

Canadian Judicial Council

Model Jury Instructions in Criminal Matters

Preface

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In his capacity as chair of the Canadian Judicial Council, Chief Justice Antonio Lamer proposed that the Council prepare model jury instructions for criminal trials. This work was enthusiastically supported and brought to publication by his successor, Chief Justice Beverley McLachlin.

When the Council embarked on this project, Mr. Justice David Watt of the Superior Court of Justice had already begun to prepare jury instructions for use in Ontario. After consultation with the Superior Court and Mr. Justice Watt, the Canadian Judicial Council established a national committee on jury instructions. The mandate of the committee was to adapt the instructions that had been developed for use in Ontario and prepare a set of national instructions for publication by the Council.

This is the origin of the instructions presented here. The Council wishes to express its thanks to the Superior Court of Justice and particularly to Mr. Justice David Watt. He developed a foundation and architecture for this project. His monumental undertaking was the starting point for the Council's instructions. The Council is indebted to him for his work.

The publication of these instructions is supported by the Canadian Judicial Council. This does not mean, of course, that the instructions carry the authority of the Council, its members or any court. They are published by the Council as a service to judges and lawyers. The only authority these instructions enjoy is the measure of approval they receive through actual use in criminal trials. As they are regularly used, criticised and revised, these instructions will provide a focal point for discussion about appropriate instructions. Of course, there will never be perfect jury instructions and these are not offered as such. As the law evolves, so will these instructions. They will be revised as necessary to reflect new developments and to correct any inaccuracies.

The difficulty that judges face in giving instructions to juries is well known. For juries to follow and apply them, instructions must be clear, complete and accurate. A model instruction satisfies these objectives. But the existence of model instructions does not mean there is only one way to instruct a jury on a given topic. A model instruction is intended to convey the essential information that a jury should be told in language that is plain, comprehensible and correct. These instructions offer one example of how this might be done.

Judges retain a broad discretion to instruct juries as they see fit. They are best placed to determine what is appropriate and necessary in each case. These model instructions are intended to assist them, not to take the place of instructions that have been tailored by the judge for a pending trial.

Complaints of misdirection or non-direction are among the most frequent grounds of appeal from jury trials. When appeals are allowed on these grounds, it is because there was some defect in the clarity, completeness or accuracy of the instructions. The instructions presented here are intended to remind judges of recurring issues at trial and to assist them in instructing juries.

These instructions do not, and cannot, supply models for every point that a judge will have to explain to a jury. When completed, the instructions will comprise two broad categories. First are instructions of a general nature that are applicable at the commencement of proceedings, mid-trial and at the end of the case. The instructions in this category cover a wide range of issues of procedure and evidence. The second broad category comprises instructions on the ingredients of specific offences and the elements of defences. Of these two broad categories, the first are being published, in English and French, in February 2004. Publication of instructions in the second category will follow thereafter.

One of the chief aims in the preparation of these instructions has been to use clear language. Whether a jury sits in a rural courthouse or in the centre of a large city, it must be given instructions that are comprehensible to each of its members. Many issues that juries must decide are inherently and irreducibly complex. Complexity in the law, however, cannot justify complexity in a judge's instructions to the jury. It can never be known with certainty whether a jury has properly understood a judge's instructions, especially when the judge has not been asked for any clarification. For this reason alone, a judge must achieve maximum clarity in every direction that is given to the jury.

These instructions are made available not only to judges, but also to lawyers and to anyone else who has an interest in the administration of justice in Canada. The Table of Contents is detailed and is intended to allow easy reference to specific topics. These instructions have not been printed; instead, they are published electronically to provide maximum flexibility for individual users. Judges might choose, for example, to construct their own book of instructions by using these as a starting-point. Alternatively, they might choose to make selections, with adaptations for individual cases. In any event, however they are actually used in practice, these instructions will provide all users with a basis from which to develop instructions on questions that frequently arise in jury trials.

Across Canada there are variations in the law and practice of jury trials. In these instructions no attempt is made to enumerate these variations and certainly no attempt has been made to harmonise existing discrepancies. A greater degree of harmonisation across jurisdictions is perhaps desirable and might be achieved slowly with continued use of these instructions. Users should be aware that these instructions do not specify points of variation in the law and practice.

