. No. 43, reviewed the authorities, in detail, and sets out what the court must decide in determining whether a defence, such as duress, should be considered by the court. He held:

> 4 An initial determination of whether s. 17 and duress have an "air of reality" must be made before proceeding to deal with the case on its merits.
>
> 5 In order to decide if a defence should be considered the Court must first consider if the defence has an "air of reality". In deciding whether the defence has an "air of reality" the Court is performing a gatekeeper function: *R. v. Savoury*, [2005] O.J. No. 3112 (Ont. C.A.).
>
> 6 The objective of the "air of reality" test is to avoid having to consider "defences" which have been described as meritless, outlandish, fanciful, far-fetched and speculative and not founded on evidence: *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) Paras, 48-84L *R. v. Savoury* (*supra*) at paras. 44 and 45. To consider defences which lack an evidentiary foundation would invite a verdict not supported by the evidence.
>
> 7 The test to determine if a defence possesses an "air of reality" is if a properly instructed jury (trier of fact) acting reasonably, could acquit on the basis of the defence: *R. v. Cinous* (*supra*), at paras. 2 and 49. So long as there is an "air of reality" to the defence, either on the evidence presented by the Crown or by the defence, the defence is entitled to be considered.
>
> 8 In *R. v. Oslin* (1993), 86 C.C.C. (3d) 481 (S.C.C.) at p. 531 Cory J. Provided the following definition of air of reality:
>
> > ... The term "air of reality" simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted ...
>
> 9 A finding that there is sufficient evidence to provide a defence with an "air of reality", shifts the burden to the Crown who is then legally obliged to prove beyond a reasonable doubt that the defence does not apply.

> 10 The test has two components. First, there must be some evidence on the issue and second, the evidence must be such that a jury properly instructed could reasonably draw the inferences necessary to acquit the accused. That is, whether there is evidence reasonably capable of forming the basis for an acquittal: *Cinous* (*supra*) at para. 61.

¶9 The issue, for me to decide, is whether there is evidence reasonably capable of forming a basis for an acquittal.

¶10 The air of reality test applies to all elements of the defence. *R. v. C. (T.L.)*, [2004] A.J. No. 800, 2004 CarswellAlta 888, at para. 73.

¶11 If the accused fails to adduce evidence to the requisite air of reality standard on any of the elements of the duress defence, there is nothing for the Crown to respond to. Cacchione, J. in *R. v. Stephen*, *supra*, at para. 324 sets out the necessary elements of defence of duress:

> 324 The defence of duress contains four elements which can be summarized as follows: (1) The accused must act solely as a result of the threats of death or serious bodily harm to himself or herself or another person; (2) The threats must be of such gravity or seriousness that the accused believed that the threats would be carried out; (3) The threats must be of such gravity that they might well have caused a reasonable person in the same situation as the accused to act in the same manner. To put it another way, would a person of reasonable firmness sharing the characteristics of the accused such as age and background have responded to the threats; (4) The accused must not have had an obvious safe avenue of escape.

¶12 It is on this law that I must assess the evidence to determine whether all of the elements of defence of duress have been established to the requisite standard.

. . .

¶148 As stated previously, I have no difficulty in finding that Mr. Ryan was an abusive and manipulative individual. Further, I have no difficulty determining that Ms. Ryan was justified in her fear of violence from him. However, as Mr. Craig correctly points out on his brief, the accused must adduce evidence to the requisite air of reality standard on all components of the defence. It is only then that it is incumbent on the Crown to show beyond a reasonable doubt, taking into account the totality of the evidence, that the accused did not act under duress. (*R.*

> *v* . *Ruzic*, [2001] S.C.J. No. 25, at para. 100) I now turn to the elements of duress, and apply the evidence, as I have found it, to those elements to determine whether the accused has met the requisite burden:

[104] I now return to the Crown's assertion that the judge ignored the need for a close temporal connection between the threat and the crime. Firstly, I agree that while the timing may now be viewed as flexible, there should indeed be a close connection between the threat and the "crime". However, in my view, the judge addressed this issue head on. Specifically, he found that while the last expressed threat may have pre-dated the "crime" by months, the peril it generated, lingered:

> ¶156 I would also point out that I do not consider that the threat to Ms. Ryan and her child had diminished at the time of the commission of the offence. She had very good reason to fear that she could suffer harm at the hands of Mr. Ryan...

