

New Brunswick Court of Queen's Bench
Trial Division - Judicial District Of Saint John

Saint John, New Brunswick

A.T. Doyle J.

Heard: January 4-7, March 29-31, 2021;

March 14 and 15, June 1, 2022; April

7 (Post-Trial Legal Brief from the Crown),

28 (Post-Trial Legal Brief from

the Defence); May 9 (Supplemental Post-Trial

Legal Brief from the Crown), 17

(Revised Supplemental Post-Trial Legal

Brief from the Crown), 19 (Second

Supplemental Post-Trial Legal Brief

from the Crown), 20 (Supplemental

Post-Trial Legal Brief from the Defence),

June 1, (Final Oral Submissions by

Counsel), July 15, 2022 (Post-Trial Conference).

Judgment: July 25, 2022.

No. SJCR-7-2019

[2022] N.B.J. No. 356 | 2022 NBQB 145

Between Her Majesty the Queen, and Michael Kirby

(270 paras.)

Case Summary

Court Summary:

Criminal Negligence and Breach of Court Order.

Counsel

Christopher M. Ryan and Elaina S. Campbell, on behalf of Her Majesty the Queen.

Charles M. Bryant, on behalf of Mr. Kirby.

DECISION**A.T. DOYLE J.****I. INTRODUCTION***A. Overview*

- 1 A group of dogs allegedly attacked and injured several pedestrians over a relatively short period of time in West Saint John.
- 2 The task of this Court is to determine whether Michael Kirby, the owner of those dogs, did by criminal negligence cause bodily harm to those pedestrians and fail to comply with a Court order.
- 3 This decision largely turns on the credibility of various witnesses and the use of intrinsic and extrinsic similar fact evidence.

B. The Indictment

- 4 Michael Kirby ("Michael Kirby" or "Mr. Kirby" or the "Defence") stands charged that he:

Count 1: On December 12th, A.D. 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, did by criminal negligence cause bodily harm to William Stevens, committing thereby an indictable offence, contrary to an[d] in violation of Section 221 of the **Criminal Code** [, R.S.C., 1985, c. C-46 and amendments thereto (the "**Criminal Code**")].

Count 2: On December 12th, A.D., 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, did by criminal negligence cause bodily harm to [A.M.], committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**].

Count 3: On December 12th, A.D., 2018, at the City of Saint John, County of Saint John, Province of New Brunswick, being at large on his undertaking entered into before Provincial Court Judge Henrik Tonning on September 27th, A.D., 2018, and being bound to comply with a condition of that undertaking, namely; 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, did fail without lawful excuse to comply with that condition, thereby committing the indictable offence, contrary to the provisions of Section 145(3) of the [**Criminal Code**].

Count 4: On or about the 22nd day of August, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, did by criminal negligence cause bodily harm to Garfield McPhee, committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**].

Count 5: On or about the 2nd day of September, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, did by criminal negligence cause bodily harm to Allen Howe, committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**].

[Revisions mine.]

C. Elements of the Offence

- 5 With respect to the elements of criminal negligence causing bodily harm, the Crown must prove beyond a reasonable doubt:¹
 - (a) that Michael Kirby's acts and/or omissions;
 - (b) showed wanton or reckless disregard for the lives or safety of others; and
 - (c) that Michael Kirby's conduct caused the alleged victims bodily harm.

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6 To establish a "wanton or reckless disregard for the lives or safety of others", the Crown must prove that Michael Kirby's acts or omissions were a marked and substantial departure from what a reasonably prudent person would do in the same circumstances, either that²:

- (a) Michael Kirby was aware of or recognized an obvious and serious risk (danger) to the lives or safety of others, but went ahead anyway despite his knowledge of that risk (danger); or
- (b) Michael Kirby gave no thought to the risk (danger) to the lives or safety of others.

D. Admissions of Mr. Kirby

7 Mr. Kirby has admitted to the following as facts:

- (a) identity of Mr. Michael Kirby at all relevant times;
- (b) Mr. Kirby is the owner of Danny, Georgie, Frank and Alice (dogs involved in the incidents in this instant case);
- (c) all relevant dates/times;
- (d) all relevant locations; and
- (e) Mr. Saliou, Mr. McPhee, Mr. Howe, Mr. Stevens and A.M. sustained injuries which constitute bodily harm.

E. Similar Fact Evidence Application

8 The Crown submitted an application to this Court seeking to rely on similar fact evidence, both extrinsic and cross-counts, at the Trial. I issued my decision in that regard on July 6, 2021 (see **R. v. Michael Kirby**, 2021 NBQB 156) and ordered that:

- (a) the propensity evidence in connection with the November 21, 2015 Incident is admissible as extrinsic similar fact evidence at the Trial in this instant case and can be applied prospectively on the four counts of criminal negligence causing bodily harm in the Indictment (that is, it is admissible on Count 4 (the August 22, 2018 Incident), Count 5 (the September 2, 2018 Incident), and Counts 1 and 2 (the December 12, 2018 Incidents);
- (b) the propensity evidence in connection with the June 20, 2018 Incident is admissible as extrinsic similar fact evidence at the Trial in this instant case and can be applied prospectively on the four counts of criminal negligence causing bodily harm in the Indictment (that is, it is admissible on Count 4 (the August 22, 2018 Incident), Count 5 (the September 2, 2018 Incident), and Counts 1 and 2 (the December 12, 2018 Incidents); and
- (c) the evidence in support of each of the four counts of criminal negligence causing bodily harm in the Indictment is admissible as intrinsic similar fact evidence at the Trial in this instant case and can be applied prospectively on the other counts of criminal negligence causing bodily harm in the Indictment (that is: (i) the evidence relating to Count 4 (the August 22, 2018 Incident) is admissible on Count 5 (the September 2, 2018 Incident), and Counts 1 and 2 (the December 12, 2018 Incidents); (ii) the evidence relating to Count 5 (the September 2, 2018 Incident) is admissible on Counts 1 and 2 (the December 12, 2018 Incidents); (iii) the evidence on Count 2 (the incident that allegedly occurred on December 12, 2018) is only admissible on Count 2 (the incident that allegedly occurred on December 12, 2018); and (iv) the evidence on Count 1 (the incident that allegedly occurred on December 12, 2018) is only admissible on Count 1 (the incident that allegedly occurred on December 12, 2018)).

II. EVIDENCE

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9 Following is a summary of the testimony that was presented to this Court during a Voir Dire that occurred between January 4, 2021 and January 7, 2021 (the "Voir Dire") and the trial that occurred between March 29, 2021 and March 31, 2021, March 14, 2022 and March 15, 2022 and June 1, 2022, where the Crown presented its evidence and Mr. Kirby presented his evidence (the "Trial").

10 For purposes of the summary of the testimony presented at the Voir Dire and the Trial that was submitted to this Court by the Crown, the Crown submits that all quotations contained in the summary of the testimony cannot be certified and are captured to the best ability of the Crown. Based upon my review of the testimony presented at the Voir Dire and the Trial, I accept that the summary of the testimony submitted by the Crown is an accurate summary of the testimony that I heard. Accordingly, for purposes of this decision, I hereby adopt the summary of the testimony presented at the Voir Dire and the Trial that was submitted to this Court by the Crown.

A. Background of Mr. Kirby

11 Michael Kirby testified at the Trial about his educational and career background and his experience with dogs in general.

12 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

11. Michael Kirby testified that he lives at 149 Winslow Street, Saint John, New Brunswick. He is currently unemployed. With respect to his education, he has an Economics Degree from Western and a MBA from Queen's University. He had a career in corporate finance in Toronto with the investment banking firms.
12. Mr. Kirby testified that he had owned dogs since he was a child aside from the times he was at university. He grew up with dogs. He had several dogs, including owning Danny and Georgie in Toronto. He had Danny and Georgie for approximately ten years prior to the incidents in 2018. They were rescue dogs. He was living in downtown Toronto when he got the dogs. He adopted a South African Boerboel named Hank when Danny and Georgie were approximately 2 years old.
13. Hank came with Mr. Kirby and the two other dogs to Saint John, New Brunswick, in 2013 but died of a gastric torsion shortly thereafter.
14. Mr. Kirby then adopted Jack, a South African Boerboel. Mr. Kirby confirmed that Jack is the dog that bit him in the 2015 incident.
15. On cross-examination, Mr. Kirby said he had average knowledge of dogs for an average owner.
16. Mr. Kirby indicated that Louisiana Catahoula dogs are rare and typically used as herding dogs.

B. Pre-Charge Conduct

(1) The November 21, 2015 Incident

(a) *Testimony of Cst. Tara Stewart*

13 Cst. Tara Stewart, of the Saint John Police Force, testified at the Voir Dire with respect to a previous incident that occurred on November 21, 2015 (the "November 21, 2015 Incident"), involving Mr. Kirby and dogs that were at his residence.

14 At the conclusion of the Voir Dire this Court found that the conversations Mr. Kirby had with Cst. Stewart were voluntary.

15 The following items were marked as exhibits at the Voir Dire:

- (a) C-1: jump-drive: statement of Mr. Kirby to Cst. Stewart (2015);

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- (b) C-2: caution form: filled out by Cst. Stewart and signed by Mr. Kirby (2015);
- (c) C-3: hand-written statement of Mr. Kirby (2015); and
- (d) C-4: 52 photographs of the November 21, 2015 Incident taken by Cst. M. Weir.

16 The Crown submitted a summary of the Voir Dire testimony of Cst. Tara Stewart to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Stewart undisputed. What evidence of Cst. Stewart, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Cst. Tara Stewart submitted by the Crown:

- 20. Cst. Stewart was dispatched to 149 Winslow St., Saint John, New Brunswick at approximately 8:48am. The dispatch information indicated that, "Michael Kirby had called 911, and advised that his dog had attacked him, had bitten him, and that he had to put it down with a rifle; he had shot his dog in the house."
- 21. Cst. Stewart arrived on scene in a marked police vehicle in a standard police uniform. Mr. Michael Kirby exited the residence and identified himself. He indicated he called police because he thought neighbors would have heard the shots and he knew he wasn't allowed to discharge a firearm that close to homes.
- 22. Cst. Stewart, while on scene, observed Mr. Michael Kirby's hand which had what appeared to be a dog bite wound. He had some punctures on his hand and there was blood running from his hand and to his upper arm.
- 23. Mr. Michael Kirby advised her that, "previously that morning, that his dog, he has three dogs, that one of them was playing with a dust mask is how he referred to it. He was doing construction, some demos at his home. He had instructed the dog to drop the mask. He tried to get the mask from the dog. The dog turned on him, bit his hand and his upper arm. He was able to exit the room leaving the dog behind him."
- 24. Cst. Stewart waited for Cst. Corrigan to go upstairs in the residence.
- 25. Michael Kirby advised that, "he was trying to give the dog a chance to cool down. At that point, in fear that the dog would retaliate or come at him again, he had loaded his .303 rifle. He said he waited approximately 35-45 minutes. At that point he went and let the dog out in hopes that it was calm. When he let it out, he looked at it and it had that same look in its eyes and that the dog was coming for him. He shot the dog once in the chest and didn't want to see the dog suffer so he shot it twice in the head." The described incident occurred upstairs in Mr. Kirby's home on 149 Winslow Street, Saint John, New Brunswick.
- 26. Cst. Stewart indicated that Exhibit C-4, photographs 1-4, were an accurate depiction of her observations of Mr. Kirby's injuries on November 21, 2015. She indicated that photograph 4 showed the puncture wounds from the teeth.
- 27. Cst. Corrigan arrived. Both officers went upstairs. To the left of the stairs, Mr. Kirby showed them the deceased dog. Sgt. Cowan arrived at scene.
- 28. Mr. Kirby had laid out the rifle he had used, the three shells, his PAL and his driver's license.
- 29. Jack, the dog that Mr. Kirby had shot was on the floor with blood running from it.
- 30. The two other dogs were in a separate room. Mr. Kirby didn't want the other dogs around.
- 31. Mr. Kirby advised he wanted to provide a statement. After he was finished at the hospital and made arrangements for the deceased dog, Mr. Kirby came in to provide a statement on November 22, 2015.
- 32. Mr. Kirby provided a voluntary statement on November 22, 2015 at 10:55am.

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33. Exhibit C-1 and C-3 are an accurate representation of his statement.
34. In the statement, Mr. Kirby indicated that Jack, the deceased dog, had had aggressive outbursts in the past.
35. Exhibit C-4 depict the scene Cst. Stewart attended on November 21, 2015. Several photographs show puncture wounds to Mr. Kirby's hand and upper arm. There were photographs of the deceased dog and the rifle that was used by Mr. Kirby to shoot the dog. Several photographs depict the location of the incident, at 149 Winslow St. showing the layout of the house and the construction/renovation that was taking place.
36. No charges were pursued for this incident.

(b) Testimony of Cst. Matthew Weir

17 Cst. Matthew Weir, of the Saint John Police Force, testified at the Voir Dire with respect to the November 21, 2015 Incident, involving Mr. Kirby at his home at 149 Winslow St., Saint John, New Brunswick.

18 The Crown submitted a summary of the Voir Dire testimony of Cst. Matthew Weir to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Weir undisputed. What evidence of Cst. Weir, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Cst. Matthew Weir submitted by the Crown:

38. Cst. Weir attended the scene in his capacity as a Forensic Identification Officer. He took various photographs marked as Exhibit C-4. The photographs are an accurate depiction of the incident involving Mr. Kirby and his dogs.
39. Cst. Weir seized an Enfield .303 rifle, a bolt-action 12-gauge shotgun, a magazine to a rifle, and some rounds.

(c) Testimony of Michael Kirby

19 Michael Kirby testified at the Trial about the November 21, 2015 Incident.

20 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

40. Michael Kirby confirmed he shot and killed the dog named Jack. Police responded to his house and called for EMTs to look at his arm where he had been bitten. Another officer came and took photographs. He had the gun laid out with his PAL. A Sergeant arrived, and Mr. Kirby talked to him about the incident. Mr. Kirby decline[d] to go in the ambulance because he wanted to arrange for Jack to be removed from the house.
41. He gave a statement to Cst. Tara Stewart (both video and written).
42. In addition to those statements, Mr. Kirby in his direct testimony added that he had hired professional training a year and a half before the incident by the name of Bev Wells. She was working at ABC Dog Training. This was for dog aggression because he would bark at other dogs while out on walks. He would see other dogs and bark at them (they would bark at him) and Mr. Kirby called this dog reactive. It was explained that he would go to the end of his leash and pull and focus on other dogs. Bev Wells did some training with him.
43. Danny and Georgie lived in downtown Toronto and were used to and had tons of exposure to people, places, other dogs and things. Mr. Kirby said he took it for granted that he did have to do the same things with Jack [to expose him]. Jack was 9 months old to a year when he started to show dog aggression.

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44. Bev helped with direction and basic training which seemed to work. Bev came out for one visit and the rest of the interaction was through email and conversation over the period of a couple months.
45. Jack improved for a time. Then there was a little bit of a reversion. At which point in time he started to re-direct. His anger or focus re-directed from one point to another which was concerning because Jack was now reacting to other dogs and then redirecting back and biting his leash. The concern was the escalation. As a result of this escalation, he contacted Ann Savoy. Mr. Kirby said he received a full program from Ann Savoy, which he followed, that was detailed and regimented. The underlying issue for why he contacted Ann Savoy in December 2014 was because Jack had redirected and bit him [Mr. Kirby] on the arm. Mr. Kirby received direction and instruction from Ann Savoy detailing training for Jack, including the type of training, the limits on the dog, how he was to behave in the house.
46. Danny and Georgie never had issues throughout this time.
47. In November 2015, there were no issues with Jack's aggression. He was fine. They were still following Ann's program.
48. On November 21, 2015, Danny and Georgie were present when Jack bit Mr. Kirby. Danny and Georgie were uninvolved and did not become excited when it happened. It happened quickly. After Mr. Kirby was bit, he backed out of the room leaving Danny and Georgie with Jack.
49. Mr. Kirby waited 10-15 minutes but was concerned if a fight broke out that Danny and Georgie would be in danger. Mr. Kirby was able to get Danny and Georgie out after about 5-10 minutes and Mr. Kirby placed the two dogs in the front left bedroom. He went into the room with Danny and Georgie and waited for 45 minutes to let Jack calm down.
50. Danny and Georgie continued to be good dogs after the incident.
51. Leading up to the 2018 incidents, Mr. Kirby was contacted about Alice and Frank in 2017. They were a referral rescue (brother and sister) and Mr. Kirby decided it was a good fit, they were just puppies. Mr. Kirby explained that they were born in late 2017 and he got them in the wintertime.
52. The four dogs got along.
53. The routine with the four dogs was two large walks on the lower West Side of Saint John, one in the morning and one in the evening. Their routine included walking down Marketplace and there is a baseball diamond there, there were a couple people who would walk their dogs down there. Once the city had taken some swinging gates off the fence, Mr. Kirby felt discouraged from going there.
54. Since 2016, he had always gone to the Port Authority area (train tracks) and walked there with Danny and Georgie. There was no one there on the weekends and it was routine to go there for their morning walk.
55. Mr. Kirby explained the train track area as fenced in until it links up with King Street, Saint John [see Exhibit D-1].
56. On cross-examination, Mr. Kirby confirmed that Jack had bitten him twice and had a history of aggression. Mr. Kirby confirmed that one bite indicated a history of aggression and it was a potentially dangerous situation. On re-direct, Mr. Kirby confirmed that there were also temperament issues that led to the conclusion.
57. Mr. Kirby confirmed he was able to spot the aggressive behaviour when the dog re-directed towards him and that he had the wherewithal to hire two trainers. On re-direct, Mr. Kirby said the first trainer was hired because Jack was reactive to other dogs.
58. Mr. Kirby considered this a life or death situation after being bite one time by one dog. On re-direct, Mr. Kirby confirmed that Jack was a big dog and the four dogs (Alice, Frank, Georgie and Danny) couldn't raise to that risk level where he would be concerned for his safety, not even a "scintilla".

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[Emphasis and typographical correction mine.]

(2) The June 20, 2018 Incident

(a) *Testimony of Cst. Brent Haines*

21 Cst. Brent Haines, of the Saint John Police Force, testified at the Voir Dire with respect to a previous uncharged incident that allegedly occurred on June 20, 2018 (the "June 20, 2018 Incident"), and allegedly involved Mr. Kirby and his dogs.

22 At the conclusion of the Voir Dire this Court found that the conversations Mr. Kirby had with Cst. Haines were voluntary.

23 The Crown submitted a summary of the Voir Dire testimony of Cst. Brent Haines to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Haines undisputed. What evidence of Cst. Haines, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Cst. Brent Haines submitted by the Crown:

61. Cst. Haines was dispatched at approximately 12:34hrs to an incident at American Iron and Metal (AIM), situated at 145 Gateway Street, Saint John, New Brunswick. The dispatch information indicated that a male was bitten by dogs. Information indicated the dog owner had left but would return later.
62. Cst. Haines turned onto Gateway St., in vicinity of the Port, he noted a small group of people, one of whom was the victim. He exited his patrol vehicle and spoke with the victim about what had occurred. The victim was identified as Dominique Saliou. The owner of the dogs returned in a mini-van and was identified by witnesses. The conversations between the owner and others got heated. Cst. Haines spoke with the owner of the dogs to deescalate the situation.
63. The owner identified himself to Cst. Haines as Michael Kirby.
64. Mr. Kirby indicated that he was walking down in the area of Gateway St. and four of his dogs were off-leash and one dog was on-leash. The dogs spotted an individual down Gateway St. The dogs that were not on leash took off running towards Dominique Saliou. Once they arrived at him they barked and jumped at him.
65. Cst. Haines indicated that Mr. Kirby downplayed the situation and didn't seem to think anyone was bitten at this point. Mr. Kirby said he gained control of the dogs, put them in his vehicle and returned the dogs home and returned to the scene of the incident.
66. Cst. Haines obtained a statement from the victim, Dominique Saliou.
67. Cst. Haines identified Exhibit C-5, photograph 1, as the victim Dominique Saliou. Cst. Haines described scratches and abrasions on the victim's back. He saw what appeared to be teeth marks and tears in fabric of the clothes worn by the victim and described several abrasions on his legs.
68. Cst. Haines returned back to the office after the incident, completed his report and contacted the SPCA. He spoke with Joan Richardson from the SPCA. He gave details of the incident and the individuals involved.

[Typographical corrections mine.]

(b) *Testimony of Sgt. Stuart Osborne*

24 Sgt. Stuart Osborne, of the Saint John Police Force, testified at the Voir Dire with respect to the June 20, 2018 Incident, that allegedly involved Mr. Kirby and his dogs.

25 The Crown submitted a summary of the Voir Dire testimony of Sgt. Stuart Osborne to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Sgt. Osborne undisputed. What evidence of Sgt. Osborne, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Sgt. Stuart Osborne submitted by the Crown:

70. Sgt. Osborne was contacted by Cst. Brent Haines at approximately 12:45hrs to provide assistance with an incident that had occurred at or near Gateway St., Saint John, NB. He spoke with Cst. Haines upon arrival and was introduced to Dominique Saliou. Sgt. Osborne learned that the victim, Dominique Saliou had several dog bites and he was to take photographs of him.
71. Exhibit C-5 are photographs of the victim, Dominique Saliou, taken by Sgt. Osborne on scene.
72. Sgt. Osborne took photographs of puncture wounds on the victim's shoulders. He was able to observe the holes in the victim's shirt. Sgt. Osborne also took photographs of the victim's left calve that showed puncture wounds.
73. Sgt. Osborne described various puncture wounds observed on Dominique Saliou's body. The wounds were consistent with the victim's description of being attacked by dogs.
74. Sgt. Osborne indicated that the victim also dropped his phone during the incident, when the dogs were attacking him.

[Emphasis mine.]

26 On cross-examination, Sgt. Osborne testified that he did not recall seeing injuries on Mr. Saliou's hands and that if he saw injuries there he would have taken pictures of them. He further testified that Mr. Saliou did not bring any injuries on his hands to his attention.

(c) Medical Records from Horizon Health Network for Dominique Saliou

27 Exhibit C-6 are the medical records from Horizon Health Network for Mr. Dominique Saliou from June 20, 2018. The medical records indicate that Dominique Saliou presented to the hospital with puncture wounds and scratches.

(d) Testimony of Dominique Saliou

28 Dominique Saliou testified at the Voir Dire with respect to the June 20, 2018 Incident, that allegedly involved Mr. Kirby and his dogs, wherein he was the alleged victim of a dog attack.

29 The Crown submitted a summary of the Voir Dire testimony of Dominique Saliou to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Dominique Saliou undisputed. What evidence of Dominique Saliou, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Dominique Saliou submitted by the Crown:

77. Dominique Saliou was working on June 20, 2018 at the Port in Saint John, near Gateway Street, Saint John, NB.
78. At 12:10pm, he was attacked. He was leaving the Port crossing Gateway Street to go to Tim Hortons. When he crossed the road, he saw a man with seven dogs, approximately 100 meters away. When the dogs were about 25 meters away, Dominique Saliou could tell the dogs were aggressive, running fast and showing their teeth.

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79. The dogs that attacked him were black in color. Some were a bit lighter. The man had some of the dogs on leash, but some were off-leash. None of the off-leash dogs wore a muzzle. One or more of the dogs was wearing a red collar.
80. The dogs that were off-leash started to run towards Mr. Saliou. They picked up speed. He understood at that time that they weren't friendly. Mr. Saliou yelled at the owner to control the dogs. The man did nothing and didn't say anything. The dogs came up to Mr. Saliou. Mr. Saliou described being surrounded by dogs. He had no way to protect himself. At the start, the dogs bit him one at a time on his legs. He yelled at the owner. At that moment, the dogs became more violent. A dog jumped on him and Mr. Saliou fell to the ground. He assumed the fetal position. He was trying to protect his face. The dogs got more and more aggressive biting him. He thought that was going to be it for him.
81. When Dominique was on the ground he could feel their teeth piercing his skin.
82. Luckily, Mr. Saliou heard a vehicle honking. It was his colleague. His colleague stopped at the scene. Without his colleague he doesn't know what he would have done.
83. Mr. Saliou identified Mr. Kirby as the man at the preliminary hearing. Identification of Mr. Kirby is not an issue with respect to the June 20, 2018 incident.
84. Michael Kirby did nothing during the attack.
85. Dominique Saliou described the dogs as black in color, medium sized. Four of the five dogs were black. They didn't appear to be attack dogs. During the attack, they were organized, and bit one at a time. In total, he recalled there were seven dogs; two on leash and five off-leash. Dominique was quite certain five dogs attacked him.
86. Dominique Saliou said he was bit several times but there were five aggressive/serious bites. The dogs became more aggressive once he was on the ground. He thought the attack lasted 3-5 minutes; "it was a long situation to live." He thought he was going to die. From the time Dominique's colleague arrived until Mr. Kirby arrived to get his dogs, it was about 5 minutes. Mr. Kirby approached in a vehicle.
87. There was time for the owner to call his dogs back. Dominique Saliou confirmed he did not hear Mr. Kirby call the dogs.
88. The dogs returned to Mr. Kirby because they appeared scared of Dominique's colleague's vehicle. Dominique Saliou testified that the dogs got in Mr. Kirby's vehicle. Mr. Kirby said, "the dogs were just playing."
89. Mr. Kirby knew the police were called and left the scene in his vehicle with the dogs. Jeremy Dehondt followed Mr. Kirby.
90. Mr. Kirby returned to the scene and Mr. Kirby dealt with the police.
91. Dominique Saliou indicated that he had bite marks on his back, calve and thigh. He identified his injuries as depicted in Exhibit C-5, confirming they were bite marks from the incident. He confirmed he went to the hospital for medical treatment. The bite marks scarred over in a month.
92. Dominique Saliou indicated that Exhibit C-8 (Trial Exhibit C-11 photographs) depicted the dogs that attacked him. He recognized the shape, the body, and the color of the dogs. These dogs "strongly resemble" the dogs that attacked him.
93. With respect to Exhibit C-9, Dominique recognized the dogs in the photographs from the attack, with the exception of photograph 4, which he could not recall. He indicated they "looked similar to the dogs that attacked him."

