Case Name:

R. v. Young

RE: Her Majesty the Queen, (Respondent), and Ashley Shannon Young, (Applicant)

[2010] O.J. No. 3280

2010 ONSC 4194

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Court File No. 10-50000206-BR

Ontario Superior Court of Justice

R.A. Clark J.

Heard: July 9, 2010.
Judgment: July 28, 2010.

(75 paras.)

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Grounds for denial -- Detention necessary for protection of public -- Review of -- Application by accused to set aside a detention order dismissed -- Accused charged with attempted murder of his former common law wife -- While picking up his son for access, accused suddenly o beat his wife with a hammer -- Accused had no prior record -- Court not satisfied that accused he did not pose a danger to the public -- Absent an adequate explanation for his bizarre behaviour, risk that he might well do something similar again if admitted to bail was quite real -- Proposed supervision by present girlfriend or as inpatient in hospital was not realistic.

Application by the accused to set aside a detention order. The accused was charged with attempted murder of his former common law spouse. At the time of the offence, the victim and accused had been separated. The accused met the victim to take his young son on an access visit. The accused suddenly picked up a hammer from his car, grabbed the victim by the hair and dragged her to the

ground, simultaneously striking her in the head numerous times with the hammer. He then drove off with the child, leaving the woman lying on the ground, unconscious and gravely injured. The accused turned himself in and gave a full confession. As a result of the incident, the victim could no longer speak, her entire right side was paralyzed, and she could not even sit up in bed without assistance. The accused had no prior record. He had made one suicide attempt and was diagnosed with Adjustment Disorder with Depressed and Anxious Mood. The accused's plan of supervision included his current girlfriend who was prepared to live with him and sign a recognizance of $30,000. She proposed to take a leave of absence from work in order to supervise the accused 24 hours a day. The accused also propose psychiatric treatment and adduced a medical opinion that he did not pose a danger to the public

HELD: Application dismissed. The existence of a court order requiring the accused to stay away from his former wife and child was no assurance that they were no longer in a danger. In the absence of any adequate explanation for the accused's bizarre behaviour, the risk that the accused might well do something similar again if admitted to bail was quite real. Considering that the proposed surety had only known the accused a few months and had never resided with him for a lengthier period, the fact that the accused continued to be under stress from not being able to see his son and had a propensity for anger and rage when confronted with loss or separation, the court was not satisfied that the surety would be able to recognize the signs if the accused were to turn violent again. She was tremendously naive and lacking in sound judgment in this regard. Her lengthy absence from work would also likely cause financial problems. The court was also concerned that the accused stopped taking the anti-depressant prescribed after his suicide attempt, indicating that the accused did not have much insight into his medical condition. The proposed psychiatric treatment plan as an inpatient was poorly thought out. The prospect that the accused could be treated as an inpatient seemed less than substantial. Considering the gravity of the offence, the possible lengthy sentence and the strength of the Crown's case, public confidence in the administration of justice would be diminished if the accused were to be released.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 515(10(b), s. 515(10(c), s. 520

Counsel:

Ruth Neilson, for the Respondent.

Louie Genova, for the Applicant.

ENDORSEMENT

R.A. CLARK J.:--

INTRODUCTION

1 The applicant stands charged with attempting to murder his former common-law spouse. At his initial bail hearing, the applicant was ordered detained; he then sought to review that order pursuant to s. 520 of the Criminal Code. On July 9, 2010, I dismissed that application in a brief oral pronouncement, indicating that more complete reasons would follow; these are those reasons.

PROCEDURAL HISTORY

2 The s. 520 review was initially commenced before Archibald J., but, according to the submissions of counsel on the hearing before me, the matter was adjourned when His Honour indicated that he considered the prospect of release to be remote unless the applicant could proffer psychiatric evidence to explain the bizarre episode leading to the charge in such a way as to permit the court to conclude that his release would not endanger the safety of the public. In the face of that observation, defence counsel sought, and was granted, an adjournment in order to have the applicant assessed by a psychiatrist.

3 On the return date, Archibald J. being otherwise engaged, the matter was then put before this court. Given the history of the matter, I indicated very clearly at the outset that I considered it to be a *de novo* proceeding and, irrespective of what Archibald J. may have intimated as to the possibility of release based on a positive psychiatric assessment, I was in no way bound by anything that had transpired in that hearing. Both counsel indicated they clearly understood and agreed the matter should proceed in that fashion. The same materials that had been put before Archibald J. were then re-entered into exhibit before this court. In addition to those materials, a further affidavit from the proposed surety and the report of Dr. Sirman, the psychiatrist who performed the assessment, were adduced.

4 Although the report of Dr. Sirman was only served on the Crown on the day of the hearing, Crown counsel was content to have it received into evidence and to proceed with the hearing provided she be given an opportunity to discuss the contents of the report with the doctor by telephone. I excused the lawyers for a period of time in order for that to occur.

FACTS SURROUNDING THE ALLEGED OFFENCE

5 The applicant met the victim and commenced a romantic relationship with her in 2003, at time when he was still living with his first wife. From 2003 until the end of 2009, the applicant lived with the victim in a common-law relationship. The victim bore him a son, who was two and a half years old at the time of the incident giving rise to this offence. At that time, the applicant had been separated from the victim for approximately four months and, by virtue of a family court order, had access to his son twice a week.