[105] Regarding the proportionality question, I note, at the outset, that some scholars wonder whether such a requirement even exists post-**Ruzic**. For example, Stephen G. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L. Rev. 147 (WL Can.) at p. 197 to 198, observes:

> ... Accordingly, where an accused has acted in a morally involuntary fashion, *Ruzic* leads to the conclusion that no proportionality requirement can be imposed in addition.
>
> . . .
>
> In *Ruzic* the Court has said that morally involuntary behaviour is not morally blameless. This is consistent with the structure of defences, as has just been noted: moral involuntariness is a predictive question asked as part of the "reasonableness" portion of a defence, and the normative judgment is contained in a different part of defences. But in saying that moral involuntariness is sufficient on its own to require an acquittal, the Court is going beyond what it did in *Perka*, where it located the moral blameworthiness in a different part of the defence. It is rendering that additional part of the defence unconstitutional.
>
> Most obviously, this would lead to the conclusion that the explicit proportionality requirements in necessity and duress would be unconstitutional.

[106] Then in *Manning*, s*upra,* the authors conjectured:

> ... While the immediacy and presence requirements were clearly struck out, the decision did not outline precisely how to proceed with section 17 cases, LeBel J. simply noting that "[t]he analysis of duress in common law will ... 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 ...".
>
> This seems to suggest that the common law rules in relation to threats and proportionality - which were discussed in *Ruzic* - should apply to statutory applications of the defence. Still, this sort of approach may not be necessary. Section 17 already requires the threat to be a grave one - of immediate death or bodily harm - and precludes most serious offences from the scope of the defence. So long as these restrictions are maintained, it could be argued that the statutory version of the defence already has its own form of internal proportionality inquiry.

[107] Respectfully, I do not see the death of the proportionality component following from **Ruzic**. Instead, the Court in **Ruzic** made it clear that to establish involuntariness, the accused must be left with "no other safe avenue of escape". The essence of proportionality is: can the impugned action be excused by the perceived threat? This concept, in my view, addresses the proportionality question. In other words, the accused must establish (an air of reality) that committing the "crime" was the *only* safe avenue of escape. Reasoning deductively, the availability of a less serious avenue of escape would vitiate the defence. Read in this light, the need for proportionality remains alive and well, post **Ruzic**. I therefore agree with the Crown on the need to establish proportionality.

[108] In any event, none of this was lost on the judge in this case. In fact, when considering the prerequisites for duress, he presented a heading entitled: "The threats must be of such gravity that they might well cause a reasonable person in the same situation as the accused to act in the same manner", under which he noted:

> ¶155 Again, I am satisfied that the accused has met the requisite standard with respect to this part of the test. A reasonable person in the circumstances of Ms. Ryan would seek to find a solution to her plight. She had attempted to have the matter dealt with by the authorities; however, she was repeatedly faced with

> the response that it was a "civil matter". A reasonable person in the circumstances of Ms. Ryan, when an individual presented themselves to her with a solution to her problem would have acted in the same manner faced with the evidence as I have outlined it, including the history of Mr. Ryan's violence towards others, his manipulative and controlling manner, his access to firearms, the threats which he made, and the lack of response by any persons in authority, establishes this element of the defence.

[109] This passage, in my view, deals exactly with what the Crown says the judge ignored. It deals with the need for proportionality. It asks: would a reasonable person in the same situation act in the same manner? In other words, it begs the question: would a reasonable person do something less drastic? If so, the defence fails. That is proportionality.

[110] Furthermore, the judge addressed the need for there to be no reasonable avenue of escape:

> 4. The accused must not have an obvious safe avenue of escape.
>
> ¶157 This is by far the most difficult aspect of this case.
>
> ¶158 The Supreme Court of Canada in *R. v. Hibbert* [1995] S.C.J. No. 63, discussed in considerable detail, the safe avenue of escape requirement and the requisite test. At para. 55 of *Hibbert* the court held:
>
> > 55 The so-called "safe avenue of escape" requirement in the law of duress is, in my view, simply a specific example of a more general requirement, analogous to that in the defence of necessity identified by Dickson J. -- the requirement that compliance with the law be "demonstrably impossible". As Dickson J. explained, this requirement can be derived directly from the underlying concept of normative involuntariness upon which the defence of necessity is based. As I am of the view that the defence of duress must be seen as being based upon this same theoretical foundation, it follows that the defence of duress includes a similar requirement -- namely, a requirement that it can only be invoked if, to adopt Dickson J.'s phrase, there is "no legal way out" of the situation of duress the accused faces. The rule that the defence of duress is unavailable if a "safe avenue of escape" was open to the accused is simply a specific instance of this general requirement -- if the accused could have escaped without undue danger, the decision to commit an offence becomes, as Dickson J. observed in the context of

