COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: **500-10-000001-881**
(700-27-001662-871)

Le 12 février 1993

CORAM: LES HONORABLES TYNDALE
MAILHOT
FISH, JJ. C.A.

SA MAJESTÉ LA REINE,

APPELANTE - poursuivante

c.

SERGE LANGLOIS,

INTIMÉ - accusé

LA COUR , statuant sur le pourvoi de l'appelante contre le verdict d'un jury de la Cour supérieure (Terrebonne, 11 décembre 1987, l'honorable John H. Gomery), lequel a acquitté l'intimé de trafic de haschich (2 chefs); possession de haschich dans le but d'en faire le trafic (2 chefs); complot (2 chefs); et vente illégale de la drogue Diazepam (1 chef).

Après étude, audition et délibéré;

Pour les motifs exprimés dans l'opinion écrite de monsieur le juge Fish déposée avec le présent arrêt, à laquelle souscrivent monsieur le juge Tyndale et madame la juge Mailhot;

REJETTE le pourvoi.

WILLIAM S. TYNDALE, J.C.A.

LOUISE MAILHOT, J.C.A.

MORRIS J. FISH, J.C.A.

Me Gilles Lahaie
pour l'appelante

Me Jacques Larochelle
pour l'intimé

Date d'audition: 21 octobre 1991

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTREAL REGISTRY

No: **500-10-000001-881**
(700-27-001662-871)

CORAM: THE HONOURABLE TYNDALE
MAILHOT
FISH, JJ.A.

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HER MAJESTY THE QUEEN,

APPELLANT - prosecutrix

v.

SERGE LANGLOIS,

RESPONDENT - accused

OPINION OF FISH, J.A.

This case concerns the current state of the defence of duress, or compulsion by threats, in Canada.

Respondent was caught smuggling drugs into the penitentiary where he worked. He successfully invoked the common law defence of duress at his trial. We are asked on this appeal to set aside respondent's acquittal on the ground that the trial judgemisapplied the law of duress. For the reasons that follow, I would decline to intervene.

I

The common law defence of duress has been denied in Canada, since 1967, to every one who "actually commits" any offence, however compelling the threats, however minor the crime(1).

Yet the defence has remained available for virtually all offences (other than murder(2), attempted murder(3), and some forms of treason(4)) to aiders and abettors(5), and to those charged in virtue of s. 21(2) of the Criminal Code (for forming an intention in common with another person to carry out an unlawful purpose)(6), unless the accused was in fact a "co-perpetrator"(7).

Section 17 of the Criminal Code, on the other hand, sets out a defence of compulsion by threats that applies to "principals", or those who "actually commit the offence", but not to aiders or abettors(8).

Section 17 reads:
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 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 any offence under sections 280 to 283 (abduction and detention of young persons).

This statutory defence is more liberal in some respects than the common law defence of duress, but it is more limited in others. Two restrictive conditions are of particular concern here. The first is that s. 17, by its express terms, can only be invoked by an accused who acted "under compulsion by threats of **immediate** death or bodily harm". Second, the defence only avails where thethreats are "from a person who is **present when the offence is committed**".

In the present case, it is conceded that the accused personally delivered and transported drugs. He thus "actually committed" the offences with which he was charged.

It is undecided whether s. 17 is restricted to threats of harm to the accused alone[(9)]. Even if it extends to threats of death or injury to third persons, such as members of the accused's family, respondent Langlois cannot invoke s. 17, since he did not act under threats of **immediate** death or injury from a person who was **present when the offences were committed**.

If s. 17 is unconstitutional, however, the common law defence of duress becomes available to respondent in virtue of s. 8(3) of the Code[(10)], which reads as follows:
(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.

The principal remaining issues would then be whether the trial judge, bearing in mind respondent's evidential burden, properly left the defence of duress to the jury and, assuming this to be so, whether the judge's charge adequately laid out its constituent elements.

My conclusion, for the moment put briefly, is that s. 17 of the Criminal Code violates the principle of fundamental justice that a person should not be found guilty of a crime if he or she is morally blameless.

In my view, a person is morally blameless if he or she commits a wrongful act that is "normatively involuntary" within the meaning of Perka[11]. An accused whose offence is normatively involuntary cannot, in a criminal law context, be said to be personally at fault and, as the Supreme Court of Canada has recently again recognized, it "is axiomatic that in criminal law there should be no responsibility without personal fault"[12].

Yet s. 17 denies the defence of compulsion to persons who commit any of the excluded offences as a result of credible threats of immediate death made by a person present when the offence iscommitted. It therefore requires the conviction of persons who commit those offences in a morally blameless and normatively involuntary manner.

In any event, there is no need in this case to consider whether s. 17 can be saved by reading it down so as to remove some or all of its "excluded offences".

This is so because s. 17, even "read down", would permit the conviction of morally blameless persons charged with **any offence** to which it applies, since it affords a defence only to persons who are compelled to perform wrongful acts by threats of **immediate** death or bodily harm made by someone who is **present when the crime is committed**.

However forceful and paralytic the threat, however fleeting and reparable the wrong, s. 17 would thus remain inaccessible to any person who is compelled to perform a prohibited act by threats of grave injury to a member of his or her family from a person who, though absent when the crime is committed, remains nonetheless positioned to actualize the threats soon if not immediately.

These limits imposed by s. 17 on an accused's right not to be punished for morally blameless behaviour are, in my opinion, not"demonstrably justified in a free and democratic society", within the meaning of s. 1 of the Charter.

In the result, I believe the common law defence of duress was in principle open to respondent. I believe as well that the trial judge properly explained the essential elements of that defence to the jury.

Recently, in Parris[13], where the accused claimed to have imported marijuana as a result of threats, Thomas J. held that certain provisions of s. 17 were unconstitutional, notably the requirements (a) that the person making the threats be present when the offence is committed and (b) that the threats be of immediate death or bodily harm.

Relying on Mena[14], Thomas J. held that it was for the jury, and not for him, to decide whether the accused had failed to avail herself of an opportunity to escape or to render the threat ineffective.

In the present case, Gomery J., also relying on Mena, came to the same conclusion. He found after careful consideration that therewas an air of reality to respondent's defence and decided that it should therefore be left to the jury.