6 On April 15, 2010, the applicant was to pick up his son for an access visit. At approximately 8:00 a.m., the victim brought the child to the parking lot of the apartment complex in which she lived. The applicant took the boy and put him into a child's car seat on the passenger side of his pickup truck. Then, for no discernable reason, and with the youngster looking on, the applicant suddenly picked up a hammer from his car, grabbed the victim by the hair and dragged her to the ground, simultaneously striking her in the head numerous times with the hammer. The applicant then drove off with the child, leaving the woman lying on the ground, unconscious and gravely injured. This vicious assault was observed by several witnesses, one with a bird's eye from a nearby balcony, who called 911. It was also captured on a security CCTV system.

7 Shortly after the assault, the applicant drove himself to 21 Division of Peel Regional Police, where he reported his crime. He was arrested and later turned over to police from 23 Division in Toronto, to whom he gave a full confession.

8 The victim underwent emergency neurosurgery to relieve pressure on her brain and thereafter spent approximately two months in intensive care. She has now been moved from the hospital to a rehabilitation facility. For the present and foreseeable future, she can no longer speak, her entire right side is paralyzed, and she cannot even sit up in bed without assistance. Whether she will ever recover sufficiently to live some semblance of a normal life is unknown at this time.

ANTECEDENTS OF THE APPLICANT

9 The applicant was born in Bermuda and came to Canada in 1998. He has no criminal record. He is an accountant and worked steadily for a number of years for one company. Shortly before this incident, however, he was let go from that job, because the stress of his failing relationship with the victim was, at least in the eyes of his employer, negatively affecting his work.

10 The applicant struck up a relationship with the proposed surety, Ms. Stacie Winkworth, at a time when he was still cohabiting with the victim, but their relationship was deteriorating.

11 In February of this year, the applicant is alleged to have attempted suicide by taking an overdose of non-prescription sleeping pills combined with wine. According to Dr. Sirman's report, the active ingredient of the sleeping pills is an antihistamine and, even combined with the alcohol, would not have been fatal. Apparently, in his self-induced stupor, the applicant tripped an alarm that brought emergency services to his home. He was taken to hospital and spent several days, as an involuntary patient, pursuant to a Form 1 issued under the *Mental Health Act*. He was discharged with a diagnosis of "Adjustment Disorder with Depressed and Anxious Mood". There was also a provisional diagnosis of "Major Depressive Disorder to be ruled out". The staff psychiatrist prescribed Cipralex, an anti-depressant. After approximately one month, the applicant decided on his own to stop taking the medication.

POSITION OF THE PARTIES

12 The Crown contends the applicant should be detained on both the secondary and tertiary grounds. For his part, the applicant contends the secondary ground has not been demonstrated because he has no criminal record and because there is now an order, issuing from the Family Court, requiring him to stay away from his ex-spouse and his child, such that victim is no longer at risk. As for the tertiary ground, the applicant contends that the facts of this case do not rise to the level required before that ground can properly be invoked to deny reasonable bail.

DISCUSSION

(i) Nature of the Review

13 The nature of a bail review is discussed in the *Law of Bail in Canada*, 2nd Ed. (Trotter, G., Toronto, Carswell, 1998). At pp. 305-306, the author states:

> The judicial discourse has focused on the relative utility of three paradigms. Some judges view the review process as an ordinary appeal. Others contend that the review ought to be a de novo hearing. The third model is a blend or hybrid of the first two approaches.

At pp. 308-309, the author goes on to say:

> The nature of the hybrid approach to bail reviews is cogently expressed in *R. v. Bradley and Bickerdike* (1977), [1977] J.Q. no 191, in which Greenberg J. stated:
>
> > The undersigned is of the opinion that a revision is a proceeding of a hybrid nature. It is basically in the nature of an appeal but, because of the provisions of s. 457.6(8) [now s. 521(8)], it also has some of the qualities of a de novo hearing. However, unless convincing new evidence is received at the revision hearing which was not heard by the Magistrate, which is not the situation in the present case, the Superior Court Judge in revision should not substitute his own discretion for that of the Magistrate unless he comes to the conclusion that the Magistrate either exceeded his jurisdiction, or made an error in law of a serious error in his appreciation of the facts.

14 I take the "hybrid" view. For the reasons that follow, I am of the view that the justice of the peace did not make any of the errors identified in *Bradley and Bickerdike, supra*. Furthermore, none of the additional evidence persuades me that the justice of the peace would have decided the matter differently had he had the benefit of it. Moreover, if it were a matter left entirely to my discretion, I would unhesitatingly come to the same conclusion as the justice of the peace

(ii) Secondary Ground

15 Mr. Genova argues that the fact there is now an order requiring the applicant to stay away from the victim and their child should give the court comfort that the victim is no longer in any danger and, further, since his anger appears to have been directed entirely at her, there is no apparent danger to any other member of the public. I disagree. The allegation is that this accused attempted to murder his former spouse, an act for which he is liable to a maximum sentence of life imprison. The notion that behaviour as bizarre as that in which the applicant has engaged will be prevented by the existence of a court order is simply not tenable. On the contrary, inasmuch as in perpetrating his initial attack he was willing to risk life imprisonment, it is self-evident, to my mind, that the penalties available for the wilful breach of such an order as now exists, trifling as they are relative to the penalty for attempted murder, would not, standing alone, have any deterrent effect on the applicant if he were otherwise inclined to engage in a further act of violence.