> necessity, "a voluntary one, impelled by some consideration beyond the dictates of 'necessity' and human instincts".
>
> ¶159 After a thorough analysis of the law in this area the court concluded at para. 60:
>
> > 60 The defences of self-defence, duress and necessity are essentially similar, so much so that consistency demands that each defence's "reasonableness" requirement be assessed on the same basis. Accordingly, I am of the view that while the question of whether a "safe avenue of escape" was open to an accused who pleads duress should be assessed on an objective basis, the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused.
>
> ¶160 Therefore, I must consider on the totality of the evidence, whether there is evidence assessed on an objective basis, taking into account the particular circumstances and human frailties of Ms. Ryan, satisfies this element of the defence to the requisite standard.

[111] As I have stated above, the “no avenue of escape” requirement has a built-in proportionality feature.

[112] For all these reasons, in my view, the judge did not ignore this aspect of the defence. I would dismiss this aspect of the appeal.

Air of Reality - Sufficient Evidence?

[113] Was there sufficient evidence to establish the requisite air of reality? I say “yes” for the following reasons.

[114] I begin by affirming that the question of whether an air of reality exists is a legal one commanding correctness. In other words, while we would defer to the judge’s factual findings, the questions of whether those findings meet the test is a legal one whereby the judge must be correct. If he is not, we would impose our view on this issue. See: **R. v. Cinous**, [2002] 2 S.C.R. 3.

[115] The Crown’s main point with this avenue of appeal involves what it views as, (a) the sheer vagueness of Ms. Doucet’s assertions; and (b) the time that

passed between the last threat in late 2007, to the time of the crime in March of 2008. Its position is summed up in its factum:

> ¶57 The Appellant submits that in this case there was simply no evidence such that a properly instructed jury acting reasonably could acquit the Respondent with respect to the duress defence. No properly instructed jury acting reasonably could find that compliance with the law by the Respondent in this case was "demonstrably impossible", the phrase adopted with approval by Lamer C.J. in *Hibbert, supra* (tab 2). No properly instructed jury acting reasonably could find by any objective standard that the accused could not have escaped without undue danger without deciding to take steps to have her husband killed. The evidence pertaining to the Respondent's previous communications with the police and with victims' services was extremely vague and incapable of showing that there was no legal way out of the situation, even factoring in the particular circumstances and frailties of the Respondent. The vagueness of this evidence must be viewed in the context of the lack of evidence of any threats by the Respondent's husband which could be said to have any close temporal connection to the date of the crime, the vagueness of any evidence pertaining to any threats by the Respondent's husband which were not quite remote in time, and the fact that the Respondent and her husband had been living apart for almost seven months prior to March 27, 2008.

[116] I must say at first blush, that it is easy to empathize with the Crown's position on this issue. As I have highlighted earlier, it is hard to imagine that, as a teacher with a steady income, support from family and friends, presumed police protection, a divorce in the works and with the last specific threat months before the "crime", she would not have had other avenues of escape. Yet, at the same time and as we have learned from **Lavallee** and **Ruzic**, *supra*, context is extremely important.

[117] Here, we have ample evidence of Ms. Doucet's *subjective* fear of her husband and her conclusion that she had no remaining safe avenue of escape. Examples include:

- how she was convinced that Mr. Ryan would kill her and their child eventually;

- how he acted differently in late 2007;

- how this convinced her that he was planning the inevitable;

- how his showing up at the school in February 2008 - her only sanctuary - telegraphed to her that the time was near;

- how she felt that she then had to go into hiding;

- how she felt that she was being stalked by him right up until the approximate time of the “crime”;

- how when the opportunity presented itself, she felt that she had no choice but to take it.