Referring to the ability of a jury to detect a "bogus defence" of duress, Smith and Hogan observe, sensibly in my view, that

The more tenuous the grounds for fear, the less likely is D [the defendant] to be believed.[15]

In a like vein, Martin J.A., speaking for the Ontario Court of Appeal, stated in Mena:

> The common sense of a jury may be relied upon to reject spurious defences.[16]

Prof. Stuart, referring to a comment of Lord Simon in Lynch[17], has expressed a similar sentiment:

The accused [in the usual situation where a defence of duress is invoked] is faced by a truly agonizing choice under very much more than great pressure. Surely the spectre of lawless gangs trumping up defences of duress is far-fetched. Even if it was not, there would be no valid defence of duress and our triers of fact can be trusted not to be duped.[18]

I agree with these observations.

In Parris, a defence of duress was rejected and the accused was convicted. In this matter, the defence of duress was accepted and respondent was acquitted.

The verdict of a properly instructed jury is in my view no less reliable when the jury acquits than when the jury convicts.

II

Respondent Serge Langlois, then a recreation officer at Archambault Penitentiary, was searched upon his arrival for work on March 24, 1984.

The authorities found in his boots 282.6 grams of hashish and 1547 tablets of diazepam (valium). A search of his briefcase and of his parked pickup truck resulted in the discovery and seizure of letters addressed to imprisoned members of the Hell's Angels motorcycle gang, $1 000 in cash, Hell's Angels clothing and stationery, video and audio cassettes intended for inmates of the penitentiary, and an additional 2076 valium pills.

Langlois admitted in a written statement that he had also smuggled four or five pieces of hashish into the penitentiary some ten days earlier.

Respondent, who testified at trial, called evidence of good character and made a defence of compulsion by threats, or duress.

He claimed to have received several anonymous telephone calls in which the caller asked him if his wife and children were well. A further caller told him that if he were ordered to do something, he had best not complain to the police if he did not wish to jeopardize the safety of his wife and children.

One day, an inmate by the name of Fernandez gave him a book of matches, told him to go to the address written inside and to bring what he received there into the penitentiary.

Langlois went to the address, a nude dancing club, received the drugs mentioned earlier and returned to his home for the night. The next day, he brought the contraband with him to work.

The same procedure was followed a second time, leading to his search and arrest.

Langlois testified that he did not report these incidents to the police because he feared for his family and did not believe that the police could give them timely and adequate protection. He did not believe that he had a sufficient delay to flee with his family and to hide them.

In respect of the first episode, Langlois was charged with conspiracy with Raymond Fernandez to traffic in hashish, trafficking in the hashish, and possession for the purposes of trafficking.

With respect to the hashish found in his possession at the time of his arrest, Langlois was charged with conspiracy, trafficking, and possession for the purposes of trafficking. He was charged in a seventh count with illegally selling 3,623 diazepam pills, thereby committing an indictable offence under s. 26(b) of the Food and Drugs Act, 1970, R.S.C., c. F-27. .

Langlois was acquitted in 1987 by a jury at St-Jérôme on all seven counts of the indictment.

III

Essentially, as I mentioned at the outset, this appeal turns on the constitutionality of s. 17 of the Criminal Code and on the availability to respondent of the common law defence of duress.

A quarter-century ago, in Carker (No. 2)[19], the Supreme Court of Canada held unanimously that

... the common law rules and principles respecting "duress" as an excuse or defence have been codified and exhaustively defined in s. 17 [of the Criminal Code]...[20]

Seven years later, in Paquette[21], the Supreme Court, again unanimous, rejected a Crown submission that
...the principles of law applicable to the excuse or defence of duress or compulsion are exhaustively codified in s. 17 of the Criminal Code...[22]

and explained that

...the application of s. 17 is limited to cases in which the person seeking to rely upon it has himself committed an offence.[23]

In the present matter, the trial judge considered the distinction between Carker and Paquette
...tout à fait illogique et artificielle et fondamentalement déraisonnable à la lumière de la Charte des droits canadienne qui dit carrément qu'il n'y a pas de discrimination entre les personnes.[24]

After referring to
respondent's right under s. 15 of the Charter to "equal protection and equal benefit of the law without discrimination", the judge decided that respondent was not precluded by s. 17 of the

Code from invoking the wider common law defence of duress.

I emphasize in fairness to the trial judge that he gave his reasons without having the benefit of subsequent Supreme Court decisions defining the scope and reach of s. 15 of the Charter: see Andrews v. Law Society of British Columbia[25] and R. v. Turpin[26].

Before this court, respondent relies on s. 7 rather than s. 15 of the Charter. Appellant contends that this is an impermissible change in position, barred by Perka[27], since it "raises an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial"[28].

With respect, I am unable to agree.

The constitutional validity of s. 17 of the Code was challenged by respondent at first instance on Charter grounds and I see nothing in Perka that would prevent him from invoking on appeal alternative or additional reasons in support of that challenge. On the contrary, Dickson J. expressly states in Perka that, in both civil and criminal matters, the respondent may "advance any argument to sustain the judgment below, and he is not limited to appellant's points of law"[29].

Nor do I find merit in the Crown's complaint that it was prevented by respondent's previous reliance on s. 15 of the Charter from introducing evidence to show that s. 17 of Code, even if it violates s. 7 of the Charter, constitutes a "reasonable limit"within the meaning of s. 1. There was nothing to stop the Crown from leading evidence at trial in support of any intended submission that s. 17 of the Code is saved by s. 1 of the Charter. Cases will doubtless arise where a decision to call evidence will depend on the section of the Charter invoked by the accused. Appellant has failed to demonstrate that this is a case of that kind.

Next, appellant urges us to overrule or "set aside" the judgment of the Supreme Court of Canada in Paquette.

Agreeing with various commentators that

-- Paquette "ne fait qu'augmenter le caractère irrationnel de la défense de contrainte que nous connaissons" (Arbour)[30];

-- Paquette has produced "an anomalous result" and is "difficult to reconcile with Carker [supra] and Bergstrom[31]" (Borins)[32];

-- it is "inacceptable que notre défense de contrainte se trouve ainsi scindée en deux" (Côté-Harper and Manganas)[33];

-- one "illogical consequence" of Paquette is "to increase the availability of the defence of duress in a somewhat incoherent manner" and, still worse, to "limit the defence in perverse and surely unintended ways" (Rosenthal)[34]; and

-- "there is clearly something fundamentally wrong with having one comparatively certain law of duress relating to most serious crimes but an uncertain and different common law of duress in the case of accessory liability for some other offences" (Stuart)[35];

appellant asks us to find that Paquette has produced "un illogisme évident", has had "un effet inéquitable", has lost its raison d'être, was based on English authority since rejected by the House of Lords, and should therefore now itself be overruled.

