Translated from the original French

Social Affairs Section

Designated as a Review Board within the meaning of ss. 672.38 *et seq*. of the *Criminal Code*

Date: October 7, 2020

Neutral citation: 2020 QCTAQ 09586

File: SAS-Q-249109-2005

Presiding Administrative Judges:

PAULO GOUVEIA

JEAN-ROSEMOND DIEUDONNÉ

PIERRE TÉTREAULT

K. D.
Accused

and

PERSON IN CHARGE OF THE CIUSSS A (HOSPITAL A)

and

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

REASONS FOR DISPOSITION
RENDERED ON JULY 7, 2020

1. The Social Affairs Section of the Tribunal administratif du Québec, designated as a Review Board for mental disorder (the “Board”) under the *Criminal Code*,[[1]](#footnote-1) is holding its first hearing for the accused.

I. THE BOARD’S MANDATE

1. On May 7, 2020, the accused was found unfit to stand trial. The following charges remain pending before the Court:
* On or about February 8, 2020, assault against E.D. while carrying a weapon;
* Between November 1, 2019, and February 5, 2020, assault against E.D.;
* On or about February 1, 2020, knowingly uttering a threat to cause death or bodily harm to E.D.;
* On or about February 8, 2020, wilfully obstructing J.S.-P. and A.G., peace officers acting in the performance of their duties.
1. The Tribunal, in rendering its decision, ordered that the accused be detained in the current hospital pending this hearing.

II. THE BOARD’S ROLE

1. The Board must first assess the accused’s mental condition to determine whether, at the time of the hearing, he has become fit to stand trial. If the Board determines that he is fit, it must order that the accused be sent back to court, and the court must make its determination as to his fitness to stand trial.
2. Next, the Board must determine whether measures should be taken to ensure that the accused remains fit to stand trial and to control the significant threat to the safety of the public that he represents because of his mental condition, until the court rules on his fitness to stand trial. It must make the disposition that is necessary and appropriate in the circumstances.
3. The Board may also find that the accused remains unfit. If the Board determines that this is the case, it must determine whether the accused poses a significant threat to the safety of the public because of his mental condition, and, if necessary, decide which measures should be taken to control this threat and allow his reintegration into society.

HEARING

1. The hearing was held during the pandemic in such a way as to limit contact and the risks of spreading the COVID-19 virus.
2. The accused, his counsel, his father, the attending physician, and counsel for the designated hospital attended the hearing via videoconference.
3. The Board members attended in a room of the Tribunal administratif du Québec in city A.

RESPECTIVE POSITIONS OF THE PARTIES

1. The attending physician recommends that the accused be declared fit to stand trial. Pending his being sent back to court, she recommends that the accused be detained subject to conditions. Given that the date of appearance before the Court of Quebec was scheduled for six days after the date of this hearing, the accused agrees with this suggestion.
2. For the reasons provided at the hearing and for those set out below, the Board accepts the attending physician’s recommendation.

BACKGROUND

III. STATUS AND PERSONAL INFORMATION

1. On a **personal level**, the accused is 21 years old. He is single and has no children. Before the current hospitalization, the accused had been living with the victim (his father) since July 2019. Prior to that, he lived in another area with his mother. He has never lived in an independent apartment.
2. He receives social assistance benefits and has a severely limited capacity for employment. He has a high school education. He has worked as a salesclerk in the past.
3. He claims to have no social network in the area where he lived with his father. The relationship between the accused and his father seems strained.

IV. CRIMINAL RECORD

1. According to the information available to the Board, the accused does not have a criminal record or any pending cases.

V. PSYCHIATRIC HISTORY

1. With respect to his **psychiatric history**, he was referred to Clinic A of hospital B shortly before he came of age. At the time, his physician retained a diagnosis of paranoid schizophrenia in complete remission since February 2015, with discontinuance of alcohol and marijuana use.
2. In December 2016, he was referred to a hospital north of city A. The accused did not return calls from the clinic and his file was closed.
3. Also reported is a history of oppositional defiant disorder and long-standing academic difficulties.
4. The accused received follow-up from a physician at city A between 2016 and December 2019.
5. Following a relapse of substance abuse, the accused was hospitalized from December 9 to December 12, 2019, in a hospital in the city for toxic psychosis (amphetamines and MDMA). It was noted during this hospitalization that the accused has suffered from an amphetamine use disorder since the age of 19. He also suffers from an alcohol use disorder, which began at age 14, with an average of three bottles of wine per week.
6. The accused reported that he stopped taking his medication in the summer of 2019 because his prescription had expired, and he found himself too drowsy and dizzy.
7. The accused also went to the emergency room from December 24 to December 25, 2019, for intoxication. It is noted in the file that his family was exhausted and could not take him back. He had scissors on him. He had to be restrained. On the day after his admission, he indicated that he was aware of his substance abuse problem but had no real intention of stopping completely.

