R. v. Kirby

New Brunswick Judgments

New Brunswick Court of Appeal

K.A. Quigg, B.V. Green and C.A. LeBlond JJ.A.

Heard: November 30, 2023.

Judgment: February 22, 2024.

No. 16-23-CA

[2024] N.B.J. No. 39 | *[2024] A.N.-B. no 39* | *2024 NBCA 32* | *2024 W.C.B. 257* | *434 C.C.C. (3d) 199* | *2024 CarswellNB 76*

Between Michael Kirby, Appellant, and His Majesty the King, Respondent

(79 paras.)

Case Summary

Appeal From:

On appeal from a decision of the Court of King's Bench: July 25, 2022 (conviction), February 10, 2023 (sentence).

Court Summary:

History of Case:

Decision under appeal: 2022 NBKB 145.

Preliminary or incidental proceedings: N/A.

Counsel

For the appellant: Ben Reentovich.

For the respondent: Patrick McGuinty and Joanne Park.

THE COURT: The appeal is dismissed. Reasons for judgment by K.A. Quigg J.A. Concurred in by B.V. Green and C.A. LeBlond JJ.A.

K.A. QUIGG J.A.

I. Introduction

1 On July 25, 2022, the appellant, Michael Kirby, was convicted of four counts of criminal negligence causing bodily harm. He was acquitted of failing to comply with his bail order. All charges related to incidents involving his various dogs and their attacks on various individuals.

II. The Facts

2 The four counts of criminal negligence causing bodily harm are related to the following incidents involving Mr. Kirby's dogs.

3 On November 21, 2015, Mr. Kirby shot and killed one of his dogs that had attacked him. The attack left him with puncture marks. He reported the incident to the police. No criminal charges were laid in connection with this incident.

4 On June 20, 2018, Mr. Kirby was walking with five of his dogs on Gateway Street in Saint John. Four of the five dogs were off leash and only one of the dogs was tethered. The four unrestrained dogs approached a pedestrian and bit him, causing injury. No criminal charges followed this incident.

5 On August 22, 2018, Mr. Kirby was walking his dogs in the vicinity of the Port Authority on Gateway Street. The dogs were off leash and had no muzzles. The dogs attacked and bit a victim while he was walking. After the incident, Mr. Kirby left without calling emergency services as requested by the victim. The injuries sustained by the victim amounted to bodily harm. This incident forms the basis of the fifth charge.

6 On September 2, 2018, Mr. Kirby attended a Tim Hortons where he tied his dogs to a post and went inside. While he was occupied inside the store, one of the dogs escaped and attacked a customer leaving the Tim Hortons by biting him on the leg.

7 On September 21, 2018, Mr. Kirby was placed under arrest for two counts of criminal negligence causing bodily harm.

8 On September 27, 2018, he was released on a Court Undertaking (Form 10).

9 On December 12, 2018, Mr. Kirby's dogs claimed two more victims. A man was bitten five to six times while walking to the entrance of a business and a 14-year-old was bitten several times while walking to catch the bus in the morning. These incidents led to the first two charges.

10 While released on the Court Undertaking, Mr. Kirby was required to follow the following condition: "all dogs in your possession are to be kept on your property at all times with the exception that they may be exercised one at a time, provided they are on a leash and securely muzzled." The third count alleges breach of this condition due to the incident of December 12, 2018.

11 On July 25, 2022, the trial judge rendered his decision, finding the accused guilty on all counts except for the breach of the Court Undertaking.

12 The procedural history of the case is summarized in the table below:

December 6, 2018	First Information filed. *R. v. Jordan,* 2016 SCC 27, [2016] 1 S.C.R. 631, deadline begins.
December 13, 2018	Second Information filed.
January 15, 2019	At the request of an agent for defence counsel, Mr. Ferguson, the Court is adjourned for the accused's election of mode of trial. No mention of disclosure.

January 24, 2019	Mr. Ferguson indicates that disclosure has been destroyed (no further explanation is given). The Crown confirms that disclosure will be ready later the same day. Court adjourned to March 26, 2019. The accused's lawyer confirms that he will not be present, but that an agent will be there with instructions.
March 26, 2019	Mr. Ferguson is not present. In discussing the disclosure relating to breaches of municipal by-laws, the Crown confirms that the disclosure had been given to the accused directly and that he had made a request to obtain it again. The Crown states that it is ready to set a trial date and opposes any further adjournment. The accused's lawyer was not present and had no representative. Court is adjourned to April 29, 2019, so that the accused can elect mode of trial in the presence of his lawyer.
April 29, 2019	Mr. Ferguson is present. The election of mode of trial is completed (Court of Queen's Bench, before a judge alone, with a limited preliminary inquiry). The preliminary inquiry is set for September 26, 2019. Defence counsel requests two days, but the Court indicates that one day is sufficient because of the limited number of witnesses.
May 2, 2019	Mr. Kirby appears for an application to vary Form 10, requesting to amend the condition prohibiting possession of weapons and the condition relating to house arrest.
September 26, 2019	Limited preliminary inquiry.
October 7, 2019	Motions Day. The Court proposes two trial dates: April 27 to May 1, 2020, or July 6 to 10, 2020. Mr. Kirby's counsel states: MR. FERGUSON: Mr. Justice, Brian Ferguson on behalf of Mr. Kirby who's present here just off to my right. July 6th to the 10th is fine. No mention of the reasonableness of the deadline.
May 29, 2020	Pre-trial conference. A representative of Mr. Kirby's lawyer indicated that Mr. Ferguson is ill and will not be able to proceed as planned. It is indicated that Mr. Ferguson will return to work for one week in September 2020 and then planned to return full-time in October 2020. Crown counsel is not available in October and dates are proposed for November 2020. The Court does not immediately set the proposed dates of November 16-20, 2020, due to Covid-19 complications. The Court explains a new directive on the operation of trials during Covid-19 and possible problems associated with the use of a videoconferencing system.