16 Mr. Genova made much of the fact that the applicant has no criminal record, such that one cannot reasonably deduce that there is a substantial likelihood that, if admitted to bail, the applicant will commit another criminal offence. Counsel placed great emphasis on the fact that s. 515(10)(b) of the Criminal Code requires that the prosecutor show not merely a likelihood, but, rather, a substantial likelihood that the applicant will commit another offence if admitted to bail. Although he acknowledged that the prosecutor was not required to demonstrate to a certainty that the applicant would commit a further offence if released, Mr. Genova suggested in his oral argument that the word "substantial" places a very heavy onus on the prosecutor to demonstrate that an accused will actually commit an offence if released.

17 In *R. v. Morale* s (1992), 77 C.C.C. (3d) 91 (S.C.C.), at p.107, Lamer C.J.C. wrote:

> Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous ...

18 In *R. v. Rondeau* (1996), 108 C.C.C. (3d) 474 (Que. C.A.), the court held that in assessing the dangerousness of the accused in terms of the secondary ground the bail judge must take account of such factors as the nature of the offence and the circumstances in which it was committed, the likelihood of conviction, the profile of the accused and the danger that the accused's release would pose to the community. Speaking for the court, Proulx J.A. stated that substantial likelihood expresses a consideration of likelihood of dangerousness (at pp. 477-78):

> ... As Parliament requires that detention be necessary for the safety of the public, "It is not justified where detention would merely be convenient or advantageous" (R. v. Morales, p. 737). Responding to the objection that this test is based on the

> premise that potential recidivism can be predicted, but that recidivism is in fact impossible to predict, Lamer, C.J.C., writing for the Court, in Morales, pointed out that exact predictability is not constitutionally mandated and that it is sufficient to establish the likelihood of dangerousness, expressed by the words "substantial likelihood" in s. 515(10). ...

19 Similarly in *R. v. Le*, [2006] M.J. No. 224 (C.A.), at paragraph 30, Hamilton J.A. speaking for the court, stated:

> Section 515(10)(b) demands an assessment as to whether there is a substantial risk that the accused will commit another offence or interfere with the administration of justice. The risk cannot be based on conjecture or speculation, or be a mere possibility (see Siemens). In R. v. Morales, [1992] 3 S.C.R. 711, Lamer C.J.C., when writing for the court about the public safety component of s. 515(10)(b) of the Code, referred to R. v. Lyons, [1987] 2 S.C.R. 309, in which La Forest J. stated that it is impossible to make exact predictions about recidivism and future dangerousness. Lamer C.J.C. wrote (at p. 739):
>
> The bail system has always made an effort to assess the likelihood of future dangerousness while recognizing that exact predictions of future dangerousness are impossible. ...
>
> ...
>
> The bail system does not aim to make exact predictions about future dangerousness because such predictions are impossible to make. However, Lyons demonstrates that it is sufficient to establish a likelihood of dangerousness, and that the impossibility of making exact predictions does not preclude a bail system which aims to deny bail to those who likely will be dangerous.

20 The word "substantial" is defined in the Concise Oxford Dictionary, [Oxford, Oxford University Press, 1964], in part, as follows: "having substance, actually existing, not illusory". The word "likelihood" is defined in the same source, in part, as "being likely". The word "likely" is defined, in part, as "such as might well happen". Therefore, so long as the prosecutor demonstrates that the applicant might well commit another offence if admitted to bail, such that the risk is real or tangible, and not simply fanciful or imaginary, she has met her burden.

21 Moreover, in my view the likelihood of a particular risk materializing cannot be looked at in the abstract. Rather, it must be weighed against the gravity of the harm that will ensue if the risk comes to pass. For example, even a very grave risk that an incorrigible petty thief will shoplift again

if granted bail is one that the court might be willing to take when balanced against the accused's constitutional right to reasonable bail. On the other hand, where the anticipated harm is very grave, a more remote risk may be sufficient meet the test of substantial likelihood. That is of import in this case, where the applicant, for no apparent reason, suddenly engaged in an act of extreme violence, leaving his victim grievously injured and possibly permanently disabled. In the absence of any adequate explanation for this behaviour, of which I will say more when I come to discuss Dr. Sirman's report, in my opinion the risk is not illusory, but, rather, quite real, that the applicant might well do something similar again if admitted to bail.

(iii) Plan of Supervision

22 The applicant has proposed a plan of supervision meant to satisfy the court's concern that the applicant might commit a further offence if admitted to bail. I have grave difficulty with the proposed plan of supervision both as proposed to the justice of the peace and as amplified in this court for the following reasons.

23 The first aspect of the plan involves the proposed surety, Stacie Winkworth, who is prepared to sign a recognizance in the amount of $30,000. Ms. Winkworth intends to live with the applicant and supervise him twenty-four hours a day to ensure he complies with the conditions of his release and commits no further acts of violence. In order to be able to do this, she is planning to take a year's leave of absence from her employment, which, she says, is something her employer would countenance.