Despite his full and able argument, counsel for appellant has failed to persuade me that the outcome of this appeal can be made to depend on Paquette, or that we would be entitled in this caseto interpret the law in a manner that contradicts a previous decision of the Supreme Court of Canada[36].

That court, however, has not since the advent of the Charter determined the constitutionality of s. 17 of the Criminal Code. We are therefore entitled, indeed bound, to face that issue here, and I turn to it now.

IV

As we have already seen, s. 17 of the Criminal Code is exhaustive in the sense that, in Canada, no one charged with any offence may be excused on the ground of duress, otherwise than in accordance with the provisions of s. 17, if that person has "actually committed" the offence, as opposed to aiding and abetting in its commission.[37]

Indeed, it has been held by our court that s. 17 can operate exhaustively even where the accused is pursued in virtue of s. 2l(2): see Robins, mentioned earlier[38].

At the instigation of her husband, Robins had participated in the kidnapping of a youthful victim.

Her defence was that she had done so in terror of her husband, who had assaulted her on previous occasions. She also feared her husband would kidnap and remove her own daughter to the United States.

Speaking for the Court, Mayrand J.A. found that the trial judge had not erred in assimilating the actions of the accused to "the co- action of a co-author of the offence"[(39)]. The case was therefore governed by s. 17 rather than the common law. And since the accused had not acted under threats of "immediate death or grievous bodily harm", she failed to meet one of the essential conditions of s. 17 (as it then read)[(40)] . Accordingly, her conviction was affirmed.[(41)]

It will be recalled in this regard that s. 21 of the Criminal Code provides:
21. (1) Every one is a party to an offence who

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence.

Thus, no one charged in Canada with the commission as actual perpetrator (or, in view of Robins, as "co-perpetrator") of any offence may ever invoke the common law defence of duress or otherwise be excused on the ground of compulsion by threats unless:

(1) the threats were of immediate death or bodily harm; and

(2) the author of the threats was present when the offence is committed.

Moreover, no one prosecuted as perpetrator or co-perpetrator, even if he or she satisfies these two conditions and believes that thethreats will be carried out, may under any circumstances invoke the common law defence of duress or the defence of compulsion under s. 17 on a charge of robbery, sexual assault unlawfully causing bodily harm, assault causing bodily harm, aggravated assault, or arson, let alone murder, treason, piracy or aggravated sexual assault.

As to the moral difficulties involved in totally excluding duress or necessity as defences to a charge of murder, I reproduce this memorable and thought-provoking passage from the 1989 Hamlyn Lecture of Prof. J.C. Smith:

At the inquest [Transcript of Zeebrugge Inquest, Coroner's somming-up, p. 5 of afternoon proceedings for October 2, 1987.] into the deaths caused in the Zeebrugge disaster evidence was given by one of the passengers in the Herald of Free Enterprise, a corporal in the army, that he and a number of other people, apparently dozens of them, were in the water and in danger of drowning. But they were near the foot of a rope ladder up which they might climb to safety. On the ladder, petrified with cold or fear, or both was a young man, unable to move up or down. No one could get past him. The corporal shouted at him for 10 minutes with no effect. Eventually he instructed someone else who was nearer to the young man to push him off the ladder. The young man then was pushed off and he fell into the water and, so far as is known, was never seen again. The corporal and others were then able to climb up the ladder to safety.

It does not appear from the transcript of the coroner's summing-up whether anyone warned the corporal, when he gave evidence, that he was not bound to incriminate himself and that this evidence might amount to an admission of murder; and yet,
as the law is currently stated, by the highest judicial authority, the killing of the young man - and it seems highly probable that he was killed by being knocked into the icy water - was neither justifiable nor excusable. Indeed, the coroner, in discussing this incident, said, "I think we need at least to glance in the direction of murder..." - but he gave no more than a glance, for he went on to say that we do not know whether the man on the ladder survived and that there was no evidence of his identity and, indeed, some uncertainty whether he was a young or a middle-aged man. Of course there may be murder of a person unknown and it is immaterial whether he was young or middle-aged, but there must be clear proof that someone was in fact killed. The coroner said, "There simply isn't any evidence" and he added:

"...but even if there were, I would suggest to you that killing in a reasonable act of what is known

as self- preservation, but that also includes, in my judgment, the preservation of other lives, such killing is not necessarily murder at all."

He went on to direct the jury, in effect, that there was no evidence of unlawful killing and, of course, there has been no suggestion that the corporal or any of the others involved in that incident should be prosecuted for murder or manslaughter. It would, in my opinion, be quite outrageous if there were. But, if there was evidence that the man on the ladder was in fact drowned as a result of being knocked off it, there is no authority for the proposition that this was a lawful thing to do. On the contrary, such authority as exists is to the effect that the killing of one to save the lives of others cannot be justified or even excused.(42)

Leaving aside such poignant incidents as this one, fortunately rare but unfortunately real, and turning to other offences excluded by s. 17, it is important to recall that "bodily harm" in this context means "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature"(43). Thus, the offence of unlawfully causing bodily harm is complete upon proof that the accused, **intentionally or not**, caused such harm(44) while committing **any objectively dangerous act**, prohibited by **federal or provincial law**: see the recent and unanimous judgment of the Supreme Court of Canada in DeSousa(45).

Sopinka J., speaking for the Court in DeSousa, confirmed that "both assault and assault causing bodily harm have identical mens rea requirements and the element of causing bodily harm is merely used to classify the offence"(46)and, further, that "the mental element ofan offence attaches only to the underlying offence and not to the aggravating circumstances"(47).

Because of s. 17 of the Criminal Code, no one in Canada may therefore be excused for yielding to the gravest of threats, if that person, in order to avoid actualization of those threats, is driven to commit any objectively dangerous federal or provincial offence that causes another person discomfort, albeit minor, though neither "transient" nor "trifling".