[Emphasis mine.]

(e) *Testimony of Jeremy Dehondt*

30 Jeremy Dehondt testified at the Voir Dire with respect to the June 20, 2018 Incident, that allegedly involved Mr. Kirby and his dogs, wherein he allegedly witnessed a co-worker, Dominique Saliou, being attacked by dogs.

31 The Crown submitted a summary of the Voir Dire testimony of Jeremy Dehondt to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Jeremy Dehondt undisputed. What evidence of Jeremy Dehondt, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Jeremy Dehondt submitted by the Crown:

95. Mr. Dehondt was working at the Port of Saint John, New Brunswick on June 20, 2018. At lunchtime he was returning to his office when he saw two men, one of whom was surrounded by dogs. A couple meters away, the other man was trying to control the dogs. This all occurred on Gateway Street.
96. Mr. Dehondt thought that there were between five and six dogs. As he approached, he saw the man who was being circled by the dogs and it was his colleague Dominique Saliou. There were several black dogs and one was tan. They were not purebreds. When they circled Dominique, they were nipping him and once he fell to his knees, they were biting him one at a time. When he got close, Dominique was laying down and "the dogs were attacking him like a pack of wolves would."
97. The owner was trying to grab the dogs one by one. None of the dogs respected the owner's orders. They all continued to attack Dominique.
98. Mr. Dehondt tried to scare the dogs with his horn and his vehicle. The dogs were still circling Dominique. Mr. Dehondt drove around in circles to try to get the dogs away from Dominique, who was still on the ground. He opened his passenger door and Dominique was able to get in as the owner showed up. Dominique was in a state of shock.
99. The dogs were afraid of the vehicle and backed off. The attack lasted at least five minutes. None of the dogs that attacked Dominique had leashes on. None were muzzled.

[10]0. Mr. Dehondt said the dogs bit Dominique five to six times on his legs, once or twice on his back and they were trying to get at his neck. Dominique had bite marks on his legs and back that Mr. Dehondt observed.

[10]1. The owner of the dogs appeared, and he was able to get the dogs into his vehicle. Once the dogs were in the vehicle, Mr. Dehondt was able to get Dominique into the vehicle as well.

[10]2. Mr. Dehondt and Dominique got out of the vehicle. Mr. Dehondt called the police and the owner of the dogs returned to his vehicle. There were conversations between the parties. Mr. Dehondt indicated he was angry because Mr. Kirby was trying to leave. Mr. Kirby tried to minimize the incident saying it wasn't serious.

103. The owner of the dogs, Mr. Kirby, stayed five to ten minutes. The dogs were in Mr. Kirby's vehicle and they were barking. Mr. Kirby started to leave in his vehicle (grey family car).

104. Mr. Dehondt got back into his vehicle and followed Mr. Kirby who was driving away. Dominique stayed at Gateway Street with another colleague who had arrived on scene.

[...]

107. Mr. Dehondt indicated that the dogs in Exhibit C-8 (Trial Exhibit C-11 photographs) resembled the dogs that attacked Dominique.

108. Mr. Dehondt also indicated that the dogs depicted in Exhibit C-9 also resembled the type of dogs that attacked Dominique.

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[Typographical corrections, revisions and emphasis mine.]

(f) *Testimony of Joan Richardson*

32 Joan Richardson, Shelter Manager for the SPCA Saint John, testified that she spoke to Mr. Kirby about the June 20, 2018 Incident.

33 At the conclusion of the Voir Dire this Court found that the statements given by Mr. Kirby to Joan Richardson were voluntary.

34 The Crown submitted a summary of the Voir Dire testimony of Joan Richardson to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this extrinsic evidence is admissible at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Joan Richardson undisputed. What evidence of Joan Richardson, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Joan Richardson submitted by the Crown:

111. Joan Richardson was made aware of by-law infractions and dog bites when she was called by Cst. Haines on June 20, 2018. As a result of the phone call with Cst. Haines, Joan Richardson called Michael Kirby on June 25, 2018.

112. On June 25, 2018, Mr. Kirby indicated to Joan Richardson the following:

- a) There were five dogs with him at the time of the incident on June 20, 2018;
- b) Four of the dogs were owned by Mr. Kirby and one was owned by a friend;
- c) Mr. Kirby indicated his four dogs were off leash and he had his friend's dog on a leash;
- d) Mr. Kirby indicated that his dogs always stay with him and his dogs were just going up to introduce themselves to the man involved in the incident; and
- e) Mr. Kirby indicated that he thought the man was exaggerating his injuries.

[Emphasis mine.]

35 Joan Richardson testified that Mr. Kirby was made aware that all of his dogs had to be leashed when off of his property.

(g) *Testimony of Michael Kirby*

36 Mr. Kirby testified at the Trial about the June 20, 2018 Incident.

37 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

114. Michael Kirby testified that Exhibit D-1 shows the area where the incident in June 2018 occurred.

115. Exhibit D-1 shows the route that Mr. Kirby walked everyday with his dogs between 2016 until August 2018. He would take the dogs year-round. It is by Gateway Street that he would run the dogs off-leash.

116. Mr. Kirby described a fence with openings (gates) going to AIM and the Port Authority. He testified that the gates were never open in the mornings until the businesses opened at 8:30 a.m. or 9 a.m. He further described the space as a corridor for him to exercise his dogs off-leash (no thru traffic). Mr. Kirby said that the western side of the street has a fence beginning at King Street and goes down and around to the Crosb[y] Plant uninterrupted.

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117. Mr. Kirby indicated that in the mornings there was no one ever there, including foot traffic or vehicle traffic. He would see an elderly gentleman, checking the gates for the Port Authority. His presence was constant but in random intervals in the mornings when Mr. Kirby was there. The gentleman would be in his truck and get out to check the gates. Mr. Kirby doesn't recall any interaction with the dogs and this gentleman.
118. On June 20, 2018, Mr. Kirby used the Port Authority area with his dogs off-leash during the daytime hours and there was an interaction with Mr. Saliou. He maintained his off-leash time was in the morning. The interaction was just after lunch time and it was a break from his routine because he had an impromptu tee time so he took the dogs out to pee off-leash.
119. Mr. Kirby put the four dogs and the neighbour's dog in the car and took them down to the Port Authority area parking his van in front of the hanger by the greenbelt.
120. Mr. Kirby intended to let the dogs relieve themselves (have a quick pee) and run around for 5 minutes. He had taken the dogs off-leash during the day prior to June 20, 2018, but it wasn't routine, maybe once or twice a month.
121. Mr. Kirby indicated that his four dogs bailed out of the car and started to go to the green patch [greenbelt]. He would estimate that he was within a 30-foot radius of the dogs off-leash. He kept the neighbour's dog on a leash with him.
122. After about 2-4 minutes, the dogs go down towards the "hanger gate" and there was a guy walking towards them. The guy was coming out of the gate and turning right. The male started walking towards them on Gateway Street and Mr. Kirby says he is 30-50 meters from him.
123. Mr. Kirby testified he saw the dogs going towards the male and yelled the dogs are friendly. The dogs get to the male and the male starts to shoo them away, which is exciting the dogs, although they are not jumping or barking, they are "circling him so to speak".
124. Georgie, Danny, Alice and Frank were the dogs involved.
125. Mr. Kirby said he was not quite halfway to him when the male starts to yell and become frantic. Mr. Kirby said, "don't yell, they are fine". Mr. Kirby moves faster because there is now a situation.
126. Mr. Kirby said the male tripped and fell backwards onto his back onto the road. Mr. Kirby said as soon as the male tripped, he was right there and giving the dog commands. The dogs circled him and finally followed Mr. Kirby to the car. The dogs all got into the car and Mr. Kirby drove towards the male.
127. Mr. Kirby indicated that the male had now dusted himself off and was standing. A white jeep had come to the area as Mr. Kirby was collecting up the dogs, the jeep had beeped and honked. The commotion had caused people to gather outside the hanger on the other side of the fence. Mr. Kirby said he approached Mr. Saliou to ask if he was okay and at that point he is frantic, grabbing his hands saying "those dogs were trying to kill me, they are trying to tear my throat out". Mr. Kirby said he looked at the male and there were no marks on him, no blood, no tearing of his clothes. Mr. Kirby looked at him from behind to see if there was any tearing.
128. Mr. Kirby said he was telling the man he was "okay".
129. Mr. Kirby said Mr. Saliou was gesturing towards his upper body. But Mr. Kirby didn't see any damage. He saw no dog bites on him anywhere.
130. The man from the jeep [Jeremy Dehondt] was outside of the jeep, yelling we are calling the cops. Mr. Kirby calls 911 and asks if he can take the dogs home because they are hot in the car. He provided his address and name.
131. Mr. Kirby said the man in the jeep is now screaming at him, saying "you can't go, you can't go". Mr. Kirby left to take the dogs home.

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132. Mr. Kirby described the dogs' interaction with Mr. Saliou. He maintained the dogs were not jumping, "they were circling him as he was running around, following him as a group, but not jumping up on him; the dogs wouldn't jump". Mr. Saliou was shooing them away.
133. Mr. Kirby maintained that he was looking at Mr. Saliou for injuries (upper body and lower body) and he had none.
134. Mr. Kirby maintained that no one mentioned a dog bite during any of his interactions. Mr. Kirby's only concern about the incident was that the dogs had caused the individual to become frantic.
135. He said the dogs followed his commands and really the dogs had lost interest in Mr. Saliou when he was on the ground, because he had curled up into the fetal position.
136. Mr. Kirby indicated that his focus was on the dogs and Mr. Saliou and the jeep was only in his peripherals.
137. Mr. Kirby returned to the scene and spoke with Cst. Haines. Cst. Haines was listening to Mr. Kirby and writing down notes. Mr. Kirby told him the dogs were playing and he didn't believe the male was injured. Cst. Haines phoned the SPCA.
138. Mr. Kirby said Cst. Haines told him the victim was a foreign temporary worker and he was lucky that the SPCA wasn't going to enforce any by-law infractions.
139. Mr. Kirby said he received a message from Joan Richardson and called her back. He said the conversation was about licensing and vaccination. A couple months went by and he still didn't have licences until approximately October.
140. Mr. Kirby maintained that he never knew anything about Mr. Saliou or his injuries.
141. Mr. Kirby confirmed that he never saw any physical contact between his dogs and Mr. Saliou whatsoever. There was no jumping, no mouth open, no grabbing of arms or legs.
142. As a result of the incident, Mr. Kirby didn't take his dogs there anymore apart from the mornings. If he was there during the day, the dogs were on leash because the gates were open, and he had the one incident.
143. Mr. Kirby indicated that he didn't want a repeat of an incident where the dogs charge up to someone and they become frantic and scared. You don't want to subject anyone to that experience. "Keeping them on leash verses having them off leash solves this problem by-and-large". Despite this, he still went to this area in the morning.
144. He didn't consider the dogs aggressive dogs at this point. He said he was trying to be aware that he is a dog person but some people aren't and "the dogs have to be under control at all times and keeping them on a leash".
145. On cross-examination Mr. Kirby confirmed that four months after this attack he was aware the male had suffered bites. He still denied seeing any of his dogs biting.
146. Mr. Kirby examined Mr. Saliou prior to leaving the scene. Mr. Kirby denied seeing any marks or tears in clothing. Mr. Kirby confirmed that the male didn't unclthe at the time of his examination. Mr. Kirby acknowledged that there were small indentations on the back of Mr. Saliou's t-shirt but said the officer wasn't aware Mr. Saliou had fallen backwards.
147. Mr. Kirby confirmed that the injuries on Mr. Saliou were "of course caused by his dogs, they were the only dogs around him unless he somehow faked those injuries, it is obvious they were caused by the dogs".
148. Mr. Kirby confirmed that he had an unobstructed view of the attack on Mr. Saliou. Mr. Kirby confirmed that there was no reason he couldn't see what was going on. He said they trotted towards him. He said as they were approaching, the dogs got around him and he starts to panic when they circled him.

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149. Mr. Kirby denied telling Cst. Haines the dogs were jumping up at Mr. Saliou but confirmed that Cst. Haines was taking notes when they spoke. None of the dogs' paws left the ground in a jumping motion, but they were excited. Mr. Kirby agreed the dogs were circling him and further agreed that if they had been bearing their teeth as described by Mr. Saliou that would be aggressive behaviour. He denied the dogs bearing their teeth. Mr. Kirby said he saw the dogs sniff Mr. Saliou upon initial greeting but stated that at no point in time did any of the four dogs open their mouths and contact Mr. Saliou.
150. Mr. Kirby said Mr. Saliou tripped over his own feet. The dogs didn't trip him and never jumped up on him causing him to fall.
151. Mr. Kirby confirmed that the man that was attacked was alleging injuries at the time.
152. Mr. Kirby denied that dogs circling people is aggressive behaviour.
153. Despite acknowledging injuries on Mr. Saliou as obvious, Mr. Kirby denied seeing his dogs bite Mr. Saliou. He confirmed he watched the whole time and that Mr. Saliou had bite marks on him.
154. Mr. Kirby was concerned enough, with the man in the fetal position, that he removed his dogs from the situation.
155. Mr. Kirby confirmed that human flesh doesn't stand up well to a dog that decides to start biting.
156. Once Mr. Kirby received disclosure for the by-law infractions on October 5, 2018, he was aware of Mr. Saliou's wounds.
157. Mr. Kirby said he told Cst. Haines "he didn't believe the man was injured" and confirmed he did no follow-up other than his own visual examination to come to this conclusion.
158. Mr. Kirby confirmed that after this date, he didn't take the dogs there in the daytime off-leash because he didn't want the dogs "scaring people".
159. In discussing the location, Mr. Kirby confirmed it was a busy Port.
160. Mr. Kirby confirmed that Exhibit C-19 is where he passed everyday when entering into the Port Authority area. [...]
161. Mr. Kirby denied that Joan Richardson of the SPCA told him that the dogs needed to be on-leash when off his property. Mr. Kirby then denied speaking to Joan Richardson on June 25, 2018, contrary to her testimony and his previous testimony on direct. He confirmed that he would have remembered this conversation.
162. The area [the Port Authority area] was fenced on both sides. Mr. Kirby confirmed he had no control of the gates to the fenced off Port area. He had no control over who came onto Gateway Street. Mr. Kirby confirmed he had no idea about the maintenance of the fencing system on either side of the area.
163. Mr. Kirby confirmed he had no control over traffic or pedestrians in this area.
164. Mr. Kirby confirmed that anyone could walk into the area. He said he couldn't speak about the area down towards the Molasses Plant because he had never been down there past the AIM plant opening. He is unable to say what fencing there is at the far end because he has never gone down there. He only knows the area is contained on the north and south sides with a large opening at King Street.
165. Mr. Kirby said he couldn't speak to how people gain access to this area or come to be there [Port Area between fencing].
166. On re-direct, Mr. Kirby said he didn't see the indents in Mr. Saliou's shirt and didn't see the tears in his jeans. He testified that the dogs weren't working in concert circling Mr. Saliou. Mr. Kirby re-confirmed that the dogs did not make contact with Mr. Saliou when he was on the ground.

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167. On re-direct, Mr. Kirby returned to his previous testimony and indicated that he did speak to Joan Richardson about this event, and that leashes could have been spoken about. He further confirmed that biting or attempted biting could have been discussed. Mr. Kirby confirmed that if the issue of biting was raised, he would have a concern as a dog owner.

[Typographical correction, revision and emphasis mine.]

C. Charged Conduct

(1) The August 22, 2018 Incident

(a) Testimony of Garfield McPhee

38 Garfield McPhee testified at the Trial with respect to an incident that allegedly occurred on August 22, 2018 (the August 22, 2018 Incident"), and allegedly involved Mr. Kirby and his dogs, wherein he was the alleged victim of a dog attack.

39 The Crown submitted a summary of the Trial testimony of Garfield McPhee to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Garfield McPhee undisputed. What evidence of Garfield McPhee, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Garfield McPhee submitted by the Crown:

169. Mr. McPhee was working on the tugboats as a deckhand at Pier 12 of the Port of Saint John, NB. On August 22, 2018, he was working a 14-day rotation. He woke up at about 5 a.m. He decided to go walk to Tim Hortons to get a coffee. He left the boat at the Port and headed to the West Side Tim Hortons. There was fencing around the Port with various access points.

170. He exited the gate at the Port and headed to Tim Hortons on the east side of the road.

171. As he walked he was attacked by dogs. He was on the side of the road, about five minutes away from the tugboat. It was just coming on dusk and he was close to the AIMS metal plant by the train tracks.

172. He said he saw the dogs and it happened so quickly. He didn't recall if there was barking when he saw the first dog. Then he saw more dogs, and they were making a semi-circle around him. He knew he was "in a bad spot" and being attacked; "I knew that this was bad." "You're saving your life."

173. He didn't know how many dogs were involved at that time. He counted six dogs afterwards. The dogs looked like a lab to him. It was dark out and the dogs were dark (black).

[174.] He described the attack: "The first dog bit me, it either bit me or I turned and it bit me, I turned to run. There was a transport on the side of the road... I got bit before I started running." He started running to a transport truck and he knew he "had to get out of there because I felt my life, I either had to get outta there or; I knew this was not a good situation."

[175.] Mr. McPhee described "running for his life."

[176.] He tried to get on the transport. He was running and looking for a way to get on the transport. Initially he ran to the side, but then he ran around the back of the transport, there was a bar that held the gates shut. "It was enough." He was able to grab onto that and pull himself up and as he did that he could feel the dogs biting him in the back of the legs. He was able to climb in the back of the transport. It happened quick.

177. He thought that there were around a half-a-dozen bites and more when getting on the transport. None of the dogs had leashes or muzzles. He indicated he could tell there was more than one dog biting him.

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178. He saw the owner when he was on the back of the truck. At that point, he could "feel the blood running and I knew I was bit, I knew I was bit bad." The owner came running up. The dogs continued to circle the transport. While up on the truck, Mr. McPhee counted six dogs. The owner, identified as Michael Kirby, started leashing the dogs about 30 seconds after Mr. McPhee got up on the truck.

179. Mr. McPhee told Mr. Kirby that the dogs had bit him and to call an ambulance. Mr. Kirby said sorry and left without calling. Mr. McPhee didn't know if his cellphone was charged. He knew he needed to get himself an ambulance. He was able to call 911 himself.

180. Mr. Kirby took off on foot with the dogs. He headed towards the highway walking and looped back. Mr. McPhee didn't see Mr. Kirby again that day. Given the path Mr. Kirby took, Mr. McPhee said it appeared as though he was trying to hide.

181. Another transport pulled in. Mr. McPhee climbed down, and the ambulance was there shortly thereafter.

182. Mr. McPhee went to the hospital in the ambulance. Trial Exhibit C-5 are the medical records of Mr. Garfield McPhee from August 22, 2018. The records indicate that Mr. McPhee presented at the hospital that day with multiple bite marks/bruising, puncture wounds to the back of both legs, a scratch on the right glute, and puncture wound to the right hand.

183. Photographs in Trial Exhibit C-3 (red tab) were taken by Cst. Matthew Weir on August 29, 2018 (week after the dog attack). These photographs depict the injuries of Garfield McPhee.

184. Mr. McPhee described his injuries in Trial Exhibit C-3 (red tab). He said he was extremely sore for about a week. "The worst part, the whole thing was not a good experience, but worrying about an infection caused a lot of anxiety". He had stitches for the puncture wounds at the hospital and saw a doctor for follow-up twice. He thought he had about ten to twelve puncture wounds, maybe more.

185. Trial Exhibit C-4 are also photographs of Mr. McPhee's injuries taken the day of the incident. Mr. McPhee was unsure if the puncture wound on his hand was from the dogs or from climbing up on the truck. The puncture wounds on his legs were all from the dogs.

186. The bruising on his legs was described as very painful. He said, "it's funny, when I was getting bit, I guess it was the adrenaline, there was very little to no pain. You could feel the teeth going into your skin and feel the bite, but you felt no pain. Afterwards on the truck... the pain..."

187. He described the first three or four days were the worst. He was unable to work the final seven days of his fourteen-day rotation because the pain was too bad.

188. He still has scars.

189. The police responded and took photos and statements. Mr. Kirby had left the scene.

[Emphasis and typographical corrections mine.]

40 I note that Mr. McPhee testified that four to six dogs were involved in the alleged attack.

41 The Defence correctly notes that Mr. McPhee was not able to testify as to which dog(s) bit him or whether any of the dogs belonged to Mr. Kirby.

(b) Testimony of Cst. Patti Pattman

42 Cst. Patti Pittman was dispatched on August 22, 2018 at approximately 6:15hrs to an alleged dog bite attack. The incident took place in proximity to Tilley Lane and Gateway Street in Saint John, NB. She arrived on scene and identified the alleged victim, Garfield McPhee.

(c) Testimony of Cst. Donnie Shannon

43 Cst. Donnie Shannon testified at the Trial with respect to the August 22, 2018 Incident, that allegedly involved Mr. Kirby and his dogs.

44 The Crown submitted a summary of the Trial testimony of Cst. Donnie Shannon to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Donnie Shannon undisputed. What evidence of Cst. Donnie Shannon, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Cst. Donnie Shannon submitted by the Crown:

192. At 16h26, Cst. Shannon was requested to attend at 149 Winslow St with Cst. Pittman. He was advised that the dogs involved in the morning's attack were at this location. Cst. Shannon described this location as walking distance to the Tim Hortons or the Port of Saint John on the west side.

193. Cst. Shannon attended at 149 Winslow Street. He described three dogs in the second storey window. He described them as "very aggressive dogs". He thought one would jump out. No one answered when Cst. Pittman yelled out, but a window did close, indicating someone was inside.

(d) Testimony of Joan Richardson

45 Joan Richardson, Shelter Manager for the SPCA Saint John, testified at the Voir Dire that she spoke to Mr. Kirby on August 27, 2018 about the August 22, 2018 Incident. At the conclusion of the Voir Dire this Court found that the statements given by Mr. Kirby to Joan Richardson were voluntary.

46 The Crown submitted a summary of the Voir Dire testimony of Joan Richardson to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Joan Richardson undisputed. What evidence of Joan Richardson, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Joan Richardson submitted by the Crown:

195. Cst. Johnson made Joan Richardson aware of an incident involving Mr. Kirby and his dogs. As a result of the phone call with Cst. Johnson, Joan Richardson called Michael Kirby on August 27, 2018.

196. On August 27, 2018, Mr. Kirby indicated to Joan Richardson the following:

- a) Mr. Kirby was aware of the incident that took place on August 22, 2018;
- b) Mr. Kirby had not licensed his dogs;
- c) Mr. Kirby indicated some of his dogs were not on a leash;
- d) Mr. Kirby indicated that the dogs involved the incident were his four dogs; and
- e) Mr. Kirby indicated they were just running up to say hello to the man.

[Emphasis mine.]

47 Joan Richardson testified that she indicated to Mr. Kirby that his dogs could not be running at large. The Crown submits that this assertion by Joan Richardson will be relied upon for all counts in the Indictment that post-date this conversation.

(e) Testimony of Michael Kirby

48 Michael Kirby testified at the Trial about the August 22, 2019 Incident.

49 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

198. Mr. Kirby testified that on August 22, 2018 he took the dogs off-leash at the Port Authority, Gateway Street (as depicted in D-1) and they had an interaction with Mr. McPhee.
199. Typically, he would take the dogs off leash once in the Gateway area (about 100 yards from King Street). The dogs would be close to him or up to 50-60 yards away from him. They would loop back around AIM and he would put the dogs back on leash before King Street because there were people accessing the Port 24 hours a day [security gate on D-1].
200. It was a typical morning and the dogs were off leash by the greenbelt. Danny and Georgie were close to him and "the puppies" were off by the train tracks. Mr. Kirby said he was on the greenbelt [short of the hanger gate on D-1]. Then he heard a yelping (single cry of pain). He looked across to the unnamed street to where the transport trucks line up in the middle of the night and the driver's sleep in their sleeper carriers waiting for AIM to open.
201. He looked to the very last tractor trailer that happened to be close to a light standard. He was about 100-115 yards away from the two dogs [Alice and Frank] and could see the dogs next to a man who was kicking at them.
202. Mr. Kirby said he started to run and so did Danny and Georgie towards the incident. He fell on the way twice. Mr. Kirby confirmed that the four dogs were there when he arrived and the male had been at the front of the cab area, and the male ran to the back of the cab and climbed up the back of the trailer. Mr. Kirby estimated he was approximately 25 yards away when the man climbed up the back of the trailer.
203. After Mr. Kirby got up from the second fall is when he saw the male finish climbing up the back of the trailer and the dogs were around the backside. At that time Mr. Kirby confirmed he was about 25 yards away but could see "pretty well" because of the street lights, although the lights aren't super bright.
204. The truck the male climbed up was an open wired mesh tractor trailer with scrap metal. You could see into the trailer and it was un-tarped. This particular tractor trailer was full of structural angle iron. This was structural angle iron (I-shaped bar) that was 1.5-2-inch bars in 6-7-foot lengths. The metal was all jumbled.
205. The dogs were at the back of the trailer. Mr. Kirby testified that the male in the back of the trailer was swearing at him, yelling "your fucking dogs" and trying to dislodge a chu[n]k of metal. Mr. Kirby also says that the man's hand slip off a piece of metal and Mr. Kirby can see he put a slit in his hand. Mr. Kirby could see the "pink flesh", "open wound" and the male grabbing his hand. The male yells "I am gonna bash your dogs' heads in and goes back to trying to dislodge metal."
206. Mr. Kirby said he just left the site with the dogs. Mr. Kirby indicated he wasn't waiting to have metal thrown at him from 10 feet above. He didn't get any information from Mr. McPhee about what happened.
207. Mr. Kirby didn't see any physical contact between Mr. McPhee and his dogs. Mr. Kirby confirmed he observed: Mr. McPhee going from the cab area around back and the dogs following him and him climbing up the back of the trailer and getting in. He could see his dogs "distanced" around Mr. McPhee.
208. Mr. Kirby maintains that Mr. McPhee never told him about physical contact with the dogs. But these instances caused Mr. Kirby concern because it was his dogs having "negative interactions with people".

