Hard Cases Make Bad Law, or Bad Law Makes Hard Cases? The Supreme Court of Canada’s Defining-down of Duress in *R. v. Ryan*

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In *R. v. Ryan*, the Supreme Court of Canada was presented with “a novel question: may a wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him murdered?”

In answering “no,” the Court unwittingly breathed new life into the adage that bad law makes hard cases. “As we see it, the defence of duress is available when a person commits an offence while under compulsion of a threat made for the purpose of compelling him or her to commit it. That was not Ms. Ryan’s situation. She wanted her husband dead because he was threatening to kill her and her daughter, not because she was being threatened for the purpose of compelling her to have him killed.”

Why the tortured distinction? The answer, it turns out, has very little to do with duress.

The decisions below

The Nova Scotia Supreme Court found that the sole reason for Ms. Ryan hiring a “hit man” (who turned out to be an undercover RCMP officer) arose from “his threats of death and serious bodily harm to herself and their daughter.” The trial judge was further satisfied that Ms. Ryan reasonably believed that her husband would consummate his threats, and that “there was no safe avenue of escape other than having him killed.” While Ms. Ryan had previously contacted the police and other agencies seeking help, her situation was viewed as a “civil matter.” As the Supreme Court of Canada rightly observed, it is a “disquieting fact that, on the record before us, it seems that the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her.”

The trial judge concluded that the common law defence of duress applied and acquitted Ms. Ryan.

The Court of Appeal unanimously upheld the trial judge’s verdict of acquittal. The Court of Appeal found that the foundational norm underlying the defence of duress is that an accused ought to be excused of criminal liability when his or her conduct is morally involuntary. Notwithstanding that duress has traditionally been applied where the person making the threat and the targeted victim are different, the Court of Appeal concluded that there was no principled basis warranting a
distinction between the aggressor (in this case, the abusive husband) being the targeted victim as opposed to a third person target.[8] It would be ironic, the Court of Appeal noted, that Ms. Ryan might have been able to plead self-defence had she killed her husband herself, but could not as a matter of law plead duress because she responded to the same threat by hiring another to kill her husband.[9]

**Policing the boundary between duress and self-defence**

The Supreme Court of Canada expressed disapproval that “the Court of Appeal thought it appropriate to develop the common law of duress in order to fill a gap in the law of self-defence.”[10] Based on this peculiar parsing of the Court of Appeal’s judgment, which is neither correct nor even necessary, the Supreme Court set out to police the boundary between self-defence and duress in order to uphold the integrity of the former and restrict the application of the latter.

In the Supreme Court’s view, duress is self-defence’s poor, if close, cousin: “while in a case of duress we excuse an act that we still consider to be wrong,” self-defence, “on the other hand, is a justification for impugned conduct that is ‘considered right.’”[11]

Therefore:

For the sake of the coherence of the criminal law, the defence of self-defence ought to be more readily available, not less readily available, than the defence of duress in situations in which the accused responds directly against the source of the threat.

[...]

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

The difficulty that this creates is not, in our view, limited to a lack of analytical tidiness. The result of this case [below] is in effect a judicial amendment of the law of self-defence.[12]

But the Supreme Court need not have read the Court of Appeal’s decision - or Ms. Ryan’s argument - in this way. Instead, irrespective of the availability of self-defence, the argument for the application of the defence of duress to the unfortunate facts of the case at bar flows from and gives full expression to the normative rationale underlying duress: moral involuntariness. In R. v. Ruzic,[13] the Supreme Court of Canada held that moral involuntariness is “[a] concession to human frailty” in the face of “agonising choice.”[14] Moral involuntariness is entrenched as “a principle of fundamental justice” which recognizes “that only voluntary conduct - behaviour that is the product of a free will and controlled body - should attract the penalty and stigma of criminal liability.”[15]

The vacuum in the case at bar is not created by the codified parameters of self-defence; even if the Nova Scotia Court of Appeal justified its decision solely in terms of filling a gap created by the incompleteness of self-defence (which it did not), the Supreme Court hardly need adopt the very analytic framework employed by a Court below that it is otherwise intent to overturn. Rather, the legal gap in the case at bar results from the “patchwork quilt” and overly narrow nature of the defence of duress. Unlike the exhaustively codified defence of self-defence, the defence of
Duress is comprised of both statutory and common law elements, which creates gaps in its application. But more problematic is the Supreme Court's insistence on the traditional, narrow, and unprincipled limitation that "the purpose of the threat is to compel the accused to commit an offence against someone other than "the person making the threat."