The restrictive and anomalous character of the law of duress or compulsion in Canada has been the subject of extensive academic comment. Don Stuart has observed, comparing s. 17 to corresponding rules in other jurisdictions, that it excepts an unusually large number of offences(48). In Prof. Stuart's view, a literal application of the requirement that the threat be "immediate" and the threatener "present", as in Carker(49), "would substantially circumscribe the defence of duress"(50). Prof. Colvin agrees that Carker "illustrates the restrictive nature of the defence"(51), butnonetheless leaves "some latitude for flexible interpretation". In his view, the

anomalous state of the law of duress in Canada stems instead from Paquette, supra[52], which he subjects to spirited criticism[53]. With respect, I see in Carker little scope for a liberal (as opposed to literal) interpretation of s. 17. Carker has indeed been described as an illustration of the dictum that "hard cases make bad law": see Nicola Padfield, "Duress, Necessity and the Law Commission," [1992] Crim L.R. 778. See also Borins, supra[54]; Rosenthal, supra[55]; and Arbour, supra[56].

Because of its narrow compass, s. 17 has the potential, in my view, of mandating a conviction despite the normatively involuntary character of the accused's actus reus. It has replaced the common law defence of duress by a statutory substitute that has proved, in cases such as Carker, supra, to be virtually inaccessible.

In this context, I find particularly apt the words of Dickson C.J. in Morgentaler[57]:

In Re B.C. Motor Vehicle Act[58], Lamer J. held, at p. 503, that "the principles of fundamental justice are to be found in the basic tenets of our legal system". **One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.** The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.[59]

Section 17 does not of course involve a "specifically-tailored defence to a particular charge", but it does deny the excuse of compulsion in circumstances where "the disapprobation of society is not warranted". I mention Morgentaler for that reason, without of course reading into it any absolute rule decisive of this appeal.

And, in this light, I again find that s. 17, on any reading of its provisions, constricts unacceptably the right of an accused not to be punished for performing a prohibited act "in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly compel disobedience": Perka, supra.

V

In its analysis of s. 7, the Supreme Court held in Re B.C. Motor Vehicle Act, supra:
It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.(60)

In Nguyen and Hess(61), the Supreme Court of Canada reiterated that it is a principle of fundamental justice that the innocent not be punished. Speaking for the majority, Wilson J. stated:
Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from an acute awareness that to imprison a "mentally innocent" person is to inflict a grave injury on that person's dignity and sense of worth. Where that person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is treated as little more than a means to an end. That person is in essence told that
because of an overriding social or moral objective he must lose his freedom even though he took all reasonable precautions to ensure that no offence was committed.(62).

Delivering the judgment of the Supreme Court of Canada in DeSousa(63), Sopinka J. stated:

It is axiomatic that in criminal law there should be no responsibility without personal fault. A fault requirement was asserted to be a fundamental aspect of our common law by this court in R. v. Sault Ste. Marie (City) (1978) 40 C.C.C. (2d) 353 [...] and as a matter of constitutional law under s. 7 of the Charter in Reference re: s. 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 [...]

Sopinka J. reiterated that:

The criminal law is based on proof of personal fault and this concept is jealously guarded when a court is asked to interpret criminal provisions, especially those with potentially serious penal consequences.(64)

Again:

The requirement of fault in regard to a meaningful aspect of the actus reus is necessary to prevent punishing the mentally, **and morally**, innocent and is in keeping with a long line of cases in this court...[65]

And finally, after referring to "the constitutional aversion to punishing the morally innocent"[66]:

In punishing for unforeseen consequences the law is not punishing the morally innocent but those who cause injury through **avoidable** unlawful action[67].

The common thread of Sault Ste. Marie, Morgentaler, Re B.C. Motor Vehicle Act, Nguyen and Hess and DeSousa, all supra, and of such cases as Wholesale Travel Group[68], Vaillancourt[69], Martineau[70] and Logan[71] is that conviction for a criminal offence requires, as a principle of fundamental justice, an element of moral blameworthiness. The Supreme Court has not yet had occasion to deal with this requirement in the context of compulsion by threats. It did however canvass the issue in Perka[72], where the Court considered the "largely analogous"[73] defence of necessity.

In my view, s. 17 of the Criminal Code, to the extent that it does not satisfy the standard of moral blameworthiness adopted by the Supreme Court in Perka, violates the principles of fundamental justice enshrined in s. 7 of the Canadian Charter of Rights and Freedoms.

VI

The defence of compulsion by threats, or duress, is founded on the same underlying considerations as the defence of compulsion by circumstances, or necessity.

Lord Simon of Glaisdale, in Lynch[74], explained the close connection between the two defences as follows:

The only difference is that in duress the force constraining the choice is a human threat, whereas in "necessity" it can be any circumstances constituting a threat to life (or, perhaps, limb). Duress is, thus considered, merely a particular application of the doctrine of "necessity": see

Glanville Williams (The General Part) (2nd ed., 1961), at p. 760.[75]

It is true, as appellant maintains, that Lynch was overruled by the House of Lords in Howe[76] . Nonetheless, as Prof. Smith has pointed out, the House again held in Howe "that the same principles applied to the two defences [of defence and necessity]"[77]. This is particularly evident in the speeches of Lord Hailsham[78] and Lord Mackay[79].

Since the defence of duress or compulsion, which concerns us in this case, is so closely related, legally and philosophically, to the defence of necessity considered in Perka[80], I believe the outcome of the present matter is in large measure dictated by the principles of law laid down in Perka.

Delivering the judgment of the Court in that case, Dickson J. recognized that
From the earliest times it has been maintained that in some situations the force of circumstances makes it unrealistic and unjust to attach criminal liability to actions which, on their face, violate the law.[81]

Illustrations of this venerable doctrine abound in the literature of both moral philosophy and pure law.