24 Ms. Winkworth, who has herself just emerged from a painful divorce, has only known the applicant for less than seven months. She first met him in December of 2009, by way of an online dating service. She then spoke with him by telephone a number of times and only met him in person in January of this year. They saw each other extensively from February through April, during which time they spent a number of weekends together at her apartment. They were planning on cohabiting in her apartment beginning at the end of May. That plan was, of course, confounded by the applicant's arrest.

25 This is a man whom Ms. Winkworth has only known for a few months and with whom she has never cohabited, except for a few weekends. He is also someone who savagely attacked a woman with whom, at least at one point in their relationship, he was very much enamoured. Indeed, the applicant apparently told the doctor that his relationship with the victim in this case started as "very loving and tender". Yet Ms. Winkworth stated categorically that she is not afraid because "[the applicant] would never hurt [her]." She seems to ignore entirely the fact that the applicant has gone through two other marital relationships, the latter ending in an act of extreme violence, notwithstanding each of them presumably started just as positively as his relationship with her.

26 Added to the mix now is the ongoing pressure of the applicant not being able to see his son, by virtue of an *ex parte* order from the family court issued shortly after the applicant attacked the victim. According to Dr. Sirman, the lack of access was one of the major stressors leading to the

applicant's attack on the victim. That frustration apparently contributed to this event, according to the doctor, even though the applicant had some reasonable access to his child at the time. The doctor stated that the applicant "spends lots of time thinking about his son and what kind of future he will be able to provide for this young child given the possibility of a lengthy incarceration." If he acted as he did when his access was simply less than he considered optimal, one can only imagine the further pressure on the applicant now that access to his son has been stopped entirely for what is likely to be many months, if not years, to come. That is of particular concern, in my view, given the doctor's opinion as to the accused propensity for "anger and rage" when confronted with loss and/or separation.

27 There is, of course, the pressure created by the present legal proceedings and their likely outcome. As the above quoted passage from the doctor's report indicates, the applicant is well aware of the prospect of a very lengthy term of imprisonment.

28 Ms. Winkworth says with great confidence that this man she barely knows, and with whom she has never lived, will never hurt her and that she will recognize any change in his demeanour that might signal further violence. Understanding that the applicant will be subject to the aforementioned pressures, only some of which were sufficient to cause him to suddenly erupt into violence, I take her pronouncement to be an example of her lack of objectivity and her extreme naivety. I am of the view that her emotional attachment to this man has eclipsed any ability she might otherwise have to objectively assess the situation.

29 Despite Ms. Winkworth's optimism as expressed in her evidence, I see financial problems in the proposed arrangement. Even assuming she can take a year's leave of absence, there is no guarantee that the case would be finished in that time. It is an unfortunate reality of our justice system that serious criminal matters can take much longer than one year to reach trial.

30 Ms. Winkworth testified, in her viva voce evidence on this hearing, that she that she would rely on her parents for some financial support during the time she is not working. She also indicated that she was in the process of trying to sell the applicant's car, which she estimated would net somewhere in the neighbourhood of $11,000.

31 In addition, if the applicant were to be released, his former employer, knowing that he is presently detained and why, would nonetheless be prepared to take him back on a regimen that would see the applicant do his work from home. Thus, Ms. Winkworth maintains, they would be able to support themselves on the earnings of the applicant, once he resumes his former employment.

32 There is, however, no evidence before me as to how much money the applicant would be earning if he were to resume working for his former employer and, as noted above, the proposed surety would not be working, but, rather, would have to rely on her parents for financial support. Notwithstanding these obvious financial pressures, Ms Winkworth denied in cross-examination that this would add stress in their relationship. While I accept that she was endeavouring to be forthright

in her answers, this simply highlights, to my mind, how unrealistic she is in terms of assessing what her life will be like if she were to take on the burden of being a surety to the applicant in the circumstances of this case.

33 Ms. Winkworth said that she could recognize the symptoms if the applicant were to reach a point where he might act out again. With respect, I simply do not accept that she would be in a position to do that. In cross-examination, she acknowledged that she has no training in mental health issues and she could not name more than one or two of the most obvious symptoms of depression. Moreover, in the face of Dr. Sirman's opinion that depression was not solely at the root of the applicant's violent episode, it is unclear what even a trained clinician would have to look for as a predictor of future violence, much less someone with no training.

34 In summary, then, while she seems to be a caring and well meaning person, I do not consider Ms Winkworth to be a suitable surety because, as well as possessing those positive qualities, she is also tremendously naive and lacking in sound judgment, at least in this regard.

35 Moving to the applicant's suitability as a candidate for bail, I am troubled by the fact that the applicant stopped taking the medication he was prescribed after his unsuccessful suicide attempt. Even though he had been diagnosed as suffering from a major mental illness, the applicant chose, without consulting anyone, to discontinue the medication that had been specifically prescribed to ameliorate his condition. That gives me great pause when considering whether he would be apt to follow any regimen of medication on which he would be placed if released.

36 I am also troubled by the fact that the applicant has apparently made no effort to secure psychiatric treatment while incarcerated now for several months. As I understand it, while it may not be the optimal therapeutic environment, psychiatric intervention is available to prisoners in the detention setting. If, as he apparently told the doctor, the applicant suffers from anxiety and depression, as evidenced by such symptoms as insomnia and weight loss, I am surprised that he has not made some overtures to the staff of the detention centre for some assistance in that behalf. Instead, so it would appear, he was only seen by a psychiatrist when it was thought to be in his interests in terms of securing his release and then, as earlier noted, only after Archibald J. intimated that release was unlikely unless there was some psychiatric evidence to assure the court that the applicant did not represent a danger to the public.