[118] Further there was evidence to corroborate the fact that Ms. Doucet held these subjective beliefs. For example:

- She was in therapy in late 2007, early 2008, reporting her fears.

- There is no question that she contacted the police on numerous occasions.

- Her colleagues in school saw her “panicked” and “frantic” when Mr. Ryan arrived at the school in February 2008.

- Her weight loss leading up to the event in question was obvious to her friends and family.

- Her need to go into hiding in late 2007 was corroborated by friends who helped and harboured her.

[119] Therefore, with ample evidence supporting her subjective belief, the greater challenge for Ms. Doucet is establishing the objective element of this defence. For the reasons which follow, I am satisfied that she has.

[120] I begin with a closer look at the applicable test - would a “reasonable person” in Ms. Doucet’s position see no avenue of escape other than to commit this crime? Thus, as noted earlier, the question is not whether I would see no avenue of escape in these circumstances. In other words, the law has fortunately

developed beyond asking what the infamous “reasonable man” would do. Wilson, J. in **Lavallee**, *supra*, explains:

> ¶38 If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".
>
> ¶39 I find the case of *State v. Wanrow*, 559 P.2d 548 (1977), helpful in illustrating how the factor of gender can be germane to the assessment of what is reasonable. In *Wanrow* the Washington Supreme Court addressed the standard by which a jury ought to assess the reasonableness of the female appellant's use of a gun against an unarmed intruder. The Court pointed out that the appellant had reason to believe that the intruder had molested her daughter in the past and was coming back for her son. The appellant was a 5'4" woman with a broken leg. The assailant was 6'2" and intoxicated. The Court first observed, at p. 558, that "in our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons." Later it found that the trial judge erred in his instructions to the jury by creating the impression that the objective standard of reasonableness to be applied to the accused was that of an altercation between two men. At p. 559, the Court makes the following remarks which I find apposite to the case before us:
>
> > The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and unfortunate history of sex discrimination." Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

[121] Therefore, in this case, the hypothetical “reasonable person” is an abused woman. Thus, in my view, the question is better framed as: was there sufficient evidence to establish (an air of reality) that a woman like Ms. Doucet, abused for years, would have acted similarly? Placed in this context, it is easier to answer with a “yes”.

[122] For example, consider Ms. Doucet's expert evidence. Dr. Stephen Hucker, a forensic psychiatrist, in a report filed with the court, spoke of Ms. Doucet's plight in relation to the defence of duress. Note that his opinion was premised on the judge accepting Ms. Doucet's version of events. Of course, we now know that the judge accepted her evidence without qualification. Dr. Hucker explained:

> It is my further understanding that there are four elements to the defence of duress: a history of threats of death or bodily harm, the subjective belief that the threats could be carried out, the objective view that a reasonable person in the same circumstances would have done what the accused did, and that the accused had no safe avenue of escape. An "air of reality" is necessary to these elements based on credible evidence. *I surmise that these components are for the trier of fact to determine and that the credibility of Ms. Doucet's claims will be reviewed for that purpose.* Ms. Doucet has been noted by me as well as others to have been somewhat inconsistent in her reports as to whether she experienced physical abuse as opposed to psychological and sexual abuse. She clearly indicated to me that it was far less frequent than the emotional and sexual abuse but that it did nonetheless occur.
>
> There may be a psychiatric element that may assist with the fourth criterion. This is related to the nature of the abusive relationship and understanding the sometimes irrational behaviour of those entangled in it.
>
> In partner abuse cases there is typically prolonged exposure to physical or psychological events, or both, that may not always be especially severe or life-threatening. Nonetheless the victim feels intense fear, helplessness, loss of control, and threat of annihilation. Based on her past experiences and knowledge Ms. Doucet states she was aware that her husband had the capacity to hurt, exploit and constrain her and members of her family. Abusive experiences create a mounting sense of entrapment and a feeling there is "no way out," a feeling Ms. Doucet articulates very clearly. Although she describes that she was able to make the decision to leave the relationship she then became alarmed at her husband's inability to "let go" and at his intensifying retaliatory threats even once they had separated. This was accentuated by her feeling that her appeals to police and other agencies were going unheeded and she therefore, in her mind, "had no other choice" but to eliminate him.
>
> [Emphasis added.]