	Court adjourned to July 6, 2020, for another conference.
July 6, 2020	Pre-trial conference. Mr. Ferguson's agent Ms. Gallagher stated: Well, I was going to suggest, with respect… Because Mr. Ferguson is counsel and I really have nothing I can bring to this conference, I was hoping perhaps we could have a conference set for the 3rd or the 4th of September, and Mr. Ferguson will- will be back then, that week. Another pre-trial conference was set for October 21 at noon.
October 21, 2020	Pretrial conference. Mr. Kirby had a new lawyer, Mr. Bryant, assigned to the case. He requested an adjournment to allow him to better prepare for trial, given the complexity of the case and the possible consequences for Mr. Kirby. The trial is set for November 30 to December 4, 2020. In response to the request, the Crown raised the issue of unreasonable delay, i.e., whether an adjournment would cause the *Jordan* threshold to be exceeded. The trial was adjourned and Mr. Kirby, indicated that he accepted responsibility for the delay. Court adjourned to November 30, 2020.
December 9, 2020	Pre-trial conference. Preparation for the January hearings, which were to proceed as planned.
December 23, 2020	Pre-trial conference. Preparation for the voir dires and the brief submitted by the Crown.
January 4-8, 2021	The voir dires take place. On January 6, 2021, the Court discusses the importance of setting a date as soon as possible. The length of the trial is discussed. No mention of unreasonable delays. On January 7, 2021, the Court asks for confirmation that the parties agree that the trial is set for March 29 to April 1, 2021. No mention of unreasonable delay at this time.
March 8, 2021	Pre-trial conference.
March 29, 2021	Commencement of trial. No mention of unreasonable delays at the beginning of the trial.
April 13, 2021	Pre-trial conference. The Crown confirmed that its brief would be ready on April 23, 2021. The defence had until May 7, 2021, to file a response and the trial was to continue on May 11, 2021.
May 11, 2021	Evidentiary hearing on admissibility of evidence of similar facts.

June 7, 2021	Continuation of voir dire (oral arguments). Additional voir dire set for June 16, 2021.
June 16, 2021	End of voir dire. Adjourned to July 14, 2021, to set a date to continue the trial.
August 18, 2021	Pre-trial conference. Defence counsel indicated that he anticipated needing two or three days for continuation of trial. Approximate trial dates are set for October 12-14, 2021. A pre-trial conference is scheduled for September 1, 2021, to confirm.
September 1, 2021	Pre-trial conference. Defence counsel advised he was unavailable the week of October 12, 2021. Trial set for December 8-10, 2021. Court discussed post-trial course of action, including an adjournment for briefs. Defence counsel indicated that he would need 3-4 weeks for the factum. The Crown to have three weeks to respond. A pre-trial conference is scheduled for January 10, 2022, to set a date for closing arguments. The Crown asked to be allowed to submit their brief on February 4, 2022. The defence did not object.
December 3, 2021	Defence moves for adjournment. Mr. Kirby's attorney indicates that he had not been able to meet with his client and is not sufficiently prepared to proceed with the trial as scheduled. Adjourned to January 10, 2022, to set a date, possibly January 24-26, 2022.
January 10, 2022	Pre-trial conference. Due to Covid-19, the Court did not schedule a trial for the next 2-3 weeks and another conference was scheduled to find a trial date.
February 3, 2022	Pre-trial conference. Trial set for March 14-16, 2022. The Crown's brief will be due on April 7, 2022, and the defence will have three weeks to respond. Closing arguments set for May 16, 2022, without objection or mention of deadlines.
March 14-15, 2022	Trial recommenced and concluded. At the end of the trial, the parties agreed to respect the timeline established on February 3, 2022.
June 1, 2022	Final pleadings for the trial. The Court asked the Crown to submit a supplementary brief to clarify the facts on June 17, 2022. Final decision adjourned to July 25, 2022 (end of calculation according to the Supreme Court in *R. v. K.G.K.*, 2020 SCC 7, [2020] 1 S.C.R. 364, at para. 50).