These model instructions are revised on a continuing basis to enhance currency, accuracy and completeness. That is, they are revised periodically to reflect new developments in the law, to correct any imperfections and to fill in gaps. Users are invited to send comments and suggestions for revision to the Canadian Judicial Council at jury@cjccm.gc.ca.

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PRELIMINARY INSTRUCTIONS

A. Instructions to the Jury Panel

Glossary

NOA	=	Name of Accused
NOC	=	Name of Complainant
NOD	=	Name of Declarant
NOW	=	Name of Witness
NOAW	=	Name of Accused Witness
NO3P	=	Name of Third Party

I - PRELIMINARY INSTRUCTIONS
1. Instructions to the Jury Panel

I - PRELIMINARY INSTRUCTIONS
1. Instructions to the Jury Panel

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.1 Introduction¹

(Last revised February 2004)

[1] Members of the jury panel, the clerk (or registrar) has just read out the charge. *NOA* has pleaded not guilty.

[2] We will now choose twelve of you as jurors, whose duty will be to consider the evidence and in the end decide whether *NOA* is guilty or not guilty.

[3] The lawyers estimate that the trial will take (*specify*) to complete. This is only an estimate. The trial could actually take more or less time than the lawyers estimate.

¹ It is the practice in some provinces to alert jurors to exemptions and disqualifications under provincial legislation at this point. It may be the better practice to ask jurors to come forward with respect to issues relating to knowledge of the case or participants, or prior involvement, as a group rather than singling people out, which could be embarrassing (*e.g.* for victims of sexual assault).

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.2 Knowledge of Participants

(s. 632)

(Last revised February 2004)

[1] The charge against *NOA* is:

(read or summarize applicable part of indictment)

[2] Every juror must be impartial, which means that every juror must approach the trial with an open mind and without preconceived ideas. He or she must decide the case solely on the basis of the evidence at trial and the instructions on the law from (me) the trial judge.

[3] A person who has or ever had a close connection with anyone involved in this case might not be able to approach the case with an open mind. By close connection, I mean a past or present association with someone that could affect your ability to be impartial.

[4] If you have or ever had such a connection with anyone involved in the case -- for example, *NOA*; Crown or defence counsel (*identify by name*); the investigating officer(s) (*identify by name*); or (me) the trial judge,² or if you have any doubt about it, please come forward.

² In some provinces, [4] may include a statement to the effect “If you are called forward , please advise me then if you have had . . .”

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.3 Knowledge of Witnesses

(Last revised February 2004)

[1] A person who has or ever had a close connection with any witness in this case might not be able to approach the case with an open mind.

[2] You will now hear a list of names of persons who may be witnesses. Please listen carefully to each name. If you have or ever had a close connection with anyone whose name is read out, or if you think you might have, please come forward.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.4 Knowledge of the Case

(Last revised February 2004)

[1] This case involves (*briefly describe circumstances of offence charged*).

[2] If anyone has personal knowledge of the circumstances of this case from any source, other than newspapers, television, radio or the Internet, please come forward.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.5 Prior Involvement in or Knowledge of Similar Offences³

(Last revised February 2004)

[1] The offence alleged is (*specify charge*).

[2] A person who has been accused of any offence of this nature, or been a victim of such an offence, or has otherwise been involved in a similar offence or experience might not be able to approach the case impartially - that is, with an open mind and without preconceived ideas.

[3] We do not wish to embarrass anyone by asking questions about personal matters. At the same time, we need to know if there is any personal matter that might make it too difficult for you to perform jury duty in this case. If this applies to you, please come forward.

³ See *R. v. Betker* (1997), 115 C.C.C. (3d) 421, 443 (Ont. C.A.). See also *R. v. Barrow* (1988), 38 C.C.C. (3d) 193 (S.C.C.).

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.6 Citizenship Requirement

(Last revised February 2004)

[1] All jurors must be Canadian citizens. If you are not a Canadian citizen, please come forward.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.7 Ability to Hear⁴

(Last revised February 2004)

[1] All jurors must be able to hear what is said in the courtroom. If you have difficulty hearing, please come forward.

⁴ When this is said, the entire jury panel should be in the room or within earshot.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.8 Understanding the Language of Trial⁵

(Last revised February 2004)

[1] All jurors must be able to read and understand the language that will be used in the trial. In this case, witnesses will testify and others involved in the case will speak in English/French. Documents written in English/French may be made exhibits.