VI. LIFESTYLE

1. With respect to his **lifestyle**, he denies any drug and alcohol use. According to collateral information, he has been a heavy user of cannabis since adolescence. He drank alcohol since 2014 but stopped in 2019. The accused also used amphetamines and methamphetamines between 2018 and 2019.
2. A urine drug test was performed on admission and came back negative for all substances.
3. He claims to have abstained from all forms of alcohol or drug use since the beginning of 2020 and acknowledges the effects of the use of such substances on his mental condition.

EVIDENCE AT THE HEARING

1. At the hearing, the accused’s attending physician, Dr. Karine Forget, read and filed her report, dated June 19, 2020. The report of the social worker, Ms. Jennifer L. DiStefano, dated June 29, 2020, was also read and filed.

*Testimony of the attending physician*

1. The attending physician testified at the hearing and added the following observations.
2. Dr. Forget agreed that the accused could receive his treatment on an outpatient basis. She explained that the hospital manages the ordering and receipt of the medication.
3. The treatment team could arrange for the administration of the treatment, should a release decision be made. The medication is in “pill” form. The accused receives the medication twice a day.
4. When asked about the significant threat to the safety of the public in the event of a release decision, the physician submitted that neither she nor the social worker had observed any dangerousness in the accused during his hospitalization.
5. She maintains that the risk is linked with his substance abuse. Delusional elements may surface, and the accused may act out.
6. She acknowledges that in the past, when the accused was not under treatment, he had gone to the hospital.
7. She emphasizes that it is important for him to build a social network and to continue medical follow-up.
8. She considers an absolute discharge to be premature, although she admits that the risk of dangerousness is not currently present.
9. She believes that if the accused is discharged, it is likely that he will relapse into substance use or become non-compliant with treatment again. She recalls that he has already discontinued his medication when left to his own devices.
10. She acknowledges that she did not address the issue of his substance abuse with him personally.
11. Dr. Forget is of the opinion that there must be psychosocial work on the harmful effects of drugs.
12. She considers the chances of relapse to be significant.
13. As to whether the treatment team was able to order the accused to take urine drug tests, Dr. Forget explained that because of the pandemic, visits were prevented by restrictions in place. She explained that while no tests had been ordered, the treatment team members did not suspect any substance use. Progression showed an absence of symptoms. In addition, there were no spikes in his mental health.

*Testimony of Ms. DiStefano*

1. Ms. DiStefano, a social worker, testified at the hearing. With regard to the accused’s substance abuse problem, she explained that he is making progress. They have been able to have several discussions on this subject. The accused is able to make the connection between substance use and the impact on his mental health.
2. With regard to the accused’s functioning in the unit, the worker introduced himself. Walking is prioritized.
3. The social worker believes that it is important to consider the fact that the accused has been hospitalized for several months when analyzing the likelihood of relapse. In the case of a release, even under conditions, the accused may underestimate the influence of friends and relapse into substance use.

*Testimony of the accused*

1. The accused testified. His testimony can be summarized as follows:
2. With respect to his medication, the accused indicated that he was feeling well and did not experience any side effects.
3. He observed that he had less difficulty socializing.
4. Regarding his substance abuse, he does not intend to take any more drugs. When asked what he would do if it were offered to him, he did not have an answer.
5. As for the criteria for fitness, he understands that the defence counsel’s role is to defend him against the charges. He acknowledges that he has been charged with assault, uttering threats, and obstructing peace officers. He cannot explain the role of the representative of the Director of Criminal and Penal Prosecutions.
6. He is able to understand that the judge must render a decision.
7. He submits that he intends to follow the recommendations of the treatment team. He would like to have more freedom and continue his outpatient care.
8. He acknowledges that being sent back to court means that he must go through the criminal process.
9. When asked if he suffered from mental illness, he replied: [translation] “Yes, more yes than no.”
10. He believes that he needs follow-up care and treatment with medication. He feels the effects of the medication immediately. He recognizes the benefits. He submits that cognitively, it is going better.
11. He maintains that he no longer believes he is a victim of a conspiracy. He admits that he had dark thoughts. He claims that he was unable to change his lifestyle in the past.
12. He emphasizes that treatment with medication helps him with his thoughts.
13. He describes his relationship with his father as good, although he admits that they do not understand each other well at times. He now understands the importance of communication. He says that they are able to have fun together. The last time they spent time together was last winter, when they went snowboarding.
14. He highlights the importance of turning to available services in the event of any problems.
15. He plans to follow the recommendations of the treatment team. He would like to get his driver’s licence back, find lodging, get a girlfriend, and perhaps even go back to school.