July 15, 2022	Conference. Parties provided clarifications on their summary of facts.
July 25, 2022	Judge rendered his decision, found Mr. Kirby guilty on all counts except for the breach of the court undertaking. Sentencing set for September 30, 2022.
September 30, 2022	Sentencing scheduled for this date originally, but rescheduled to October 28, 2022.
October 28, 2022	Defence requested an adjournment to await a Supreme Court decision dealing with conditional sentences. The Crown opposed the adjournment because it asked for a term of incarceration. Its position was the conditional sentence regime did not apply. Trial judge granted the adjournment to January 31, 2023.
February 3, 2023	Mr. Kirby filed a s. 11(b) motion over six months after his conviction.
February 7, 2023	Trial judge heard the motion.
February 9, 2023	Trial judge dismissed the motion.

III. Issues in Dispute

13 As indicated above, on February 3, 2022, Mr. Kirby filed a motion arguing that his right to be tried within a reasonable time under s. 11(b) of the *Charter* had been violated. The Court heard the motion on February 7, 2022, and rendered a decision on February 9, 2022.

14 Mr. Kirby appeals the trial judge's decision of February 9, 2022, on a motion alleging that his rights under s. 11(b) of the *Charter* had been violated. He argues that three periods attributed to the defence should be reviewed by this Court on the basis of *R. v. Jordan*, *2016 SCC 27*, *[2016] 1 S.C.R. 631*. This ground raises the following questions:

1. Should Mr. Kirby's adjournment requests between January 15, 2019, and April 29, 2019, be attributed to him?
2. Should the period between the trial set for July 6, 2020, and the discovery that defence counsel was ill and unable to proceed on May 29, 2020, be attributed to Mr. Kirby?
3. Should Mr. Kirby be attributed the delay caused when his counsel was unavailable on the first proposed dates when the trial was set?
4. If the net delay exceeds the presumed 30-month cap established in *Jordan*, is the complexity of the case an exceptional circumstance that justifies the delay?

15 Mr. Kirby is also appealing the trial judge's decision dated July 25, 2022. He alleges the verdicts on counts 1, 2, and 3 are contradictory. He asks this Court to grant an acquittal, claiming that the guilty verdicts on the counts of criminal negligence causing bodily harm are inconsistent with a verdict of not guilty on the count of breach of a condition of the Court Undertaking.

16 This ground of appeal raises the following question:

5. Is it consistent to conclude that the *mens rea* for the offence of criminal negligence is present and at the same time to conclude that the *mens rea* for the offence of failing to comply with a Court Undertaking is not present?

17 Finally, Mr. Kirby contends the trial judge misinterpreted the evidence relating to the September 2, 2018 incident. This ground of appeal raises the following issue(s):

6. Did the judge misinterpret the evidence relating to the September 2, 2018 incident? Specifically, the characterization of the pedestrian presence as "heavy".

18 In the following analysis I will deal separately with each of these issues applying their corresponding standards of review.

IV. Delays

A. *Standard of review*

19 The reasonableness of time limits is a question of law, and this Court has determined that the standard of review applicable to *Jordan* claims is correctness. However, appellate courts must defer to the trial judge on findings of fact.

(1) January 15 - April 29, 2019

20 The trial judge attributed this delay to the defence agreeing with the Crown's position. In attributing this delay to the defence, the judge cited paragraph 33 of *R. v. J.F. 2022 SCC 17*, *[2022] S.C.J. No. 17* (QL), which states that the defence cannot take advantage of its own inaction.

21 Mr. Kirby maintains the defence's adjournments were legitimate because neither the judge nor the Crown raised an objection. In his brief, Mr. Kirby states that on January 15, 2019, his lawyer was not aware of the filing of the information of December 13, 2021. Furthermore, he submits Mr. Ferguson's representative did not have sufficient instructions to choose a mode of trial at the March 26, 2019, appearance.

22 The Crown states that the cause of the delay was defence counsel's lack of preparation.

23 The Supreme Court's guidelines are clear in *R. v. J.F.* It is difficult to conceive that this period is not attributable to the defence when Mr. Kirby indicates that even at the March 26, 2019, appearance, there were insufficient instructions to elect the mode of trial.

24 In *R. v. Hizebry*, *2023 QCCQ 2956*, *[2023] J.Q. No. 4317* (QL), in discussing the Supreme Court's decision in *R. v. Cody*, *2017 SCC 31*, *[2017] 1 S.C.R. 659*, the Court states the following:

> [TRANSLATION]
>
> In this case, while the adjournments sought by the defence do not show any illegitimate motive, the analysis does not end there. In the context of attribution of periods of delay, an "illegitimate" action does not necessarily mean an action taken for an inappropriate purpose, devised to delay, or involving professional or ethical malpractice on the part of defence counsel. Rather, the term "illegitimate" refers to an action that is not necessary to respond to the accusations. [para. 17]

25 In this case, the adjournments between January 15, 2019, and April 29, 2019, were not necessary to answer the charges.