In Perka, after referring to Aristotle's Ethics (Book III, 1110a), Dickson J. cited Pollard, Sergeant at Law, in Reniger v. Fogossa[82]:
...in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken. And therefore the words of the law of nature, of the law of this realm, and of other realms,and of the law of God also will yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion...

as well as Hobbes[83] and Kant[84].
Similarly, in Russell on Crime, reference is made to

...a recognition by ancient authorities[85] that persons should in certain circumstances be excused for those acts which are not done of their own free will, but in subjection to the power of others [...][86]

And finally:
The defence of duress per minas ("duress by threat") has its roots in antiquity; in the law of the Hebrews, for example, "the fear of death, threatened in the event of non-compliance with an order to commit a crime, is an excuse for the commission".[87]

After a careful review of the authorities, including the philosophers I have mentioned and legal writers of the past three centuries, Dickson J. concluded that the defence of necessity, conceptualized as an "excuse",
... 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...[88]

Dickson J. noted that this view of necessity has been described by George Fletcher in Rethinking Criminal Law as "compulsion of circumstance"[89]. This description, said Dickson J.,
... points to the conceptual link between necessity as an excuse and the familiar criminal law requirement that in order to engage criminal liability, the actions constituting the actus reus of an offence must be voluntary.[90]

Justice Dickson continued as follows:

Literally, this voluntariness requirement simply refers to the need that the prohibited physical acts must have been under the conscious control of the actor. Without such control, there is, for purposes of the criminal law, no act. The excuse of necessity does not go to voluntariness in this sense. The lost Alpinist who, on the point of freezing to death, breaks open an isolated mountain cabin is not literally behaving in an involuntary fashion. He has control over his actions

to be extent of being physically capable of abstaining from the act. Realistically, however, his act is not a "voluntary" one. His "choice" to break the law is no true choice at all; it is remorselessly compelled by normal human instincts. This sort of involuntariness if often described as "moral or normative involuntariness". Its place in criminal theory is described by Fletcher at pp. 804-5 as follows:

The notion of voluntariness adds a valuable dimension to the theory of excuses. That conduct is involuntary - even in the normative sense - explains why it cannot fairly be punished. Indeed, H.L.A. Hart builds his theory of excuses on the principle that the distribution of punishment should be reserved for those who voluntarily break the law. Of the arguments he advances for this principle of justice, the most explicit is that it is preferable to live in a society where we have the maximum opportunity to choose whether we shall become the subject of criminal liability. In addition Hart intimates that it is ideologically desirable for the government to treat its citizens as self-actuating, choosing agents. **This principle of respect for individual autonomy is implicitly confirmed whenever those who lack an adequate choice are excused for their offenses.**

I agree with this formulation of the rationale for excuses in the criminal law. In my view, this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

Punishment of such acts, as Fletcher notes at p. 813, can be seen as **purposeless as well as unjust**:

...involuntary conduct cannot be deterred and therefore it is pointless and wasteful to punish involuntary actors. This theory ... of pointless punishment, carries considerable weight in current Anglo- American legal thought.

Relating necessity to the principle that the law ought not to punish involuntary acts leads to a conceptualization of the defence that integrates it into the normal rules for criminal liability rather than constituting it as a sui generis exception and threatening to engulf large portions of the criminal law. **Such a conceptualization accords with our traditional legal,**

moral and philosophic views as to what sorts of acts and what sorts of actors ought to be punished. In this formulation it is a defence which I do not hesitate to acknowledge and would not hesitate to apply to relevant facts capable of satisfying its necessary prerequisites.(91)

Whether a prohibited act results from compulsion by circumstances or compulsion by threats, does not seem to me to materially alter "the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available" (per Dickson J., supra).

Section 17 of the Criminal Code permits this perceived injustice to become an inescapable reality in two main ways: first, where the threats made, though not of **immediate** death or injury, or not from a person who is present when the prohibited act is done, would have caused any reasonable person to behave exactly as did the accused; second, where the accused was truly compelled, within the meaning of Perka, to commit one of the excluded offences.

Writing for the court in DeSousa(92), Sopinka J. stated:

The fact that the appellant's conduct would attract criminal responsibility because the mental element conforms to constitutional requirements would not resolve the issue if the section is in its other applications criminalized conduct that did not meet
constitutional standards. We have not adopted the "constitutional as applied" approach that is prevalent in the United States: see R. v. Smith (1987), 34 C.C.C. (3d) 97 at pp. 143-4...per Lamer J. (as he then was), and at p. 150, per Le Dain J..(93)

In Hess and Nguyen(94), McLachlin J. (dissenting on another point) stated:

The Attorney General for Ontario argued that since the accused are not in the category of young unprotected males, they have no standing to raise the second ground upon which it is alleged s. 146(1) discriminates. The majority of this Court, per Dickson J. (as he then was) took a broad view of standing on constitutional questions in criminal cases in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 , at pp. 313-14:

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid.... .....

It is the nature of the law, not the status of the accused, that is in issue.

It follows that any constitutional defect can be raised in the defence of a criminal charge. This is only just. A person should not be convicted under an invalid law.(95)

In the present case, respondent seeks to invoke the common law defence of duress in virtue of s. 8(3) of the Criminal Code. He may avail himself of that defence only if s. 17 of the Code is shown to be unconstitutional and inoperative.

In view of Big M Drug Mart Ltd., Hess and Nguyen and DeSousa, it may well be that respondent can rely for this purpose on the fact that s. 17 excludes an inordinate number of offences, even though this aspect of the provision is irrelevant to the circumstances of his own case.

As I said earlier, however, it is unnecessary for me to reach a firm conclusion on that issue, or to consider whether this limitative aspect of s. 17 can be "read down" or "read out", since I believe s. 17 in any event violates s. 7 of the Charter for reasons directly relevant to respondent's factual situation.

Respondent claims that he acted under threats of injury to members of his family. The threats were not made by a person present when the crime was committed. Nor were they threats of immediate death or injury. Respondent's defence therefore cannot comply with the mandatory conditions of s. 17. In effect, he is deprived by the narrow compass of that provision from invoking any defence of compulsion by threats.

As I stated earlier, the requirements of s. 17 that respondent is unable to satisfy create a real risk of criminal conviction for normatively involuntary acts. They expose to penal consequences behaviour that may well be morally blameless. Section 17 therefore violates principles of fundamental justice venerated equally by ancient and contemporary philosophers. These principles were recently reaffirmed, in relation to the defence of necessity, by the Supreme Court of Canada in Perka, supra. In my view, they apply equally to compulsion by threats or duress.