[2] If you have difficulty reading or understanding English/French, please come forward.

⁵ This instruction may require amendment in jurisdictions (*e.g.* Northwest Territories) where a person who speaks and understands an official aboriginal language is eligible to serve on a jury.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.9 Juror Health

(Last revised February 2004)

[1] The lawyers estimate that this trial will last about (*specify*) but, in reality, nobody knows for sure. It depends on many things. As a general rule, jurors sit each day, from Monday to Friday, from (*specify time*) to (*specify time*) with a morning, (and) lunch (and afternoon) break (*or, specify*). There might be a need to vary this schedule, depending on how the trial unfolds.

[2] Some of you might have health problems that require medical or other treatment. This might make it difficult for you to serve as a juror.

[3] We do not wish to embarrass anyone by asking about personal matters. But if you have a health problem, or if you are in a treatment or therapy program that might prevent you from serving as a juror, please come forward.

I - PRELIMINARY INSTRUCTIONS

1. Instructions to the Jury Panel

1.10 Personal Hardship

(Last revised February 2004)

[1] Jury service is the most important role that citizens can play in the administration of justice in Canada, and it is the duty of citizens to serve as jurors from time to time. Most people chosen as jurors find jury duty a valuable experience, one that gives them a chance to play a direct part in the administration of justice in their community. If you are selected, jury service will require changes to your daily routine of work, family, religion, education, or leisure activities.

[2] In some cases, jury service may cause exceptional personal, financial or other hardship. If this applies to you, please come forward.

I - PRELIMINARY INSTRUCTIONS

2. Instructions Relating to the Jury Selection Process

2. Instructions Relating to the Jury Selection Process

I - PRELIMINARY INSTRUCTIONS
2. Instructions Relating to the Jury Selection Process

2.1 Choosing Jurors and Peremptory Challenges⁶ Only
(Last revised February 2004)

[1] To start jury selection, the clerk will choose (*specify number*) names at random, then read them out loud. If your name is called, please come forward and stand where shown by court staff.

[2] Both the Crown and the defence participate in the process of selecting jurors.

[3] The lawyers will take turns choosing. As each name is read, each lawyer will say “content” or “challenge”, without saying why. If any lawyer says “challenge” when your name is called, you will not become a juror in this case. If both (all) lawyers say “content”, you will become a juror in this case. We will repeat the procedure until we have chosen twelve jurors.

[4] When the Crown and the defence use the rights that our law gives them to choose jurors they do not mean to offend anyone. Do not feel embarrassed if you are not selected. Do not take it personally. It is a normal part of jury trials.

⁶ When selecting more than one jury at a time, this instruction may require some modification. It should be given only where there is no challenge for cause. Where there is a challenge for cause, Preliminaries 2.2 to 2.4 should be given.

I - PRELIMINARY INSTRUCTIONS

2. Instructions Relating to the Jury Selection Process

2.2 Challenges for Cause - Procedure⁷

(Last revised February 2004)

[1] Choosing jurors takes place in two stages. In the first stage, each of you whose name is called will be asked a (*or, specify number*) question(s). Everybody will be asked the same question(s). If there is anything you do not understand about a question, or if you had trouble hearing it, please feel free to ask for clarification.

[2] If you proceed to the second stage, you will not be asked any more questions. Instead, counsel will be asked to say “content”, or “challenge”. You will be a juror in this case only if both (all) say “content”.

[3] (*Advise those not chosen as jurors of any remaining obligations.*)

⁷ There are variations in the procedure followed by judges in cases that involve a challenge for cause. Some judges prefer that the challenge for cause take place in the presence of the other members of the jury panel. Other judges consider that it should take place in the absence of other jury panel members to reduce the risk that prospective jurors might tailor their responses to the questions to facilitate or avoid selection as jurors or to prevent contamination of the remaining jurors. The matter should be discussed with counsel before jury selection begins. Further, in some jurisdictions, in the interests of impartiality, the judge asks some or all of the questions.

If the challenge is based on pre-trial publicity, the other members of the panel should not be present. If the challenge concerns issues of race, the Supreme Court of Canada has suggested in *R. v. Williams*, [1998] 1 S.C.R. 1128 that the challenge should take place in front of the entire panel.