37 The fact that he took himself off medication and the further fact that he has not, until now at least, been all that eager to have the benefit of psychiatric intervention, suggest to me that the applicant does not have as much insight into his medical predicament as Mr. Genova would have the court accept. In that regard, I hasten to add that the applicant did not give evidence on this hearing. While he is certainly not obliged to testify, it might have helped the court to hear from the applicant directly how he presently views his situation and, if released, what he intends to do to come to grips with his not inconsiderable mental problems.

(iv) Psychiatric Diagnosis and Proposed Treatment

38 Part of the plan of supervision involves psychiatric intervention to address the applicant's diagnosed mental illness.

39 Dr. Sirman interviewed the applicant for approximately two hours. Dr. Sirman indicated the applicant self reported what the doctor described as "a chronic sense of hopelessness and helplessness, as well as depression." According to what he told the doctor, he also experiences insomnia, sleeping only two to three hours per night on average, and anxiety that manifests itself in shortness of breath, heart palpitations and profuse sweating.

40 The doctor opines in his report that the applicant suffers from Major Affective Disorder, Major Depression with underlying anxiety. He made a secondary diagnosis of Narcissistic Personality Disorder. The doctor suggests that the applicant requires ongoing psychiatric treatment by way of both antidepressant medication and psychotherapy.

41 In the following passage under the title "Assessment", the doctor opined that the applicant can safely be released into the community:

> The fact that his aggressive response occurred in the context of a toxic relationship gives us reassurance that this was an isolated incident that would not have occurred as a result of depression alone. If any risk considered, depression alone would have led to suicide and not aggression towards anyone else. It is my clinical opinion at this time that Mr. Young is not a risk to [his ex-spouse] or in fact to anyone else in society.

42 As for the proposed psychiatric treatment, the plan of supervision enunciated by Mr. Genova in his oral submissions envisions that the applicant would receive treatment as an inpatient. I find several aspects of that proposal troubling.

43 First, Mr. Genova posited that hospitalization would form part of the plan of supervision, at least at the outset, until such time as the doctor could be assured that the applicant would not represent a risk to the safety of the community if he were at large, but that is clearly not what the doctor envisioned when he wrote the report. The report itself says simply that the doctor would be willing to provide psychiatric treatment, but implicit in the report is the notion that the applicant would be an outpatient. That is made plain on the penultimate page of the report, where, under the heading "Treatment Recommendations", the doctor speaks of monitoring the applicant's progress if released and recommending hospitalization as one "appropriate measure" if he were to notice any deterioration in the applicant's mental state.

44 It was only after the aforementioned brief hiatus at the outset of this hearing, during which the lawyers had a discussion on the telephone with the doctor, that defence counsel suggested the doctor would be willing to treat the applicant as an inpatient at Humber River Regional Hospital and that the court should make it a condition of any release order that the applicant admit himself to the hospital for that purpose. Against the backdrop of the aforementioned language in the report,

that leaves me with the clear impression that initial inpatient treatment was something of an afterthought. Apparently, the doctor did not at first envision inpatient status as a central part of the treatment regimen; rather, it was only after he spoke with the lawyers that he came to this view. Were it otherwise, surely he would have mentioned it in his report.

45 Mr. Genova at first suggested that the court could release the applicant on a Form 1 under the *Mental Health Act*. Obviously, only a doctor can sign a Form 1 and only if the doctor considers the person to be a danger to himself or others. When it was pointed out to Mr. Genova that this was contrary to his position, and the doctor's opinion, that the applicant no longer presents as a danger to the public, he quickly resiled from this suggestion.

46 In the alternative, Mr. Genova suggested that the court could order the release of the applicant on condition that he admit himself to the hospital to which Dr. Sirman is attached. That suggestion is also problematic. In my view, I am not empowered to impose a condition that effectively binds third parties, in this case a public hospital.

47 Furthermore, in my experience, beds in psychiatric facilities are in relatively short supply at any given time. Thus, even if I were empowered to make such an order, there is no evidence before me as to how many beds there are in the psychiatric wing of Humber River Regional Hospital and, more importantly, whether there is presently one available for the applicant. Assuming, for the sake of this discussion, a bed were available, there is no evidence as to how long it could remain available pending the applicant's release and no indication whether the doctor has made any overtures to have a bed maintained for the applicant. Furthermore, there is no timetable as to how long the applicant would likely be an inpatient or when he would likely be released from the hospital into the community.

48 Another concern is that, even if he were admitted as an inpatient, there is no evidence as to what impediment, if any, there would be to the applicant checking himself out of the hospital. Inasmuch as he would not be admitted on a Form 1, presumably there would be nothing to prevent the applicant from leaving the hospital at any time he saw fit. If the bail were structured to require the applicant to remain in hospital at the discretion of the doctor, then, of course, he would be in breach of his bail if he were to leave. But, that said, he would, nonetheless, be at large for some indeterminate period of time before he could be arrested for that breach.