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209. As a result of this episode, he never took the dogs there off-leash again but claims he didn't know of the injury until he was charged in late September 2018 (September 21, 2018).
210. Mr. Kirby agreed and acknowledged that after this incident he was aware of two "dramatic" incidents with people and his dogs.
211. As a result of keeping the dogs on leash at all times, Mr. Kirby would take the dogs on longer walks for exercise.
212. Mr. Kirby didn't consider any training for the dogs at this time. He just was "more aware of the conditions they were in" and the people they would meet.
213. On cross-examination Mr. Kirby indicated he modified his routine when he knew people could be around during business hours. On August 22, 2018, he confirmed he had no control over who entered into the fenced in area. He confirmed he had no control over the workers coming and going that day and he had no way of restricting any public access. He made no inquiries about the workers or the business hours. He still hadn't been down to the end of the tracks so he didn't know the activity or anything about the fencing down that way, to the extent he didn't know there was a tug repair [business] down there.
214. Mr. Kirby did not leash his dogs or muzzle the dogs that morning.
215. Mr. Kirby denied having any knowledge at this time that the dogs were involved in an alleged attack previously on Mr. Saliou in this area because his visual examination indicated otherwise, despite Mr. Saliou's assertions at the time.
216. Mr. Kirby confirmed that his dogs attacked again on August 22, 2018.
217. Mr. Kirby confirmed that the day of the attack on Mr. McPhee, it was well-lit and there was nothing obstructing his view on this occasion.
218. As the male was climbing up the back of the transport truck, the dogs were right at the tailgate.
219. Mr. Kirby said he went over because there was concern; this was not normal behaviour and that is of course why he went over to collect the dogs. Mr. Kirby acknowledged that these dogs were herding breeds and so if you run the dogs are going to chase you. Mr. Kirby acknowledged that if someone was spooked by his pack of dogs off-leash and ran, because they are herding dogs, they would chase them. He called this prey-drive (prey-drive is to attack, bite, and kill something, tear it apart like a pack of wolves) but later changed the term herding drive (to follow something).
220. Mr. Kirby confirmed that when dogs herd, they get behind and follow. He would not acknowledge this was circling.
221. Mr. Kirby denied the male told him he was injured. He said the male was angry because he had just been chased up the back of a transport truck.
222. Mr. Kirby said he was within 25 meters with an unobstructed view and he didn't see any biting when the male was climbing up the back of the trailer. He then said his view would have been perpendicular to the back of the trailer. Mr. Kirby said he never saw the dogs latch onto him. Mr. Kirby did confirm that he was able to see Mr. McPhee climb the back of the trailer.
223. Mr. Kirby agreed that Mr. McPhee was bitten several times and he confirmed he missed (didn't see) any of the biting. Mr. Kirby indicated what he saw on Mr. McPhee's buttock was a nip, not a bite.
224. Mr. Kirby said the absence of any puncture wounds is a nip. Mr. Kirby questioned Mr. McPhee's wounds because he didn't see four puncture marks that lined up and therefore would not acknowledge he was bitten.
225. Mr. Kirby did acknowledge that there were holes in Mr. McPhee's legs although he didn't know how deep they were. He didn't see two opposed puncture wounds and seemed to question if Mr.

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McPhee was bitten. He said he could not distinguish between biting and nips given the evidence but agreed Mr. McPhee was nipped or bitten several times.

226. After testifying that the area was well-lit, Mr. Kirby indicated that it was dark out and the only reason he could see the male was because of dim illumination.

227. Mr. Kirby denied that Mr. McPhee asked him to call the ambulance. Mr. Kirby did not inquire as to the condition/injuries of the male with the police or any authority after the incident. He did no follow-up with Mr. McPhee.

228. Mr. Kirby doesn't recall if he talked to Joan Richardson after this incident. He didn't take notes, so he isn't sure of the timing. Mr. Kirby testified that he never talked to Joan Richardson about the Mr. McPhee incident. He would recall this if it was close to the incident.

229. After this incident he didn't take the dogs off-leash anywhere. He was concerned enough that he ceased to go to the Port Authority area.

230. On re-direct, Mr. Kirby said he had never seen a tug worker from that area and had never seen traffic from that area at that time of day. Mr. Kirby did not recall if he said sorry to Mr. McPhee, but typically, if his dogs scared someone he would say sorry.

[Typographical correction and emphasis mine.]

(2) The September 2, 2018 Incident

50 On September 2, 2018, Allan Howe was the alleged victim of a dog attack that occurred in Saint John, New Brunswick (the "September 2, 2018 Incident").

(a) *Testimony of Allan Howe*

51 Allan Howe testified at the Trial with respect to the September 2, 2018 Incident, that allegedly involved Mr. Kirby and his dogs.

52 The Crown submitted a summary of the Trial testimony of Allan Howe to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Allan Howe undisputed. What evidence of Allan Howe, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Allan Howe submitted by the Crown:

233. Mr. Howe was going to get his morning coffee and his dad's hot chocolate at the Tim Hortons on the West Side of Saint John. He noticed there was an officer there speaking to someone.

234. Mr. Howe saw Mr. Kirby approach with either two or three dogs. Mr. Howe saw the dogs tied to the metal or wooden sign. He passed the dogs, saying "nice dogs" but otherwise did not engage with them. He turned his back and the next thing he knew he was getting bit by them. The dog attacked him, "one [dog] for sure." "The officer was there to react in time."

235. Mr. Howe stated the dogs did not have any mouth covering (muzzle).

236. The dog bit him on the back of the leg (lower thigh); he was wearing shorts that day. The dog bit him 2-3 times. With respect to injuries, "there was a bruise and you could see the teeth"; "you could see the teeth mark clearly". He thought he was bit two times; one bite was hard, and one was not, the hard one left teeth marks.

237. Another officer and an ambulance arrived. Mr. Howe had to return to his house prior to going to the hospital. [...]

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238. Mr. Howe identified Trial Exhibit C-3 (blue tab) photographs as photographs taken of him after the dog bites. Mr. Howe described his injuries as marks on the back of his right leg from where the dog bit him ("teeth marks"). He cleaned the wound with alcohol and it took 4-5 days to heal up.

[Emphasis mine.]

53 I note that when Mr. Howe was reviewing the photographs in Trial Exhibit C-3 (blue tab) he testified that he suffers from memory loss and that he could not remember the cause of the injuries displayed in some of the photographs.

54 Trial Exhibit C-7 are the medical records of Mr. Allan Howe from September 2, 2018. The records indicate that he had received a dog bite to the right thigh, two abrasions, one slight laceration.

(b) Testimony of Cst. Jason Lohnes

55 Cst. Jason Lohnes testified at the Voir Dire and the Trial with respect to the September 2, 2018 Incident, that allegedly involved Mr. Kirby and his dogs.

56 The Crown submitted a summary of the Voir Dire and the Trial testimony of Cst. Jason Lohnes to this Court. Mr. Kirby elected to not testify at the Voir Dire and the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Jason Lohnes undisputed. What evidence of Cst. Jason Lohnes, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire and the Trial testimony of Cst. Jason Lohnes submitted by the Crown:

240. At approximately 07:22hrs, Cst. Lohnes was at the Tim Hortons on the West Side of Saint John, New Brunswick early in the morning dealing with a separate incident that had occurred. The Tim Hortons is located on King St. He described this location as a high traffic area. He watched Mr. Kirby approach with three dogs that were leashed. Mr. Kirby secured the dogs to a metal signage post beside the sidewalk. This was about thirty to forty feet from his location. He did this by tying the leashes to the signage post. This "caught his attention", "the dogs had full access to the sidewalk." Mr. Kirby tied all three leashes together, wrapping them around the pole and tying them in a knot, in a "quick maneuver". The dogs did not have muzzles on. Mr. Kirby went inside the Tim Hortons.

241. Pedestrian presence at the Tim Hortons was heavy.

242. One of the dogs became loose and approached a man whom had exited the Tim Hortons. The dogs were tied loosely. The dog that got loose wasn't struggling or pulling aggressively. He wasn't secured properly. Alice "wasn't tugging very hard at the leash, it wasn't secure." She wasn't tugging at the post but was still able to pull free.

243. The dog approached the male in the parking lot, that was not previously engaged with the dog. The dog began to "herd him". The dog began to growl (a low growl), and the man was, "dancing around the parking lot trying to avoid this dog." The dog was biting the male and Cst. Lohnes described this as aggressive. The dog bit Mr. Howe several times. Mr. Howe was yelling.

244. The man had been bit by the dog and an ambulance was called. Cst. Lohnes saw blood on the male's leg (back of leg). The man continued to try and get away from the dog as he was being bit. Cst. Lohnes described this as aggressive behaviour.

245. At this time, Cst. Lohnes intervened and drew his baton. Mr. Kirby exited the Tim Hortons and took control of the dog. Mr. Kirby re-secured the dog to the signage post, using what Cst. Lohnes described as a tighter knot. Cst. Lohnes indicated that [he did not note] the leash [to be broken and he did not recall it to be] broken, it just simply became untied.

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246. Mr. Kirby identified himself to Cst. Lohnes. He indicated that the dogs were all up to date on their vaccines. Cst. Lohnes told him if the dogs have this problem they should be wearing a muzzle. He warned him that given the proximity to the sidewalk, it was dangerous; this could have happened to a child in the area. Mr. Kirby indicated that a child was not injured, and the proposed danger was just a "what if" and he laughed. Mr. Kirby identified the dog as a mix breed of Louisiana Catahoula Leopard Dog and Labrador Retriever. The dog's name was Alice and she was approximately nine months old. Alice was a dark colored dog with a white chest.

247. Cst. Lohnes indicated that there would be an investigation. Mr. Kirby took the dogs and left in the direction of Ludlow Street. The Tim Horton's is about three blocks from the corner of Winslow and Ludlow Street.

248. Trial Exhibit C-3 (blue tab) was identified by Cst. Lohnes as the victim of the dog attack, Allan Howe.

[...]

251. Trial Exhibit C-6, was retrieved by Cst. Amy Cunningham. It accurately depicts Mr. Kirby approaching Tim Hortons with the dogs.

[Revisions and emphasis mine.]

57 The Defence correctly notes that Cst. Jason Lohnes was on scene for the duration of time that Mr. Kirby and his dogs were in the immediate vicinity and observed the entire incident. The Defence further correctly notes that Cst. Lohnes made the following observations:

- (a) the dogs remained leashed the entire time;
- (b) all three dogs appeared tied together to the signpost;
- (c) only Alice's leash became untied;
- (d) the other two dogs remained calm; and
- (e) Alice engaged in herding behavior.

58 The Defence contends that Cst. Lohnes testified that Alice was calm before and after the incident. Recall, Cst. Lohnes also testified that when Alice began to herd the man, Alice began to growl (a low growl), Alice was biting the man and Cst. Lohnes described this as aggressive.

59 At the conclusion of the Voir Dire this Court found that the conversations Mr. Kirby had with Cst. Lohnes were voluntary.

60 The Crown notes that the assertion by Cst. Lohnes that the dogs should be muzzled will be relied upon for all counts in the Indictment that post-date this conversation.

61 Trial Exhibit C-3 (blue tab) photographs were taken by Cst. James Smith on September 6, 2018. Photographs 4 and 5 depict Allan Howe's upper right leg where Mr. Kirby's dog bit him. Cst. Smith described the area as deep scratches surrounded by bruising. It had been covered by a bandage.

62 The injuries sustained by Allan Howe amounted to bodily harm.³

(c) *Testimony of Mr. Kirby*

63 Mr. Kirby testified at the Trial about the September 2, 2018 Incident.

64 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown.

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252. Mr. Kirby testified that September 2, 2018, was a regular Sunday morning. He took Frank, Alice, and Danny to get a coffee at Tim Horton's after their big morning walk. He got to Tim Horton's about 7:15 a.m.
253. He noticed police cars were already there. Mr. Kirby confirmed that he tied his dogs to the no-parking post as depicted in Exhibit C-12 on the morning of September 2, 2018. There were about three cars in the parking lot that morning.
254. Mr. Kirby demonstrated how he attached the three dogs to the post outside of Tim Hortons. Mr. Kirby presented Danny and Alice's leashes from the date in question [Exhibit D-2]. Mr. Kirby indicated that the puppy leash (Alice's leash) was thinner.
255. Mr. Kirby described his routine. He would use Danny's leash (the thicker leash) as the tether leash. Essentially, Danny's leash is looped onto the post and the puppies are linked to Danny's leash. Mr. Kirby testified that the loop on Alice's leash broke allowing her free from the tethering.
256. After tethering the dogs, he proceeds into the Tim Horton's. He hears a commotion and exits the Tim Horton's. Mr. Kirby said he didn't see anything that happened. He sees Cst. Lohnes collapsing his baton. He goes to Alice. She is sitting at the sign with the other dogs and he notices her leash is broken. He indicated that the glued handle on Alice's leash was the issue.
257. Mr. Kirby maintained that Alice was sitting next to Frank and Danny when he got to her.
258. Mr. Kirby said he was trying to show Cst. Lohnes how the dogs were tied but Cst. Lohnes turned away and wouldn't acknowledge him. Cst. Lohnes was dismissive and "I told you you didn't tie them up properly and shut up, I don't want to hear what you have to say."
259. Cst. Lohnes stood there with Mr. Kirby and started taking down Mr. Kirby's details. EMTs arrived in 5-10 minutes. The individual who had the nip mark went to the EMTs to get treated. The male that was nipped had his leg bandaged and Mr. Kirby was advised his dog had bit the victim in the back of the leg.
260. As a result of this incident, Mr. Kirby stopped using those leashes. He got adult leashes for all the dogs. It was clearly inappropriate for any size dogs and it didn't take a lot to break the leash (the glue). He got stitched leashes.
261. At the incident on September 2, 2018, Mr. Kirby said that Cst. Lohnes sarcastically said "major crime is gonna love this".
262. September 21, 2018, Mr. Kirby was arrested for two counts of criminal negligence causing bodily harm by Cst. Johnson.
263. Mr. Kirby was placed on a Court Undertaking (Form 12) by Judge Toning on September 27, 2018. There was appropriate notice given to Mr. Kirby that the Crown intended to produce a certified copy of the Form 12, consistent with the Canada Evidence Act requirements.
264. Up until December 12, 2018, Mr. Kirby indicated that there were never complaints of the dogs running at large and the dogs never got out.
265. On cross-examination Mr. Kirby agreed he left his dogs tied to a poll, just next to the sidewalk. Mr. Kirby said that the place was "devoid of people". His recollection was that no one was there because it was a Sunday morning.
266. Mr. Kirby acknowledged he had no control of people coming and going from the area or on the sidewalk where he left the dogs. He agreed he left the dogs in a public area where he had no control of the public area.
267. He acknowledged 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.
268. Knowing his dogs ha[ve] chased after two pedestrians, Mr. Kirby did not inspect the leash before using it to tie up Alice, knowing that it was being used to control her.

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269. He assumed it was a workable leash and was fully reliant on the leash when he left Alice alone in public.
270. Mr. Kirby confirmed he didn't see Alice break loose or how she approached Mr. Howe.
271. Mr. Kirby was aware Mr. Howe was nipped.
272. Mr. Kirby didn't think it would be diligent to muzzle the dogs when he was leaving them that close to a sidewalk. He didn't believe the dogs needed to be muzzled at that point.
273. He confirmed he received his by-law infractions disclosure in October, 2018. He denied that the by-law disclosure indicated that people were injured. He later indicated that the by-law infraction disclosure showed pictures of injuries to Mr. Saliou. He later testified that this disclosure included photographs of people injured and as of October 5, 2018 (or that week) he was aware people were injured by the dogs (Mr. Saliou, Mr. McPhee, Mr. Howe).
274. He was aware of what he was being charged with. He denied receiving disclosure for those charges, but he knew exactly which incidents they were referring to: August 22 and September 2, 2018.
275. Mr. Kirby said if you thought you had dangerous dogs you would do something about it. He didn't think these were dangerous dogs and he had to keep them away and "kennel them".
276. Mr. Kirby said he has never had a dangerous dog.
277. Mr. Kirby testified if he believed his dogs were a danger to the public "you would have to start doing something".
278. On re-direct, Mr. Kirby confirmed he was at the Tim Horton's from about 7:20 a.m. for about 25 minutes. Mr. Kirby confirmed that there was no change in the pedestrian traffic. He confirmed if there was heavy pedestrian traffic, he wouldn't tie his dogs there. He estimated Alice had been tied up by the Tim Horton's dozens of times (24 times) with no previous issues.

[Typographical correction and emphasis mine.]

(d) September 21, 2018 Arrest and Placement on a Court Undertaking

65 On September 21, 2018, Mr. Kirby was arrested by Cst. Johnson for two counts of criminal negligence causing bodily harm.

66 Mr. Kirby was placed on a Court Undertaking (Form 12) by Judge Toning on September 27, 2018 (see Trial Exhibit C-2) (the "Court Undertaking"). There was appropriate notice given to Mr. Kirby that the Crown intended to produce a certified copy of the Court Undertaking, consistent with the **Canada Evidence Act**, R.S.C., 1985, c. C-5, requirements⁴. The Crown notes that the legal duty placed upon Mr. Kirby pursuant to the Court Undertaking will be relied upon for all counts on the Indictment that post-date this legal document.

(3) The December 12, 2018 Incidents

67 On December 12, 2018, William Stevens and A.M. and were both allegedly attacked by dogs in Saint John, New Brunswick (the "December 12, 2018 Incidents").

(a) Testimony of William Stevens

68 William Stevens testified at the Trial with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs, wherein he was the alleged victim of a dog attack.

69 The Crown submitted a summary of the Trial testimony of William Stevens to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of William Stevens undisputed. What evidence of William

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Stevens, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of William Stevens submitted by the Crown:

281. On that morning, Mr. Stevens was going to Tim Hortons to get a coffee. He had left his house at 207 Winslow Street, Saint John, New Brunswick and Tim Hortons is approximately 2-3 minutes to get half-way. Half-way down, two dogs were in the garage and attacked him. They were big, black dogs. "One came at me, then five seconds later the other came at me. They got my leg, my arm, my leg, my arm, and then one came at my throat. I was fighting with them the best I could." "I was standing at the time, but they were getting me down to the ground." A woman showed up and yelled at the dogs and they backed off.
282. He was [bitten] 5-6 [times] in the legs and on the back and arse.
283. When describing the attack Mr. Stevens said, "I was just going down on the ground, they were coming at me both sides and that when the girl called out. I hadn't quite hit the ground. If it hadn't been for her, they woulda had me." "I don't know what woulda happened, I was scared."
284. The woman got the dogs to back off. He was on the ground and the dogs were pushing him into the bushes. He was able to get into the woman's car and she drove him home.
285. Once home he checked his cuts. He started to panic because he thought of dog bites and rabies. The police showed up to take him to the hospital. He described the pain as stinging.
286. Trial Exhibit C-11 (2 photographs) were identified by Mr. Stevens as the dog that attacked him, saying "they look like the dogs." He recognized the dogs as the ones from the "white house on the corner", "corner of Winslow and Ludlow."
287. Mr. Stevens indicated he was bit on both legs, back of the legs.
288. Photographs in Trial Exhibit C-3 (clear tab) were taken by Cst. James Smith on December 12, 2018.⁵ These photographs depict the injuries of William Stevens. Mr. Stevens described his injuries as dog bites, teeth marks, from the dogs. When he got home he could feel the blood dripping down his leg. "There was blood coming from all of them."
289. At the hospital he said they wanted to give him stitches but he wouldn't let them. He said he should have gotten them.
290. On the back of his left leg (photograph 27/28 of Trial Exhibit C-3 (clear tab)) there was a wound that he described as a quarter inch deep. He said that it took about six months to heal and he still had the scar. "That was the worst bite of the bunch of them."
291. Trial Exhibit C-8 are the medical records of Mr. William Stevens from December 12, 2018. The records indicate that he had multiple abrasions, bites, and puncture wounds as the result of being attacked by dogs.

[Typographical corrections and emphasis mine.]

70 I note that Mr. Kirby's counsel did not cross-examine William Stevens.

(b) *Testimony of A.M.*

71 A.M. testified at the Trial with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs, wherein he was the alleged victim of a dog attack.

72 The Crown submitted a summary of the Trial testimony of A.M. to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of A.M. undisputed. What evidence of A.M., if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of A.M. submitted by the Crown:

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293. On December 12, 2018, 14-year-old [A.M.] was on his way to school at Saint John High School. He got attacked by two dogs when he was walking towards his bus stop around 8 a.m. He had left his house on Winslow Street, Saint John, New Brunswick, and was about a block away from his bus stop when the dogs attacked. He was close to the corner of Winslow and Watson Street.
294. Two dogs attacked me from the back, I didn't see them coming for me." He was walking up the hill and one grabbed his left ankle and the other grabbed his right wrist. They bit him multiple times, but at first, they were trying to pull him back down the hill. They bit him around eight times in total. He was scared and yelling for help. He fell down once during this attack but got right back up. He was scared they were going to get his face.
295. A guy across the street starting yelling at the dogs. The dogs let him go. He was able to get across the street to the man, but the dogs returned and attacked him again.
296. When they attacked [A.M.] for the second time, "they just kept biting me", "they bit my back, my calves, my ankles, my wrist, upper arm too." They were trying to pull him down.
297. The dogs were pulling him towards the road and a car came. The car stopped, and he jumped into the car. He didn't know the woman, but he had to get to safety.
298. Once in the car, he described himself as in shock. He called his parents.
299. The police and ambulance came. They cleaned up the bite marks in the ambulance and his mother took him to the hospital.
300. He did not make it to school that day. He is now scared of dogs.
301. [A.M.] described the dogs as all black and muscle. They were up to his hip. [A.M.] thought the first attack lasted about a minute; twenty seconds later, the second attack lasted about a minute and a half. Throughout the attacks, [A.M.] knew he had to get to safety and was yelling for anyone to help.
302. Neither dog had a leash or muzzle.
303. Trial Exhibit C-11 (two photographs) were identified by [A.M.] as photographs of the two dogs that attacked him.
304. Photographs in Trial Exhibit C-3 (yellow tab) were taken by Cst. James Smith on December 12, 2018.⁶ These photographs depict the injuries of [A.M.]. [A.M.] described the bite on his right arm as very painful and he could not use his arm for a while. All the marks photographed were from the dogs. He had bite marks on his arms, ankle, and spine.

[...]

[Revisions and emphasis mine.]

73 I note that Mr. Kirby's counsel did not cross-examine A.M.

74 Trial Exhibit C-10 are the medical records of A.M. from December 12, 2018. The records indicated there were multiple superficial puncture wounds and A.M. received needles.

(c) Testimony of Christine Landry

75 Christine Landry testified at the Trial with respect to the December 12, 2018 Incidents, that allegedly involved Mr. Kirby and his dogs, wherein she allegedly witnessed two dogs attacking William Stevens and A.M.