26 In the *Cody* decision, the Supreme Court stated:

> The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial

> judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> Defence conduct encompasses both substance and procedure - the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay. [Emphasis in original; paras. 31-32]

27 In *R. v. Boulanger*, *2022 SCC 2*, *[2022] S.C.J. No. 2* (QL), the Supreme Court analyzed delay caused by a late defence motion. Although the motion was legitimate, the Court stated:

> [...] it is not sufficient that the step taken by the respondent be legitimate for the delay not to be attributable to him. In this case, it is the *manner* in which the defence conducted itself with respect to its motion for an unredacted copy of the information that was illegitimate, particularly because of how late that motion was brought. [...] [para. 5]

28 In the present case, a review of the file does not raise an error in the trial judge's reasoning for attributing this delay to the defence. Mr. Kirby's conduct during this period shows marked inefficiency and disregard for time limits.

(2) May 29, 2020 to July 6, 2020

29 At this point, the trial was set for July 6-10, 2020. However, on May 29, 2020, a representative for Mr. Ferguson appeared in court to advise that Mr. Ferguson was ill and the trial would not proceed as scheduled. On July 6, 2020, a representative appeared on behalf of Mr. Ferguson again and indicated that Mr. Ferguson should be back in the Fall. On October 21, 2020, Mr. Kirby appeared with a new lawyer, Mr. Bryant, for the first time.

30 The trial judge attributed the delay between May 29, 2020, and July 6, 2020, to the defence, indicating that the Crown acted on the assumption that Mr. Ferguson would be back in the Fall and that for this reason another date was not set.

31 Mr. Kirby argues it was obvious as early as May 29, 2020, that Mr. Ferguson would not be back before the Fall, no party "pushed" to set a date and the trial date must be used to calculate the actual delay. The Crown concedes this point, so this period will be included in the calculation of time limits.

(3) December 4, 2020 to April 1, 2021

32 On October 21, 2020, Mr. Kirby appeared at a pre-trial conference with his new lawyer. The new lawyer knew Mr. Kirby from another file that had been assigned to him three weeks previously. However, he was not aware of the case before us. There was a discussion surrounding the circumstances:

> THE COURT: And we're now getting to the latter part of October, and you still haven't had your trial and you had the benefit of having an outside legal advisor now for three weeks who did not realize this matter until today. Did you not bring this up with Mr. Bryant?
>
> MR. KIRBY: Mr. Bryant - as he mentioned earlier, I'm not sure of the specifics of it because the last time he represented me it was again, he showed up to Court and said Margaret has delegated this charge to me. There was some - at that time some confusion as to which charges the Court had and which charges he was representing me on - or believed he was representing me on, and he was going to speak with - it was either Margaret was going to speak with him and get that resolved -
>
> THE COURT: Okay, so that was looked into around three weeks ago?
>
> MR. KIRBY: No - no.

> MR. BRYANT: No, Mr. Justice, that - that was probably pretty close to that July 6th date. I would not be surprised if I was assigned the provincial court matter around that time, and I made inquiries as to whether I would have all of Mr. Kirby's files. It was decided at that time that they would stay with Mr. Ferguson pending his return. And then about three weeks ago I was ultimately assigned all the files. And though I'm not a staff lawyer with legal aid the - the understanding I have is that these are not going to change again. I'm - I am Mr. Kirby's lawyer for all his - his matters - his criminal matters that are - he does have some by-law matters that I do not represent him on.
>
> MR. KIRBY: Right. And - there is a date already set for that one specific charge, February 2nd.
>
> MR. BRYANT: Yes.
>
> MR. KIRBY: So, there was lots of time for myself and Mr. Bryant to get together on that matter and speak. But as for all these other charges, all the criminal negligence causing harm, the breaches, and what not, nothing's been discussed between myself and legal aid up until this point.
>
> THE COURT: Okay.

33 In *R. v. Hanan*, *2023 SCC 12*, *[2023] S.C.J. No. 101* (QL), the Court advocates a contextual approach:

> Like the majority and the dissent below, we reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. We agree with van Rensburg J.A. and Tulloch J.A., as he then was, at para. 56, that this approach is inconsistent with this Court's understanding of defence delay. Defence delay comprises "delays caused solely or directly by the defence's conduct" or "delays waived by the defence" (*Jordan*, at para. 66). Furthermore, "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable" (para. 64). All relevant circumstances should be considered to determine how delay should be apportioned among the participants (*R. v. Boulanger*, *2022 SCC 2*, at para. 8). We share the view of the majority and dissenting judges in the Court of Appeal that, in the circumstances of this case, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence delay (paras. 59 and 136). [para. 9]

34 At the pre-trial conference on September 1, 2021, Mr. Kirby's failure to raise the issue of unreasonable delay prevented the Crown and the Court from remedying the situation. Proactive intervention by the defence could have remedied the situation in this case.

35 I would attribute the period between October 16, 2021, and November 17, 2021, to the defence. While the period between November 17, 2021, and December 6, 2021, would be included in the calculation, the only party not available was the Crown for three days in November.

(4) Late submission of the application

36 The Crown emphasizes the responsibility of an accused to raise the issue of unreasonable delay as early as possible in the process and to act proactively to ensure the proper administration of justice. The Crown states in its brief that the late filing of a motion concerning unreasonable delay prevented the Crown and the Court from taking further steps to mitigate delay. For this reason, the Crown argues that "any dispute regarding delay attribution should be found in favour of the Court and Crown".