This last is the precise limitation - a limitation of the defence of duress, not of self-defence - identified and relied on by the Court of Appeal below. The Supreme Court of Canada itself identified this gap, noting that "neither in the sources cited by the parties nor in our own research has duress been extended to a case in which the threat was not made for the purpose of compelling the commission of an offence and the victim was the person making the threat." Notice that the limitation in question relates to the defence of duress, not self-defence. The supposed threat to the substantive coherence of self-defence is nothing more than a red herring. Full expression and effect can be given to the fundamental justice principle of moral involuntariness by providing for a full and flexible defence of duress capable of recognizing situations where there "is no legal way out" such that the offence will not be punished because, in the circumstances, there was realistically no choice of action but to break the law.

The norm of moral involuntariness underlying the defence of duress can be vindicated without trenching in the least on the parameters of self-defence. Indeed, because the defence of duress is not completely codified (unlike self-defence), the Court has the jurisdiction to further develop and clarify the common law elements of the defence of duress to ensure that they comport with the principle of fundamental justice, just as the Court in Ruzic "supplemented the interpretation and application of s. 17 of the Criminal Code with elements from the common law defence of duress, which it found to be 'more consonant with the values of the Charter.'"

But instead of bringing the defence of duress further in line with the principle of fundamental justice, the Court contented itself with merely observing (although at considerable length) the shared elements of the statutory and common law defences of duress, which include:

- There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party;
- The accused must reasonably believe that the threat will be carried out;
- There is no safe avenue of escape. This element is evaluated on a modified objective standard;
- A close (but not necessarily "immediate") temporal connection between the threat and the harm threatened (i.e., threats of future harm satisfy this element);
- Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard; and
- The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy, or association.

Incidentally, all of these elements are met in the case at bar. More significant, however, is the evident disjuncture between the purposive and flexible nature of these common elements of the defence of duress summarized by the Court, on the one hand, and the Court's curious insistence on maintaining other traditional, narrow, and unprincipled limitations on the defence's availability. By insisting on such
limits, the Court has effectively defined-down the norm of moral involuntariness and the defence of duress.

Conclusion: A hard case, or a bad law?

In Winterbottom v. Wright, Justice Rolfe noted that "[t]his is one of those unfortunate cases in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law." [23] Legal Scholar Glanville Williams later added that "cases in which the moral indignation of the judge is aroused frequently make bad law." [24] And yet insufficient attention to the moral foundations of the law - such as the norm of moral involuntariness underlying the defence of duress - can also lead the law astray, particularly if normative analysis is sacrificed for purely logical reasoning. This is hardly a new concern. As John Chipman Gray cautioned in 1909, we lawyers are wont to overvalue the "logical coherency of the system itself" to the detriment of justice and people's well-being. In R. v. Ryan, the Supreme Court needlessly policed the boundary between self-defence and duress, as if to make sure a hard case did not make for a bad law. [25] But it is more likely that the Court's decision will allow a bad law to make for a future of hard cases.

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[2] Id., para. 2 [the Court's emphasis].
[3] 2010 NSSC 114, paras. 149-152.
[6] Id., para. 35
[8] [1] Id, para. 99.
[9] Id.
[12] Id., paras. 27, 29, 32 [emphasis added]. Instead of "the availability of the offence" the Court surely intended to say "the availability of the defence" but it appears to have committed a Freudian slip revealing its true disposition toward the duress defence.
[16] The Supreme Court fully acknowledges this, explaining that while the statutory defence applies to principals, the common law defence is available to parties of an offence. The Court also observes that while the statutory defence includes a lengthy list of exclusions, it is unclear if any exclusions obtain at common law: R. v. Ryan, above note 1, para. 83. But the Court is apparently unaware of (or unconcerned by) the gaps created by the narrow application of the defence of duress, be it the statutory defence, the common law defence, or the partially harmonized defence the Court summarizes in the case at bar (see para. 81).
[17] R. v. Ryan, above note 1, paras. 20, 32 [the Court's emphasis].
[18] Id., para. 32 [emphasis added].
[20] Perka v. The Queen, [1984] 2 S.C.R. 232, where the Court found that the defence of necessity was predicated on "normative involuntariness."
[23] (1842) 10 M&W 109 [emphasis added].
[25] The Court granted a stay of the proceedings against Ms. Ryan (with Fish J. dissenting on this point alone) so as to ensure its judgment did not work an injustice. But in the process the Court needlessly limited and defined-down the defence of duress while also stretching and straining the application of what is supposed to be "a drastic remedy of last resort": R. v. Ryan, above note 1, para. 88 per Fish J. in dissent.
Amazon's Victory: it took more than "One Click"