I - PRELIMINARY INSTRUCTIONS
2. Instructions Relating to the Jury Selection Process

2.3 Challenges for Cause - Introductory Instructions to Triers
(Last revised February 2004)

[1] You have been chosen to help select the jurors in this case. Listen carefully to my instructions about how to do this.

[2] All prospective jurors will be asked a (some) question(s). They will give (an) answer(s).

[3] Listen to the answers each person gives. You will decide, based on those answers, whether the person is acceptable or not acceptable as a juror in this case.

[4] An acceptable juror is a person who is impartial, which means that he or she will approach jury duty with an open mind and without preconceived ideas. He or she will decide the case solely on the evidence given at trial and the legal instructions given by (me) the trial judge.

[5] If you conclude that the person is impartial, you must find that person “acceptable”. If not, you must find that person “not acceptable”.

I - PRELIMINARY INSTRUCTIONS

2. Instructions Relating to the Jury Selection Process

2.4 Challenges for Cause - Final Instructions to Triers

(Last revised February 2004)

[1] Having heard the answers, you must now decide whether this person is acceptable as a juror.

*(Where pre-trial publicity is the basis for the challenge, select [2-A] or [2-B], or both, always followed by [3] and [4].)*⁸

[2-A] Just because a person has read, watched or listened to reports of matters relating to this case does not mean, by itself, that the person is not acceptable as a juror to try this case.

[2-B] Just because a person has an opinion about this case does not mean, by itself, that the person is not acceptable as a juror to try this case.

(Where generic prejudice is the basis for challenge, read [2-C],[3] and [4].)

[2-C] Just because a person has a prejudice or bias against a racial (ethnic) group (or, against persons charged with (*specify nature of crime*)) does not mean, by itself, that the person is not acceptable as a juror to try this case.

[3] What is important is whether the person is impartial. Before finding anyone who has read, watched or listened to reports of matters relating to (has an opinion about this case), (or, has a prejudice or bias against (*describe as in [2-C]*)) acceptable as a juror, you must find that that person would approach jury duty with an open mind and decide the case on the evidence given at trial and the instructions of the trial judge.

[4] Discuss the matter with one another. To reach a decision, both of you must agree. When asked for your decision, simply say “acceptable” or “not acceptable”.

⁸ [1], [3] and [4] should be read in all cases.

I - PRELIMINARY INSTRUCTIONS

2. Instructions Relating to the Jury Selection Process

2.5 Concluding Instructions to Jury Panel⁹

(Last revised February 2004)

[1] Jury selection will continue until twelve jurors have been chosen. Then we will take a short break. Court staff will show you to the jury room. At that time, you may contact your families and employers, if you wish to do so, to tell them you were selected as a juror. We will then continue the trial (*or, specify*).

⁹ This may have to be modified in situations where the trial is delayed by preliminary motions.

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3. Opening Instructions to the Trial Jury

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3.1 Introduction

(Last revised February 2004)

[1] Members of the jury, you have been chosen to decide this case.

[2] I remind you of the importance of your oath. It means that you must listen closely to the evidence that will be presented and decide this case solely on that evidence and the instructions that I give you. I also remind you that your deliberations are secret and that it is a criminal offence to reveal any information about your deliberations to anyone other than your fellow jurors.

[3] I will now describe your duties as jurors and the procedure that we will follow during the trial. I will also explain to you some of the rules of law that apply in this case.

[4] During and at the end of the trial, I will give you specific and detailed instructions about the rules of law that apply to this case. You must listen carefully to all of these instructions.

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3.2 Duties of Jurors
(Last revised February 2004)

[1] You will decide what the facts are in this case solely on the evidence presented to you in this courtroom.

[2] I will tell you what the law is and you will apply it to the evidence when you decide what the facts are. You must not use your own ideas about what the law is or should be and you must not rely on information about the law or this case from any other source.

I - PRELIMINARY INSTRUCTIONS

3. Opening Instructions to the Trial Jury

3.3 Evidence Defined

(Last revised February 2004)

[1] To decide what the facts are in this case, you must consider only the evidence presented in the courtroom. Evidence is the testimony of witnesses and things produced as exhibits. It may also consist of admissions.

[2] The evidence includes what each witness says in response to questions asked. The questions are not evidence unless the witness agrees that what is asked is correct. Only the answers are evidence.