37 On this point I disagree with the Crown. Filing a *Jordan* motion after trial is not fatal to the accused. The accused has an obligation to assert the right conferred by 11(b) when it becomes clear that the right is not being respected. In this case, therefore, it is necessary to determine at what point in the proceedings it became clear that the accused's 11(b) right was at stake, and whether a request at that point could have prevented the breach of the right.

38 At the pre-trial conference of September 1, 2021, in setting the trial date, counsel for the defence in no way

raised its intention to assert his client's rights. Mr. Kirby's counsel mentioned the unreasonable delays in discussing the submission of post-trial briefs:

> THE COURT: Okay. So, I mean, having said that, does it make more sense, Mr. Bryant, for us to get together after the final Brief is submitted from the Crown for a Pre-Trial Conference? I'm gonna accommodate the parties one way or the other, whatever you'd prefer.
>
> MS. CAMPBELL: Certainly, we could. And depending on the schedule of the Court, February 7th we could reconvene and discuss at what point in time this Court would like to hear oral arguments.
>
> MR. BRYANT: I'd actually- I'd prefer to keep the 10th-
>
> THE COURT: Okay.
>
> MR. BRYANT: -for scheduling purposes.
>
> THE COURT: Okay.
>
> MS. CAMPBELL: Yep.
>
> MR. BRYANT: You know, just we do need to move things along.
>
> THE COURT: Exactly, yeah.
>
> MR. BRYANT: There have been a lot of- a lot of issues, a lot of delays, so...
>
> THE COURT: Okay, I see where you're going here, right. So, Mr. Bryant, you're saying you may submit your Brief before Christmas, potentially.
>
> MR. BRYANT: Knowing me, unlikely, but yes.
>
> THE COURT: But, you know, you could be doing that.
>
> MR. BRYANT: That's right.
>
> THE COURT: And you need to hammer down your own schedule in the new year, and you want to know when...
>
> MR. BRYANT: Yes.
>
> THE COURT: I think we can agree on when we can hear oral arguments, on January 10th.
>
> MR. BRYANT: Very good.

39 So, after discussing the timeline, and the filing of post-trial briefs at the September 1, 2021, pre-trial conference, the anticipated end of the trial was January 19, 2022. This was 37 months after the filing of the initial information. It was clear at the time that the issue of unreasonable delay could be raised, notwithstanding the delays caused by Mr. Ferguson's illness. However, not only did defence counsel fail to act proactively to reduce delays, but he was also unable to prepare his client and the trial set for December 3, 2021, had to be adjourned solely because of his lack of preparation. This type of behaviour "demonstrates a marked inefficiency or indifference to deadlines." Therefore, although it is not fatal to file a s. 11(b) motion after a conviction, in this case, as previously stated, the delays are primarily attributed to Mr. Kirby and therefore it does not change the outcome.

(5) Calculation

40 On December 6, 2018, the first information was filed. July 15, 2022, is the end of the trial. Total time is 1317 days.

41 The delays attributable to the defence are as follows:

1. January 15, 2019 - April 29, 2019: 104 days (reasons above).
2. July 10, 2020 (end of portion of 1st trial) - December 4, 2020 (end of 2nd trial): 147 days (attributable to the defence due to Mr. Ferguson's illness).

3. December 4, 2020 (end of 2nd trial) - April 1, 2021 (end of 3rd trial): 118 days (Assumed by the defence due to lack of preparation). In the first instance, the judge made an error in using the time limit. The date of the anticipated end of the trial must be used to calculate a period.
4. October 16, 2021 - November 17, 2021: 32 days (reasons above).
5. December 10, 2021 (end of 4th trial) - March 15, 2022 (end of 5th trial): 94 days (Delay attributable to the defence's lack of preparation and admitted by the defence).
6. April 28, 2022 - May 5, 2022: 7 days (Defence counsel submitted his brief late. The 7 days do not give rise to controversy between the parties).

42 Total defence time: 502 days. Net delay: 1,317 days - 502 days = 815 days = 27.17 months, below the ceiling set by *Jordan*.

(6) The complexity of the case

43 At trial, the judge indicated that, even if the time limits were above the *Jordan* ceiling, the Crown could still rebut the presumption of unreasonableness because of the complexity of the case.

44 I do not agree. The delay could not be justified due to the complexity of the case. The Supreme Court stated the following in *Jordan*:

> As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case. [Emphasis in original; para. 77]

45 In the case before us, the complexity of the case lies primarily in the voir dires that were held to allow the Crown to admit "similar facts" in order to establish the *mens rea* of the criminal negligence counts.