By: Steve Hundal, Ridout & Maybee LLP

On September 11th, 1998, Amazon.com, Inc. filed a patent application in Canada for what has become known as the "one-click" method, which essentially permits online purchasers to enter their address and billing information once, and thereafter to purchase items with one click based on identifying information stored on a cookie. Fourteen years later, Amazon has its patent. The road to the one-click patent, however, has been fraught with legal uncertainty and onerous hurdles at the Canadian Intellectual Property Office (CIPO).

The Patent Act permits the grant of a patent for an "invention", defined as "any new and useful art, process, machine, manufacture or composition of matter...". There are also categories of excluded subject matter. Methods generally fall into the category of "art".

The CIPO's Commissioner of Patents refused the Amazon patent application based on a "form and substance" approach to claim analysis, where it is determined if the form of the claim (i.e. the claim on its face) comes within one of the categories of invention and is not excluded or non-technological subject matter, and then the same analysis is repeated, however with regard to the substance of the claim, or what it has added to human knowledge. The decision was appealed to the Federal Court, where Phelan J., having purposively construed the claims, sent the matter back to the CIPO with the direction that the claims constitute patentable subject matter. The Commissioner then appealed to the Federal Court of Appeal.

On appeal, the Court held that the determination of patentable subject matter is to be made having regard to "the subject matter defined by the claim", rather than the 'invention' or 'what the inventor claims to have invented'. The Court clarified that this "does not mean that the Commissioner cannot ask or determine what the inventor has actually invented, or what the inventor claims to have invented." However, contrary to the Commissioner's two-step "form and substance" approach, "the Commissioner's identification of the actual invention [is] to be grounded in a purposive construction [and not] solely on ... a literal reading of the ... claims, or [an analysis notanchored in the language of the claims]."

The Court then addressed the Commissioner's bases for refusing the patent.

(a) **Patentable subject matter must be technological in nature**

The Court held that "this test should not be used as a stand-alone basis for distinguishing patentable from non-patentable subject matter," and that it is only correct to the extent that it distinguishes "fine arts or works of art that are inventive only in an artistic or aesthetic sense.

(b) **Business methods are not patentable**

Like the Federal Court, the Court held that there is no categorical exclusion of business method patents in Canadian jurisprudence. Unlike the Federal Court, however, the Court held that merely having a practical application "cannot be a distinguishing test, because it is axiomatic that a business method always has or is intended to have a practical application."
Ultimately, it must be determined, on a purposive construction of the claims, whether "the only inventive aspect of the claimed invention is the algorithm ... programmed into the computer", or if the method is "not the whole invention but only one of a number of essential elements in a novel combination."[11] The Court held that the Commissioner must be "open to the possibility that a novel business method may be an essential element of a valid patent claim."[12]

(c) A patentable art must cause a change in the character or condition of a physical object

The Court agreed with Phelan J. "that patentable subject matter must be something with physical existence, or something that manifests a discernible effect or change."[13] However, the Court held that Phelan J.'s interpretation of the "physicality of the invention" requirement from Lawson, that the requirement can be met simply by the fact that the method has a practical application, was overly broad.[14]

Ultimately, the Court held that Phelan J. erred in purposively construing the claims as such an exercise requires a "foundation of knowledge about the relevant art". [15] For these reasons, the Court set aside the judgment of the Federal Court and required the Commissioner to re-examine the application in accordance with the Court's reasons.

As a result of the Amazon FCA decision, the CIPO granted the patent, which issued on January 17, 2012, and issued new practice guidelines on March 8, 2013.