[123] Further in direct evidence, Dr. Hucker supplemented those comments. Note again his premise that the judge accept her evidence:

> ... It also looks as if she was right that people weren't able to help her. So I think there's both the subjective and the objective and I'm sure His Lordship will evaluate them too. The other part of it, which I think is a professional ... professionally relevant, is how does a person perceive themselves in the situation? What I'm trying to convey in the description of this abusive pattern and the way people respond to it is that it's not just a psychological prison as a physical one, that they see their situation as a form of entrapment that they can't see any way out, so although the rest of us might say, Well, you divorce him, you go to your family and you mobilize resources, you go to a shelter. The kind of things that we advise clients and patients all the time. They don't see those resources as either helping them or, more particularly, aggravating their situation. So if you call the police and they don't take him into custody, I'm going to be foiled, so I'm hesitant to do anything. So I think that degree of psychological entrapment, for want of a more generalized term, I think does convey something of that. Whether His Lordship will believe that Ms. Doucet was in that mental state is obviously up to him, but she seemed to be saying things that reflected very much what brought individuals who've been through these experiences describe that sense of, I have no other way out, I have to explore other options. And she, of course, describes it not just for her own safety but for that of her daughter, which I think compounds things.
>
> . . .
>
> A. Just summarizing it, if one believes Ms. Doucet's account, it's a credible account, then she fulfills the characteristics of the battered woman syndrome or as I would prefer to put it, she has the characteristics of a woman who's been through a chronically abusive relationship. That that has given rise to post-traumatic symptoms and that she also has shown ... or she has features of personality traits that I described as avoidant, dependent and obsessional, which to some extent may be partly attributable to that chronic abuse. That said, ... oh, I'm not allowed to answer any question about duress, am I? So then I leave it there. That I think that the characteristics of the "battered woman syndrome" in quotes, can be applied to the legal test.
>
> [Underlining added.]

[124] Then, Dr. Hucker in his testimony explains why Ms. Doucet might not simply “up and leave” this abusive situation:

> ... Also, this is what you see in the victims is a way of excusing the behaviour. This is a question that's always asked, Well, why didn't you get out? Why didn't you divorce him. Why didn't you go to your family and go back to mother or

> whatever? This sort of explains that to some extent is the person will actually make excuses for the person and Ms. Ryan in her discussions with me, and I think she conveyed it in her testimony, felt sorry for him. She felt he was a wounded animal who had this terrible up-bringing and she could understand that behaviour up to a point anyway. She certainly did at the beginning and my view of it is she was, even in the interview with me, she was still making excuses for him, although she decided she couldn't take it anymore there was an element of her that still felt bad for him and that if you only loved him enough then maybe he'd change. Which is a very strange thing when you describe the experiences that she has, why would you feel any sympathy for a person who's treated you like that? And that's part of it. We call it cognitive distortions. Ways of faulty thinking, if you like, that justify your continued behaviour. I mentioned that there are varieties of abuse, there's not just physical. It can be psychological; it can be sexual. Many victims describe it being harder to cope with emotional and psychological abuse because it doesn't leave scars. We know that people who are physically abused get black eyes, cut lips. Will lie to workmates, take the day off to see if the bruise subsides, colour their bruises around their neck with a polo neck shirt or a sweater. These are the kind of things. People don't want to talk about this. They want to keep it private. And yet people who've experienced these situations will often say, emotional abuse is harder because nobody sees the scars, even though they feel them just as acutely, they're not something that's visible.

[125] Thus, we have an expert confirming that Ms. Doucet was a victim of "psychological entrapment" who suffered "battered woman syndrome" and who could see "no way out". In other words, this expert witness came just short of stating that her plea of duress had an air of reality; that being the ultimate issue properly left to the judge.

[126] In short, we see a woman who, on the surface, appeared to have had choices. But, below the surface, we see a victim of abuse, who at the time of the "crime" appeared to have been living in a state of terror. Parenthetically, this is not unlike Ms. Lavallee who was acting in self-defence when she shot her husband in the back of the head as he walked away. On the surface, this did not look like self-defence, but below the surface we see a much different picture. So it is with Ms. Doucet.