46 The threshold of complexity required to justify exceeding the presumptive ceiling in *Jordan* is high and will only be exceeded in exceptional circumstances. In *R. v. Gharibzada*, 2022 ONSC 4667, [2022] O.J. No. 3682 (QL), the Ontario Superior Court held:

> [...] For example, the argument regarding multiplicity of issues as noted above (jurisdiction, identity, *mens rea*, party status, witness statements and similar fact) occurs routinely in many cases. A lengthy preliminary inquiry may be another indicator of complexity. However, multiple accused facing trial is no longer an issue and the trial time may now be overestimated given the resolution of accused or charges. Further, crimes alleged over a lengthy period of time or in multiple jurisdictions does not, *per se*, necessarily entail complexity. [para. 82]

47 The Court contrasts this decision with those that have been determined to be exceptionally complex.

48 *R. v. Picard*, 2017 ONCA 692, [2017] O.J. No. 4608 (QL), is a first-degree murder case supported by forensic analysis of data from 53 cell phones. The investigation lasted approximately six months and was carried out by two police forces. The disclosure was 30,000 pages long, and 78 witnesses were interviewed. Over 43 people testified at the trial. However, the Ontario Court of Appeal ruled that the complexity threshold had not been met.

49 In *R. v. Papasotiriou-Lanteigne*, 2018 ONSC 1449, [2018] O.J. No. 3115 (QL), a first-degree murder case exceeded *Jordan's* presumptive ceiling, but was justified on the grounds of complexity. Evidence included DNA

analysis, geolocation by cell phone network, examination of bank transactions, dozens of witnesses and international extradition. The case was notable for the number of frivolous motions put forward by the defence, which made the case even more complex.

50 In *R. v. Millard*, 2017 ONSC 4030, [2017] O.J. No. 6903 (QL), two co-defendants were jointly charged with first-degree murder. Evidence included testimony from 217 civilians and 260 police officers. There was a complex forensic analysis of cell phones, tablet computers and computers (59 devices seized). The four-month trial required a great deal of preparation. The circumstances were deemed particularly complex.

51 In *R. v. Bulhosen*, 2019 ONCA 600, [2019] O.J. No. 3666 (QL), the Crown intended to call 220 witnesses, including 22 experts, and to use 400 of the 100,000 wiretap files. The evidence included more than 250,000 documents. There were several defendants. The delay exceeded *Jordan's* limit, but this was found to be acceptable because the Crown had a reasonable plan to address the complexity of the case.

52 After reviewing the jurisprudence on point, I do not agree the case was complex.

(7) Conclusion regarding delays

53 For the reasons stated above, I would dismiss this ground of appeal. In my view, on a proper calculation the impugned delay was below the presumptive ceiling.

V. Inconsistent Verdicts

A. *Standard of Review*

54 Mr. Kirby correctly raised the applicable standard of review. In *TFE Industries Inc. v. R.*, 2009 NBCA 39, 346 N.B.R. (2d) 202, this Court held that inconsistent verdicts are unreasonable verdicts within the meaning of paragraph 686(1)(a) of the *Criminal Code*. In *R. v J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, the Court stated: "Finally, verdicts are deemed inconsistent - and therefore unreasonable in law - if no properly instructed jury could reasonably have returned them both: *R. v. Pittiman*, [2006] 1 S.C.R. 381, 2006 SCC 9" (emphasis omitted; para. 23).

55 In *R. v. J.F.*, the Court commented on the reasonableness of two different verdicts for two counts with similar *mens rea*:

> A brief comment on this branch of the matter will therefore suffice. If the fault element under both counts was the same - if a *marked departure* was sufficient in both instances - and acquittal on one and a conviction on the other would be plainly inconsistent because both counts alleged the identical *actus reus* as well. It is undisputed, however, that criminal negligence, unlike failure to provide the necessaries of life, involves a marked *and substantial* departure from the norm of a reasonable person. In this light, the verdicts at trial - not guilty of failing to provide necessaries, yet guilty of criminal negligence - are not only inconsistent, but incomprehensible as well. [Emphasis in original; para. 11]

56 In *R. v. J.F.*, the Court indicated the *mens rea* for one of the offences was a "marked departure" and the *mens rea* for the other offence was a "marked and substantial departure." The guilty verdict was for the offence whose *mens rea* was higher than that for the offence of which the accused was acquitted.

B. *The qualitative difference between mens rea and infractions*

57 Mr. Kirby relies on the Supreme Court's decision in *R. v. R.V.*, 2021 SCC 10, [2021] S.C.J. No. 10 (QL), which states:

> The ultimate inquiry for appellate courts then is whether the verdicts are actually inconsistent. Apparently inconsistent verdicts can be reconciled on the basis that the offences themselves are "temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses" (*Pittiman*, at para. 8). If verdicts are reconciled to reveal a theory on which the jury could have returned the

> verdicts without acting unreasonably, the verdicts are consistent and appellate intervention is not warranted. [para. 31]

58 In this case, the question is therefore whether the *mens rea* for a breach of an order is identical to the *mens rea* required for a conviction for the offence of criminal negligence. In other words, are the *mens rea* qualitatively different?