[3]¹⁰ The Crown and the defence (or, *NOA*) may also agree about certain facts. When that happens, no evidence is required. Whatever they agree about is a fact in this case. This is called an “admission”.

[4] There are also some things that are not evidence. You must not consider or rely upon them to decide this case. If I instruct you to disregard any evidence, it is your duty to do so.

[5] In particular, the charge in the indictment that you heard read out when we started this case is not evidence. What the lawyers and I say when we speak to you during the trial is not evidence.

[6] What people outside this courtroom say, or have said, about this case is not evidence. That includes what is said in radio, television, newspaper and Internet reports about this case, or what you may have heard from other persons. That is not evidence. You must ignore it completely. You must avoid all media coverage of this case. You must consider only the evidence presented to you in the courtroom.

¹⁰ When formal admissions are made under *Code*, s. 655, paragraph [3], or a modification of Mid-Trial 7.1 should be given. Where there are no formal admissions, para. [3] should be omitted.

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3.4 Evidence Admitted for a Limited Purpose¹¹
(Last revised February 2004)

[1] Sometimes, certain evidence can only be used for a specific purpose. If that happens here, I will tell you how you may use the particular evidence in deciding this case. You must consider the evidence only for the purpose I describe. You must not use it for any other purpose.

¹¹ This instruction is optional. Some judges may prefer to omit it as a Preliminary Instruction but use it later, if appropriate, as a Mid-Trial Instruction.

I - PRELIMINARY INSTRUCTIONS

3. Opening Instructions to the Trial Jury

3.5 Direct and Circumstantial Evidence¹²

(Last revised February 2004)

[1] I will now explain the meaning of the terms “direct evidence” and “circumstantial evidence”.

[2] Usually, witnesses tell us what they personally saw or heard. For example, a witness might say that he or she saw it raining outside. That is called direct evidence.

[3] Sometimes, however, witnesses say things from which you are asked to draw certain conclusions. For example, a witness might say that he or she had seen someone enter the courthouse lobby wearing a raincoat and carrying an umbrella, both dripping wet. If you believed that witness, you might conclude that it was raining outside, even though the evidence was indirect. Indirect evidence is sometimes called circumstantial evidence.

[4] Like witnesses, things filed as exhibits may provide direct or circumstantial evidence.

[5] In making your decision, both kinds of evidence count. The law treats both equally. One is not better or worse than the other. In each case, your job is to decide what conclusions you will reach based upon the evidence as a whole, both direct and circumstantial. To make your decision, use your common sense and experience.

¹² These are optional instructions. Many judges take the view that an instruction on the difference between direct and circumstantial evidence is unnecessary in opening to the jury. Reference to it in the summing-up is adequate. Others take the position that some instruction is required so that jurors understand:

- (i) that there need not be direct evidence of every essential element of the offence charged;
- (ii) that the essential elements of the offence may be proved by circumstantial evidence;
- (iii) that circumstantial evidence involves drawing an inference; and,
- (iv) that circumstantial evidence is perfectly good evidence, not an inferior form of proof.

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3.6 Irrelevance of Prejudice And Sympathy
(Last revised February 2004)

[1] You must consider the evidence with an open mind. Make your decision without sympathy, prejudice or fear. Do not be influenced by public opinion.

I - PRELIMINARY INSTRUCTIONS
3. Opening Instructions to the Trial Jury

3.7 Irrelevance of Sentence¹³
(Last revised February 2004)

[1] If you find *NOA* guilty of an offence, it is for me to decide what sentence is appropriate. Sentencing has no place in your discussions or in your decision¹⁴.

¹³ Where the person charged may be found not criminally responsible on account of mental disorder, consider the appropriateness of this instruction. Counsel should be consulted.

¹⁴ This instruction is optional and potentially confusing to jurors. It may be useful, however, in cases where there has been advance publicity about a repeat offender.

I - PRELIMINARY INSTRUCTIONS

3. Opening Instructions to the Trial Jury

3.8 Conduct of Jury

(Last revised February 2004)

[1]¹⁵ During the trial, you may discuss the case amongst yourselves but only when all of you are together in the jury room. You must not, however, come to any conclusions about the case until you have heard all of the evidence, listened to the lawyers on both sides and received my instructions about the law. Keep an open mind.