[127] Furthermore, the fact that Ms. Doucet is a well educated professional should not serve to vitiate this defence. In other words, the question is not about whether Ms. Doucet's plight meets the medical label of "battered wife syndrome" (which ironically can itself be stereotypical). Instead, as I have discussed earlier,

it is about her (and only her) unique experience. Again, L'Heureux-Dubé, J. explains in **Malott**, *supra*:

> ¶40 *It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance*, women who have demonstrated too much strength or initiative, women of colour, *women who are professionals*, or women who might have fought back against their abusers on previous occasions, *should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman*. See, e.g., Julie Stubbs and Julia Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australia Case Study" (1995), 8 *C.J.W.L.* 122. Needless to say, women with these characteristics are still entitled to have their claims of self-defence fairly adjudicated, and they are also still entitled to have their experiences as battered women inform the analysis. Professor Grant, *supra*, at p. 52, warns against allowing the law to develop such that a woman accused of killing her abuser must either have been "reasonable 'like a man' or reasonable 'like a battered woman'". I agree that this must be avoided. The "reasonable woman" must not be forgotten in the analysis, and deserves to be as much a part of the objective standard of the reasonable person as does the "reasonable man".
>
> ¶41 How should the courts combat the "syndromization", as Professor Grant refers to it, of battered women who act in self-defence? *The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman* and her entitlement to claim that she is suffering from "battered woman syndrome". This point has been made convincingly by many academics reviewing the relevant cases: see, e.g., Wendy Chan, "A Feminist Critique of Self-Defense and Provocation in Battered Women's Cases in England and Wales" (1994), 6 *Women & Crim. Just.* 39, at pp. 56-57; Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1992), 14 *Women's Rts. L. Rep.* 213, at pp. 216-17; and Marilyn MacCrimmon, "The social construction of reality and the rules of evidence", in Donna Martinson et al., *supra*, 36, at pp. 48-49. By emphasizing a woman's "learned helplessness", her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "battered woman syndrome", the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important

> advancements achieved by the decision in *Lavallee*. [Underlining by the author.]
>
> [Emphasis added.]

[128] Therefore, in my view, this evidence, combined with the judge's unqualified acceptance of Ms. Doucet's version of events, represents a sufficient basis to support the judge's conclusion that her plea had the requisite air of reality. I would not disturb this finding.

[129] Finally, although not raised as a specific ground of appeal, it is important to note that the judge made strong factual findings to support his conclusion that once Ms. Doucet raised an air of reality for this defence, the Crown failed to disprove its existence beyond a reasonable doubt:

> ¶161 I find that at the time of the commission of the offence Ms. Ryan was in a very vulnerable state, she had lost a considerable amount of weight, was dissociated and despondent. She had an intense fear of Mr. Ryan, was feeling helpless, felt she had lost control and felt she was threatened with annihilation.
>
> ¶162 While true 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". Her condition accentuated her feeling that her appeals to the police and other agencies were going unheeded. Therefore, applying the test as previously set out I find that given that particular circumstances and frailties of Ms. Ryan, and viewing it objectively, there was no other safe avenue of escape available to her.
>
> ¶163 The circumstances are unique in this case in that it is at a time when Ms. Ryan is at her weakest point that the avenue of escape presents itself to her, an undercover officer who is going to assist her in eliminating her husband. The perception of Ms. Ryan regarding the safe avenue of escape must also be viewed in light of her condition at the timing of encounter with the police.
>
> ¶164 I am satisfied that the accused has met her burden with respect to this aspect of the defence.
>
> ¶165 It is ironic, as previously stated, that one of the agencies she had appealed to, the police, was actually the avenue which presented itself to her to solve her problem.

> ¶166 I am further satisfied that evidence has not been introduced by any party which would negative the defence. Again, I was struck by the fact that Mr. Ryan did not take the stand to give evidence with respect to any of the assertions that were made against him. Ms. Ryan was compelled to take the action she did by normal human instincts and self preservation. It would be inappropriate, under these circumstances, to attribute criminal conduct to her.
>
> ¶167 Therefore, I am satisfied that the four elements of the defence of duress have been established to the requisite standard.
>
> ¶168 As a result, I find Ms. Ryan not guilty of the offence charged.

DISPOSITION

[130] I conclude that there is nothing to prohibit Ms. Doucet from raising the defence of duress in these unique circumstances. Further, the judge did not err in finding an air of reality to this defence. I would therefore dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Oland, J.A.