76 The Crown submitted a summary of the Trial testimony of Christine Landry to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Christine Landry undisputed. What evidence of Christine

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Landry, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Christine Landry submitted by the Crown:

307. On December 12, 2018, Ms. Landry was picking up her daughter and granddaughter at 161 Winslow Street, Saint John, New Brunswick. She was waiting for them to come down at 8:15 a.m.
308. She watched the dogs on the street, getting into the garage but then they noticed the gentleman. They were barking at him and he was going backwards with his hands in the air into a bush.
309. Ms. Landry said she was scared because she had already been bitten in the past. She didn't want to get out of her car, "but I couldn't not help... I had to help"; "because I know what it's like to be bitten." "I just got out and did my best, I wasn't gonna sit there and watch the dogs attack him and bite him to death."
310. She got out of the car because she could see that these dogs were not going to stop. She got out of the car and scared the dogs off long enough to get the gentleman into the car. She drove him down the street, to his home. William Stevens was shaken and very upset.
311. Ms. Landry identified the gentleman who was attacked as William Stevens who was photographed in Trial Exhibit C-3 (clear tab).
312. Ms. Landry returned to her daughter's house.
313. She saw the dogs again. The dogs noticed a little boy down the street and the dogs bolted. She peeled her tires to get down there to the little boy. She hit the gas pedal hard to try to race them, they were going. "It was too late, they were jumping on him and biting him."
314. Ms. Landry honked to try to scare the dogs but had to get out to scare them and get the little boy into the car. Once in the car, she got the little boy to make a call. Once enough people were on scene, Ms. Landry left.
315. Ms. Landry identified the little boy who was attacked as [A.M.] who was photographed in Trial Exhibit C-3 (yellow tab). "He was the second victim I saved." She was afraid for him, "they charged at him and were biting." She hit her horn trying to get them away but got out and yelled to get the dogs off of him and got him in the car.
316. Ms. Landry identified Trial Exhibit C-11 (two photographs) as the two dogs that attacked the two victims that day. The second photo shows the dogs running towards the little boy, [A.M.]. They are an accurate depiction of what she saw that day.
317. Trial Exhibit C-11 (first clip) shows the dogs into the garbage before attacking [A.M.]. Her daughter wanted to go to work and became impatient, but Ms. Landry had a bad feeling; and that is when they took off after [A.M.]. Trial Exhibit C-11 (second clip) shows Ms. Landry driving towards [A.M.] who is being attacked by the dogs.
318. Neither dog had a leash or a muzzle.
319. The owner, Mr. Kirby arrived and retrieved the dogs as Ms. Landry left the scene. Later she saw the police at Mr. Kirby's house and stopped to indicate that the boy who was attacked needed an ambulance.
320. Later, Ms. Landry provided a statement.

[Revisions and emphasis mine.]

77 I note that Mr. Kirby's counsel did not cross-examine Christine Landry.

(d) *Testimony of Jeff McKay*

78 Jeff McKay testified at the Trial with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs, wherein he allegedly witnessed two dogs attacking A.M.

79 The Crown submitted a summary of the Trial testimony of Jeff McKay to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Jeff McKay undisputed. What evidence of Jeff McKay, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Jeff McKay submitted by the Crown:

322. Mr. McKay indicated that he was delivering newspapers to the Lower West Side. When he was at 105 Winslow Street, Saint John, New Brunswick, he could hear someone yelling for help. He came down the stairs and exited the house; he saw two dogs attacking the boy. He started to go towards the boy and the dogs took off. The boy approached Mr. McKay. As they were talking the dogs came back and started attacking.

323. Mr. McKay indicated at first, the dogs were trying to "chew" [A.M.]'s legs and [A.M.] was trying to get away.

324. When the dogs came back, they attacked both of them. Mr. McKay indicated that they were biting the little boy. He ended up kicking one to get it away from himself.

325. Mr. McKay described the dogs as black, almost like a lab but smaller. Mr. McKay indicated the dogs in Trial Exhibit C-11 (two photographs) were "the very ones" that attacked the little boy.

326. Mr. McKay indicated that another man came down the street and chased the dogs off and a woman approached in her car and the little boy got in.

327. Mr. McKay described the dogs as scary, going in and biting the little boy.

328. The dogs went down the street and got into a grey van with Mr. Kirby. Mr. McKay is familiar with the dogs from delivering newspapers and they live on the end of Ludlow Street.

329. Neither dog had a leash or muzzle.

[Revisions and emphasis mine.]

(e) *Testimony of Angela Babcock*

80 Angela Babcock testified at the Trial with respect to an incident that allegedly occurred on December 12, 2018. The Crown concedes that the majority of her testimony is hearsay and therefore is not reliable.

(f) *Testimony of David Babcock*

81 David Babcock testified at the Trial with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs.

82 The Crown submitted a summary of the Trial testimony of David Babcock to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of David Babcock undisputed. What evidence of David Babcock, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of David Babcock submitted by the Crown:

332. On December 12, 2018, David Babcock was residing at 210 Winslow Street, Saint John, New Brunswick. One of his dogs had gotten loose so he got up to go retrieve the dog with his wife. He went outside and saw a kid running up the road. He notice[d] two dogs pursuing him. Then the kid was on the ground. One dog had one arm and the other dog had his leg and they were pulling on each end of the child. The dogs were jostling their heads pulling the little boy.

333. They were two black dogs. He recognized them as Michael Kirby's dogs, who resides on the corner of Winslow and Ludlow.

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334. After the attack, Mr. Babcock saw Mr. Kirby come up in his van, retrieve the dogs and return home. Mr. Kirby never stopped to see if the child was okay.

335. Mr. Babcock described the child as "beside himself" [be]cause he had been bitten. He called the attack "a bad situation", and he intervened getting the dogs off A.M.. He kicked one dog in the head that was biting the leg of the child. [A.M.] got into a car with a woman.

336. Neither dog had a leash or muzzle.

337. Mr. Babcock said that the dogs depicted in C-11 (two photographs) looked similar to the dogs involved in the attack.

[Typographical corrections and emphasis mine.]

(g) Testimony of Cst. Robert King

83 Cst. Robert King, of the Saint John Police Force, testified at the Voir Dire with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs.

84 The Crown submitted a summary of the Voir Dire testimony of Cst. Robert King to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Robert King undisputed. What evidence of Cst. Robert King, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Cst. Robert King submitted by the Crown:

339. Cst. King indicated that on December 12, 2018 at approximately 8:20hrs he responded to the area of 161 Winslow Street, Saint John, New Brunswick. Dispatch information indicated that two black dogs were attacking people in the area.

340. Witnesses indicated to Cst. King that the owner of the dogs had arrived in a grey van with a license plate number JFI-555 registered to a male named Michael Kirby who lived at 149 Winslow Street. The van was parked at this address.

341. Cst. King indicated that Mr. Kirby was subject to a Court Order at the time.⁷ It required the dogs to be on Mr. Kirby's property or leashed and muzzled.

342. Cst. King spoke with Christine Landry and received information regarding the incident.

343. Cst. King was in the driveway of Mr. Kirby for approximately 25 minutes. After some time, Mr. Kirby exited the home and approached the police. Given the information received from witnesses, Cst. King arrested Mr. Kirby. He was handcuffed, searched and placed in the police vehicle at approximately 8:45hrs.⁸ The arrest was lawful.

344. Cst. King informed Mr. Kirby of his right to counsel and police caution. Mr. Kirby indicated he understood.

[...]

346. Mr. Kirby indicated there were six dogs in the home and the new foster dogs were the dogs involved in the incident on that day.

347. Mr. Kirby was afforded his right to counsel. He spoke with duty counsel and was subsequently placed in cells, awaiting Court.

[Emphasis mine.]

85 At the conclusion of the Voir Dire this Court found that the conversations Mr. Kirby had with Cst. King were voluntary.

(h) Testimony of Cst. George Prosser

86 Cst. George Prosser, of the Saint John Police Force, testified at the Voir Dire with respect to an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs.

87 The Crown submitted a summary of the Voir Dire testimony of Cst. George Prosser to this Court. Mr. Kirby elected to not testify at the Voir Dire on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. George Prosser undisputed. What evidence of Cst. George Prosser, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire testimony of Cst. George Prosser submitted by the Crown:

349. Cst. Prosser was dispatched with Cst. King in the same police vehicle. He corroborated the evidence of Cst. King.

350. Cst. Prosser indicated that he and Cst. King did not approach the door to 149 Winslow Street because they had received information that the dogs were vicious.

[...]

352. Once Mr. Kirby was [in] custody, Cst. Prosser indicated that Mr. Kirby wanted to make a "deal" with them. He wanted to return to his home and turn over "the two dogs" that were responsible for "the attack."

[Typographical correction and emphasis mine.]

88 At the conclusion of the Voir Dire this Court found that the conversations Mr. Kirby had with Cst. Prosser were voluntary.

(i) Testimony of Sgt. Gino Doucet

89 Sgt. Gino Doucet, of the Saint John Police Force until 2019, testified at the Trial with respect to his involvement stemming from an incident that allegedly occurred on December 12, 2018, and allegedly involved Mr. Kirby and his dogs.

90 The Crown submitted a summary of the Trial testimony of Sgt. Gino Doucet to this Court. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Sgt. Gino Doucet undisputed. What evidence of Sgt. Gino Doucet, if any, is found to be a fact is a question that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Sgt. Gino Doucet submitted by the Crown:

354. Sgt. Doucet was dispatched to Winslow Street, Saint John, New Brunswick with respect to dog attacks. He contacted the Identification Unit and Cst. Johnson from Major Crime Unit to coordinate the investigation.

355. Sgt. Doucet had a conversation with Mr. Kirby, who was being held in detention cells.

356. Sgt. Doucet went to 149 Winslow Street in the afternoon of December 12, 2018 to secure the residence. He checked all the doors. The door to the room containing all the dogs was unlocked, they were inside barking. He got a piece of rope to secure the door shut. He tied the handle to decking to make sure it wouldn't open. There was concern the dogs would get out.

[Emphasis mine.]

(j) Testimony of Michael Kirby

91 Michael Kirby testified at the Trial about the December 12, 2018 Incidents.

92 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision, I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

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357. Mr. Kirby testified that on December 12, 2018, he went to get coffee in his van, after his morning walk with the dogs. He left the dogs. Once he returned, Frank and Alice were missing. Upon his return, he noticed the door was slightly ajar and Alice and Frank were missing.

358. It was a normal everyday morning.

359. He left through the exterior steel door to the deck. It is the only way out of that portion of the house without going through the house.

360. The door handle was a knob handle with an ordinary turn button lock. He indicated the door swings in and would have to be propped open because it will draft shut.

361. The dogs had never tried to open the door and it had not opened itself. There is not difficulty with the latch. There is no deadbolt. He generally keeps the door locked.

362. Mr. Kirby said he didn't have to give it another pull, there was no concern that the door was not shut. He said the dogs had never tried to leave before and never tried to escape.

363. Mr. Kirby recovered the dogs close to the front of his neighbours' yard on Winslow Street.

364. About 20-30 minutes later, he saw a police car in the driveway. He went down and was spun around and put under arrest. He was unaware at that time that anyone was harmed.

365. On cross-examination Mr. Kirby confirmed he had received disclosure from the by-law infractions and knew he was charged criminally. He knows there are allegations that the dogs are dangerous. He didn't do anything to investigate or inquire about injuries.

366. He knew at this time that four of the dogs were involved in three biting incidents (didn't know which dog).

367. He didn't recall doing big walks that morning, December 12, 2018, with the dogs on cross-examination.

368. He confirmed the yard is not fenced. There were no warning signs about the dogs.

369. When he left the dogs that morning, they weren't muzzled, leashed, caged, or kenneled. There was no deadbolt lock. All six dogs were left in the same room. Only two of the dogs left.

370. Mr. Kirby indicated that he locked his door that morning.

371. Mr. Kirby said that the door obviously didn't latch properly. He didn't know how the door opened. He didn't double check the door to make sure it had latched.

372. Mr. Kirby indicated that Cst. Prosser told him two people were torn to shreds and kept counting others who had been bitten. Mr. Kirby said that this was false information that Cst. Prosser was providing.

373. On re-direct, Mr. Kirby said the dogs never showed signs of aggression towards him and he knew what he was looking for (aggression is the growling verses a refusal). He confirmed that before December 12, 2018, he was aware of the injuries from the three previous incidents.

374. On December 12, 2018, Mr. Kirby confirmed that he was charged by Cst. Johnson with criminal negligence causing bodily harm so obviously something happened. He knew he had already been charged with criminal negligence causing bodily harm from the previous incidents. He said that the assertion that Alice and Frank were problem dogs was based on the false information he received from Cst. Prosser about 8 people being bitten on December 12, 2018. This was not his opinion of Alice and Frank until he received this information.

[Emphasis mine.]

D. Lead Investigator's Testimony

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93 Cst. Lacey Johnson, of the Saint John Police Force, testified at the Voir Dire and the Trial with respect to her involvement with Mr. Michael Kirby and his dogs throughout 2018.

94 This Court held that the conversations Mr. Kirby had with Cst. Johnson were voluntary.

95 The Crown submitted a summary of the Voir Dire and the Trial testimony of Cst. Lacey Johnson to this Court. Mr. Kirby elected to not testify at the Voir Dire and the Trial on the question of (a) whether her extrinsic evidence (relating to the November 21, 2015 Incident and the June 20, 2018 Incident) is admissible at the Trial and (b) whether her evidence relating to each of the four specific counts of criminal negligence causing bodily harm in the Indictment is admissible at the Trial on the other counts of criminal negligence causing bodily harm in the Indictment. This decision by Mr. Kirby does not in any way render the evidence of Cst. Lacey Johnson undisputed. What evidence of Cst. Lacey Johnson, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Voir Dire and the Trial testimony of Cst. Lacey Johnson submitted by the Crown:

377. Cst. Johnson worked as an officer in the major crime unit and was the lead investigator with respect to this file. She first became involved in August, 2018, after the attack on Garfield McPhee, which was allegedly the second dog attack on the Lower West Side.
378. Cst. Johnson compared the files produced as a result of the two attacks and was able to identify Mr. Michael Kirby as the owner of the dogs involved. This is when her investigation started. She obtained statements from the victims. She contacted the SPCA and City By-Law Officers.
379. While preparing to pursue a charge in this matter, there was another attack that occurred on September 2, 2018. She was made aware of the incident. She again investigated in a similar manner.
380. It was determined the charge to be pursued would be criminal negligence causing bodily harm.
381. On September 19, 2018, Cst. Johnson reached out to Mr. Kirby by phone. She advised him of the criminal investigation and asked if he would come to the station. He wanted to speak to a lawyer and indicated he would get back to her. She did not hear back from him for several days.
382. On September 21, 2018, given the potential danger, Cst. Johnson arrested Mr. Kirby after he had exited his house, on the highway. Mr. Kirby was arrestable and was to be placed on a police undertaking with conditions.
383. Mr. Kirby was released on a promise to appear and subject to police conditions. He was provided his right to counsel and police caution consistent with his Charter Rights.
384. On December 12, 2018, Cst. Johnson was made aware of two more attacks on the lower west side. She was contacted by Sgt. Doucet and made aware that Mr. Kirby was placed under arrest. She took witness statements that morning and was able to go talk to Mr. Kirby around the lunch hour.
385. On 12:45pm on December 12, 2018, after Mr. Kirby was arrested, Cst. Johnson inquired with Mr. Kirby if he wanted to make a statement. Mr. Kirby told Cst. Johnson the following information as he was exiting the cell:
 - a) That morning he had left his house and gone to MacDonald[s] for breakfast and when he returned he found [t]he door ajar;
 - b) Two of his dogs were missing from his house when he returned; and
 - c) The two dogs were identified as Alice and Frank.
386. Exhibit C-10 (Trial Exhibit C-1) is an accurate depiction of the formal statement Mr. Kirby provided to Cst. Johnson. Mr. Kirby says the following:

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- a) Mr. Kirby had left his house, 149 Winslow Street, travelling across the harbour bridge to the MacDonald[']s;
- b) He returned to his house and upon returning to the entrance that he uses, the door was slightly ajar;
- c) He went into the house and Alice and Frank were missing;
- d) The next door, that connects this room to the main house was not ajar;
- e) They must have got out that door;
 - f) He got in his van, found the dogs close to his house, ushered them into the van and goes back to the house;
 - g) The police were present at the house, so he went down to meet them and was arrested;
 - h) The two dogs involved were the younger pups, Alice and Frank;
 - i) He didn't know if anyone was injured but had been told by police multiple people had been bitten[;]
 - j) "Clearly we have an issue with these two dogs. These were the dogs that were involved in the other incident. The one at Tim Hortons was Alice alone. And then there was a previous incident that Alice and Frank were both involved."
 - k) Mr. Kirby indicated he had a discussion with the Sergeant where Mr. Kirby offered to surrender the two dogs;
 - l) With respect to surrendering the two dogs Mr. Kirby said, "I said listen, these are clearly problem dogs. Why would I keep problem dogs?"[;]
 - m) Mr. Kirby indicated the house was unsecure;
 - n) He said if the police were to go there, "they would have a whole group of dogs coming at them and it could be potentially dangerous";
 - o) He was willing to sign off on an order [to] destroy the two dogs;
- p) There are six dogs in total in the house;
 - q) Alice, Frank, Danny, and Georgie "are the ones involved in the incidents you are talking about", and two foster dogs were obtained in the last two-three weeks (both black lab mixes from Ontario);
 - r) Georgie is tanned in color and the rest are black;
 - s) Mr. Kirby said his concern was, "my concern, and I have said it numerous times, is that I left the house and they got out of the house and that house is still unsecure";
 - t) The door the dogs exited was just a regular turn handle button do[or];
 - u) The door is "still in the same condition as it was" when the dogs got out;
 - v) Mr. Kirby expressed concern for public safety;
 - w) Mr. Kirby expressed concern about people going there, he said "it would be one thing if it was one dog, but if a group of dogs come after an individual that's supposed to be the handler, what's gonna happen?";
 - x) Mr. Kirby didn't see anything or anyone when he went to find the dogs; and
 - y) He got as far as his neighbors and saw the dogs and secured them in the van.

387. At 14:43hrs, Cst. Johnson told Mr. Kirby that he was being charged with two additional counts of criminal negligence causing bodily harm. He was read his rights and placed in contact with duty

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counsel. At this time, Mr. Kirby expressed concern about the security of the outer most door. As a result, Cst. Johnson had an officer attend at the residence and secure the door with rope. They didn't want it to blow open or become ajar.

388. Cst. Johnson continued to obtain victim statements.

389. On December 13, 2018, given that Mr. Kirby had been remanded, at about 1:30pm, Cst. Johnson had a meeting to safely arrange the extraction of the six dogs from 149 Winslow Street. There were several police officers and SPCA officers present.

390. The officers were able to make a plan to extract the dogs, which involved fencing. Given that the dogs were dangerous, safety was the priority. The SPCA had access to tools to assist in the extraction. The purpose of the fence was to set up a perimeter so that if one dog got out of the home that was not controlled, then the dog wouldn't get far. They did not want to take any risks that any of these dogs got out.

391. Other than fencing, precautions taken for the extraction included:

- a) Officer in uniform to prevent the public from coming onto the property;
- b) Neighbors were warned;
- c) Bite [suits] were worn; and
- d) Multiple officers were present.

392. Given the complex nature of the extraction and the potential dangers, Cst. Johnson placed a call to Mr. Kirby on December 13, 2018, who was in custody at the time in county jail. He returned her call at about 3pm.

393. Cst. Johnson described Mr. Kirby as very helpful in that he didn't want anyone to get hurt during the extraction. The following was information learned from Mr. Kirby during that phone call:

- a) He described the six dogs in his possession[;]
- b) There were two new dogs that he had just recently acquired in the last two to three weeks. They were identified as Mercedes and Diamond, with a blue and black leather collar. They were black lab mixes. They were "foster dogs". He had acquired them from a woman in Scarborough, Ontario[;]
- c) The other two dogs were litter mates, Frank and Alice. They were also black in color. Frank was wearing a red collar and Alice had white on the chest. They were just over a year old. These dogs were Louisiana Catahoula Leopard mix dogs[;]
- d) The last two were older dogs, Georgie and Danny. Georgie was tan in color and Danny was black with white on the paws. They were also Louisiana Catahoula Leopard dogs. Being senior they were recognizable[;]
- e) He was concerned at this point[;]
- f) He indicated Frank and Alice were involved in the December 12, 2018 attacks[;]
- g) Alice was confirmed to be the dog in the attack at Tim Hortons on Allen Howe[;]
- h) The August 22 attack (Garfield McPhee) Alice, Frank, Georgie and Danny were present although he didn't know who did the biting[;]
- i) Mr. Kirby confirmed that Alice and Frank were involved in the "foreigner attack" being Dominique Saliou[;]
- j) He did say that Alice and Frank were clearly the aggressors.
- k) Alice was involved in all attacks[;]
 - l) He volunteered to have the dogs surrender[ed][;]

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- m) He said, "Georgie and Danny were present for the June 2 and August 22 attack" and therefore indicated he would sign a destruction order for them[;]
 - n) Mr. Kirby was concerned about the outer-most door at the deck. He was afraid the dogs would get out[; and]
 - o) With respect to the layout of the house, there was a deck that led to a door. The door led to a large room. He indicated that is where the dogs would be found.
394. On December 14, 2018, Mr. Kirby called Cst. Johnson from the county jail. He called her office phone. During this phone call Mr. Kirby said the following things:
- a) He expressed concern that the dogs were all together, they weren't being walked and had no water;
 - b) He told Cst. Johnson none of the dogs were spayed or neutered;
 - c) He gave more advice about commands to use;
 - d) He says that he has something to tell Cst. Johnson and realized it could change his jeopardy. He says that there are two firearms in the home. Cst. Johnson was aware of the previous file and wasn't surprised. Mr. Kirby described that one, an antique .303 shotgun was leaning up against the wall and was not trigger locked. He said the rifle was in a golf bag; and
 - e) Mr. Kirby referred to the 2015 shooting and indicated that he had had to shoot a dog in the past and the gun was accessible for quick access.

[Typographical corrections and emphasis mine.]

E. Testimony of Michael Kirby Regarding the Behaviour of His Dogs and the Use of His Firearms

96 The Crown submitted a summary of the Trial testimony of Mr. Kirby to this Court. For purposes of this decision I adopt the following summary of the Trial testimony of Mr. Kirby submitted by the Crown:

- 395. Mr. Kirby testified that to his knowledge, Danny and Georgie were never involved in any aggressive behaviour towards any individual. He was never concerned about their behaviour.
- 396. He said he was never concerned about Alice[']s or Frank[']s behaviours being aggressive.
- 397. He explained that he told Cst. Johnson that Alice and Frank were the problem dogs because Alice had nipped someone, and they were both running at large on December 12, 2018.
- 398. With respect to the firearm that was seized, Mr. Kirby said that he had the firearm (.303) out that morning because he was thinking of doing some deer hunting. He was measuring it to see if he could add a scope for hunting. The trigger lock was off for measurement purposes. The gun was not loaded. The trigger lock was sitting 2 feet (nearby) from the firearm. He did not have a magazine for the gun but had one bullet. He maintained on re-direct that the ammunition was not accessible.
- 399. This was a family gun.
- 400. Mr. Kirby denied he ever said the firearm was for protection from intruders and further denied telling Cst. Johnson the firearm was out for protection from the dogs.
- 401. Mr. Kirby clarified that he called Cst. Johnson on December 14, 2018 because he wanted the guns removed since he thought he was going to be held on remand for upcoming months. He testified he requested that the guns be removed for safety purposes. This is when he told Cst. Johnson, he had the gun out for measurements/"sport-ification". He maintained he still didn't say he had the guns out for protection from intruders or for protection from the dogs.
- 402. He indicated that the dogs were happy, well socialized dogs.
- 403. Mr. Kirby indicated that he had never seen Frank or Alice exhibit any aggressive behaviour.

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404. Mr. Kirby testified he never saw any signs that caused him concern of handling the dogs or for his own safety but confirmed he had used that .303 firearm against Jack in the November 2015 incident. He said he never mentioned this incident to Cst. Johnson ever.
405. On cross-examination Mr. Kirby said that the assertion that Frank and Alice were dangerous was based on Cst. Prosser telling him that he was fucked and that his dogs had bit[ten] 7 people and ripped a small kid to shreds and tore an old man apart. Cst. Prosser kept adding to the number of victims. It was in this context that he said Alice and Frank were the problems.
406. Mr. Kirby maintained the reason he had the gun out was to fit it for a scope for deer hunting season. He didn't have a license and had never gone before.
407. Mr. Kirby confirmed he knew on December 12, 2018 that there were a group of dogs in his house and it could be potentially dangerous if someone approached the door. He was concerned about the door failing again.
408. Mr. Kirby said that he didn't fail to keep the dogs on his property, it happened in his absence.
409. The dogs weren't kenneled in his absence.
410. Mr. Kirby denied any heightened concern about the dogs.
- [Emphasis mine.]

F. Extraction of Dogs and Seizure of Guns(1) Testimony of Cst. Lacey Johnson at the Trial

97 The Crown submitted to this Court a summary of the testimony of Cst. Lacey Johnson at the Trial regarding the extraction of the dogs and seizure of guns. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Lacey Johnson undisputed. What evidence of Cst. Lacey Johnson, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Cst. Lacey Johnson submitted by the Crown:

411. As a result of the conversation with Mr. Kirby on December 14, 2018, a search warrant was obtained to seize the guns identified by Mr. Kirby that were in the home.
412. Cst. Johnson understood that Mr. Kirby kept guns accessible in the home in case one of the dogs turned on him. He also indicated that he keeps them on hand in case someone breaks into the home, in a room not occupied by the dogs. He mentioned he was having the scope sized. He was not sure if it was trigger locked.
413. Approximately ten officers were involved in the extraction. Emergency Tactical Services were present in case a dog got out and had to be shot. This was well thought out to make sure no one else got hurt.
414. On [December] 14, 2018, during the extraction, Cst. Johnson was able to identify the dogs as they exited the home at 149 Winslow Street, Saint John, New Brunswick. The dogs came out the back door which had an attached wooden deck. Mr. Kirby had explained that he and the dogs lived in that room, which was isolated from the rest of the house.
415. Alice and Frank were harder to gain control of during the extraction. Alice was the hardest to get from the home. Cst. Johnson identified the dogs in Trial Exhibit C-11 (two photographs) as Alice and Frank.
416. The sixth dog was deceased.
417. None of the dogs were leashed or muzzled. There were no muzzles present.