In my respectful view, s. 17 does not pass constitutional muster. It should therefore be declared inoperative, leaving open to all parties -- those who commit the offence and those who aid in its commission -- the common law defence of duress.

In Canada, this defence ought in my view to be conditioned by Perka, where Dickson J. summarized as follows his conclusions as to the "nature, basis and limitations" of the defence of necessity:

(1) the defence of necessity could be conceptualized as either a justification or an excuse;

(2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) [now s. 8(3)] of the Criminal Code;

(3) necessity as an excuse implies no vindication of the deeds of the actor;

(4) the criterion is the moral involuntariness of the wrongful action;

(5) this involuntariness is measured on the basis of society's expectation of **appropriate and normal resistance to pressure**;

(6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;

(7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;

(8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary, the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;

(9) the defence only applies in circumstances of imminent risk where the sanction was taken to avoid a direct and immediate peril;

(10) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.[96]

Dickson J. noted that the trial judge, dealing with the defence of necessity, had invited the jury to apply the "correct test", taken verbatim from Morgentaler, to the effect that "they must find facts which amount to 'an urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible'"[97].
Clearly, the words "inevitable" and "unavoidable" in paragraph (8) are conditioned by the adjective "reasonable" appearing in the preceding and following phrases of the same paragraph. Likewise, the words "demonstrably impossible" must be read in the light of the very next paragraph:

The trial judge was obliged in my opinion, to direct the jury's attention to a number of issues

pertinent to the test for necessity. **Was the emergency a real one? Did it constitute an immediate threat of the harm purportedly feared? Was the response proportionate? In comparing this response to the danger that motivated it, was the danger one that society would reasonably expect the average person to withstand? Was there any reasonable alternative to the illegal response open to the accused?**[98]

I shall return to these questions after a short look at the contemporary state of the common law defence of duress.

VII

In Mena[99], writing for the Court, Martin J.A. noted that

The common law, with respect to the defence of duress, is in a somewhat unsatisfactory state.[100]

Reference was then made to Lynch[101], where the House of Lords, by a majority, held that duress was available as a defence on an indictment for aiding and abetting murder. Lynch was noted with approval by the Supreme Court of Canada in Paquette, supra, but has since been overruled by the Judicial Committee of the Privy Council in Howe[102].

More recently still, in Gotts[103], the House of Lords, by a majority of three to two, held that duress was not available to one charged with attempted murder. As noted by Lord Keith of Kinkel, dissenting along with Lord Lowry, it seemed that "the generally accepted wisdom [when the crime was committed] was that the defence was only withheld in cases of murder[104] and treason.[105]

Lord Keith added:
The complexities and anomalies involved in the whole matter of the defence of duress seem to me to be such that the issue is much better left to Parliament to deal with in the light of broad considerations of policy.[106]

Though there was no question of their Lordships in Gotts being asked to deny the defence of duress in circumstances where it had previously been held to be available, Lord Jauncey of Tullichettle felt

...constrained to express the personal view that given the climate of violence and terrorism which ordinary law-abiding citizens have now to face Parliament might do well to consider whether that defence should continue to be available in the case of all very serious crimes.[107]

Lord Browne-Wilkinson expressed a similar sentiment:

I therefore agree that the appeal should be dismissed but express the hope that Parliament will consider the whole question of duress as a defence to all crimes with particular reference to the question whether duress is not better regarded as a mitigating factor than as a defence.[108]

Despite these reflections concerning the advisability of legislative intervention as to the scope and effect of duress under English criminal law, Gotts does not cast doubt on the constituent elements of the common law defence as it now stands or as it stood during the period relevant to the appeal now before us.

Notably, at common law, there is no requirement that the threats be made by a person who is present at the scene of the crime. It has been said that the threat must be "immediate" or "imminent" and that persons threatened must resort to the protection of the law if they can do so[109]. While the defence is not available to those who have "an obvious safe avenue of escape"[110], I agree with Martin J.A. that the operative test is "whether the accused failed to avail himself or herself of some opportunity to escape or render the threat ineffective"[111].

VIII

The trial judge, in opening the common law defence in this case, directed the jury that duress involved three essential requirements[112].

First, there had to be either explicit or implicit threats of death or serious injury[113].
Second, the threats had to be "immediate": respondent had no right to yield to threats if he had an obvious safe avenue of escape. He had a duty to try by all possible means to avoid committing the crime, to escape[114].

The judge reviewed the evidence on this issue in a fair and careful way[115] and again directed the jury, as to this second element of duress, to ask itself whether the accused could validly claim that he had no safe avenue of escape.

Essentially, the trial judge appears to have invited the jury to apply an objective standard in determining whether the respondent had an obvious and safe way of escape. This seems to be in accord with the authorities: see Mena, supra[116]. However, the issue is not free from controversy. Ingraham, supra[117], appears to leave the issue open.

On this branch of the matter, in an article to which I referred earlier, Nicola Padfield writes:
The [English] Law Commission's approach [eliminating any subjective view as to the availability or

effectiveness of official protection] does not represent current law. In Hudson and Taylor[118] two girls were convicted of perjury having been denied the defence of duress by the Recorder as the threat of harm to them could not be put immediately into effect in the courtroom when they were testifying. They claimed that they had been threatened with violence by a gang if they did not give false evidence at the trial of one of the gang members. Whilst testifying they had seen one of the gang in the gallery of the court. Lord Widgery C.J., in allowing their appeal, held that the question whether the police would be able to provide effective protection was relevant: "The threats...were likely to be no less compelling, because their execution could not be effected in the court room, if they could be carried out in the streets of Salford the same night."[119] Lord Widgery recognised that, if an accused was unable to plead duress where he had the opportunity to ask for protection from the police before committing the offence and failed to do so, this would "in effect restrict the defence of duress to cases where the person threatened had been kept in custody by the maker of the threats, or where the time interval between the making of the threats and the commission of the offence had made recourse to the police impossible." He did not accept that such a severe restriction should be placed upon it.

Lord Griffiths in Howe[120] pointed out that: "if duress is introduced as a merciful concession to human frailty it seems hard to deny it to a man who knows full well that any official protection he may seek will not be effective to save him from the threat under which he has acted." This must surely be the case. If under clause 26(2)(a)(iii) a jury must have regard to the alternative courses of action available to the defendant, "it distorts this enquiry if the jury is obliged to assume that official protection is available when the jury and everyone else knows perfectly well that it isn't."[121]

In any event, as I mentioned earlier, the trial judge directed the jury to apply an essentially objective standard as to the availability of an avenue of escape, and in this regard I see no room for complaint by the Crown.