With the new guidelines, the CIPO will now assess whether claimed subject matter is an "invention" in accordance with section 2 of the Patent Act (i.e. "statutory subject matter") based on the essential elements of the claim as determined by a purposive construction of the claim, and having regard to the actual invention as revealed through this purposive analysis. Strangely, the notices place emphasis on identifying the problem and solution in order to determine the essential elements, and further indicates that examiners should look to the "promise" of the patent (i.e. its utility) to identify the problem and solution. These approaches appear to represent the Commissioner's own interpretation and extension of the Amazon FCA decision. In this regard, the CIPO should bear in mind the cautionary advice of the Federal Court of Appeal: "the Commissioner should be wary of devising or relying on tests of the kind [used in the initial refusal of the application], even if they are intended only to summarize principles derived from the jurisprudence. ... The focus should remain on the principles. ... [G]eneralizations can take on a life of their own, diverting attention away from the governing principles."[16]

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[5] Ibid. at para. 42.
[6] Ibid. at para. 42.
[7] Ibid. at para. 57.
[8] Ibid. at para. 58.
[9] Ibid. at para. 60.
[10] Ibid. at para. 61.
[12] Ibid.
[13] Ibid. at para. 66.
[14] Ibid. at paras. 67-69.
[15] Ibid. at para. 73.
[16] Ibid. at para. 53.
Costs Still Follow the Event

By: Eric J. Adams, Associate at Dutton Brock

It is no secret that trials are not cheap. Following a verdict, a court is left to determine how to compensate the victor for the often significant legal costs it incurred in overcoming its opponent's failed claim or defence. The general rule is that the costs of trial follow the event: the successful party is entitled to have part of its legal fees repaid to it by the losing party. Losing parties, however, typically offer a variety of reasons why following the general rule would be unjust in their specific circumstances. Two recent Ontario decisions exemplify how this general rule continues to apply at all levels of court in the province: the first involves costs awarded after a five week jury trial; the second, costs awarded after a one-day small claims court trial.

In Rodas v. Toronto Transit Commission (2012), CarswellOnt 12926 (SCJ), the plaintiff sued the Toronto Transit Commission for a neck injury which she allegedly sustained after her bus came to a sudden stop. After a five-week trial and an extremely short jury deliberation, the jury held that the accident had not caused or contributed to any injury suffered by the plaintiff.

During the subsequent costs hearing, the plaintiff argued that costs of trial ought not to be awarded against her because she had been effectively punished as the result of a newspaper article published after the jury verdict which caused her to be ostracized in her community. The plaintiff also argued that an adverse costs award would require her to sell her home and that this would result in a disruption in the lives of her children.

The court refused to depart from the general rule and awarded partial indemnity costs to the defendant. The Court took into account the fact that the defendants had made an offer to settle of $60,000, though this was withdrawn prior to trial. It noted that plaintiff's counsel brought an unsuccessful mistrial motion and provided new expert reports during the trial, both of which extended the duration of the proceedings. It noted that plaintiff's counsel engaged in disrespectful behaviour “unbecoming of an advocate” during the trial. Justice Wilson ordered that the plaintiff pay $250,000 to the transit commission forthwith.

In McDonald's Restaurants of Canada Limited v. Mary Harrison (2012), CarswellOnt 14825 (SCJ), I had the privilege of representing McDonald's in an action to recover damages sustained by a restaurant after a driver lost control of her vehicle and collided into the side of the restaurant. At trial, the defendant's adjuster denied the scope of damage suffered by McDonald's, notwithstanding that he did not send out his own contractors or experts to provide an estimate. The trial judge accepted that the property damage was as McDonald's represented and awarded an additional $9,421.04 in business interruption losses.

During the costs hearing, defence counsel argued that his client's expenses ought to be offset with those of McDonald's and noted the expense the defendant incurred in moving to have the claim transferred from Toronto to Welland. The Court rejected those submissions and declined to depart from the general rule that costs follow the event. The Court, moreover, held that the defendant had engaged in "unreasonable behaviour" by not accepting the plaintiff's offers to settle and awarded double the maximum
amount of costs normally permitted for small claims proceedings under the Courts of Justice Act. The defendant was ordered to pay McDonald's $7,770.65 in costs and disbursements.

While the costs considerations of bringing an action in the Superior Court are quite different from those in Small Claims Court, neither venue permits parties to litigate with impunity. As Justice Wilson notes in Rodas: "Parties are certainly entitled to their 'day in court' but they must understand that there may be adverse cost orders if the case does not turn out as anticipated".