*Testimony of the father of the accused*

1. The father says he likes the atmosphere at the hearing. He is glad that his son asked him to be present. He submits that he feels his son’s love and points out that things are already going well.

SUBMISSIONS

1. Counsel for the accused made submissions. She pointed out that with respect to the criteria for fitness, the accused understands the charges and the consequences. He understands the role of the defence counsel. It is possible that the reason he is unable to identify the role of the prosecutor is that the last court appearance was by videoconference. She affirmed that the evidence demonstrates the accused is able to follow the court proceedings.
2. She concedes that the accused’s condition is fragile. There had been a change of area and environment. Residential instability must be considered.
3. As for the recommendation for detention, she does not have any formal objections, given that the next court appearance is scheduled only six days after the present hearing.
4. Counsel for the designated hospital stated that the evidence shows the accused is fit to stand trial. With respect to the recommendation of detention, he noted that this limit on the accused’s freedom is temporary since the accused can be brought to court quickly. Nonetheless, he pointed out that it is necessary to allow the accused to maintain his current state in the interim.

DECISION

1. Section 2 of the *Criminal Cod*e defines the notion of unfit to stand trial as follows:

“unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to:

(a) understand the nature or object of the proceedings;

(b) understand the possible consequences of the proceedings, or

(c) communicate with counsel;

1. The word “unfit” in the definition of “unfit to stand trial” makes it clear that the issue is about the capacity of the accused and not about his current performance or understanding. If a person can be instructed on matters where his or her understanding is deficient, that person is not unfit. Similarly, if a person can communicate with a lawyer but chooses not to, that person is not unfit.
2. To determine whether the accused is unfit, the *Taylor*[[2]](#footnote-2) test of “limited cognitive capacity” should be applied. This is therefore not a high standard of proof for fitness. Another decision from the same Court of Appeal, rendered in 2007, affirmed that s. 2 of the *Criminal Code* requires only a “rudimentary understanding of the judicial process” and a basic, but significant, ability to relate the facts concerning the offence.[[3]](#footnote-3)
3. According to this instruction, the mental capacity of the accused must be sufficient to understand the conduct of the trial in order to present an appropriate defence and to understand the details of the evidence.
4. In a judgment rendered in 2011, *R v. Thompson*,[[4]](#footnote-4) J.S. Nadel J. provided a useful list of considerations to determine whether an accused person is fit:

If he understands the nature of the proceedings and the functions of the persons involved in them;

If he knows what the issues are and the possible outcomes of the proceedings;

If he is able to follow the evidence generally, even though he may misinterpret it;

If he is capable of instructing counsel although he may disagree with counsel as to how the case should be conducted and he (the accused) may not act with good judgment.

1. In essence, Justice Nadel adopted the *Morrissey* criteria, which established that “the ability to communicate with counsel contemplates the ability to communicate with counsel for the purposes of conducting a defence, considering counsel’s advice, and giving instructions with respect to the defence.”
2. The Ontario Court of Appeal found that the accused must not only be physically and intellectually present, but also able to communicate and to participate in the presentation of a full answer and defence.
3. In *R v. Whittle*,[[5]](#footnote-5) the Supreme Court reiterated that the burden of proving fitness is not onerous. Specifically, the Court stated that there is no obligation to be satisfied that the accused possesses “a higher degree of cognitive capacity”.
4. It is also important to note that an accused will not be considered unfit simply because their mental illness influences their decisions or their choices, or deprives them of the ability to make good choices.
5. Recently, the Court of Appeal of Quebec[[6]](#footnote-6) ruled on the issue of fitness to stand trial. It reiterated that the notion of fitness is in relation to procedural fairness. The Court of Appeal summarizes the current state of the law as follows:

[translation]

It is established that the accused must be physically and mentally present at his or her trial. The accused’s mental attitude is intrinsically linked to his or her fundamental right to control his or her defence and the right to make full answer and defence.10

The notion of fitness refers, however, to a relatively low threshold, that is, the “limited cognitive capacity to understand the process and to communicate with counsel” without requiring the accused to be “capable of making rational decisions beneficial to him” or “capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests.”11

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10. *Ibid*.