As to the third element, the judge directed the jury that a person subjected to threats was expected to show reasonable courage:

...la Loi ne protège pas une personne qui commet des infractions criminelles sous l'effet de menaces si cette personne n'est pas normalement et raisonnablement courageuse dans les circonstances particulières de sa situation.(122)

The jury was then told that society expects a higher standard or additional degree of courage from someone who has chosen a calling that normally requires courage, such as a police officer. Penitentiary employees were also expected to show "the kind of courage one does not demand of an accountant or schoolteacher"(123).
The jury was thus to ask itself whether Langlois
...a démontré la résolution, la détermination et le sang-froid qu'un surveillant dans un pénitencier devrait posséder normalement. S'il n'avait pas ces qualités, avait-il l'obligation au lieu de continuer son emploi de démissioner de son poste et de chercher un emploi dans un domaine moins exigeant.

Le manque de courage n'est pas une excuse légitime pour un acte criminel...

In Howe(124), following Graham(125), the House of Lords held that the defence fails if "the prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant".

The appropriate test involved **reasonable belief**, amounting to **good cause for fear**, and the response of **a sober person of reasonable firmness**.

Again, the matter is not free from dispute. According to Smith and Hogan, Howe and Graham apply too strict a rule:

D [the defendant] should surely be judged on the basis of what he actually believed and what he actually feared. If his actual fear was such that no person of reasonable firmness could have been expected to resist it, he should be excused. He
may have been unduly credulous or stupid, but he is no more blameworthy than a person whose fear is based on reasonable grounds.(126)

For present purposes, there is no need to determine whether the rule laid down in Graham and applied in Howe imposes too high a standard. In substance, the judge's charge adopted that standard and, once again, I see no grounds for complaint by appellant.

Finally, I agree with Martin J.A., who concluded in Mena, supra, that, at least in principle, "whether the accused had failed to avail himself of an opportunity to escape, which was reasonably open to him, is a question for the jury"(127).

In this case, the trial judge gave careful consideration to the Crown's submission concerning respondent's evidential burden on the defence of duress. He concluded that there was an air of reality to the defence and that it should therefore go to the jury.

Another judge might perhaps have taken a less indulgent view, but in the absence of any material misdirection as to the elements required to found a defence of duress, I would not interfere.

Taken as a whole, I think it can fairly be said that the judge's charge to the jury subjected respondent's defence to the tests laid down, for necessity, in Perka, supra:

Was the emergency a real one? Did it constitute an immediate threat of the harm purportedly feared? Was the response proportionate? In comparing this response to the danger that motivated it, was the danger one that society would reasonably expect the average person to withstand? Was there any reasonable alternative to the illegal response open to the accused?(128)

And as I said near the outset, the verdict of a properly directed jury is no less reliable in the case of an acquittal than in the event of conviction.

IX

There have been calls in England, as we have seen, for a fresh parliamentary look at the common law defence of duress. Similar views have been expressed in Canada with respect both to the common law and to the statutory defence under s. 17 of the Criminal Code. Paquette, supra, may well have introduced unforeseen anomalies into the law. That case can be seen, however, as a judicial initiative constrained by the law as it then stood.

Under the Charter, different considerations obtain. Courts are now mandated to determine whether impugned statutory provisions satisfy Canadian constitutional requirements, including adherence to the principles of fundamental justice.

For the reasons given, I believe s. 17 of the Criminal Code fails that test and should therefore be declared inoperative.

I have also concluded that appellant has established no reversible error in the judge's charge to the jury in this case.

Accordingly, I would dismiss the appeal.

MORRIS J. FISH, J.A.

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1. Carker (No. 2), [1967] 2 C.C.C. 190 (S.C.C.).
2. See Howe, [1987] A.C. 417 (H.L.).
3. See Gotts, [1992] 1 All E.R. 832 (H.L.).
4. Smith and Hogan, Criminal Law, 6th ed., 1988, p. 230.
5. Paquette (1976), 30 C.C.C. (2d) 417 (S.C.C.).
6. "A person whose actions have been dictated by fear of death or of grievous bodily injury cannot be said to have formed a genuine common intention to carry out an unlawful purpose with the person who has threatened him with those consequences if he fails to co-operate": per Martland J., for the Court, in Paquette, supra, note 5, at p. 423.
7. Robins (1982), 66 C.C.C. (2d) 550 (Que. C.A.), discussed below.

8. Paquette, supra, note 5, at p. 421.
9. See Stuart, infra, note 18, p. 398.
10. Paquette, supra, note 5.
11. (1984), 14 C.C.C. (3d) 385 (S.C.C.).
12. Per Sopinka J., speaking for the court in DeSousa (1992), 76 C.C.C. (3d) 124 (S.C.C.), at p. 134
13. See Parris, Ontario Court of Justice - General Division, Brampton, Ontario, Action No. 2420/92, July 27, 1992, Quicklaw citation [1992] O.J. No. 2814.
14. (1987), 34 C.C.C. (3d) 304 (Ont. C.A.).
15. Smith and Hogan, Criminal Law, 6th ed., 1988, p. 236.
16. At p. 319.
17. [1985] A.C. 653 (H.L.).
18. Don Stuart, Canadian Criminal Law: A Treatise, 2nd ed., 1987, p. 401.
19. Supra, note 1.
20. At p. 191. Section 17 of the Code has since been amended. The current version, reproduced below, provides that the statutory defence does not apply to more offences than were mentioned in the former version.
21. Supra, note 5.

22. At p. 420.
23. Ibid.
24. Appellant's Factum, p. 6.

25. [1989] 1 S.C.R. 21 .
26. [1989] 1 S.C.R. 1296 .
27. [1984] 2 S.C.R. 232 .
28. Per Dickson J., speaking for the court in Perka, at p. 391.
29. Ibid.
30. Louise Arbour (now Arbour J. A., of the Ontario Court of Appeal), "La Cour suprême sans contrainte", (1977) 39 C.R.N.S. 264, at p. 280.