49 In addition, there was no indication as to whether the employer would be willing to wait for the resumption of the applicant's services until he was no longer an inpatient.

50 In summary, the whole proposal of psychiatric treatment struck me as somewhat poorly thought out. More particularly, the prospect that the applicant be treated as an inpatient seems to me to be a good deal less than substantial.

51 As for the psychiatric assessment itself, Dr. Sirman opines in his report that the applicant does not represent a danger to the public. I find that opinion problematic for the following reasons.

52 First, the doctor only spoke to the applicant for a very brief period. In a matter as serious as this, where the applicant has acted in manner that was apparently completely out of character and no really adequate explanation for his actions is forthcoming, the approximately two hour interview, with no follow up, was not long enough, in my respectful view, for the doctor to be in a position to responsibly state with confidence that the applicant no longer presents a danger to the public.

53 Second, in my opinion the doctor relied far too heavily on the account given to him by the accused, without looking carefully enough at the conflicting evidence.[1] Yet, despite the existence of that conflicting evidence, all of which was available to him, the doctor took it as a given that the applicant's account was correct, namely, that victim both insulted and assaulted the applicant in such a manner as to effectively provoke him into the action he took. While unconditional positive regard[2] may have its place in the therapeutic realm, it is inappropriate, in my respectful view, in the forensic context, and particularly so when the issue in sharp relief is not just the well being of the patient/accused, but the safety of the public. Moreover, the applicant's version lies at the root of the "toxic relationship" the doctor postulates as being the cause of what he considers to be "an isolated incident."

54 Third, the doctor opines that the applicant is not a danger because his principal malady is depression, which, as I read the report, while it may suggest the possibility of suicide is not indicative of a potential to harm others.[3] I simply do not accept this proposition. It is, quite simply, contrary to a myriad of cases one sees in these courts[4] and, moreover, the doctor seems to contradict himself in this behalf at other points in his report.[5]

55 Fourth, the doctor makes a secondary diagnosis of Narcissistic Personality Disorder. He indicates that this may account, at least in part, for the applicant having attacked the victim. This is so, according to the doctor, because individuals afflicted with this malady "are more prone to fits of anger and rage when threatened by loss, separation or abandonment." This affliction, the doctor opines, can be successfully treated by "Cognitive Behavioural Psychotherapy". What concerns me, however, is that the doctor gives no indication of what particular efforts would be employed to address and manage the applicant's tendency to experience "fits of anger and rage" and says nothing of the overall success rate of such treatment generally or how long it might be expected to take to achieve success. Instead, the doctor offers only the bald conclusion that the problem can be overcome. With respect, the doctor's unsubstantiated optimism for eventual success gives me little comfort for the present safety of the public. During an indeterminate interim, there would be, based on the evidence before me, simply no way of knowing what might prompt the applicant to experience another fit of anger and rage and to succumb to it by acting out violently.

56 In that regard, of course, the doctor offers his assurance that in the course of such treatment as he envisions he "would be in a position to detect any deterioration in Mr. Young's mental state that would signal a risk to himself or others" and that he "would then take all appropriate measures, i.e. to hospitalize him in order to eliminate the above mentioned risks." As with his optimistic projection for successful treatment, this, too, gives me little assurance for the safety of the public.

Although he indicates that he would be willing to start treating the applicant immediately, the doctor says nothing in his report about the expected frequency of therapy sessions for such individuals generally or what he proposes in this case. Likewise, he says nothing to explain what stimuli are apt to trigger rage in such an individual and nothing about how quickly such an episode might come to pass.

57 Absent any evidence in those respects, I am left only with the doctor's bald assurance that he could recognize deterioration in time to prevent another episode of violence such as occurred on April 15, 2010. Given the nature of that incident, it seems, to my mind at least, that the applicant can be moved to violence almost instantly. After all, even accepting his version of events concerning the provocative acts of the victim, the applicant, according to his own account to the doctor, "just snapped". Moreover, I do not accept, for the reasons outlined above, that the relationship was as "toxic" as the doctor maintains. Nor, in the face of the countervailing evidence, do I accept that victim provoked the applicant in the way he maintains on the occasion in question. That leaves one to wonder, then, why exactly the applicant chose that moment to explode into violence, in a way that was completely out of character, and what other triggers would prompt him to act in a similar fashion against others who might have the misfortune to incur his displeasure in the future.

58 Against that backdrop, I find the doctor's suggestion that he would be in a position to foresee such an event in sufficient time to be able to take steps to prevent it wholly unrealistic.

59 Fifth, the doctor speaks in his report of dissociation on the part of the applicant during his attack on the victim.[6] Although there was no direct evidence on this point, the phenomenon of dissociation, as I understand it, is typically characterized by a later failure to remember the events transpiring during the period of dissociation. Judging by the content of his report that would appear to be the doctor's view, as well. The problem with this statement, in my view, is that it is belied by the applicant's revelations to the doctor, noted at other points in the report, indicating that he in fact remembers much of what transpired.[7] To my mind, the applicant's degree of recollection does not suggest someone who was experiencing dissociation, but, rather, someone who, albeit he had lost his power of self control, was nonetheless fully aware of what he was doing. The trouble with the doctor's contrary conclusion in this regard is that it suggests, once again, an uncritical evaluation of the independently verifiable evidence. That conclusion lies at the root of the doctor's opinion that this was an isolated incident, which, in turn, goes to the heart of his further conclusion that the applicant does not represent a danger to the public.