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418. Outside the house, there was no exterior fencing or obstruction to contain the dogs once they exited the home (officers erected their own fencing).

[Typographical correction and emphasis mine.]

(2) Number of and Particulars of Dogs Extracted

98 Six dogs were removed from 149 Winslow Street, Saint John, New Brunswick on December 14, 2018. None of the dogs were muzzled or leashed at that time⁹.

(3) Testimony of Cst. Peter Haslett

99 Cst. Peter Haslett testified at the Trial with respect to the extraction of the dogs from 149 Winslow Street, Saint John, New Brunswick.

100 The Crown submitted to this Court a summary of the testimony of Cst. Peter Haslett at the Trial regarding the extraction of the dogs and the observations he made at the time. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Peter Haslett undisputed. What evidence of Cst. Peter Haslett, if any, is found to be a fact and whether any of his evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Cst. Peter Haslett submitted by the Crown:

421. Given Cst. Haslett's background and knowledge of canines, he was asked to be involved in the extraction of the dogs. He was able to help and provide bite suits (used in training Police Canine).

422. When he arrived on scene there were multiple police officers and SPCA officers present.

423. Fencing was rented and set up for the extraction, so that if the dogs got past the officers, they would still be secure.

424. For the seizure of the dogs, they used bite suits, bite sleeves, lasso poles, a shovel, and the fencing.

425. Trial Exhibit C-9 is an accurate depiction of the extraction that occurred on December 14, 2018.

426. The extraction video showed the back door and the wooden deck as well as the fencing that was erected around the doorway. The door was unlocked but secured with the rope. There were no kennels, crates, or cages in the house.

427. Cst. Haslett described the following:

- a) Officers were present in bite suits to extract the dogs;
- b) Cst. Haslett was in the gated area with other officers for the extraction;
- c) At first, he was unable to see how many dogs there were because they were up close to the door;
- d) The first dog exited without a muzzle or a leash in a non-aggressive manner; this was identified as one of the foster dogs;
- e) The door was subsequently closed to prevent more dogs from exiting;
- f) The first dog was taken into a crate for transport;
- g) The officers entered to get the dogs;
- h) The second dog to exit, later identified as Alice, was aggressive and biting a metal shovel as she exited;
- i) Alice had started to go behind one of the officers in the house, approached in an aggressive manner, and was placed in a lasso that restricted her airway to control her;

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- j) She was placed in a crate and a leash and muzzle were placed on her;
- k) Alice did not have a leash or a muzzle;
- l) The third dog to exit was also aggressive, no muzzle or leash;
- m) The fourth and fifth dog were not considered aggressive, more docile; and
- n) The sixth dog was deceased and appeared to be chewed on with bite marks and open flesh observed.

428. Cst. Haslett described the room that was the living area of Mr. Kirby and the dogs. There was an outer most door and a door that connected this room to the rest of the house.

[Emphasis mine.]

(4) Cst. Trinda McAlduff

101 Cst. Lacey Johnson testified that Cst. McAlduff remained on scene after the extraction until the search warrant was executed.

(5) Seizure of Items from Mr. Kirby's Residence

102 On December 14, 2018, authorized by a search warrant, Cst. James Smith seized the following items from Michael Kirby's residence at 149 Winslow Street, Saint John, NB:

- (a) 10 shot-.303 bolt action Lee-Enfield rifle without a trigger lock (trigger lock was nearby but not properly secured);
- (b) 12-gauge bolt-action shotgun;
- (c) single ShurShot Remington 12-gauge shotgun shell;
- (d) plastic bag containing: 30 red colored 12 gauge shotgun shells, 23 green colored 12 gauge shotgun shells and 1 .303 British rifle shell; and
- (e) cardboard box containing 15 red colored 12 gauge shotgun shells.¹⁰

(6) Security of House; No Cages or Crates; Photographs of House

103 The Crown submitted to the Court a summary of the testimony of Cst. Lacey Johnson at the Trial regarding the seizure of items from Mr. Kirby's residence, the security of the house and the absence of any cages or crates. Mr. Kirby elected to not testify at the Trial on the question of whether this evidence is admissible cross-counts at the Trial. This decision by Mr. Kirby does not in any way render the evidence of Cst. Lacey Johnson undisputed. What evidence of Cst. Lacey Johnson, if any, is found to be a fact and whether any of her evidence is applied against any of the counts with which Mr. Kirby has been charged are questions that will be determined by this Court in this decision. For purposes of this decision, I adopt the following summary of the Trial testimony of Cst. Lacey Johnson submitted by the Crown:

431. Cst. Johnson indicated that her and Cst. Smith entered the house through the unlocked door. This main outer-most door had a push button lock (inside button on handle) and no dead-bolt. In the main living area, as identified by Mr. Kirby, one of the guns was leaning against the wall and was not triggered locked. This was the area where Mr. Kirby lived with the dogs. The other gun was in a bag in the corner (right beside the entrance) of the main room. The house was secured when they left.

432. Cst. Johnson did not observe any cages or crates for the dogs in the home.

[Emphasis mine.]

104 Cst. Smith took 108 photographs of the residence during the seizure of the firearms on December 14, 2018, which were an accurate depiction of the residence on the date of the seizure.¹¹

III. LAW

A. *The Elements of the Offence of Criminal Negligence Causing Bodily Harm*

105 The Crown must prove beyond a reasonable doubt each of the following elements of criminal negligence causing bodily harm:¹²

- (a) an act or omission of the Accused;
- (b) that act or omission showed a wanton or reckless disregard for the lives or safety of the complainants; and
- (c) that act or omission caused bodily harm to the complainants.

106 Regarding the first element above, the Crown refers this Court to *R. v. Fortin*, (1957), 121 C.C.C. 345 (N.B. Sup. Ct. (App. Div.)) at page 347, where the Appeal Division of the New Brunswick Supreme Court explained that the phrase "a duty imposed by law" in then subsection 191(2) (now subsection 219(2)) of the **Criminal Code** "clearly includes a duty arising by virtue of either the *common law* or statutory enactment. In New Brunswick, alike under the *common law* and the *Motor Vehicle Act*, the driver of a motor vehicle upon a public highway is under a duty to take care in its operation so as to avoid injury to the person or property of others."

107 The Crown correctly notes that one year later, in 1958, the Appeal Division of the New Brunswick Supreme Court in *Regina v. Coyne*, 1958 CanLII 463 (NBCA), [1958] N.B.J. No. 11, affirmed this interpretation of the *common law* duty from *Fortin* and at page 180 went on to quote a passage from *R. v. Salmon* (1880), 6 Q.B.C. 79, where Sir James Fitzjames Stephen J. enunciated the *common law* duty in the following terms:

There is a [*common law*] duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of every one who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it.

[Revisions and emphasis mine.]

108 The Crown correctly notes that in 2003, Justice Young of the New Brunswick Court of Queen's Bench, in *R. v. Mallaley*, [2003] N.B.J. No. 94, 260 N.B.R. (2d) 304 (Q.B.) at paragraph 191, affirmed *Coyne's* interpretation of the *common law* duty. I note that the Cour du Québec in *R. c. Jean-Gilles*, 2018 QCCQ 828 (CanLII) relied upon *Coyne*, *Fortin* and *Salmon* in interpreting the *common law* duty.

109 Regarding the second element above, in order to show a wanton and reckless disregard for the lives or safety of the complainants, the Crown must prove that the accused's act or omission was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances, and a reasonable person in the circumstances would have foreseen that this conduct posed a serious risk to the lives or safety of others.¹³

B. *Credibility Analysis*

110 The outcome of this instant case largely turns on the credibility of various witnesses.

111 Justice Ferguson, at paragraphs 137 through 145, in *R. v. Colin Howe*, 2014 NBQB 259 (CanLII) aptly summarized the following credibility assessment process a judge is obliged to undertake:

[137] [...] Perhaps the best explanation of the proper context for the judicial assessment of the veracity and reliability of witnesses was penned by Chief Justice McLachlin in *R. v. R.E.M.* 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3 (S.C.C.). At paragraphs 48-51 she said:

The sufficiency of reasons on findings of credibility -- the issue in this case -- merits specific comment. The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that

"[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility ... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

[138] There are a number of legal tools required to properly assess credibility. First, there were a number of "interested witnesses" who testified in this trial. See: *Faryna v. Chorny* [1951 CanLII 252](#) (BC CA), [\[1952\] 2 D.L.R. 354](#) (B.C.C.A.); *Brethour v. Law Society of British Columbia* 1950 CanLII 346 (BC CA), [\[1951\] 2 D.L.R. 138](#) (B.C.C.A.) Their individual "interest" in the outcome was in varying degrees depending upon their relationships with the important parties in the incident. As the Court said in *Brethour* at pp.15-16:

In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions.

[139] When considering testimony given by the accused the comments of Charron J. in *R. v. Laboucan* [2010 SCC 12](#) (S.C.C.) at paragraph 11-12 are instructive:

The fact that a witness has an interest in the outcome of the proceedings is, as a matter of common sense, a relevant factor, among others, to take into account when assessing the credibility of the witness's testimony. A trier of fact, however, should not place undue weight on the status of a person in the proceedings as a factor going to credibility. For example, it would be improper to base a finding of credibility regarding a parent's or a spouse's testimony solely on the basis of the witness's relationship to the complainant or to the accused. Regard should be given to all relevant factors in assessing credibility.

The common sense proposition that a witness's interest in the proceedings may have an impact on credibility also applies to an accused person who testifies in his or her defence. The fact that the witness is the accused, however, raises a specific concern. The concern arises from the fact that both innocent and guilty accused have an interest in not being convicted. Indeed, the innocent accused has a greater interest in securing an acquittal. Therefore, any assumption that an accused will lie to secure his or her acquittal flies in the face of the presumption of innocence, as an innocent person,

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presumably, need only tell the truth to achieve this outcome. In *R. v. B. (L.)* (1993), [1993 CanLII 8508](#) (ON CA), [13 O.R. \(3d\) 796](#) (C.A.), Arbour J.A. (as she then was) succinctly described the inherent danger in considering the accused's motive arising from his or her interest in the outcome of the trial. In an often-quoted passage, she stated as follows (at pp. 798-99):

It falls into the impermissible assumption that the accused will lie to secure his acquittal, simply because, as an accused, his interest in the outcome dictates that course of action. This flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused. The accused is obviously interested in being acquitted. In order to achieve that result he may have to testify to answer the case put forward by the prosecution. However, it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question. If the trial judge comes to the conclusion that the accused did not tell the truth in his evidence, the accused's interest in securing his acquittal may be the most plausible explanation for the lie. The explanation for a lie, however, cannot be turned into an assumption that one will occur. [Emphasis added.]" (in original)

[140] Further assistance is found in *R. v. M. (E.K.)* [2012 NBCA 64](#) (N.B.C.A.). In that case Chief Justice Drapeau quoted with apparent approval at paragraph 22 the comments of Fairgrieve J. in *R. v. Schauman* [2006 ONCJ 304](#), [\[2006\] O.J. No. 3425](#) (Ont. C.J.) in addressing whether it is better to assess the credibility of the accused's testimony first in order not to preclude accepting it after quantifying the evidentiary worth of that of other witnesses first. Fairgrieve J. said:

The difficulty with such an approach, it seems to me, is that the assessment of credibility is not a linear reasoning process where individual factors are given consideration on a *seriatim* basis or where one version of events is assessed in a vacuum without reference to the rest of the evidence. Rather, I think, determinations of credibility require an analysis of the evidence that involves the simultaneous weighing of a multitude of factors. While reasons may have to be organized and presented in a coherent way, it is difficult to accept that appellate courts have imposed straightjackets on trial judges requiring that witnesses whose credibility is at issue should be considered in a particular order, isolated from the factual context in which at least some tentative assessment of the reliability of other confirmatory or contradictory evidence may have been made.

The most important factor in assessing a witness's credibility, I think, remains the assessment of whether the testimony seems plausible in terms of the inherent likelihood that events occurred as the witness described them. This involves an exercise of what has been referred to as common sense and judicial experience. As part of that process, it seems to me, a court would inevitably consider the extent to which a particular witness's evidence accorded with other factual findings which were either not in dispute or were compelled by other evidence accepted or considered reliable by the court.

[141] See, also, to the same effect comments from the Supreme Court that the order in which witness credibility is evaluated is not important as long as proof beyond a reasonable doubt remains at the centre of the process *R. v. Vuradin* [2013 SCC 38](#) (CanLII), [\[2013\] 2 S.C.R. 639](#) (S.C.C.) at paragraph 21.

[142] Mention should also be made of the use that may be put to hearsay statements that were testified to during the trial by several of the eye witnesses and some witnesses not identified. Of course those statements are not admissible for their truth and can only be used to provide a context within which the unfolding of events is better understood. *R. v. Dowding* (2005), [2004 BCCA 583](#) (CanLII), [191 C.C.C. \(3d\) 1](#) (B.C.C.A.); *R. v. Curto* [2008 ONCA 161](#) (CanLII), [\[2008\] O.J. No. 889](#) (O.C.A.)

[143] Finally, to all of these tools must be added the test for evaluating the testimony of the accused, namely, the principles set out in *R. v. W. (D.)* [1991 CanLII 93](#) (SCC), [\[1991\] 1 S.C.R. 742](#) (S.C.C.) and its progeny. At paragraph 28 Cory J., speaking for the majority said:

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[144] The *W. (D.)* principles apply to the defence witnesses as well who contradict the evidence led by the Crown or provide evidence favorable to the defence. *R. v. Dayes* [2013 ONCA 614](#) (CanLII), [\[2013\] O.J. No. 4615](#) (O.C.A.), particularly at paragraphs 51-52.

[145] In sum, in order for testimony or evidence to become, or assist producing a finding of fact, it must bear the marks of plausibility, harmony with other testimony or evidence and inherent likelihood thus according with reason and common sense. These are the touchstones from which the cogency of the testimony or evidence is derived.

[Emphasis mine.]

112 The Saskatchewan Court of Appeal, at paragraphs 20 through 22, in *R. v. Van Deventer*, [2021 SKCA 163](#), offered the following guidance to trial judges concerning being careful to avoid a credibility contest between the accused and the Crown witnesses:

[20] Despite the inconsequential nature of the sequence of the credibility and reliability analysis, a trial judge must be careful to avoid a credibility contest between the accused and the Crown witnesses. A trial judge cannot simply compare the evidence of an accused and the evidence of a complainant, or another Crown witness, and then choose which version of events they prefer. Correspondingly, a trial judge cannot reject an accused's testimony solely because it is inconsistent with the Crown's evidence: see *R v Hoskins*, [2021 SKCA 23](#) at para 98; *R v Libertore*, [2010 NSCA 82](#) at paras 11-12, [262 CCC \(3d\) 559](#) [Libertore]; and *Vuradin* at paras 21 and 26.

[21] Although trial judges must exercise caution in order to avoid conducting a credibility contest between the complainant and the accused when performing a *W.(D.)* analysis, the acceptance of the complainant's testimony and other evidence that is inconsistent with an accused's bare denial can provide a sufficient explanation for the rejection of the accused's inconsistent evidence: *R v J.J.R.D.* ([2006](#)), [218 OAC 37](#) (CA) at para 55; *R v R.E.M.*, [2008 SCC 51](#) at para 66, [\[2008\] 3 SCR 3](#) [R.E.M.]; and *R v R.I.G.*, [2020 SKCA 26](#) at paras 74-78. In making such an assessment, the testimony of the accused must not be isolated for a separate examination or divorced from the remainder of the evidence: *R v Menow*, [2013 MBCA 72](#) at para 23, [300 CCC \(3d\) 415](#). These ideas are well-synthesized by Dewitt-Van Oosten J.A. in *R v Redden*, [2021 BCCA 230](#):

[81] A court does not assess the evidence of an accused in isolation: *R. v. Wanihadie*, [2019 ABCA 402](#) at para. 31. As a result, there will be cases where a denial, defences that rely heavily on the testimony of the accused, or hypothesized inferences are rejected outright "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence": *R. v. D.* (J.J.R.) ([2006](#)), [215 C.C.C. \(3d\) 252](#) (Ont. C.A.) at para. 53, leave to appeal ref'd, [\[2007\] S.C.C.A. No. 69](#). This does not mean that the trial judge has erroneously chosen between competing narratives, simply preferring one to the other. To do so would constitute reversible error. Rather, it represents a finding that the testimony of the accused cannot stand in light of the cogency of the other evidence.

[22] Further to this point, in the recent decision of *R v G.C.*, [2021 ONCA 441](#), the Ontario Court of Appeal found that the trial judge did not err in considering the evidence of the complainant while assessing the accused's credibility. In doing so, the Court noted the following:

[15] ... an accused person is not entitled to an acquittal simply because his evidence does not raise any obvious problems. His evidence may be rejected "based on considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence" which may provide "as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence":

[citations omitted].

[Emphasis mine.]

C. Criminal Negligence Causing Bodily Harm Caselaw Involving Dog Attacks

113 The Crown refers this Court to the following three cases:

(1) **Jean-Gilles**

114 In ***Jean-Gilles***, Mr. Jean-Gilles was charged and convicted of one count of criminal negligence causing bodily harm to a seven-year old child. The victim was assaulted on September 20, 2015, in a public park by a Pitbull dog named Ashes owned by Mr. Jean-Gilles. The accused did not testify. The Cour du Québec found the accused "failed to comply with his obligations under the municipal by-laws in force" (see paragraph 20). The Cour du Québec heard evidence of prior incidents involving Ashes. Referring to these prior incidents, the Cour du Québec held as follows:

[25] Several incidents of this nature occurred in the vicinity of the accused who did nothing to prevent this from happening again. He was in charge and responsibility for his animals and did not care much about it. No chain, no necklace, no fence, no muzzle, nothing has been done to secure the place. By repeatedly failing to comply with his legal obligations, it is clear that the accused is an irresponsible person who makes a mockery of the law and the safety of others.

[26] The accused knew that his dogs were dangerous. He still left custody of them to his mother who had no control over them. He was aware of a serious risk to the safety of others. He was aware of the danger and did nothing to ward it off or deliberately refused to care. In doing so, the accused showed a reckless or reckless disregard for the life or safety of others. His conduct constitutes a marked and significant deviation from the behaviour of a person placed in the same circumstances. A reasonable person would have been aware of the risk to the life or safety of others.

[27] In short, the accused should have foreseen the consequences of his inaction. He knew the potential for dangerousness of his Pitbull dogs and did not take the necessary measures to control them.

[Emphasis mine.]

(2) **R. v. Vantroba, 2015 ONSC 1569**

115 In ***Vantroba***, Mr. Vantroba was found not guilty of criminal negligence causing bodily harm and unlawfully causing bodily harm. The charges arose from an incident on November 17, 2012, in a public park where Mr. Vantroba's Old English Bulldog, named Big Brown, bit an 11-year old named Dante. Mr. Vantroba testified at trial as follows:

[6] Mr. Vantroba testified that the dog was never known to be aggressive to other animals or to growl, bark or jump at people. He said that when he was with the dog, the dog was fully under his control and was obedient.

[7] Mr. Vantroba testified about two incidents during which Big Brown was permitted to run free and did not respond to commands. Once, along the Kaministiquia River, the dog came across three homeless people sleeping by the river. Mr. Vantroba called the dog back, but he would not come. He just stood there. He did not growl or bark at those people. On another occasion, the dog found a skunk and stayed by it until Mr. Vantroba approached to investigate.

[8] Mr. Vantroba testified that before he moved into his own home with the dog, his son kept Big Brown in a kennel adjacent to the back lane. From time to time, children passing by threw rocks at the kennel and kicked the backyard fence, which got the dog agitated and upset. Mr. Vantroba testified that was the only time he heard the dog bark. When Mr. Vantroba moved to his own house, Big Brown and the female resided in the house while the puppies remained outside in a kennel.

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[9] Mr. Vantroba said that on one occasion when he was walking Big Brown, in the middle of the night, they suddenly came upon Mr. Vantroba's neighbour who was walking his three dogs. Mr. Vantroba had to pull on the leash and say "stop" in a loud voice to control Big Brown.

116 The victim, Dante, testified that "He [Dante] had put his sleeve over his face right after the dog bit him because he knew he was going to be bleeding. He spoke to Mr. Vantroba with his sleeve over his face" (see paragraph 20). Mr. Vantroba testified that Dante "had his [Dante's] hands over his [Dante's] mouth. Mr. Vantroba testified that he saw no sign of injury or blood other than a slight scratch over Dante's right eye, which he thought may have been caused by Big Brown's paw" (see paragraph 22).

117 First, Justice Shaw found the Crown had not proven the *actus reus* of criminal negligence (see paragraph 51).

118 Justice Shaw's reasons included the following: "There was no evidence leading up to the incident [on November 17, 2012] that Big Brown had been aggressive towards people or adults ... No witnesses were called by the Crown to testify that there had been any prior problems with the dog." (see paragraph 55)

119 Regarding the prior incidents related by Mr. Vantroba, Justice Shaw held as follows: "[N]one of these [prior] events indicate that the dog had a propensity for aggressive behaviour. The dog stood quietly by the homeless people and the skunk. Also, in my view, no adverse conclusions can be drawn about the dog's behaviour because he barked when rocks were thrown at his kennel or when the fence by his kennel was kicked or because he strained at his leash when he unexpectedly came upon dogs in the dark. None of these reactions appear to be abnormal." (see paragraph 57)

120 Justice Shaw also found that the victim's jumping over the boards into the rink area (where the accused and dog were) "would not have reasonably been expected in the circumstances." (see paragraph 61)

121 Second, Justice Shaw found the Crown had not proven the *mens rea* of criminal negligence:

[68] The fact that on prior occasions when training the dog off leash, Mr. Vantroba kept the dog away from strange children is equally consistent with Mr. Vantroba exercising reasonable caution as it is with knowledge that the dog posed a risk. In the circumstances related to this incident, Mr. Vantroba did not foresee that a child would suddenly jump over the boards and run across the rink. Such a failure to foresee did not, in my view, constitute a marked and substantial departure from what a reasonably prudent person would have foreseen. It was understandable that Mr. Vantroba called loudly to the dog when he suddenly saw it running towards Dante. It was also understandable that he ran over to Dante and the dog after the dog stopped on Mr. Vantroba's command. Although this may have indicated that Mr. Vantroba was aware of a risk to the child because the dog had run to the child, it does not necessarily follow that, before the dog ran over to Dante, Mr. Vantroba failed to direct his mind to a risk to such a degree that the failure represented a marked and substantial departure from the norm.

[69] I again refer to Mr. Vantroba's uncontradicted evidence about the nature and extent of his training of his dogs. [...]

[Emphasis mine.]

(3) **R. v. Zeitner, 1991 Carswell BC 1712, [1991] BCWLD 1231 (CA)**

122 In *Zeitner*, Mr. Zeitner unsuccessfully appealed his two convictions of criminal negligence causing bodily harm. "The first count related to a letter carrier employed by the Canadian Postal Service. The second count concerned a 15-year-old boy named James Peeler. The negligence asserted was the appellant failed to keep control of a Rottweiler dog whose name appropriately was Brutus. The dog escaped from the appellant's control and attacked first the boy, Peeler, and sometime later the letter carrier" (see paragraph 2).

123 The British Columbia Court of Appeal noted at paragraph 6 the following prior, similar incidents involving the same dog:

This was not the first occasion on which the dog had injured people. On two prior occasions, one of them just about a month before this incident, the dog had escaped from custody and had injured passers by. So there is no question that the appellant knew the propensity for this dog when loose, to attack innocent pedestrians. One of those occasions is in some ways similar to the present occasion. On that occasion the appellant said the dog was left in an automobile. Other evidence in the case indicated that a window in the automobile was open but only about three inches. Notwithstanding the size of the dog and the smallness of the window opening the dog managed to escape and attack a passer by.

[Emphasis mine.]

124 Mr. Zeitner's ground of appeal was "whether the impugned conduct of the appellant amounts to a marked and significant departure from the standard to be expected of a reasonably prudent person in the circumstances of this case" (see paragraph 3).

125 Justice Taggart, writing for a unanimous British Columbia Court of Appeal, reproduced the trial judge's conclusion at paragraph 8 as follows:

I [the trial judge] think it is clear from all the evidence that Brutus was a dangerous animal, and adequate precautions were not taken to maintain a control on the day in question. In my view, it matters not whether it was free in the backyard, tied in the backyard or in the basement, as the circumstances of the containment of the dog were not adequate to protect others. The accused, if he thought the dog was secure in the basement, was reckless in that belief as he gave no thought whatsoever to the very great possibility and probability of escape of the dog through the window which was partly opened, and could be easily opened further. In this regard, he failed to contain the dog. And he knew that the safety of others would be endangered if that dog were free to roam outside. His belief in the security of the situation was ill-conceived and unsupported by the circumstance.

[Revisions and emphasis mine.]

126 Justice Taggart found that the evidence supported this conclusion by the trial judge. The appeal was therefore dismissed.