[2] Some of your family, friends, fellow workers or others may ask you about jury duty. You must not talk to them about the case. Nor should you discuss the case with anyone involved in it, including *NOA*, *NOC*, their friends or families, witnesses, investigating officers, or lawyers. You may, of course, give a polite greeting around the courthouse to someone, but do not talk about the case with anyone except your fellow jurors.

[3] If anyone else approaches you to discuss any part of the case, please tell that person that you cannot discuss it. If the person does not stop, please tell me about it. I will deal with it.

[4] When you arrive at the courthouse each morning and return to it after lunch each afternoon, please go straight to the jury room. When you leave at lunch time or at the end of your duties for the day, please leave directly from the jury room. Please do not linger around the halls or other places in the building before or after our sittings.

[5] Finally, you are not lawyers or investigators. You must not investigate, seek out any information, or do any research about the case, the persons involved in it, or the law that applies to it. Do not consult other people or other sources of information, printed or electronic.

¹⁵ Paragraph [1] requires amendment where the trial judge decides to follow the traditional rule that jurors should be told not to discuss the evidence during the trial.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4. Instructions on Trial Procedure

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.1 Introduction

(Last revised February 2004)

- [1] Let me now explain to you briefly the procedure that we will follow in this trial.
- [2] Crown counsel is (*identify counsel by name*). The Crown prosecutes the case.
- [3]¹⁶ Defence counsel is (*identify counsel by name*). S/he represents *NOA*, who is on trial here.

¹⁶ Where the person charged is unrepresented, [3] should be replaced by Preliminary 4.2.

I - PRELIMINARY INSTRUCTIONS
4. Instructions on Trial Procedure

4.2 Self-Represented Persons¹⁷
(Last revised February 2004)

[1] *NOA* is representing her/himself in this case as s/he is entitled to do. The fact that *NOA* is not represented by a lawyer must not affect your decision in this case.

¹⁷ This instruction should be used in place of or in addition to [3] of Preliminary 4.1 where the person charged is unrepresented.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.3 The Order of Presentation

(Last revised February 2004)

[1] In all criminal trials, the Crown presents its evidence first because it has the burden of proving the charge. Before presenting evidence, the Crown may make an opening address about the case.

[2] After the opening address, the Crown will call witnesses to the witness box. Various things may also be filed in evidence as exhibits. Facts that are admitted by the defence may also be part of the Crown's evidence.

[3] All persons charged with an offence are presumed to be innocent under our law. This means that they do not have to prove their innocence. They do not have to testify or present evidence. The law requires the Crown to prove the charge beyond a reasonable doubt.¹⁸

[4] If the defence does choose to present evidence, it may also make an opening address.

[5] In making their opening addresses, the lawyers (or *NOA*) may summarize the evidence they intend to present and refer to some of the principles of law that may apply here. What they say about the evidence, however, is not itself evidence for you to consider in deciding this case. What they say about the law is only meant to help you understand some of the issues to which the evidence may relate. I will explain to you which principles of law apply to your decision, and it is your duty to follow these instructions.

¹⁸ This instruction requires modification in reverse onus cases, for example, where the person charged denies criminal responsibility on account of mental disorder.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.4 Questioning Witnesses

(Last revised February 2004)

- [1] When lawyers ask witnesses questions, they have to follow certain rules.
- [2] One set of rules applies when they are asking questions of witnesses they have called. These questions are called “examination in chief.”
- [3] Another set of rules applies when lawyers are questioning witnesses that the other side has called. These questions are called “cross examination.”
- [4] Examination in chief always comes first; then the lawyer from the other side has an opportunity to cross-examine the same witness.¹⁹
- [5] After a witness has been cross-examined, the lawyer who first called that witness may be permitted to ask additional questions to clarify or explain matters that have come up in cross-examination. This is called “re-examination”.

¹⁹ Where the trial judge permits jurors to ask questions, [3] requires modification or the addition of instructions such as Preliminary 4.6.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.5 Note-Taking by Jurors²⁰ (Last revised February 2004)

[1] We depend on the memory and judgment of all jurors to decide this case. If you want to take notes during the trial to help you remember what a witness said, you may do so. You may find it difficult, however, to take detailed, accurate notes and, at the same time, pay close attention to what witnesses are saying and how they are saying it.