59 The *mens rea* required for the offence of criminal negligence causing bodily harm has been correctly identified by the trial judge. *R. v. J.F.* establishes the elements of criminal negligence as follows:

> Turning to the offence of criminal negligence, the *actus reus* will be established if it is proved (1) that the accused was under a legal duty to do something; (2) that, from an objective standpoint, he or she failed to perform the duty; and (3) that in failing to perform the duty, he or she showed, again from an objective standpoint, wanton or reckless disregard for the lives or safety of other persons. Proof of the *mens rea* will flow from a finding that the conduct of the accused was wanton or reckless. Wanton or reckless behaviour has been equated with a marked *and substantial* departure from the norm (H. Parent, *Traité de droit criminel* (2nd ed. 2007), vol. 2, at p. 299), which necessarily includes behaviour that constitutes a marked departure. [para. 68]

60 In the decision, the trial judge indicated that Mr. Kirby's conduct demonstrated a marked and significant departure from what a reasonably prudent person would have done in the same situation (para. 253). The comparison of the accused's actions with those of a reasonable person demonstrates the objective nature of the *mens rea* required by the offence of breach of condition.

61 In my opinion, the *mens rea* required for the offence of breach of bail was properly applied by the trial judge.

62 In *R. v. Zora*, *2020 SCC 14*, *[2020] 2 S.C.R. 3*, the Court emphasized that the *mens rea* required is subjective because of the legislative intent behind subsection 145(3) of the *Criminal Code*:

> I conclude that the Crown is required to prove subjective *mens rea* and no lesser form of fault will suffice. Under s. 145(3), the Crown must establish that the accused committed the breach knowingly or recklessly. Nothing in the text or context of s. 145(3) displaces the presumption that Parliament intended to require a subjective *mens rea*. Further, this intention is supported by this Court's jurisprudence on the interpretation of the breach of probation offence, the consequences of charges and convictions under s. 145(3), the role of s. 145(3) within the constitutional and legislative scheme of bail, and the practical operation of the bail system. A subjective *mens rea* standard for breach under s. 145(3), like Parliament's recent amendments to the bail scheme, keeps the focus on the individual accused, where it belongs.
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> [...]
>
> All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions. Requiring subjective *mens rea* to affix criminal liability under s. 145(3) reflects the principles of restraint and review and mirrors the individualized approach mandated for the imposition of bail conditions. [paras. 4 and 6]

63 Continuing, the Court also explained the difference between subjective and objective *mens rea*:

> The main issue in this appeal is whether the *mens rea* for s. 145(3) is subjective or objective. A subjective fault standard would focus on what was in the accused's mind at the time they breached their bail condition.

> It directs a court to consider whether the accused "actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether [they] 'could', 'ought' or 'should' have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability" (*R. v. Hundal*, *[1993] 1 S.C.R. 867*, at pp. 882-83, quoting D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 123-24). In applying a subjective *mens rea*, courts can consider personal circumstances and challenges of the accused in a manner which mirrors the individualized manner in which bail conditions are to be imposed.
>
> Under objective *mens rea*, the question would be whether the accused's behaviour was a marked departure from the behaviour of a reasonable person subject to the accused's bail conditions (C.A. reasons, at para. 68). The standard is based on what the reasonable person would know or do or have foreseen in the circumstances and it does not matter if the accused does not know they were breaching their condition. Objective fault is premised on uniform societal standards of behavior and therefore does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused, short of an incapacity or virtual inability to comply (C.A. reasons, at para. 87 (Fenlon J.A. concurring), citing *R. v. Creighton*, *[1993] 3 S.C.R. 3*, at pp. 58-74 (per McLachlin J.) and pp. 38-39 (per La Forest J.); *R. v. Naglik*, *[1993] 3 S.C.R. 122*, at p. 148 (per McLachlin J.) and p. 149 (per L'Heureux-Dubé J.)). [paras. 29-30]

64 I am therefore of the opinion that the *mens rea* of each offence is qualitatively different. It is conceivable that a reasonably instructed jury could reach a verdict of guilty for an offence where the *mens rea* is objective, and a verdict of acquittal for an offence where the *actus reus* is the same, but the *mens rea* is subjective. Different verdicts are consistent. An analysis of the offence for breach of condition reveals that the *mens rea* required is specific because of the role the offence plays in the justice system and in bail proceedings.

65 That said, the trial judge's application of the law to the facts is not in question in this appeal. I will not consider whether the facts of this case satisfy both types of *mens rea*.

66 I therefore conclude that the verdicts on counts 1, 2 and 3 are not contradictory. There is no reason to question the verdicts on counts 4 and 5.

VI. Assessment of the Evidence - Did it lead to an unreasonable verdict?

A. *Standard of review*

67 Mr. Kirby contends the trial judge misinterpreted the evidence related to the September 2, 2018 incident. Specifically, he challenges the trial judge's finding of fact characterizing the Tim Hortons parking lot as having a "heavy pedestrian presence".

68 Mr. Kirby says this finding is erroneous and the trial judge used it to draw an inference regarding Mr. Kirby's negligence.

69 The Crown, however, points out the determining issue is not whether there were many people in the parking lot, but rather the risk posed by Mr. Kirby's dogs when he left them unattended, tied to a post next to a pedestrian walkway.