60 Sixth, the doctor indicated that the medication prescribed to the applicant in February failed to have any effect because the applicant did not take it for long enough. In order to have any salutary effect, according to the doctor, one must take the medicine for approximately six to eight weeks. That troubles me because, without repeating my early comments, it is clear to me that the doctor, at least initially, envisioned the applicant, if released, being at large and not an inpatient. That would mean that he would be at large in the community for six to eight weeks before the medication would

even start to have an effect. Against the backdrop of this extremely violent episode, even assuming the depression was only partly to blame for the applicant's violent behaviour, the fact that this did not seem to trouble the doctor gives me great pause as to whether the doctor gave any meaningful consideration to the safety of the public.

61 Seventh, respecting the treatment regimen imposed after the suicide attempt, the doctor in his report places all responsibility for the applicant having not continued to take the prescribed medication, and having not pursued therapy, on the treating physicians and attributes no fault to the applicant in that regard. It may be fair to say that the hospital staff ought to have done more to follow up with the applicant. Be that as it may, if the applicant has some insight into his illness, as the doctor contends in his report, surely, even allowing for his debilitating illness, it is not unreasonable to expect that he would do something to help himself in that behalf. As I have already indicated, I am not confident that this accused would apply himself in a conscientious way to any treatment regimen that this court might impose by way of a release order. My misgiving in that behalf is further compounded by the doctor placing responsibility for the failed intervention entirely on the hospital instead of at least partly on the applicant. That suggests to me that, if the applicant were released, the doctor would be far too sympathetic toward the applicant qua patient to be as diligent as he should in monitoring the applicant's compliance with any treatment regimen in the interests of public safety.

62 In summary, for the foregoing reasons, I am not prepared to place any weight whatsoever on the doctor's assessment that the applicant does not represent a danger to the public.

63 Albeit the Crown bore the onus on the initial bail hearing, it is trite to observe that on a s. 520 review the applicant bears the onus of demonstrating that the court at first instance erred in ordering his detention or, in the alternative, that the amplified record on this hearing justifies his release. For the foregoing reasons the applicant has failed to meet that onus.

Tertiary Ground

64 In the event that I am wrong in my conclusion on the secondary ground, I propose to examine the tertiary ground.

65 In *R. v. Hall*, [2002] 3 S.C.R. 309, 167 C.C.C. (3d) 449, at paragraph 40 ff., McLachlin C.J.C. described the circumstances of the crime that justified detention on the tertiary grounds:

> Section 515(10)(c) sets out specific factors which delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. As discussed earlier, situations may arise where, despite the fact the accused is not likely to abscond or commit further crimes while awaiting trial, his presence in the community will call into question the public's confidence in the administration of justice. Whether such a situation has arisen is judged by all the circumstances, but in particular the four

> factors that Parliament has set out in s. 515(10)(c) -- the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for lengthy imprisonment. Where, as here, the crime is horrific, inexplicable, and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose.
>
> This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole. The question is whether the means it has chosen go further than necessary to achieve that purpose. In my view, they do not. Parliament has hedged this provision for bail with important safeguards. The judge must be satisfied that detention is not only advisable but necessary. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to maintain confidence in the administration of justice. Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. In addition, as McEachern C.J.B.C. (in Chambers) noted in R. v. Nguyen (1997), 119 C.C.C. (3d) 269, the reasonable person making this assessment must be one properly informed about "the philosophy of the legislative provisions, Charter values and the actual circumstances of the case" (p. 274). For these reasons, the provision does not authorize a "standardless sweep" nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad.

66 In *R. v. B.S.*, [2007] O.J. No. 3046 (C.A.), Winkler C.J.O. stated:

> The tertiary ground continues to apply to all persons seeking judicial interim release, whether charged with relatively minor, non violent offences or whether charged with murder. In a practical sense, it will not often be a factor in most cases, but as the nature of the offence and surrounding circumstances become more serious, the consideration of the tertiary ground will become more relevant. That is not to say that the tertiary ground operates to effectively dictate the detention of all persons charged with murder.

67 Similarly, in *R. v. Qaiser*, [2003] O.J. No. 3668 (Sup. Ct.), at paragraph 29, Durno J. stated:

> The tertiary ground is to be used sparingly. The cases which call for its use will be few and far between given the thousands of bail applications heard annually.

68 Public fear and concern about safety are relevant factors to be considered in terms of assessing the need to detain on the tertiary ground, provided that they are considered along with the other factors enumerated in s. 515(c) and not considered to be dispositive in and of themselves: *R. v. M. (E.W.)*, 223 C.C.C. (3d) 407, (Ont. C.A.). I am told by the prosecutor that the parents of the victim are concerned for their safety should the applicant be released; they, of course, are members of the public. But, even looking beyond the victim's parents, given the sudden, unpredictable violence exhibited by this applicant, which has not been explained in any satisfactory way by the medical evidence in my opinion, if I were to release him the public at large would quite rightly be concerned for their safety and, as a consequence, their confidence in the administration of justice would be lessened.

69 Section 515(10)(c) obliges the court to consider four factors in assessing whether an accused should be detained on the tertiary ground.