[2] If you take notes, do not be distracted from your duty to observe the witnesses. You may always ask to hear a tape of a witness's testimony or have some evidence read back to you, but you only have one chance to observe the appearance and behaviour of the witnesses when they testify.

[3] To protect the secrecy of your work, you must not take your notes with you at the end of our sittings each day. We will make arrangements to keep them in a secure place and return them to you when we resume sitting the following day.

[4] If you decide not to take notes, you must still listen carefully to the evidence.

²⁰ This instruction is optional and should only be given when the judge decides to tell jurors that they may take notes. When proceedings have been concluded, juror notes should be shredded.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.6 Questioning of Witnesses by Jurors²¹

(Last revised February 2004)

[1] It is not the role of jurors to conduct the trial. It is your duty to consider the evidence that is presented, not to decide what questions the witnesses should be asked or how to ask them.

[2] Sometimes you might wish to ask a witness questions. It is usually best to listen to the rest of the witness's testimony in case your question is answered later. It may even be answered by another witness. This is why it is generally best simply to be patient and listen closely to all the evidence.

[3] However, if there is an important point that you believe needs to be clarified, put up your hand to indicate that you have a question. Please hand your question to me in writing. After I have read the question, I will decide what to do. I may need to ask you to go to the jury room while I discuss the question with the lawyers.

²¹ This instruction is optional. It should only be given when the judge decides to permit jurors to ask questions and to tell them that they may do so.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.7 Exclusions from the Courtroom

(Last revised February 2004)

[1] From time to time during this trial, you may be asked to go to the jury room while counsel and I discuss legal issues. This is normal and should not concern you. You will undoubtedly find interruptions a bit annoying but I will try to keep them to a minimum.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.8 The Addresses of Counsel (Last revised February 2004)

[1] When all the evidence has been presented, the Crown and defence will address you. They will tell you their positions and refer to some of the evidence that they say you should rely on to reach the conclusion they suggest.

[2] They may also refer to some rules of law to help you understand their positions better. What they say about the law may be correct, but it is for me, as the trial judge, to tell you what rules of law apply and what they mean. You must follow my instructions on the law. If there is a difference between what I say and what counsel say about the law, you must follow my instructions.

I - PRELIMINARY INSTRUCTIONS
4. Instructions on Trial Procedure

4.9 The Summing-Up
(Last revised February 2004)

[1] My final instructions will also include a review of some of the evidence given during the trial. You should always remember, however, that it is only your memory and understanding of the evidence that counts in this case - not mine or that of counsel.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.10 Multiple Accused Tried Jointly

(Last revised February 2004)

[1] (*Specify number*) people are being tried together in this case. Although they are being tried together, you must consider and decide the case of each person on trial separately and individually. You do not have to make the same decision for each person on trial.

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

4.11 Assessing Evidence (Last revised February 2004)

[1] To make your decision, you should consider carefully, and with an open mind, all the evidence that is presented during the trial. It is up to you to decide how much or little of a witness's testimony you will believe or rely on. You may believe some, none or all of the evidence given by a witness.

[2] When you watch and listen to testimony, and later when you go to the jury room to decide the case, use your collective common sense to decide whether people know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe²² of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind as the trial proceeds.²³

[3] Does the witness seem honest? Is there any particular reason why the witness would not be telling the truth?

[4] Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?

[5] Was the witness in a position to make accurate and complete observations about the event? Did he or she have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?

[6] Does the witness seem to have a good memory? Does any inability or difficulty that the witness has in remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions? Does the witness have any reason to remember the things about which he or she testified?

[7] Does the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?

[8] Does the witness's testimony seem reasonable and consistent? Is it similar to or different from what other witnesses say about the same events? Did the witness say or do something different on an earlier occasion?

²² Some judges prefer "accept" to "believe".

²³ In their Preliminary Instructions, some judges prefer not to mention the factors that appear in question form in [3] - [12]. For those who prefer this approach, [1] and [2] may be read, omitting the last sentence of [2].

I - PRELIMINARY INSTRUCTIONS

4. Instructions on Trial Procedure

[9] Do any inconsistencies in the witness's evidence make the main points of the testimony less believable or reliable? Is the inconsistency about something important or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does it make sense?