70 The following passages from the trial decision are relevant:

> **Mr. Kirby acknowledged in his testimony that he had no control over the dogs if someone approached or cut over the greenspace from the parking lot**. The control he relied on was the three leashes. The Crown submits that knowing his dogs had chased after two pedestrians in the recent past, Mr. Kirby testified that he did not inspect the leash before using it to tie up Alice, knowing that was being used to control her. Mr. Kirby testified that he assumed it was a workable leash and was fully reliant on the leash when he left Alice alone in public.
>
> **The Crown correctly notes that Mr. Kirby attempted to justify his actions by testifying that Tim Hortons was devoid of pedestrians**. Mr. Kirby **testified that if there was heavy pedestrian traffic**, he

> would not have tied his dogs there. The Crown also correctly notes that this evidence of Mr. Kirby was contrary to that of Cst. Lohnes who testified that pedestrian presence at the Tim Hortons was heavy. The Crown also correctly notes that Cst. Lohnes' testimony is supported by the fact that he was already there dealing with a previous call, which indicates others were obviously around. [Emphasis added; paras. 215-216]

71 The standard of review for a verdict that is unreasonable because of a misinterpretation of the facts is set out by this Court in *Gavin v. R.*, *2019 NBCA 19*, *[2019] N.B.J. No. 42* (QL):

> The Court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge: *R. v. R.P.*, *2012 SCC 22*, *[2012] 1 S.C.R. 746*, at para. 9.
>
> Section 686(1)(a)(i) of the *Criminal Code* dictates a full review of the evidential record. However, at the end of the required evidential re-examination and to some extent re-weighing, it is the probative effect of the totality of the evidence that is determinative, not the probative value of individual pieces of evidence in isolation from their context: see *Oland*, at para. 29. Furthermore, when reviewing the trial judge's assessments of credibility, the Court can only interfere if it is established they cannot be supported on any reasonable view of the evidence: see *R. v. R.P.*, at para. 10.
>
> [...]
>
> The standard for appellate intervention based on evidential misapprehension is stringent. The misapprehension must go to the substance rather than to detail; must be material, rather than peripheral to the reasoning of the trial judge; and the errors must play an essential part in the reasoning process resulting in conviction and rendering the trial unfair: *R. v. Lohrer*, *2004 SCC 80*, *[2004] 3 S.C.R. 732*, at para. 2, and *Gillis*, at para. 76. Any error, including one involving a misapprehension of the evidence by the trial judge, is assessed by reference to its impact on the fairness of the trial. [paras. 9, 10 and 13]

B. *Analysis*

72 In my view, the trial judge's finding of fact is not erroneous. The trial judge found Mr. Kirby's conduct on September 2, 2018, leaving these dogs, tied to a post outside Tim Hortons unattended, represented a marked and significant departure from what a reasonably prudent person would do in the same circumstances. In reaching this conclusion, the trial judge examined all the evidence.

73 Traffic in the Tim Hortons parking lot only increases the potential for risk. Mr. Kirby admitted that he had no control over the traffic in the environment where he had tied up his dogs. He testified that the parking lot was devoid of pedestrians, and that if there had been a heavy pedestrian presence, he would have acted differently. This testimony is contrasted with that of Constable Lohnes, who indicated that there is usually a heavy pedestrian presence in the vicinity, but at the time of the incident, there were two people in the parking lot.

74 The trial judge's conclusion is not erroneous for two reasons. First, the characterization and use of the word "heavy" is not a test of criminal negligence, but simply the words used by a witness to describe a situation. What the trial judge must measure is the potential for risk, for example whether the place where the dogs were left posed a risk to the reasonable person. Furthermore, the danger posed by the dogs is not only apparent when there were several people present. In the past, the dogs had attacked single victims, not groups of people. In other words, it was not the high presence of pedestrians that created a risk, but rather the high chance of a pedestrian being present while the dogs were unattended. A reasonable person knows that, even early on a Sunday morning at Tim Hortons, there are likely to be pedestrians either on the sidewalk or in the parking lot, and that this represents a significant risk.

75 Secondly, the word "heavy" is an adjective used by the witness himself. It is used in contrast to the term "devoid" to describe the number of pedestrians in the vicinity. In my opinion, the judge's use of the term "heavy"

could also describe a situation where there are not necessarily a large number of people in the same place at the same time, but a continuous stream of people, which is a general description of the traffic in the area. This term can refer to a high number of pedestrians in the parking lot at the same time, or to a constant presence of pedestrians over a longer period. In any case, I do not believe that, in light of the totality of the evidence, the trial judge's interpretation of the evidence resulted in an error warranting review.

VII. Conclusion

76 In conclusion, I find that the accused's right to be tried within a reasonable time has not been violated, taking into account the periods of delay attributable to the defence.

77 The verdicts on counts 1, 2 and 3 are not contradictory. The *mens rea* for the offence of breach of condition is subjective, whereas the *mens rea* for the offence of criminal negligence causing bodily harm is objective. This reveals a qualitative difference between the offences.

78 The trial judge did not commit a reviewable error in his assessment of the evidence relating to the incident of September 2, 2018.

VIII. Disposition

79 I would dismiss the appeal.