11. *R v. Whittle*, [1994] 2 S.C.R. 914, referring to *R v. Taylor*, (1992) 77 C.C.C. (3d) 551 (Ont. C.A.)

1. Given the evidence, in particular the reports of Ms. Di Stefano and the attending physician filed at the hearing to stand as if recited, and the testimony heard at the hearing;
2. The Board notes that following a trial with a new drug (Amisulpride), the accused has shown clear benefits in his cognitive abilities and concentration. He has adapted well to the different stages of the judicial process and is able to express his ideas clearly.
3. The evidence shows that the accused understands the nature and purpose of the charges. He understands that he is at the hospital because of a conflict. While he maintains that he is the victim, he no longer argues that there is a conspiracy against him.
4. He demonstrates an ability to participate in the proceedings in a meaningful way. He understands the possible legal consequences. He acknowledges that the judge will ultimately decide the final verdict.
5. In terms of how the court works, the accused understands the basics better. He understands that he must mount a defence with the help of counsel. His ability to communicate effectively and rationally has considerably improved.
6. Because of his improved attention span, the accused is able to follow the court process in an involved manner.
7. The Board is of the opinion that the evidence clearly demonstrates that the accused is represented by counsel and that he appears entirely able to communicate with counsel to present his case as well as to instruct counsel to conduct his defence;
8. In view of the fact that the accused meets the criteria for fitness set out in the *Criminal Code*;
9. The Board is convinced that the accused is fit to stand trial and orders that he be sent back to court for a determination of his fitness to stand trial.
10. With respect to the issue of whether steps should be taken to ensure the accused’s continued fitness to stand trial and to control the significant risk he poses to the safety of the public due to his mental condition until such time as the court determines his fitness to stand trial, given all of the evidence, the Board is convinced that detention on conditions must be ordered to ensure his continued fitness to stand trial and to control the significant risk he poses to the safety of the public.
11. In coming to this conclusion, the Board takes into account the fact that the accused suffers from schizophrenia, treated only recently with a “special” medication.
12. The Board cannot overlook the accused’s substance use disorder and his history of non-compliance with medication.
13. The evidence shows that the accused still has residual cognitive symptoms, that he is very fragile and isolated, that he does not have a stable living environment, and that any substance use could compromise his mental condition.
14. Finally, the Board acknowledges the accused’s consent to remain hospitalized while awaiting his appearance before court and considers it decisive that the next date of appearance before the Court of Quebec is scheduled six days from the present hearing.

**FOR THESE REASONS, THE BOARD:**

**DECLARES** the accused fit to stand trial;

**ORDERS** that the accused be sent back to court.

**IN THE INTERIM, ORDERS** the accused’s detention at the hospital in charge, subject to the following conditions:

* that the accused be entitled to outings, with or without accompaniment, the duration, frequency, and conditions of which to be determined by the treatment team based on the accused’s clinical state, his conduct, and the treatment plan,
* comply with the recommendations of the treatment team;
* abstain from using any drugs;
* keep the peace;

This disposition, rendered unanimously, was communicated to the parties from the bench during the hearing held on July 7, 2020, the day that it took effect.

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|  | PAULO GOUVEIA, a.j.t.a.q.Alternate Chairperson |

Legal Department of CIUSSS A

Mtre Carl Dutrisac

Counsel for the person in charge of the hospital

Community Legal Centre A

Mtre Michèle Lamarre-Leroux

Counsel for the accused

1. 1985, c. C-46. [↑](#footnote-ref-1)
2. 1992 CanLII 7412 (Ont. C.A.) [1992] O.J. no 2394 (ONT C.A.). [↑](#footnote-ref-2)
3. *R v Morrissey*, [2007] O.J. No. 4340. [↑](#footnote-ref-3)
4. 2011 ONCJ 209 (Chief Justice of Ontario). [↑](#footnote-ref-4)
5. [1994] 2 S.C.R. 914. [↑](#footnote-ref-5)
6. *Justin Milette v. Her Majesty the Queen*, 2019 QCCA 1755 (CanLII), leave to appeal refused, 2020 CanLII 30828 (SCC). [↑](#footnote-ref-6)