31. [1987] 1 S.C.R. 439.
32. His Honour Judge Stephen Borins, "The Defence of Duress", (1981-82) 24 Crim.L.Q. 191 , at p. 199.
33. Gisèle Côté-Harper and Antoine D. Manganas, Droit pénal canadien, 1984, p. 498.
34. Peter Rosenthal, "Duress in the Criminal Law", (1989-90) 32 Crim.L.Q. 199, at p. 218.
35. Don Stuart, Canadian Criminal Law, 1987, p. 401.
36. See R. v. Landry (1991), 62 C.C.C. (3d) 117, especially at p. 124 (per Lamer C.J., Wilson, La Forest, Cory and Sopinka JJ., concurring) and p. 127 (per McLachlin J., L'Heureux-Dubé J. concurring).
37. Carker, supra; Paquette, supra.
38. Supra, note 7.
39. At p. 561.
40. "Grievous" was dropped from the bodily harm requirement by S.C., 1980-81-82-83, c. 125, s. 4.
41. See Mena (1987), 34 C.C.C. (3d) 304, where Robins is discussed and distinguished at pp. 316-17.
42. J.C. Smith, Justification and Excuse in the Criminal Law, Hamlyn Lectures, 1989, pp. 73-74.
43. See s. 267(2) of the Criminal Code.
44. "For liability to be imposed for unlawfully causing bodily harm, the harm caused must have **sufficient causal connection** to the underlying offence committed": per Sopinka J., in DeSousa, at p. 133.
45. (1992), 76 C.C.C. 124 (S.C.C.), especially at pp. 133 and 142.
46. At p. 140.
47. At p. 141.
48. Op. cit., supra, note 35, at p. 395.
49. Supra, note 1.
50. At p. 397.
51. Eric Colvin, Principles of Criminal Law, 2nd ed., p. 231-2.
52. Note 5.
53. At pp. 234-5.
54. Note 32, especially at p. 207.
55. Note 34, especially at pp. 219-23.
56. Note 30.
57. [1988] 1 S.C.R. 30 .
58. [1985] 2 S.C.R. 486 , 48 C.R. (3d) 289 .
59. At p. 70. My emphasis.
60. At p. 319 C.R.

61. (1990) 59 C.C.C. (3d) 161 (S.C.C.).
62. At p. 171.
63. (1992), 76 C.C.C. 124 (S.C.C.), at p. 134.
64. At p. 134.
65. At p. 140. My emphasis.
66. At p. 141.
67. At p. 142. My emphasis.
68. [1991] 3 S.C.R. 154 .
69. [1987] 2 S.C.R. 638.
70. (1990), 58 C.C.C. (3d) 353 (S.C.C.).
71. (1990), 58 C.C.C. (3d 391 (S.C.C.).
72. (1984), 14 C.C.C. (3d) 385 (S.C.C.).
73. At p. 403.
74. [1975] A.C. 653 (H.L.).
75. At p. 692.
76. Supra, note 2.
77. J.C. Smith, Justification and Excuse in Criminal Law, Hamlyn Lectures, 1989, p. 76.
78. At p. 429.
79. At p. 453.
80. Supra, note 70.
81. At p. 392.
82. (1551), 1 Plowden 1 at p. 18, 75 E.R.1.
83. Leviathan, (Pelican ed., 1968), p. 157.
84. The Metaphysical Elements of Justice (translator Ladd, 1965) p. 41.
85. 1 Hale 43; Blackstone 4 Comm. 27.
86. Russell on Crime: A Treatise on Felonies and Misdemeanors, 10th ed, 1950, by J.W. Cecil Turner, p. 68.
87. Peter Rosenthal, "Duress in Criminal Law", (1989-90) Crim. L.Q. 199, at p. 200, citing S. Mendelsohn, The Criminal Jurisprudence of Ancient Hebrews , 2nd ed., 1968, p. 30.
88. At p. 398.
89. The same concept was described as "duress of circumstances" by Woolf L. J. in Willer, [1988] 3 W.L.R. 1238 (C.A.). See Smith, op. cit., note 41, pp. 84-9.
90. Perka, p. 398.
91. At pp. 398-9. Emphasis added throughout.
92. (1992) 76 C.C.C. (3d) 124 (S.C.C.).
93. At p. 133.
94. Supra, note 61.
95. At p. 191.
96. At pp. 405-6. My emphasis.
97. At p. 407.
98. Ibid.
99. (1987) 34 C.C.C. (3d) 304 (Ont. C.A.).
100. At p. 319.
101. [1975] A.C. 653 (H.L.)
102. [1987] 2 W.L.R. 568.

103. Supra, note 3.
104. See Abbott, [1977] A.C. 755 (P.C.), Kenny, Outlines of Criminal Law (13th ed., 1929) p. 74.
105. At p. 834.
106. At p. 834. See also Lord Lowry, at pp. 840-41.
107. At p. 839.
108. At p. 853.
109. Smith and Hogan, supra, note 4, at p. 235.
110. Mena, p. 322.
111. Mena, p. 323.
112. Appellant's factum, p. 79.
113. Ibid., pp. 79-80. It is clear from the authorities that the threat may be express or implied: see Lynch, [1975] A.C. 653 at pp. 669 and 679 (H.L.); Mena, supra, especially at pp. 320-1; and Ingraham (1991), 66 C.C.C. (3d) 27 at p. 45 (Ont. C.A.).
114. P. 80.
115. Pp. 80-83.
116. At p. 322.
117. Note 113, at pp. 45-6.
118. [1971] 2 Q.B. 202 (C.A.). However, compare Hébert (1989), 49 C.C.C. (3d) 59 (S.C.C.). The constitutional validity of s. 17 does not appear to have been raised in Hébert.
119. Ibid., at p. 207.
120. [1987] A.C. 417 at p. 443 (H.L.).
121. Nicola M. Padfield, "Duress, Necessity and the Law Commission," [1992] Crim. L.R. 778 at p. 781.
122. Appellant's factum, p. 83.
123. P. 84.
124. [1987] 2 W.L.R. 568 at p. 574 (H.L.).
125. [1982] 1 All E.R. 801 at p. 806 (C.A.)
126. Op. cit., note 4, at p. 236.
127. At p. 323.
128. Ibid.