Where Is It Made: A Comment on the Product of Canada Guidelines

By: James Musgrove, Michael Flavell and Philip Plante-Ajah, McMillan LLP

The Competition Bureau's Enforcement Guidelines as to "Product of Canada" and "Made in Canada" Claims (the "Guidelines") came into effect as of July 1, 2010. The Guidelines apply to all goods sold in Canada, including those that are imported. The Guidelines, like their predecessors, are designed to assist in evaluating compliance with misleading advertising prohibitions as applied to the identification of Canadian content requirements in the Competition Act, the Consumer Packaging and Labelling Act, and the Textile Labelling Act.

In the predecessor version to the Guidelines, The Bureau expressed the view that "Made in Canada" claims could be made as long as the product met a 51% threshold of Canadian content, and had its last substantial transformation in Canada.

Despite no changes in legislation or jurisprudence the current Guidelines set higher thresholds, and draw a distinction between "Made in Canada" and "Product of Canada" claims. For a good to qualify as a "Product of Canada", the Guidelines take the position that the last substantial transformation must have occurred in Canada and at least 98% of the total direct costs of producing or manufacturing the good must have incurred in Canada.

For a good to qualify as being "Made in Canada", the Guidelines provide that the last substantial transformation must have occurred in Canada, and at least 51% of the total direct costs of producing or manufacturing the good must have been incurred in Canada. In addition, the representation must be accompanied by an appropriate qualifying statement such as "Made in Canada with imported parts" or "Made in Canada with domestic and imported parts". This could also include more specific information such as "Made in Canada with 60% Canadian content and 40% imported content". The Guidelines go on to advise that use of specific terms that reflect the limited production, manufacturing, or other activity that took place in Canada would be most appropriate (for example, "Assembled in Canada with foreign parts" or "Designed in Canada").

Terms such as "produced in Canada" or "manufactured in Canada" are likely to be considered synonymous with "Made in Canada" and should also, according to the Guidelines, comply with the above "Made in Canada"
requirements. Sellers must also be cautious of implicit declarations (such as logos, pictures or symbols) that could be considered to give the same general impression to the public that a product is “Made in Canada” as an explicit declaration.

By contrast with the approach in the Guidelines, under the United States’ “Made in USA” rules, total domestic versus foreign costs are analyzed on a case-by-case basis, according to the Federal Trade Commission’s guide Complying with the Made in USA Standard, which expressly states that there is not a fixed point for all products at which they become “all or virtually all” made in the United States; the nature of the product, consumer expectations, how far removed the finished product is from the foreign content and the proportion of domestic costs are all taken into account.

The hard and fast quantitative thresholds contained in the new Guidelines are not prescribed by legislation or regulation. They are not the result of court decisions. Furthermore, some aspects are impractical. For instance, having to state in advertising materials such things as “Made in Canada with domestic and imported parts” may be problematic for many companies. It is simply too long a claim to be concisely articulated.

Additionally, it would appear that the transition from 51% to 98% was without significant public support. The House of Commons Standing Committee on Agriculture and Agri-Food, after receiving extensive representations, recommended only an increase to an 85% threshold, in their June 2008 report on “Product of Canada”, in order to achieve the appropriate level of transparency and accuracy in these claims for food products.

There are obviously peculiarities inherent in rigid “Made in Canada” rules. Consider the case of jam, sausages and pickles. The fruit, pork and cucumbers, the essential ingredients, can all be locally grown in Canada. But the requirement for sugar, salt and spices, in transforming the essential ingredients into their finished product may require qualifying statements such as “made with imported sugar”. It would be difficult to argue that consumers, who take pride in Canada made or produced goods, would think that the incidental addition of such ingredients not available in Canada would rob the finished product of its “Canadian-ness”. Such producers and manufacturers, who cannot take advantage of the beneficial “Product of Canada” / “Made in Canada” claims, are negatively affected. Consumers are affected, because they are deprived of knowing that certain goods are essentially made in Canada, yet do not qualify for technical reasons.

The Guidelines take a very narrow, and mathematical, view of what is Product of Canada/Made in Canada. Much more so than the U.S. equivalent. They do so without the legislative; regulatory, jurisprudential or stakeholder support. They suggest clarifications which are impractical. The difficulty, however, is that if advertisers do not accede to the Bureau’s view they run a serious risk of prosecution or civil challenge - with fines up to $10 million. With such serious consequences, it is submitted that the Bureau’s Guidelines should reflect a more flexible approach - consistent with the legislation and jurisprudence.