*D. Applicable Mens Rea for subsection 145(3) of the **Criminal Code***

127 The Supreme Court of Canada, in *R. v. Zora*, [2020 SCC 14](#), described what the Crown must establish to prove subjective *mens rea* for purposes of subsection 145(3) of the **Criminal Code**. I adopt the following headnote in the *Zora* decision, which, in my view, accurately summarizes the *ratio decidendi* of *Zora*:

Subjective mens rea under s. 145(3) can be satisfied where the Crown proves: (1) the accused had knowledge of the conditions of their bail order or were wilfully blind to those conditions; and (2) either the accused knowingly failed to act according to the bail conditions or they were wilfully blind to those circumstances and failed to comply despite that knowledge, or the accused recklessly failed to act according to the conditions, meaning they perceived a substantial and unjustified risk that their conduct would likely fail to comply with the conditions and persisted in this conduct. Genuinely forgetting a condition could be a mistake of fact and would negate mens rea. The accused need not have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. Knowledge in the second component of the mens rea means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act or refrain from acting. The second component of the mens rea can also be met by showing that the accused was reckless. Knowledge of risk is key to recklessness -- the accused must know of their bail conditions and the risk of factual circumstances arising that would require them to act (or refrain from acting) to comply with their bail conditions. Recklessness is a subjective standard and the accused must be aware that their conduct created a substantial risk of non-compliance with their bail conditions and aware of any factors that contributed to that risk being unjustified.

IV. APPLICATION OF THE LAW TO THE FACTS

A. Count 4: The August 22, 2018 Incident- Garfield McPhee

(1) An alleged act or omission of Mr. Kirby

128 The Crown correctly notes that on August 22, 2018, it is undisputed that Mr. Kirby took his four dogs to the Gateway Street area and allowed them to run off-leash.

129 The Crown submits that, at that time, Mr. Kirby was under a legal duty imposed by law, to prevent his dogs from running at large at all times when they were off his property pursuant to the Saint John by-law in force (see ***A By-law respecting the Control of Dogs in the City of Saint John: By-law Number M-13 ("By-law Number M-13")***): section 7(1) "The owner of a dog shall prevent such dog from running at large in the City.").

130 The Crown correctly notes that Joan Richardson testified that on June 27, 2018 she told Mr. Kirby his dogs were required to be leashed when off his property. On cross-examination, Mr. Kirby denied speaking to Joan Richardson on June 27, 2018, contrary to her testimony. Mr. Kirby denied that Joan Richardson of the SPCA told him that the dogs needed to be on-leash when off his property. Mr. Kirby confirmed that he would have remembered this conversation given its proximity to the incident. However, on direct examination, Mr. Kirby indicated he had a conversation with Joan Richardson about licenses for the dogs and elaborated on a requirement to have the dogs' blood titrated to see if they were immune to rabies.

131 The Crown maintains that there were blatant inconsistencies in Mr. Kirby's testimony surrounding the conversation he had with Joan Richardson. The Crown contends that the inconsistencies indicate Mr. Kirby's version of events is not credible.

132 The Crown submits that it is noteworthy that Mr. Kirby became increasingly evasive during cross-examination to the point of becoming akin to a moving target, namely by evading or refusing to answer the questions (see ***R. v. Gyurko***, [2019 NBPC 18](#) at paragraph 29). The Crown submits that, albeit, not determinative, this adds to the credibility triggers (see ***R. v. Gyurko***, [2019 NBPC 18](#) at paragraph 29).

133 The Crown submits that Ms. Richardson, on the other hand, provided clear and cogent evidence of the conversation with Mr. Kirby. The Crown maintains that Ms. Richardson had taken notes of the conversation and was acting in the course of her employment with no vested interest.

134 In my view, based upon the totality of the evidence before this Court, and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I do not accept Mr. Kirby's denial that Joan Richardson of the SPCA told him on June 27, 2018 that his dogs needed to be on-leash when off his property. I find as a fact that Joan Richardson of the SPCA told Mr. Kirby on June 27, 2018 that his dogs needed to be on-leash when off his property. To be clear, my conclusion in that regard is based upon my review of the whole of the evidence, and not just that of Ms. Richardson. In my view, there were blatant inconsistencies in Mr. Kirby's testimony surrounding the conversation he had with Ms. Richardson. In my view, these inconsistencies do not accord with common sense and judicial experience and with the competing testimony of Ms. Richardson. In my view, Ms. Richardson provided clear and plausible evidence of her conversation with Mr. Kirby. Furthermore, Ms. Richardson took notes summarizing her conversation with Mr. Kirby, and when speaking with Mr. Kirby was acting in the course of her employment with no vested interest.

135 The Crown argues that, independent of Mr. Kirby's conversation with Joan Richardson, it is abundantly clear from ***By-law Number M-13*** that Mr. Kirby had a duty to prevent his dogs from running at large off of his property.

136 The Defence correctly notes that Crown must prove the existence of this legal duty of Mr. Kirby to keep his dogs leashed when they are off his property beyond a reasonable doubt.

137 The Defence contends that it is trite law that municipal by-laws do not automatically apply to federal lands, such as ports and airports, within city limits.

138 The Defence argues that the Crown has failed to prove that **By-law Number M-13** requiring dogs to be leashed applied within The Saint John Port Authority grounds.

139 The Crown agrees that Gateway Street, being the location of the August 22, 2018 Incident, is located within the area of The Saint John Port Authority. However, the Crown disagrees with the Defence's position that **By-law Number M-13** does not apply to Gateway Street. The Crown submits that this issue raises the constitutional law question of whether and in what circumstances a municipal by-law (being "a valid expression of provincially authorized legislative power": see **British Columbia (Attorney General) v. LaFarge Canada Inc.**, [2007 SCC 23](#) at paragraph 79) applies to federally regulated activities such as a port. The Crown submits that **By-law Number M-13** applies to the activity of walking a dog on federally regulated land. In that regard, the Crown relies upon and refers this Court to paragraphs 36, 37, 79 and 91 in **LaFarge Canada Inc.**, where the Supreme Court of Canada stated the following:

36 There is no separate head of legislative power over "ports". The federal government enjoys exclusive jurisdiction in relation to its public property and over shipping and navigation activities. The province exercises jurisdiction over "property and civil rights" and "municipal institutions" within the province but it has, of course, been long recognized that the power to control navigation and shipping conferred by s. 91(10) is "capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights": *Montreal (City of) v. Montreal Harbour Commissioners*, 1925 CanLII 325 (UK JCPC), [\[1926\] 1 D.L.R. 840](#) (P.C.), at pp. 848-49, per Viscount Cave L.C.

37 The development of waterfront land could potentially fall under either provincial or federal jurisdiction, depending on the ownership and the use to which the land is proposed to be put. Waterfront lands do not cease to be "within the province" by reason of their potential use for federally regulated activities (*Cardinal v. Attorney General of Alberta*, 1973 CanLII 980 (SCC), [\[1974\] S.C.R. 695](#)), but of course federal authority will be paramount to the provincial authority in cases of overlapping jurisdiction where there is a valid federal law and a valid provincial law applicable to different aspects of the proposed use and the two laws come into operational conflict. In this respect, we agree, as did the Ontario Court of Appeal ((1978), 21 O.R. (2d) 491), with what was said by Griffiths J. (as he then was) in *Hamilton Harbour Commissioners v. City of Hamilton* (1976), 1978 CanLII 1511 (ON CA), [21 O.R. \(2d\) 459](#) (H.C.J.), at p. 484:

In my opinion, land-use control within a harbour has both provincial and federal aspects. . . . Only if conflict arises with respect to the use of a parcel of land within the limits of the harbour, will the paramountcy of the federal power cause the operation of the by-law of the City to be suspended.

[...]

79 There was also, as the Ratepayers contend, a valid provincial law. It is beyond question that City of Vancouver By-law No. 3575 is a valid expression of provincially authorized legislative power. It is a law of general application that is not aimed at navigation and shipping. It does not authorize development that would adversely affect shipping and navigation. (On the contrary, it emphasizes cooperation with the VPA on all such matters.) In the absence of conflicting federal law, the City's By-law No. 3575 would properly regulate where industrial uses such as a cement batch facility would be permitted. This point was recognized as early as 1911 when Middleton J. (as he then was) stated in *Re Sturmer and Town of Beaverton* ([1911](#)), [24 O.L.R. 65](#) (Div. Ct.), at p. 72:

The harbour may be, as a harbour, "within the jurisdiction of the Parliament of Canada;" but is none the less, for purposes within the ambit of provincial legislation, within the jurisdiction of the Province and its Legislatures, provincial and municipal.

Middleton J.'s judgment was upheld on appeal by the Divisional Court and cited with approval in the *Hamilton Harbour Commissioners* case, at p. 483.

[...]

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91 For these reasons, we would dismiss the appeal with costs and answer the constitutional questions as follows:

1. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to property, with a legal description of Parcel P, Block 17, Plan LMP 47343, District Lot 184 and the Public Harbour of Burrard Inlet (the "Property"), held by the Vancouver Port Authority, on the basis that the Property is "public property" within the meaning of s. 91(1A) of the *Constitution Act*, 1867?

Answer: No.

[...]

140 I agree with the Crown's submission regarding *By-law Number M-13*. In my view, I am satisfied beyond a reasonable doubt that *By-law Number M-13* applies to the activity of walking a dog in the Gateway Street area within The Saint John Port Authority grounds. In other words, I am satisfied beyond a reasonable doubt that Mr. Kirby was under a legal duty imposed by law, pursuant to *By-law Number M-13*, to prevent his dogs from running at large at all times when they were in the Gateway Street area.

141 In my view, based upon the totality of the evidence before this Court regarding the August 22, 2018 Incident and my conclusions and observations outlined above regarding the August 22, 2018 Incident, I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to prevent his dogs from running at large during the August 22, 2018 Incident was in violation of *By-law Number M-13*.

142 In the event that I am incorrect in my conclusion that *By-law Number M-13* applies to the Gateway Street area within The Saint John Port Authority grounds and that Mr. Kirby failed to comply with *By-law Number M-13* on August 22, 2018, I feel it is incumbent on me to address the applicability of the *common law* duty "of everyone who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it".

143 The Defence submits that the June 20, 2018 Incident did not give rise to a special risk in the circumstances of August 22, 2018.

144 First, the Defence argues that given Mr. Kirby's evidence that, over hundreds of similar visits, he had never seen a pedestrian in that location at that time, including daily since the June 20, 2018 Incident, it was not likely that Mr. Kirby and his dogs would encounter a person walking in that area at that time of day. The Defence maintains that in light of that evidence, Mr. Kirby's conduct was not likely to be dangerous to the safety of others.

145 Second, the Defence argues that the June 20, 2018 Incident would not give rise to knowledge that these dogs were likely to cause danger to the safety of others if off-leash. The Defence submits that with the benefit of hindsight, and having seen the photographs of Mr. Saliou presented at the Trial, one might be tempted to conclude that the danger posed by the dogs was readily ascertainable, but this was not the nature of the information available to Mr. Kirby at the time of the incident and was not made available to Mr. Kirby until October, 2018.

146 The Defence contends that Mr. Kirby's evidence on this point - whether he knew Mr. Saliou was actually bitten by his dogs - is consistent with the Crown's evidence. The Defence notes that Cst. Haines testified that Mr. Kirby did not believe Mr. Saliou suffered injury. Moreover, the Defence notes that Cst. Haines testified that the tears in Mr. Saliou's clothing were apparent in the photographs; he did not testify that they were apparent to the naked eye on June 20, 2018.

147 The Defence notes that it was clear to Mr. Kirby, however, that the situation required a response. Mr. Kirby testified that he recognized Mr. Saliou had a substantially negative experience with his dogs and this was not something he wished to repeat.

148 The Defence correctly notes that if this Court finds the events of June 20, 2018 imposed upon Mr. Kirby an

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enhanced duty to take reasonable measures of prudence when walking his dogs, this Court must determine whether Mr. Kirby breached that duty.

149 The Defence asserts that the duty was not breached because Mr. Kirby no longer allowed his dogs off-leash in that area at any time that they were reasonably likely to encounter pedestrians.

150 The Defence maintains that Mr. Kirby adjusted to the circumstances following each incident, starting with the June 20, 2018 Incident, and that those changes demonstrate consideration of the potentiality for risks to public safety.

151 The Defence submits that Mr. Kirby knew that Mr. Saliou was frightened by his dogs and that he was extremely upset by the interaction he had with them. The Defence maintains that by limiting his off-leash time at The Saint John Port Authority property to the early morning hours when he was substantially unlikely to see other people, Mr. Kirby adjusted to the negative interaction on June 20, 2018.

152 The Crown, on the other hand, maintains that on August 22, 2018, Mr. Kirby had a *common law* duty to take proper precautions in the use of his dangerous dogs. Specifically, the Crown argues that this *common law* duty obliged Mr. Kirby to leash his dogs on Gateway Street on August 22, 2018. The Crown correctly notes that it is "the legal duty of every one who does any act [e.g., dog walking], which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it" (see *Salmon*). The Crown argues that on August 22, 2018, Mr. Kirby knew his dogs to be dangerous, for two months prior (on June 20, 2018) his dogs, without provocation, attacked and injured Mr. Saliou in the same geographic area. Therefore, the Crown submits Mr. Kirby failed in his legal duty imposed by the *common law*.

153 In my view, as I have concluded below in paragraph 176, Mr. Kirby, at the time of the August 22, 2018 Incident, was aware of or recognized that his dogs, when not adequately contained, leashed or controlled, posed an obvious and serious risk (danger) to the lives and safety of others. In that regard, I am satisfied beyond a reasonable doubt that Mr. Kirby, during the August 22, 2018 Incident, failed to take ordinary precautions and performed an act (walking his dogs off-leash) which was or may have been dangerous to human life. In my view, I am satisfied beyond a reasonable doubt that Mr. Kirby, in not leashing his dogs on August 22, 2018, failed in his legal duty imposed by *common law*. In other words, I am satisfied beyond a reasonable doubt that Mr. Kirby had a *common law* duty to leash his dogs while walking them on Gateway Street on August 22, 2018.

(2) Did the omission by Mr. Kirby show a wanton or reckless disregard for the lives or safety of the complainant, being Garfield McPhee?

154 The Defence maintains that there is not sufficient evidence before this Court to support the inference that, following the June 20, 2018 Incident, Mr. Kirby must have had knowledge of his dogs' propensity to cause bodily harm to pedestrians when off-leash, and that, in ignoring that knowledge and persisting in allowing his dogs off-leash, Mr. Kirby showed wanton or reckless disregard for the safety of other persons.

155 The Defence argues that first, the evidence indicates that Mr. Kirby did not believe that Mr. Saliou sustained injuries, but he was aware of the negative interaction, and he took reasonable steps to avoid such encounters. The Defence maintains that even if the Court finds Mr. Kirby was willfully blind to the knowledge of Mr. Saliou's injuries by his dogs, the Crown has not established that Mr. Kirby showed wanton or reckless behaviour on August 22, 2018.

156 The Defence notes that Mr. Kirby testified that after June 20, 2018, he stopped allowing his dogs off-leash anywhere within the City of Saint John, except on The Saint John Port Authority property in the early morning hours. The Defence submits that it is important to note that Mr. Kirby had been making that walk daily for several years and had never encountered another person on foot. The Defence contends that it was reasonable for Mr. Kirby to believe at that time that his dogs posed no risk to the safety of others. The Defence maintains that given the information available to Mr. Kirby at the time, he was not unreasonable in that course of action, but more to the

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point, he did not proceed without regard to the consequences. The Defence submits that Mr. Kirby made reasonable and considered changes to his care of the dogs and their routines. The Defence further submits that this is not a marked and substantial departure from the conduct of a reasonable dog owner in Mr. Kirby's circumstances, and it is antithetical to the notion of wanton or reckless disregard for the safety of other persons.

157 I note that Mr. Kirby testified that following the June 20, 2018 Incident he was trying to be aware that he is "a dog person" but some people are not and "the dogs have to be under control at all times and keeping them on a leash." He also testified that following the June 20, 2018 Incident, he did not take his dogs off-leash on The Saint John Port Authority property in the daytime because he did not want his dogs "scaring people."

158 The Crown, on the other hand, submits that on August 22, 2018, Mr. Kirby knew the propensity of his dogs. The Crown correctly notes (see my finding of fact in paragraph 170 below) that this was not the first time Mr. Kirby's dogs had attacked a pedestrian. On a prior occasion, about two months before this incident (namely, the June 20, 2018 Incident), at the exact same location, Mr. Kirby's dogs had injured a pedestrian. The Crown submits there is no question that Mr. Kirby knew the propensity for his dogs when loose, to attack innocent pedestrians. In that regard, the Crown refers this Court to the *Zeitner* case.

159 The Crown argues that in evaluating Mr. Kirby's knowledge at the time of the attack on August 22, 2018, the circumstances surrounding the June 20, 2018 Incident become relevant. The Crown submits that Mr. Saliou provided clear evidence that he was attacked by Mr. Kirby's dogs. Mr. Saliou testified that he was circled and was knocked to the ground by the dogs. He further testified that he was bitten several times and a colleague of his intervened and came to his assistance. The Crown correctly notes that Mr. Saliou's testimony was consistent with testimony of an independent civilian, Mr. Dehondt, who testified that he was so caught off-guard by the circumstances surrounding the June 20, 2018 Incident that he intervened and tried to scare the dogs off with his vehicle. Both Mr. Saliou and Mr. Dehondt testified the dogs bit Mr. Saliou several times when he was on the ground.

160 The Crown also correctly notes that not only was the testimony of Mr. Saliou consistent with Mr. Dehondt, it was consistent with the medical evidence from Horizon Health Network and the observations of both Cst. Haines and Sgt. Osborne who attended the scene of the June 20, 2018 Incident in the course of their duties. Both officers observed bite marks (puncture wounds/abrasions) to Mr. Saliou and evidence of the dog attack on his clothes.

161 The Crown submits that Mr. Kirby provided self-serving and illogical evidence with respect to the June 20, 2018 Incident. The Crown correctly notes that Mr. Kirby acknowledged having the dogs off-leash, but characterized their approach towards Mr. Saliou as a trot. The Crown correctly notes that Mr. Kirby further stated that the dogs' mouths never contacted Mr. Saliou and that the dogs did not jump up on him which "flies in the face" (see *R. v. Dennis James Oland*, [2015 NBQB 257](#) at paragraph 7) of the undisputed medical evidence before this Court. At the Trial, Mr. Kirby confirmed he had an unobstructed view of Mr. Saliou.

162 The Crown submits that, based upon the evidence before this Court, the following table demonstrates Mr. Kirby did not provide credible evidence and that his testimony is both internally inconsistent and logically incongruent as it relates to all of his descriptions of incidents including peripheral matters.

Mr. Kirby Testimony	Evidence to the Contrary
Mr. Kirby said that the western side of the street has a fence beginning at King Street and goes down and around to the Crosb[y] Plant uninterrupted. ¹⁴	Mr. Kirby later testified that he couldn't speak about the area down towards the Molasses Plant because he had never been down there past the AIM plant opening. ¹⁵ He is unable to say what fencing there is at the far end because he has never gone down there. He only knows the area is contained on the north

[Editor's Note: Notes^{14,15} are included in the image above]

	and south sides with a large opening at King Street. ¹⁶
<p>Mr. Kirby described the dogs' interaction with Mr. Saliou. He maintained the dogs were not jumping,¹⁷ "they were circling him as he was running around, following him as a group, but not jumping up on him; the dogs wouldn't jump".¹⁸</p>	<p>Cst. Haines, in the course of his duty, spoke with Mr. Kirby who indicated that he was walking down in the area of Gateway St. and four of his dogs were off-leash and one dog was on-leash.¹⁹ The dogs spotted an individual down Gateway St. The dogs that were not on leash took off running towards Dominique Saliou. Once they arrived at him, they barked and jumped at him. Dominique Saliou and Jeremy Dehondt both testified to the contrary. In fact, Mr. Saliou said a dog jumped on him causing him to fall to the ground.</p>
<p>Despite acknowledging injuries on Mr. Saliou as "obvious", Mr. Kirby denied seeing his dogs bite Mr. Saliou.²⁰ Mr. Kirby confirmed that he never saw any physical contact between his dogs and Mr. Saliou whatsoever.²¹ There was no jumping, no dog's mouth open, no grabbing of arms or legs. Mr. Kirby re-confirmed on re-direct that the dogs did</p>	<p>Mr. Kirby confirmed he watched the whole time and that Mr. Saliou had bite marks on him.²³ The bite marks are consistent with the testimony of Mr. Saliou and Mr. Dehondt who also witnessed this event and the medical evidence from Horizon Health Network.</p>

[Editor's Note: Notes ¹⁶,¹⁷,¹⁸,¹⁹,²⁰,²¹,²²,²³ are included in the image above]

<p>not make contact with Mr. Saliou when he was on the ground.²²</p>	
<p>On direct examination, after the June 20, 2018 incident, Mr. Kirby said he received a message from Joan Richardson and called her back.²⁴ He said the conversation was about licensing and vaccination.</p> <p>On cross-examination, Mr. Kirby denied that Joan Richardson of the SPCA told him that the dogs needed to be on-leash when off his property.²⁵ Mr. Kirby then denied speaking to Joan Richardson on June 25, 2018, contrary to her testimony and his previous testimony on direct.²⁶ He confirmed that he would have remembered this conversation.²⁷</p> <p>On re-direct, Mr. Kirby returned to his previous testimony and indicated that he did speak to Joan Richardson about this event, and that leashes could have been spoken about.²⁸ He further confirmed that biting or attempted biting could have been</p>	<p>Joan Richardson testified that Mr. Kirby was made aware that all dogs had to be leashed when off property in their conversation on June 25, 2018.³¹</p>

[Editor's Note: Notes^{24;25;26;27;28;29;30;31} are included in the image above]

discussed. ²⁹ Mr. Kirby confirmed that if the issue of biting was raised, he would have a concern as a dog owner. ³⁰	
Mr. Kirby said he looked at Mr. Saliou and there were no marks on him, no blood, no tearing of his clothes. ³² Mr. Kirby looked at him from behind to see if there is any tearing.	Sgt. Osborne took photographs of puncture wounds on Mr. Saliou's shoulders. He was able to observe the holes in the victim's shirt. Cst. Haines described scratches and abrasions on the victim's back. He saw what appeared to be teeth marks and tears in fabric of the clothes wore by the victim and described several abrasions on his legs. ³³

[Editor's Note: Notes^{32,33} are included in the image above]

[Emphasis by the Crown; typographical correction mine.]

163 The Crown correctly notes that Mr. Kirby claimed that he was unaware of the injuries. The Crown also correctly notes that evidence from other witnesses indicates that he chose to disregard or downplay the injuries sustained. Mr. Kirby testified that Mr. Saliou indicated to Mr. Kirby that he was injured. Cst. Haines testified that Mr. Kirby downplayed the situation and did not seem to think anyone was bitten at this point. Joan Richardson testified that Mr. Kirby indicated to her that he thought the man was exaggerating his injuries.

164 The Crown submits that Mr. Kirby's claims are inconsistent with the information he received from multiple other individuals. The Crown submits that Mr. Kirby's claims that he was unaware of injuries to Mr. Saliou are self-serving and illogical given his unobstructed view of the incident, given the undisputed hard evidence presented at the Trial and Mr. Kirby's endorsement of the injuries as "obvious". I also note that Mr. Kirby confirmed in his testimony that he was watching the incident the entire time. I agree with the Crown's submissions regarding Mr. Kirby's claims regarding Mr. Saliou's injuries. Mr. Kirby's claims are not consistent with the information he received from other people.

165 The Crown contends that it is clear that Mr. Kirby was a moving target when he testified. The Crown requests that this Court make a commonsensical conclusion that Mr. Kirby reverted and changed his evidence to avoid guilt. In that regard, the Crown refers this Court to *R. v. Russell*, [2021 NBCA 19](#) at paragraph 28.

166 The Defence, on the other hand, maintains that Mr. Kirby did not change his evidence. The Defence notes that Mr. Kirby testified that he acknowledged that the people involved in the incidents with his dogs sustained injuries, but that he was not aware of the injuries at the time of the incidents.

167 The Crown maintains that Mr. Kirby's evidence could have no other purpose other than to avoid guilt. The Crown submits that recognition of these obvious contradictions is quite properly considered in connection with the

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assessment of Mr. Kirby's credibility. I am mindful of these conspicuous contradictions in Mr. Kirby's testimony. In my view, these contradictions undermine the plausibility of Mr. Kirby's evidence and make it difficult to accept Mr. Kirby's evidence in that regard.

168 The Crown submits that Mr. Kirby's testimony lacks any foundation to support a finding that it is either credible or reliable and asks that this Court accept the consistent evidence of Crown witnesses that was presented. I agree with the Crown's submission in that regard. In my view, based upon the totality of the evidence before this Court relating to the June 20, 2018 Incident, and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I accept as a fact that the consistent evidence from the witnesses of the Crown and am not persuaded by Mr. Kirby's evidence regarding the June 20, 2018 Incident. I am satisfied that the consistent evidence from the witnesses of the Crown accurately describes the events that transpired during the June 20, 2018 Incident.

169 In my view, Mr. Kirby's evidence is "not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions" (see *Brethour v. Law Society of British Columbia* 1950 CanLII 346 (BC CA), [\[1951\] 2 D.L.R. 138](#) (B.C.C.A.)). In my view, Mr. Kirby's testimony regarding the June 20, 2018 Incident is not plausible in terms of the inherent likelihood that the events occurred as Mr. Kirby described them.