70 The first factor to be taken into account is the apparent strength of the Crown's case. In this case, neither the nature of the attack on the victim nor the identity of her attacker is contested. The assault was, after all, as noted above, witnessed by several people, captured on video tape and admitted by the accused in his statement to police. The only live issue, it would seem, is the applicant's intent. In sharp contrast to the position advanced by applicant's counsel in oral argument, that the most the Crown could reasonably expect to prove was a case of aggravated assault, in my view the case for the Crown on the issue of the requisite intent is very strong indeed. After all, although not a presumption, it is nonetheless a permissible inference, and part of the standard instruction to a jury, that a sane and sober man intends the natural consequences of his acts. I find it hard to imagine that a jury could find other than that death is a natural consequence of striking someone repeatedly in the head with a hammer.

71 The second factor to be considered is the gravity of the nature of the offence. Attempted murder is, of course, one of them most serious offences known to our criminal law.

72 The third factor concerns the circumstances in which the offence was committed. As with any offence, understanding that any instance of attempted murder will be grave, obviously the degree of seriousness that will attend its commission in a particular instance is a function of the means by which the offence is carried out and the surrounding circumstances. Marital breakdown is a phenomenon affecting roughly fifty per cent of married couples in this country. That said, to smash in a woman's skull by repeated blows with a hammer for no apparent reason other than one's inability to cope with the vicissitudes of that phenomenon is shocking. To do so to the mother of one's infant child, in full view of the child, and then leave the woman for dead is nothing short of horrific.

73 The last factor is the potential for a lengthy term of imprisonment. As noted above, the

maximum sentence for attempted murder is life imprisonment. Like most maximum sentences, that are not also mandatory minimums, it is rarely imposed; nonetheless, it informs the likely range of sentence to be imposed. Thus, most cases of attempted murder attract, at a minimum, high single digit sentences. In this case, if he is found guilty, I would be surprised if the applicant were to receive a sentence of less than ten years in prison. Given the numerous highly aggravating factors surrounding the commission of the offence itself and what appears at this point to be the grave and lasting injury to the victim, the applicant might well receive considerably more. Accordingly, the potential for a lengthy term of imprisonment is extremely high.

74 Looking at those factors in the aggregate, together with the uncertainty as to the applicant's mental state and the threat he poses to public safety, as discussed above, I am of the view that public confidence in the administration of justice would be diminished if the applicant were to be released. Accordingly, this is one of those rare cases where, even if it were not necessary on the secondary ground, the applicant's detention is necessary on the tertiary ground.

Result

75 In the result, for the foregoing reasons, as pronounced orally on July 9, 2010, the application to set aside the order of detention is hereby refused and it is further ordered that the applicant's detention continue until trial.

R.A. CLARK J.

1 For example, as opposed to the victim "hurling verbal insults and hitting him with an open hand", as the applicant claims, at least one of the witnesses who saw the attack indicated that the victim was laughing immediately before the applicant attacked her. Moreover, although I have not seen it, as I understand it there is nothing on the videotape to substantiate the applicant's account of the victim striking him prior to the applicant hitting her repeatedly with the hammer.

2 By which I mean, in this context, neither challenging a patient's account of past events nor appearing to judge his actions.

3 The doctor states under the title "Risk Assessment": "If any risk considered, depression alone would have led to suicide and not aggression towards anyone else."

4 For example, where the later explanation for homicide (usually advanced in the context of the defence that an accused was not criminally responsible) is that the accused was clinically

depressed when s/he caused the death of another, most often the accused's spouse, but not infrequently the accused's child.

5 For example, under the title "Evaluation", the doctor states, "[t]he further escalation of his anxieties arising from the Family Court process, with now a much reduced and troublesome access to his son may have escalated his depression and anxiety, putting him at increased risk of aggression towards himself and others." [Emphasis added.] Later in the same section the doctor goes on to say, "Mr. Young's depression added to his conflict making him more vulnerable to acting out in an aggressive fashion." The doctor also refers, in the section of his report entitled "Risk Assessment", to the applicant's depression as being "[f]irst and foremost" among a "number of psychological factors ..." contributing to the applicant's "aggressive behaviour". Those passages suggest to me that the depression, while not singularly causal, perhaps, was nonetheless an integral part of his violent action toward his ex-spouse, such that it is not a fair conclusion that the applicant's depression suggests only the prospect of self harm and not violence to others.

6 The doctor states, under the title "Evaluation", "Mr. Young's inability to remember the course of events from the time he seated his son in the car to the time when he surrendered himself to police points to a transient period of Mental Dissociation, which is in fact [in] keeping with the extent of his anxiety and depression ..."

7 For example, according to what he told the doctor, the applicant remembers in some considerable detail the actions of the victim that he claims caused him to react violently. Although he claims to have no further memory from that point forward, according to the doctor's rendition of the interview, he went on to say, according to the report, that he remembers picking up a hammer from a tool kit located behind the driver's seat of his truck and striking the victim with the hammer about the head. He recalls hearing the woman screaming and "falling to the ground", although he denied knowing the extent of the injury he caused her. Likewise, in his statement to the police, as I understand it, the applicant was able to recount fully, in a way more or less consistent with the accounts of other witnesses, what took place.