170 Based upon the foregoing, I find the following as facts in connection with the June 20, 2018 Incident:

- (a) Mr. Kirby saw his dogs jump up on and attack Mr. Saliou;
- (b) Mr. Kirby chose to disregard or downplay the injuries that Mr. Saliou sustained as a result of his dogs jumping on and biting Mr. Saliou; and
- (c) Mr. Kirby was aware of his dogs causing injuries to Mr. Saliou.

171 The Crown contends that if the Court accepts the testimony of Crown witnesses, the Crown asserts that on August 22, 2018, at the time of the incident with Mr. McPhee, Mr. Kirby's omission to leash his dogs was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances given that:

- (a) Mr. Kirby knew or reasonably ought to have known that his dogs were dangerous;
- (b) Mr. Kirby knew or reasonably ought to have known the propensity of his dogs, when loose, to attack innocent pedestrians; and
- (c) Mr. Kirby was aware or reasonably ought to have known that his dogs, when not adequately contained or controlled, posed a serious risk to the lives or safety of others.

172 In my view, the fact that Mr. Kirby testified that after the June 20, 2018 Incident: (a) he stopped allowing his dogs off-leash anywhere within the City of Saint John, except on The Saint John Port Authority property in the early morning hours, (b) he did not take his dogs on The Saint John Port Authority property during the daytime off-leash because he did not want his dogs "scaring people" and (c) "the dogs have to be under control at all times and keeping them on a leash", offers persuasive evidence to support the Crown's position that on August 22, 2018:

- (a) Mr. Kirby knew or reasonably ought to have known that his dogs were dangerous;
- (b) Mr. Kirby knew or reasonably ought to have known the propensity of his dogs, when loose, to attack innocent pedestrians; and
- (c) Mr. Kirby was aware or reasonably ought to have known that his dogs, when not adequately contained or controlled, posed a serious risk to the lives or safety of others.

173 The Crown correctly notes that Mr. Kirby confirmed when he testified at the Trial that if the issue of biting was raised, he would have a concern as a dog owner.

174 The Crown submits that given the prior knowledge of Mr. Kirby with respect to his dogs, that his omission was

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a marked and substantial departure from what a reasonably prudent person would do in the circumstances given that: Michael Kirby was aware of or recognized an obvious and serious risk (danger) to the lives or safety of others, but went ahead anyway despite his knowledge of that risk.

175 The Crown submits that Mr. Kirby had no control over the area where he allowed his dogs off-leash. In my view, based upon the totality of the evidence before this Court, I agree with the Crown's submission in that regard. Mr. Kirby confirmed in his testimony that he had no ability to control pedestrian traffic or vehicular traffic in the Gateway Street area in The Saint John Port Authority grounds. Mr. Kirby acknowledged in his testimony that truckers would line up and wait for the AIM gate to open. He further testified that he had no idea what if any fencing was down at the far end of Gateway Street because he had never gone that far down to inspect it. Mr. Kirby also testified that he did not expect that he would have interactions with pedestrians but knew he could not control that given the location at the busy Port. Mr. Kirby further testified that when walking his dogs in the Gateway Street area he would put his dogs back on-leash before King Street because there were people accessing The Saint John Port Authority area 24 hours a day. The Crown submits that Mr. Kirby knew there was risk but went ahead anyway despite his knowledge of that risk.

176 In my view, based upon the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the submissions of the Crown and of the Defence, my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that on August 22, 2018, Mr. Kirby was aware of or recognized that his dogs, when not adequately contained, leashed or controlled (a) posed an obvious and serious risk (danger) to the lives and safety of others and (b) had a propensity to attack innocent pedestrians, but went ahead anyway and walked his dogs off-leash, despite his knowledge of that risk (danger) and the propensity of his dogs.

177 In my view, based on the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and the Defence, and my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to walk his dogs on-leash on August 22, 2018 was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.

178 In my view, based on the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and the Defence, and my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), I am also satisfied beyond a reasonable doubt that, as of August 22, 2018, Mr. Kirby knew that his dogs were dangerous. In the event that I am incorrect in my conclusion in that regard, in my view, based on the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and the Defence, and my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), I am satisfied beyond a reasonable doubt that, as of August 22, 2018, Mr. Kirby reasonably ought to have known that his dogs were dangerous.

179 In the event that I am incorrect in my conclusion outlined in paragraphs 176 and 177 above, in my view, based on the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the submissions of the Crown and of the Defence, my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that, in connection with

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the August 22, 2018 Incident, Mr. Kirby, in his omission to leash his dogs, gave no thought to the risk (danger) to the lives or safety of others. The Crown correctly notes that this conclusion is supported by the testimony of Mr. Kirby that he did not follow-up with respect to the June 20, 2018 Incident involving Mr. Saliou and continued to take his dogs to the same location where he completely lacked control over his surroundings.

180 Again, in my view, based upon the totality of the evidence before this Court relating to the August 22, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and of the Defence, and my observations and conclusions outlined above relating to the August 22, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident), I am satisfied beyond a reasonable doubt that Mr. Kirby's act, in walking his dogs off-leash on August 22, 2018, was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.

(3) Did the act or omission by Mr. Kirby cause bodily harm to Garfield McPhee?

181 The Crown submits that it is clear and uncontested that the dogs running at large caused bodily harm to Garfield McPhee by biting him several times.

182 In my view, based upon the totality of the evidence before this Court relating to the August 22, 2018 Incident, my conclusions and observations outlined above relating to the August 22, 2018 Incident, the submissions of the Crown and of the Defence, and the relevant legal principals I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that Mr. Kirby's dogs running at large on August 22, 2018 caused bodily harm to Garfield McPhee by biting him several times.

(4) Conclusion - Count 4

183 Accordingly, based upon my observations and conclusions outlined above relating to the August 22, 2018 Incident, I am satisfied beyond a reasonable doubt that on or about the 22nd day of August, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, Mr. Kirby did by criminal negligence cause bodily harm to Garfield McPhee, committing thereby an indictable offence, contrary to and in violation of Section 221 of the **Criminal Code** .

B. Count 5: The September 2, 2018 Incident - Allen Howe

184 The Crown submits that following the attack on Garfield McPhee, Mr. Kirby's circumstances changed in that he was aware of the June 20, 2018 Incident and the August 22, 2018 Incident and he had heightened knowledge regarding the propensity of his dogs to repeatedly attack pedestrians which informs what a reasonably prudent person would do in the particular circumstances.

(1) An alleged act or omission of Mr. Kirby

185 On September 2, 2018, the Crown submits that Mr. Kirby's act of leaving his dogs unsupervised and consequential omission to supervise his three dogs in public is contrary to his *common law* duty to take ordinary precautions in the performance of an act that is or may be dangerous to human life given the propensity of the dogs.

186 Furthermore, the Crown contends that Mr. Kirby omitted to keep the dog from running at large contrary to **By-law Number M-13**, which requires a dog to be secured by a leash or similar device of 1.2 meters maximum length suitable to keep a dog under the control of the owner (see **By-law Number M-13**: section 7(1) "The owner of a dog shall prevent such dog from running at large in the City". The definition of "running at large" means an unleashed dog: (a) in a public place other than a fenced in municipal off-leash dog park; (b) on property other than that of the owner of the dog; or (c) in a forest or wooded area while not in the company and control of the owner of the dog. The definition of "leashed" means secured by a leash or similar device of 1.2 meters maximum length suitable to keep a dog under the control of the owner).

187 Mr. Kirby testified that following the August 22, 2018 Incident, he was concerned enough about his dogs' behaviour that he stopped walking his dogs off-leash in the Gateway Street area. He testified that the two prior incidents (namely, the June 20, 2018 Incident and the August 22, 2018 Incident) caused him concern because it was his dogs having "negative interactions with people". He agreed and acknowledged at the Trial that after the August 22, 2018 Incident he was aware of two "dramatic" incidents with people and his dogs.

188 Mr. Kirby also testified though that, after two different incidents with his dogs (involving Mr. Saliou and Mr. McPhee), he did not seek out a trainer for his dogs.

189 Mr. Kirby also testified that he always walked his dogs on-leash when walking in the City of Saint John because **By-law Number M-13** required him to do so.

190 Mr. Kirby testified that he had tied his dogs to the post outside of the Tim Hortons approximately 24 times in the past and never experienced any of his dogs breaking free from their leash. He testified that September 2, 2018 was the first time one of his dogs broke free from their leash. He testified that Alice broke free from her leash because her leash was faulty. He testified that he did not inspect Alice's leash before he used it to secure her to the post.

191 The Defence correctly notes that Mr. Kirby testified to his substantial experience owning dogs within urban areas, and his method of securing his dogs had proven reliable over the course of that experience.

192 The Defence also correctly notes that Mr. Kirby testified to demonstrate the method of securing his dogs to the post, and this evidence was without contradiction. The Defence also correctly notes that Cst. Lohnes testified that he observed Mr. Kirby quickly "tying" the leashes to the post, but he did not examine the method by which they were secured.

193 The Defence maintains that if, as Mr. Kirby testified, Alice's leash became unattached to the anchor leash by the failure of the glue holding the handle loop closed, can that constitute a breach of his duty to keep Alice leashed?

194 In my view, based on the totality of the evidence before this Court relating to the September 2, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident and the August 22, 2018 Incident), and my conclusions and observations outlined above relating to the September 2, 2018 Incident (and also my conclusions and observations that I made in connection with the June 20, 2018 Incident and the August 22, 2018 Incident (where I concluded that, as of August 22, 2018, I am satisfied beyond a reasonable doubt that Mr. Kirby knew or reasonably ought to have known that his dogs were dangerous)), I am satisfied beyond a reasonable doubt that Mr. Kirby's act of leaving his dogs unsupervised and consequential omission to supervise his three dogs outside the Tim Hortons on September 2, 2018 is contrary to his *common law* duty to take ordinary precautions when performing an act which is or may be dangerous to human life.

195 In the event that I am incorrect in my conclusion outlined in paragraph 194 above, in my view, based on the totality of the evidence before this Court relating to the September 2, 2018 Incident, and my conclusions and observations outlined above relating to the September 2, 2018 Incident, I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to keep his dog from running at large during the September 2, 2018 Incident was in violation of **By-law Number M-13**, which requires a dog to be secured by a leash or similar device of 1.2 meters maximum length suitable to keep a dog under the control of the owner.

- (2) Did that act or omission by Mr. Kirby show a wanton or reckless disregard for the lives or safety of the complainant, being Allen Howe?

196 The Defence correctly notes that Mr. Kirby testified that, after the August 22, 2018 Incident, he no longer took his dogs off-leash anywhere, and that he felt the need to socialize the dogs with more control over the circumstances.

197 In that regard, the Defence argues that this was not the conduct of a person proceeding without regard to the consequences of his actions, but that of an experienced and conscientious dog owner responding to two prior negative incidents involving his dogs. The Defence maintains that there is no evidence before this Court to suggest that it was unreasonable to tie these three dogs to the post in the manner employed by Mr. Kirby.

198 The Defence contends that the Crown is essentially asserting that because Alice got loose, tying the dogs in that manner was unreasonable. The Defence maintains that this assertion by the Crown is faulty. The Defence correctly notes that there is no evidence before this Court to suggest Alice, or either of the other two dogs, was likely to get free.

199 The Defence maintains that on September 2, 2018, Mr. Kirby's belief that he had secured his dogs sufficiently -- as he had many times before -- was not a marked and substantial departure from the conduct of a reasonable dog owner in the circumstances. The Defence argues that the Crown has failed to prove, beyond a reasonable doubt, that Mr. Kirby's conduct on September 2, 2018 was a marked and substantial departure from the conduct of a reasonable person in the circumstances.

200 The Crown, on the other hand, submits that on September 2, 2018, Mr. Kirby knew the propensity of his dogs for danger. The Crown correctly notes that September 2, 2018 was not the first time his dogs had attacked a pedestrian. On two prior occasions (namely, the June 20, 2018 Incident and the August 22, 2018 Incident), within months of the September 2, 2018 Incident, his dogs had attacked a pedestrian. The Crown submits there is no question that Mr. Kirby knew the propensity for his dogs when loose, to attack innocent pedestrians. In that regard, the Crown refers this Court to paragraph 6 in *Zeitner*.

201 The Crown argues that in evaluating Mr. Kirby's knowledge at the time of this attack, the circumstances surrounding the June 20, 2018 Incident and the August 22, 2018 Incident become relevant. The Crown re-iterates the submissions it made with respect to the June 20, 2018 Incident. The Crown submits that the evidence before this Court clearly demonstrates that Mr. Kirby watched his dogs attack Mr. Saliou. Recall, I agree with that submission of the Crown and found as a fact that Mr. Kirby saw his dogs jump up on and attack Mr. Saliou.

202 The Crown submits that, based upon the evidence before this Court, the following table demonstrates Mr. Kirby did not provide credible evidence and that his testimony with respect to his knowledge on September 2, 2018 is both internally inconsistent and logically incongruent.

Mr. Kirby Testimony	Evidence to the Contrary
Mr. Kirby agreed that Mr. McPhee was bitten several times and he confirmed he missed [didn't see] any of the biting. ³⁴	Garfield McPhee tried to get on the transport truck. ⁴² He was running and looking for a way to get on the transport. Initially he ran to the side, but then he ran

[Editor's Note: Notes^{34,35} are included in the image above]

Mr. Kirby confirmed that the day of the attack on Mr. McPhee, it was **well-lit** and there was **nothing obstructing his view** on this occasion.³⁵

Mr. Kirby didn't see any physical contact between Mr. McPhee and his dogs.³⁶ Mr. Kirby confirmed he observed: Mr. McPhee going from the cab area around back and the dogs following him and him climbing up the back of the trailer and getting in.³⁷ He could see his dogs distanced around Mr. McPhee.

Mr. Kirby said he was within 25 meters with an unobstructed view and he didn't see any biting when the male was climbing up the back of the trailer.³⁸ He then said his view would have been perpendicular to the back of the trailer. Mr. Kirby said he never saw the dogs latch onto him.³⁹ Mr. Kirby did **confirm that he was able to see Mr. McPhee climb the back of the trailer.**⁴⁰

around the back of the transport, there was a bar that held the gates shut. "It was enough." He was able to grab onto that and **pull himself up and as he did that he could feel the dogs biting him in the back of the legs.** He was able to climb in the back of the transport. It happened quick.

The medical records indicate that Mr. McPhee presented at the hospital that day with **multiple bite marks/bruising, puncture wounds to the back of both legs, a scratch on the right glute, and puncture wound to the right hand.**

[Editor's Note: Notes^{36,37,38,39,40} are included in the image above]

<p>Mr. Kirby did acknowledge that there were holes in Mr. McPhee's legs although he didn't know how deep they were.⁴¹ He didn't see two opposed puncture wounds and seemed to question if Mr. McPhee was bitten (eluded to perhaps these were nips).</p>	
<p>Mr. Kirby denied the male told him he was injured. He said the male was angry because he had just been chased up the back of a transport truck.⁴³</p> <p>On cross-examination, Mr. Kirby denied that Mr. McPhee asked him to call the ambulance.⁴⁴</p> <p>Despite not providing answers on cross-examination, when asked on re-direct, Mr. Kirby did not recall if he said sorry to Mr. McPhee, but typically, if his dogs scared someone he would say sorry.⁴⁵</p>	<p>Mr. McPhee told Mr. Kirby that the dogs had bit him and to call an ambulance. Mr. Kirby said sorry and left without calling.⁴⁶</p>
<p>Mr. Kirby doesn't recall if he talked to Joan Richardson after this incident</p>	<p>Joan Richardson testified that Mr. Kirby indicated his dogs were just running up to say hello to the man when they</p>

[Editor's Note: Notes^{41,42,43,44,45,46} are included in the image above]

<p>(August 22, 2018).⁴⁷ He didn't take notes, so he isn't sure of the timing.</p>	<p>discussed the incident involving Mr. McPhee from August 22, 2018.⁴⁹</p>
<p>Later, Mr. Kirby testified that he never talked to Joan Richardson about the Mr. McPhee incident.⁴⁸ He would recall this if it was close to the incident.</p>	

[Editor's Note: Notes^{47,48,49} are included in the image above]

[Emphasis by the Crown.]

203 The Crown notes that Mr. Kirby testified that Mr. McPhee threatened him with a metal bar. The Crown submits that this is an attempt to deflect blame onto the victim to avoid his own guilt.

204 The Crown correctly submits that Mr. Kirby claimed at the Trial that he was unaware of the injuries that Mr. McPhee sustained. The Crown also correctly notes that evidence from other witnesses indicated that he chose to disregard or downplay the injuries sustained. The Crown contends that yet again, despite what Mr. Kirby refers to as a perpendicular view of Mr. McPhee climbing the back of the tractor trailer, Mr. Kirby denied observing any contact between the dogs and Mr. McPhee. The Crown submits that this is illogical because it is clear from medical evidence and photographs that Mr. McPhee was bitten several times. Joan Richardson testified that Mr. Kirby again downplayed the situation during their telephone call together. Mr. Kirby denies speaking to her about Mr. McPhee.

205 The Crown correctly notes that the evidence before this Court is that Mr. Kirby did not inquire as to the condition/injuries of the male with the police or any authority after the incident. Mr. Kirby testified that he did not follow-up with Mr. McPhee.

206 The Crown submits that Mr. Kirby's testimony lacks any foundation to support a finding that it is either credible or reliable and asks that the Court accept the consistent evidence of Crown witnesses that was presented.

207 I agree with the foregoing submissions of the Crown.

208 In my view, based upon the totality of the evidence before this Court relating to the August 22, 2018 Incident (including the medical evidence, the photographs of bite marks on Mr. McPhee's body and the testimony of Mr. McPhee, Ms. Richardson and Mr. Kirby), and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I accept as a fact the consistent evidence from the witnesses of the Crown and am not persuaded by Mr. Kirby's evidence regarding the August 22, 2018 Incident. I am satisfied that the consistent evidence from the witnesses of the Crown accurately describes the events that transpired during the August 22, 2018 Incident. In my view, Mr. Kirby's evidence is "not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions" (see *Brethour*). In my view, Mr. Kirby's testimony regarding the August 22, 2018 Incident is not plausible in terms of the inherent likelihood that the events occurred as Mr. Kirby described them.

209 Based upon the foregoing, I find the following as facts in connection with the August 22, 2018 Incident:

- (a) Mr. Kirby saw physical contact between his dogs and Mr. McPhee;
- (b) Mr. McPhee told Mr. Kirby that his dogs bit him and he asked Mr. Kirby to call an ambulance;

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- (c) Mr. Kirby was aware that Mr. McPhee sustained injuries as a result of his dogs biting Mr. McPhee;
- (d) Joan Richardson discussed the August 22, 2018 Incident with Mr. Kirby; and
- (e) Mr. Kirby downplayed the August 22, 2018 Incident when he spoke with Joan Richardson.

210 The Crown contends that if this Court accepts the testimony of the Crown witnesses, the Crown asserts that on September 2, 2018, at the time of the incident with Mr. Howe, Mr. Kirby's omission to keep his dogs leashed and under his control in public was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances, given that:

- (a) Mr. Kirby knew or reasonably ought to have known that his dogs were dangerous;
- (b) Mr. Kirby knew or reasonably ought to have known the propensity of his dogs, when loose, to attack innocent pedestrians;
- (c) Mr. Kirby was aware or reasonably ought to have known that his dogs, when not adequately contained or controlled, posed a serious risk to the lives or safety of others.

211 The Crown correctly notes that Mr. Kirby confirmed when he testified at the Trial that if the issue of biting was raised, he would have a concern as a dog owner.

212 The Crown submits that given the prior knowledge of Mr. Kirby with respect to his dogs, that his omission was a marked and substantial departure from what a reasonably prudent person would do in the circumstances given that: Michael Kirby was aware of or recognized an obvious and serious risk (danger) to the lives or safety of others, but went ahead anyway despite his knowledge of that risk.

213 The Crown correctly submits that when Mr. Kirby left the dogs tied to a post outside of Tim Horton's he acknowledged in his testimony that he had no control over the area or any pedestrians on the sidewalk. The Crown also correctly notes that Mr. Kirby agreed, in his testimony at the Trial, that he left his dogs tied to a pole, just next to the sidewalk. I note that Cst. Lohnes, in his testimony at the Trial, confirmed that the three dogs had full access to the sidewalk. Recall also that Cst. Lohnes testified that, at the time, he warned Mr. Kirby that given the proximity to the sidewalk, it was dangerous, and a child could have been injured. Cst. Lohnes testified that Mr. Kirby responded to him, at the time, and said that a child was not injured, and the proposed danger was just a "what if" and he laughed.

214 The Crown maintains that, independent of Alice's leash becoming unattached to the anchor leash, Mr. Kirby knew he could not control whether his dogs had any interactions with pedestrians given the fact that he chose to go inside Tim Horton's and leave the dogs where he could not control them. The Crown submits that Mr. Kirby knew there was risk, but went ahead anyway despite his knowledge of that risk.

215 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.

216 The Crown correctly notes that Mr. Kirby attempted to justify his actions by testifying that Tim Horton's 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.

217 The Crown submits that it is clearly a marked and substantial departure from what a reasonably prudent person would do in the same circumstances to leave three dogs outside of a local business, on the sidewalk, not

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under the owner's control. The Crown contends that this is compounded by the fact that these dogs were clearly dangerous, which the Crown submits was known at the time of this incident. The Crown correctly notes that as a result of the incidents at Gateway Street, Mr. Kirby never took the dogs there off-leash again but claims he did not know of the injuries (of Mr. Saliou and Mr. McPhee) until he was charged in late September 2018 (September 21, 2018). The Crown contends that the changes to Mr. Kirby's routine with the dogs are supportive of the assertion that there were undeniable issues with the dogs. The Crown argues that otherwise, there would be no reason to modify his behaviour. I agree with the Crown's contention in that regard. In my view, Mr. Kirby's actions in changing his routine with the dogs, supports the assertion that there were issues with the dogs.

218 The Crown submits that if the Court accepts the proposition that Mr. Kirby did not know the dogs had a propensity for danger, it was certainly clear that given the previous incidents, he was reckless in that belief and showed a reckless disregard for the lives or safety of others.

219 The Crown further submits that Michael Kirby gave no thought to the risk (danger) to the lives or safety of others. The Crown contends this argument is supported by the assertions that Mr. Kirby did not follow-up with respect to the incident with Mr. Saliou or Mr. McPhee and continued to leave his dogs in public areas outside of his control, unmuzzled.

220 In my view, based on the totality of evidence before this Court relating to the September 2, 2018 Incident (and also the totality of the evidence relating to the June 20, 2018 Incident and the August 22, 2018 Incident), my observations and conclusions outlined above relating to the September 2, 2018 Incident (and also my observations and conclusions relating to the June 20, 2018 Incident and the August 22, 2018 Incident), the submissions of the Crown and of the Defence, and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that, in connection with the September 2, 2018 Incident, Mr. Kirby, in tying his dogs to a post outside of Tim Horton's and then leaving his dogs unsupervised, gave no thought to the risk (danger) to the lives or safety of others.

221 In short, I am satisfied beyond a reasonable doubt that, Mr. Kirby's actions, in tying his dogs to a post outside of Tim Horton's and then leaving them unsupervised on September 2, 2018, were a marked and substantial departure from what a reasonably prudent person would do in the same circumstances. In my view, a reasonably prudent person in the same circumstances would have been aware of the risk (danger) to the lives or safety of others and would not have left the dogs unsupervised while tied to a post outside of Tim Horton's.

(3) Did that act or omission by Mr. Kirby cause bodily harm to Allen Howe?

222 The Crown submits that it is clear and uncontested that Mr. Kirby's failure to control Alice and keep her from running at large caused bodily harm to Allen Howe when she approached him and bit him on the leg.

223 In my view, based upon the totality of the evidence before this Court relating to the September 2, 2018 Incident, my conclusions and observations outlined above relating to the September 2, 2018 Incident, and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to control Alice and keep her from running at large on September 2, 2018 caused bodily harm to Allen Howe when she approached him and bit him on the leg.

(4) Conclusion - Count 5

224 Accordingly, based upon my observations and conclusions outlined above relating to the September 2, 2018 Incident, I am satisfied beyond a reasonable doubt that on or about the 2nd day of September, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, Mr. Kirby did by criminal negligence cause bodily harm to Allen Howe, committing thereby an indictable offence, contrary to and in violation of Section 221 of the **Criminal Code**.

C. Counts 1 and 2: The December 12, 2018 Incidents - William Stevens and A.M.

225 Mr. Kirby confirmed in his testimony that he received his by-law infractions disclosure in October, 2018. The Crown correctly notes that initially, Mr. Kirby denied that the by-law disclosure indicated that people were injured, but Mr. Kirby later indicated that the by-law infraction disclosure showed pictures of injuries to Mr. Saliou. Mr. Kirby also subsequently testified that this disclosure included photographs of people injured and as of October 5, 2018 (or that week), he was aware people were injured by the dogs (namely, Mr. Saliou, Mr. McPhee, and Mr. Howe).

226 Mr. Kirby testified that he was aware of what he was being charged with. The Crown correctly notes that he denied receiving disclosure for those charges, but he knew exactly which incidents they were referring to: the August 22, 2018 Incident and the September 2, 2018 Incident. Mr. Kirby testified that before December 12, 2018, he was aware of the injuries from the three previous incidents.

227 Mr. Kirby testified at the Trial that, "if you thought you had dangerous dogs you would do something about it". He testified that he did not think these were dangerous dogs and he did not have to keep them away and "kennel them". Mr. Kirby said he has never had a dangerous dog (I note that Mr. Kirby's dog named Jack attacked Mr. Kirby on November 21, 2015 and Mr. Kirby testified that he shot and killed Jack to defend himself and that it was a "life or death situation"). Mr. Kirby testified if he believed his dogs were a danger to the public "you would have to start doing something".

228 The Crown submits that prior to December 12, 2018, Mr. Kirby was well-aware of the incidents and allegations of injuries. The Crown correctly notes that the evidence is clear that he had disclosure in the form of photographic evidence. The Crown submits it is clear that the dogs were dangerous and that they had a propensity to attack innocent pedestrians when loose and any assertion to the contrary is illogical.

229 The Crown submits that the foregoing circumstances inform whether Mr. Kirby's actions on December 12, 2018 constitute a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.

230 The Defence, on the other hand, correctly maintains that on December 12, 2018, without Mr. Kirby present, Alice and Frank left Mr. Kirby's property and attacked and injured William Stevens and A.M.

231 The Defence maintains that there is no evidence before this Court to suggest that anyone in Mr. Kirby's position would have anticipated this was a possibility - much less a likelihood. The Defence argues that the Crown has failed to prove, beyond a reasonable doubt, that Mr. Kirby acted or omitted to act in any way that contributed to Alice and Frank escaping his residence.

232 The Defence further submits that the Crown asserts that Mr. Kirby should have had the dogs kenneled and muzzled, but does not offer evidence that he was under a duty to do so.

(1) An alleged act or omission of Mr. Kirby

233 The Crown correctly submits that, on December 12, 2018, Mr. Kirby was under a legal duty imposed by law, to prevent his dogs from running at large at all times when they were off his property pursuant to **By-law Number M-13** (see **By-law Number M-13**: section 7(1) "The owner of a dog shall prevent such dog from running at large in the City").

234 The Crown also correctly notes that, on December 12, 2018, Mr. Kirby was also subject to the Court Undertaking, wherein he was bound to comply with a condition of the Court Undertaking, namely: "all dogs in you['] 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" (revision mine).

235 The Crown correctly contends that beyond the requirements of **By-law Number M-13**, it is clear that as of September 27, 2018 (the date of the Court Undertaking), there was heightened concern surrounding Mr. Kirby's

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dogs and very restrictive conditions were put in place. The Crown maintains that given that two dogs were running at large, there was clearly an omission by Mr. Kirby.

236 Furthermore, the Crown maintains that Mr. Kirby also acted when he chose to leave his house with the dogs inadequately contained.

237 In my view, based upon the totality of the evidence before this Court relating to the December 12, 2018 Incidents, my conclusions and observations outlined above relating to the December 12, 2018 Incidents and the submissions of the Crown and of the Defence, I am satisfied beyond a reasonable doubt that, in connection with the December 12, 2018 Incidents:

- (a) Mr. Kirby was under a legal duty imposed by law, pursuant to **By-law Number M-13**, to prevent his dogs from running at large at all times when they were off his property;
- (b) Mr. Kirby was also subject to the Court Undertaking, wherein he was bound to comply with the following condition, namely: "all dogs in you[r] 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"(revision mine); and
- (c) given that two of Mr. Kirby's dogs were running at large, Mr. Kirby was in breach of his legal duties outlined in (a) and (b) above.

238 In the event that I am incorrect in my conclusion in paragraph 237 above, in my view, based on the totality of the evidence before this Court relating to the December 12, 2018 Incidents (and also the totality of the evidence relating to the June 20, 2018 Incident, the August 22, 2018 Incident and the September 2, 2018 Incident), my conclusions and observations outlined above relating to the December 12, 2018 Incidents (including those conclusions and observations that I made in connection with the June 20, 2018 Incident, the August 22, 2018 Incident (including my earlier conclusion that as of August 22, 2018 I am satisfied beyond a reasonable doubt that Mr. Kirby knew his dogs were dangerous) and the September 2, 2018 Incident), I am satisfied beyond a reasonable doubt that Mr. Kirby, in not taking ordinary precautions to control his dogs and secure them in his home when he left them alone unsupervised (see my conclusion in paragraph 252 below) acted in a fashion that violated his *common law* duty to take ordinary precautions.

- (2) Did that act or omission by Mr. Kirby show a wanton or reckless disregard for the lives or safety of the complainants, being William Stevens and A.M.?

239 The Defence correctly notes that Mr. Kirby offered the uncontradicted evidence that he left his house during the morning of December 12, 2018 in the normal course and closed and locked the door behind him. The Defence argues that, because there is no evidence as to how Alice and Frank got out of the house that morning, the Court must be left with a reasonable doubt.

240 The Defence argues that Mr. Kirby's evidence was clear and consistent; it was largely free of embellishment. The Defence submits that Mr. Kirby was not evasive or combative upon lengthy cross-examination. The Defence maintains that most importantly, when allowing for differences in perception based on different experiences of the various witnesses, Mr. Kirby's evidence is not inconsistent with that of the other witnesses.

241 The Defence contends that when considering the evidence as a whole, Mr. Kirby should be believed, but more to the point, the Crown's evidence is incapable of supporting a finding of guilt beyond a reasonable doubt.

242 The Crown, on the other hand, submits that Mr. Kirby has a poor recollection of what occurred the morning of December 12, 2018. Mr. Kirby testified that he went to get coffee in his van, after his morning walk with the dogs. The Crown notes, though, that on cross-examination, after acknowledging that the Court Undertaking was in place at that time, he did not recall doing big walks that morning with the dogs. Mr. Kirby testified that he thought maybe he just had his dogs in the yard.

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243 The Crown correctly notes that there were no muzzles or kennels present when the officers searched the house. Officers noted that there was no external fencing for the dogs, no signage, and no security measures in place. The Crown submits that quite simply, six dogs (four of which had previously attacked individuals) were left in a single room with no deadbolt on the exit door and Mr. Kirby did not check the door to ensure it latched when he left. The Crown submits that Mr. Kirby took no measures, prudent or otherwise, to protect the public despite the Court's involvement at that time.

244 I note that Mr. Kirby testified that he locks the exit door to the room that his dogs are in every time he steps outside because (a) he has had uninvited people enter his property and back deck before and (b) his house is located on the lower westside where there are some "interesting characters". He testified that he locks his door when he is inside his home and when he leaves he unlocks it and re-locks it and closes the door. He further testified that the door has never not latched. He testified that December 12, 2018 was the first time his door was ajar when he returned to his home. He testified that his dogs had never gotten out of his home from that door before and that the door never failed to lock properly before. Mr. Kirby testified that he does not know how the door opened. He testified that on December 12, 2018 he did not double check the door to make sure it was latched.

245 The Crown contends that Mr. Kirby had taken precautions to prevent a dangerous situation inside the home for his own protection. The Crown submits that he told Cst. Johnson he had the .303 gun out for quick access (referencing the November 21, 2015 Incident). Cst. Johnson took notes during this conversation. Mr. Kirby testified to the contrary. He indicated that he had the gun out to measure it for a scope and go deer hunting. The Crown contends that this evidence rings hollow because on December 12, 2018, deer hunting season had just passed and Mr. Kirby testified that he has never been deer hunting in his life. The Crown submits that Mr. Kirby was continuously unwilling to acknowledge the danger presented by the dogs and made excuses in the face of hard evidence to the contrary.

246 The Crown submits that Mr. Kirby himself said "if you thought you had dangerous dogs you would do something about it". The Crown correctly notes that Mr. Kirby was admittedly aware that dangerous dogs had to be kept away and you would "kennel them".

247 I note that Mr. Kirby testified that, following his arrest involving the December 12, 2018 Incidents, he believed that if someone were to enter his house it could be a dangerous situation and that he tried to express that urgent concern he had with Cst. Johnson. He testified that if the police were to go into his home then "they would have a whole group of dogs coming at them and it could be potentially dangerous". He testified that on December 12, 2018 he knew that four of his dogs had incidents with people that resulted in injuries. I note that on December 12, 2018 the exit door to his house leading from the room where his six dogs were located had a simple push button lock -- there was no deadbolt on the door. Recall, Mr. Kirby testified that he has had uninvited people enter his property and his back deck before and that the lower westside where his property was located had "some interesting characters" in it.

248 The Crown submits that given the level of danger known at that time, Mr. Kirby showed a wanton or reckless disregard for the lives or safety of others. The Crown submits that his behaviour was a marked and substantial departure from what a reasonably prudent person would do in the circumstances.

249 The Crown contends that if the Court accepts that Mr. Kirby knew or ought to have reasonably known the dogs were dangerous, he admits further steps should have been taken, including kennelling the dogs. The Crown submits Mr. Kirby knew the potential for dangerousness of his dogs and did not take the necessary measures to control them. In that regard, the Crown refers this Court to **Jean-Gilles** at paragraph 27.

250 The Crown further argues that Mr. Kirby, if he thought the dogs were secure in the room, was reckless in that belief as he gave no thought whatsoever to the possibility and probability of escape given the lack of security measures. In that regard, the Crown refers this Court to **Zeitner** at paragraph 8. The Crown further maintains that Mr. Kirby knew that the safety of others would be endangered if the dogs were free to roam outside. The Crown

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submits that Mr. Kirby's belief in the security of the situation was ill-conceived and unsupported by the circumstances.

251 The Crown submits that several incidents of this nature occurred in a short period of time in the vicinity of Mr. Kirby who did nothing to prevent this from happening again. In that regard, the Crown refers this Court to **Jean-Gilles** at paragraph 25. The Crown submits that Mr. Kirby was in charge of and responsible for his dogs, yet he left them with no muzzle, no fence, no chain, nothing had been done to secure his dogs in his home. The Crown maintains that by repeatedly failing to comply with his legal obligations, it is clear that Mr. Kirby is an irresponsible person who makes a mockery of the law and the safety of others.

252 In my view, based on the totality of the evidence before this Court relating to the December 12, 2018 Incidents (and also the totality of the evidence relating to the June 20, 2018 Incident, the August 22, 2018 Incident and the September 2, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and of the Defence, and my conclusions and observations outlined above relating to the December 12, 2018 Incidents (and also those conclusions and observations that I made in connection with the June 20, 2018 Incident, the August 22, 2018 Incident and the September 2, 2018 Incident), I am satisfied beyond a reasonable doubt that, in connection with the December 12, 2018 Incidents:

- (a) Mr. Kirby knew the potential for dangerousness of his dogs and he did not take ordinary precautions to control them and secure them in his home (including, among other courses of action, muzzling them, putting them in kennels, erecting a fence to contain the rear part of his property, or installing a deadbolt on the exit door of the room where the dogs were located);
- (b) Mr. Kirby, if he thought the dogs were secure in the room, was reckless in that belief as he gave no thought to the possibility of escape given the lack of security measures;
- (c) Mr. Kirby knew or reasonably ought to have known that the safety of others would be endangered if his dogs were free to roam outside; and
- (d) any belief by Mr. Kirby in the security of the situation, when he left his dogs alone in his home, was ill-conceived and unsupported by the totality of the evidence.

253 In short, I am satisfied beyond a reasonable doubt that, in connection with the December 12, 2018 Incidents, in failing to take ordinary precautions to control his dogs and secure them in his home while leaving them unsupervised, Mr. Kirby's conduct showed a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.

254 In my view, based upon the totality of the evidence before this Court relating to the December 12, 2018 Incidents (and also the totality of the evidence relating to the June 20, 2018 Incident, the August 22, 2018 Incident and the September 2, 2018 Incident), the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, the submissions of the Crown and of the Defence, and my conclusions and observations outlined above relating to the December 12, 2018 Incidents (and also those conclusions and observations that I made in connection with the June 20, 2018 Incident, the August 22, 2018 Incident and the September 2, 2018 Incident), I am satisfied beyond a reasonable doubt that, in connection with the December 12, 2018 Incidents, Mr. Kirby, in failing to take ordinary precautions to control his dogs and secure them in his home while leaving them unsupervised, gave no thought to the risk (danger) to the lives or safety of others.

- (3) Did that act or omission by Mr. Kirby cause bodily harm to William Stevens and A.M.?

255 The Crown submits that it is clear and uncontested that Mr. Kirby's failure to secure his dogs and keep them from running at large caused bodily harm to William Stevens and A.M.

256 In my view, based on the totality of the evidence before this Court relating to the December 12, 2018 Incident involving William Stevens (including the medical records of William Stevens -- Trial Exhibit C-8; and the photographs of Mr. Stevens' injuries -- Trial Exhibit C-3), the relevant legal principles I have outlined above regarding assessing the credibility of the witnesses, the submissions of the Crown and Defence counsel and my

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conclusions and observations outlined above relating to the December 12, 2018 Incidents, I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to take ordinary precautions to control his dogs and secure them in his home and prevent them from running at large on December 12, 2018 caused bodily harm to William Stevens.

257 In my view, based on the totality of the evidence before this Court relating to the December 12, 2018 Incident involving A.M. (including the medical records of A.M. -- Trial Exhibit C-10; and the photographs of A.M.'s injuries -- Trial Exhibit C-3), the relevant legal principles I have outlined above regarding assessing the credibility of the witnesses, the submissions of the Crown and Defence counsel and my conclusions and observations outlined above relating to the December 12, 2018 Incidents, I am satisfied beyond a reasonable doubt that Mr. Kirby's failure to take ordinary precautions to control his dogs and secure them in his home and prevent them from running at large on December 12, 2018 caused bodily harm to A.M.

(4) Evidence used in my legal analysis of Counts 1 and 2

258 Recall, in my similar fact evidence decision, dated July 6, 2021 (see **R. v. Michael Kirby**, 2021 NBQB 156), I ordered a number of things, including the following: (a) the evidence on Count 1 (the incident that allegedly occurred on December 12, 2018) is only admissible on Count 1 (the incident that allegedly occurred on December 12, 2018); and (b) the evidence on Count 2 (the incident that allegedly occurred on December 12, 2018) is only admissible on Count 2 (the incident that allegedly occurred on December 12, 2018). As is clear from my analysis and conclusions above, the background circumstances surrounding Alice and Frank attacking each of William Stevens and A.M. on December 12, 2018 included, among other circumstances: (a) Mr. Kirby exiting his home on December 12, 2018, while leaving his dogs unsupervised; (b) Alice and Frank subsequently leaving Mr. Kirby's home (while unsupervised by Mr. Kirby) and running at large; and (c) the ordinary precautions that Mr. Kirby took, if any, to control his dogs and secure them in his home. In my view, the fact that both dog attacks arose from the same dogs and background circumstances on December 12, 2018 does not make my use of those common circumstances similar fact evidence cross-counts for purposes of my analysis of Counts 1 and 2.

(5) Conclusion - Counts 1 and 2

259 Accordingly, based upon my observations and conclusions outlined above relating to the December 12, 2018 Incidents, I am satisfied beyond a reasonable doubt that:

- (a) On December 12th, A.D. 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, Mr. Kirby did by criminal negligence cause bodily harm to William Stevens, committing thereby an indictable offence, contrary to and in violation of Section 221 of the **Criminal Code**; and
- (b) On December 12th, A.D., 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, Mr. Kirby did by criminal negligence cause bodily harm to A.M., committing thereby an indictable offence, contrary to and in violation of Section 221 of the **Criminal Code**.

D. Count 3: December 12, 2018 - Alleged Breach of Mr. Kirby's Undertaking to Hon. Judge Tinning

260 At the time of the alleged offence, subsection 145(3) of the **Criminal Code** provided as follows:

- (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.

261 Mr. Kirby was required by the Court Undertaking to always keep his dogs on his property, except to exercise them, one at a time, and when his dogs were off his property, to leash and securely muzzle them.

262 The Crown maintains that the events of December 12, 2018, in which Frank and Alice escaped from Mr. Kirby's home and left his property, constitute a breach of the Court Undertaking.

263 The Defence correctly notes that, pursuant to the Supreme Court of Canada decision in **Zora**, the Crown must prove, beyond a reasonable doubt, that Mr. Kirby knew he was failing to comply with the condition of the Court Undertaking or that he perceived a substantial and unjustified risk that his conduct would likely fail to comply with the condition of the Court Undertaking and he persisted in his conduct in leaving his home.

264 The Defence submits that there is no evidence before this Court that Mr. Kirby's dogs escaped from his home prior to December 12, 2018, nor is there any evidence that Mr. Kirby could have anticipated that his house might be incapable of keeping his dogs within his house.

265 The Crown argues that Mr. Kirby was aware of the condition in the Court Undertaking. The Defence concedes that Mr. Kirby was aware on December 12, 2018 of the condition in the Court Undertaking. In that regard, in my view, based on the totality of the evidence before this Court and the relevant legal principles I have outlined above regarding assessing the credibility of witnesses, I am satisfied beyond a reasonable doubt that on December 12, 2018 Mr. Kirby was aware of the condition in the Court Undertaking.

266 Subsection 145(3) of the **Criminal Code** requires the Crown to prove that Mr. Kirby was aware that his dogs were likely to escape from his home when he left his home and he persisted in leaving his home. The Defence maintains that the Crown has not met this burden.

267 The Crown submits that Mr. Kirby, in leaving his home on December 12, 2018, recklessly failed to act according to the condition of the Court Undertaking, meaning he perceived a substantial and unjustified risk that his conduct would likely fail to comply with the condition and persisted in this conduct. The Crown maintains that this was evident in Mr. Kirby's decision to leave his dogs without the proper security measures in place. The Crown further maintains that Mr. Kirby gave no thought to their containment and did not ensure the only obstacle stopping them from running at large was properly secure.

268 In my view, based on the totality of the evidence before this Court relating to the December 12, 2018 Incidents (and also the totality of the evidence relating to the June 20, 2018 Incident, the August 22, 2018 Incident, and the September 2, 2018 Incident), the submissions of the Crown and the Defence, and my conclusions and observations outlined above relating to the December 12, 2018 Incidents (and also my conclusions and observations relating to the June 20, 2018 Incident, the August 22, 2018 Incident, and the September 2, 2018 Incident), I am not satisfied beyond a reasonable doubt that, in connection with the December 12, 2018 Incidents, Mr. Kirby recklessly failed to act according to the condition of the Court Undertaking, meaning he perceived a substantial and unjustified risk that his conduct would likely fail to comply with the condition of the Court Undertaking and persisted in this conduct.

269 Accordingly, based on the foregoing, I am not satisfied beyond a reasonable doubt that Mr. Kirby, on December 12th, A.D., 2018, at the City of Saint John, County of Saint John, Province of New Brunswick, being at large on his undertaking entered into before Provincial Court Judge Henrik Tønning on September 27th, A.D., 2018, and being bound to comply with a condition of that undertaking, namely: "all dogs in your possession are to be kept on you[r] 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" (revision mine), did fail without lawful excuse to comply with that condition, thereby committing the indictable offence, contrary to the provisions of Section 145(3) of the **Criminal Code**.

V. CONCLUSION AND DISPOSITION

270 For these reasons outlined above, I find Mr. Kirby:

- (a) guilty of the following counts in the Indictment:

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- (i) Count 1: On December 12th, A.D. 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, [Mr. Kirby] did by criminal negligence cause bodily harm to William Stevens, committing thereby an indictable offence, contrary to an[d] in violation of Section 221 of the Criminal Code of Canada [, R.S.C., 1985, c. C-46 and amendments thereto (the "**Criminal Code**")];
- (ii) Count 2: On December 12th, A.D., 2018 at the City of Saint John, County of Saint John, Province of New Brunswick, [Mr. Kirby] did by criminal negligence cause bodily harm to [A.M.], committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**];
- (iii) Count 4: On or about the 22nd day of August, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, [Mr. Kirby] did by criminal negligence cause bodily harm to Garfield McPhee, committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**]; and
- (iv) Count 5: On or about the 2nd day of September, A.D. 2018, at or near the City of Saint John, in the County of Saint John and Province of New Brunswick, [Mr. Kirby] did by criminal negligence cause bodily harm to Allen Howe, committing thereby an indictable offence, contrary to and in violation of Section 221 of the [**Criminal Code**]; and

[Revisions and typographical correction mine.]

- (b) not guilty of the following count in the Indictment:

- (i) Count 3: On December 12th, A.D., 2018, at the City of Saint John, County of Saint John, Province of New Brunswick, [Mr. Kirby] being at large on his undertaking entered into before Provincial Court Judge Henrik Tønning on September 27th, A.D., 2018, and being bound to comply with a condition of that undertaking, namely; 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, did fail without lawful excuse to comply with that condition, thereby committing the indictable offence, contrary to the provisions of Section 145(3) of the [**Criminal Code**].

[Revisions and typographical correction mine.]

A.T. DOYLE J.

¹ David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd Ed. (2015), Part III-Criminal Negligence Causing Bodily Harm, pp. 650-654.

² Ibid.

³ Agreed Statement of Fact, para. 6

⁴ Agreed Statement of Fact, para. 8.

⁵ Agreed Statement of Fact, para. 7.

⁶ Agreed Statement of Fact, para. 7.

⁷ Agreed Statement of Fact, para. 9.

⁸ Agreed Statement of Fact, para. 10.

⁹ Agreed Statement of Fact, para. 11

¹⁰ Agreed Statement of Fact, para. 12

¹¹ Agreed Statement of Fact, para. 12

¹² David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd Ed. (Thomas Reuters Canada Limited, 2015), Part III-Criminal Negligence Causing Bodily Harm, pp. 650-654. See also National Judicial Institute, Model Jury Instructions,

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Offence 221: Criminal Negligence Causing Bodily Harm, available online at Model Jury Instructions - National Judicial Institute (nji-inm.ca) (accessed May 20, 2022).

- 13 See National Judicial Institute, Model Jury Instructions, Offence 221: Criminal Negligence Causing Bodily Harm (Last revised November 2017) at footnote 6: "This instruction is intended to reflect the fault element in *R. v. J.F.*, [\[2008\] 3 S.C.R. 215](#), para 9, in which the Court said that the Crown has to prove that the accused's conduct represented a marked and substantial departure from the conduct of a reasonable and prudent person in the circumstances where the accused either recognized and ran an obvious and serious risk to the lives or safety of others, or alternatively, gave no thought to that risk. See also *R. v. Roy*, [2012 SCC 26](#), at para 36."
- 14 Testimony of Michael Kirby on March 14, 2022 at 10:37:55am.
- 15 Testimony of Michael Kirby on March 15, 2022 at 11:34:40am.
- 16 Testimony of Michael Kirby on March 15, 2022 at 11:34:45am.
- 17 Testimony of Michael Kirby on March 14, 2022 at 11:47:30am.
- 18 Testimony of Michael Kirby on March 14, 2022 at 11:47:35 am.
- 19 Testimony of Cst. Brent Haines on January 4, 2021 at 4:23:10pm.
- 20 Testimony of Michael Kirby on March 15, 2022 at 11:03:10am.
- 21 Testimony of Michael Kirby on March 14, 2022 at 2:17:25pm.
- 22 Testimony of Michael Kirby on March 14, 2022 at 3:36:20pm.
- 23 Testimony of Michael Kirby on March 15, 2022 at 11:03:35am.
- 24 Testimony of Michael Kirby on March 14, 2022 at 11:53:50am.
- 25 Testimony of Michael Kirby on March 15, 2022 at 11:25:30am.
- 26 Testimony of Michael Kirby on March 15, 2022 at 11:26:45am.
- 27 Testimony of Michael Kirby on March 15, 2022 at 11:27:25am.
- 28 Testimony of Michael Kirby on March 15, 2022 at 3:32:05pm.
- 29 Testimony of Michael Kirby on March 15, 2022 at 3:32:30pm.
- 30 Testimony of Michael Kirby on March 15, 2022 at 3:32:45pm.
- 31 Testimony of Joan Richardson on January 3, 2021 at 4:04:30pm.
- 32 Testimony of Michael Kirby on March 14, 2022 at 11:44:20am.
- 33 Testimony of Cst. Brent Haines on January 4, 2021 at 4:28:20pm.
- 34 Testimony of Michael Kirby on March 15, 2022 at 11:48:00am.
- 35 Testimony of Michael Kirby on March 15, 2022 at 11:42:30am.
- 36 Testimony of Michael Kirby on March 14, 2022 at 2:18:50pm
- 37 Testimony of Michael Kirby on March 14, 2022 at 2:19:00pm.
- 38 Testimony of Michael Kirby on March 15, 2022 at 11:45:30am.
- 39 Testimony of Michael Kirby on March 15, 2022 at 11:47:20am
- 40 Testimony of Michael Kirby on March 15, 2022 at 1:47:15pm
- 41 Testimony of Michael Kirby on March 15, 2022 at 11:50:40am.
- 42 Testimony of Garfield McPhee on March 29, 2021, file one, 49:15.
- 43 Testimony of Michael Kirby on March 15, 2022 at 11:45:00am.
- 44 Testimony of Michael Kirby on March 15, 2022 at 11:54:25am.
- 45 Testimony of Michael Kirby on March 15, 2022 at 3:38:05pm.

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- 46** Testimony of Garfield McPhee on March 29, 2021, file one, 52:30.
- 47** Testimony of Michael Kirby on March 15, 2022 at 11:56:00am.
- 48** Testimony of Michael Kirby on March 15, 2022 at 11:57:00am.
- 49** Testimony of Joan Richardson on January 4, 2021 at 4:06:00pm.

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