[10] What is the witness's manner when he or she testifies? Do not jump to conclusions, however, based entirely on how a witness testifies. Looks can be deceiving. Giving evidence in a trial is not a common experience. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or even the most important factor in your decision.

[11] These are only some of the factors that you should keep in mind as the evidence is given. When you go to the jury room at the end of the case, these factors might help you decide how much or little of a witness's evidence you will believe or rely on. You may consider other factors as well.

[12] In making your decision, do not consider only the testimony of the witnesses. Take into account, as well, any exhibits that may be filed. Decide how much or little you will rely on them, as well as the testimony and any admissions, to help you decide this case.

I - PRELIMINARY INSTRUCTIONS

5. Fundamental Principles

5. Fundamental Principles

I - PRELIMINARY INSTRUCTIONS

5. Fundamental Principles

5.1 Presumption of Innocence and Burden of Proof

(Last revised February 2004)

[1] *NOA* has pleaded not guilty. S/he is presumed to be innocent of the crime charged.

[2] The presumption of innocence lasts throughout the trial. This presumption only ceases to apply if, at the end of the case and on the whole of the evidence, the Crown satisfies you beyond a reasonable doubt that *NOA* is guilty of the crime charged.

[3]²⁴ The presumption of innocence also means that *NOA* does not have to testify, present evidence or prove anything in this case. It is the Crown that must prove the guilt of *NOA* beyond a reasonable doubt. You must find *NOA* not guilty of an offence unless the Crown satisfies you beyond a reasonable doubt that s/he is guilty of it.

²⁴ Paragraph [3] requires amendment where the accused bears the onus of proof.

I - PRELIMINARY INSTRUCTIONS

5. Fundamental Principles

5.2 Reasonable Doubt²⁵

(Last revised February 2004)

[1] The principle of “proof beyond a reasonable doubt” is an essential part of the presumption of innocence.

[2] A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells you but also on what that evidence does not tell you.

[3] It is not enough for you to believe that *NOA* is probably or likely guilty. In those circumstances, you must find him/her not guilty, because the Crown would have failed to satisfy you of his/her guilt beyond a reasonable doubt. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[4] You should also remember, however, that it is nearly impossible to prove anything with absolute certainty. The Crown is not required to do so. Absolute certainty is a standard of proof that does not exist in law.

[5] If, at the end of the case, and after assessing all of the evidence, you are not sure that *NOA* committed the (an) offence, you must find him/her not guilty.

[6] If, at the end of the case, based on all the evidence, you are sure that *NOA* committed the (an) offence, you should find *NOA* guilty.

²⁵ This instruction will require modification where a reverse onus provision applies.

I - PRELIMINARY INSTRUCTIONS

5. Fundamental Principles

5.3 Elements of Offence²⁶

(Last revised February 2004)

[1] To help you follow the evidence in this case, I will briefly describe the essential elements of the offence charged. The Crown is required to prove each of these essential elements beyond a reasonable doubt.

[2] The offence charged is (*name or list offence charged--for example, "sexual assault", "first degree murder"*).²⁷ The charge(s) in the indictment read as follows:

(Read or summarize applicable part of indictment)

[3] *(Set out, in point form, the essential elements of each offence charged as found in paragraph[2] of the relevant offence instruction)*

[4] After all of the evidence has been presented, I will give you more complete instructions

²⁶ This instruction is optional. It should be used with care, especially where there are several definitions of an offence and a dispute between the parties whether there is an evidentiary foundation for the submission of some of them to the jury.

²⁷ Where there are several offences charged, each count, or group of counts charging the same offence, should be referred to separately. The essential elements may be taken from their description in the instructions relating to offences.

I - PRELIMINARY INSTRUCTIONS

5. Fundamental Principles

about these essential elements. I will also tell you about any defences or other issues that arise from the evidence. I will explain how they relate to the essential elements that the Crown must prove and the verdicts that you may give at the end of the case.²⁸

²⁸ Except in the rarest of cases, Preliminary Instructions should not include any reference to substantive defences.

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6. Concluding Instructions

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6.1 Selection of Foreperson²⁹

(Last revised February 2004)

[1] Later, I will ask you to choose one juror to act as your foreperson. The foreperson will lead your discussions, and announce your verdict in the courtroom at the end of the case. You do not have to choose that person immediately. As the trial continues, however, please think about which one of you would be best suited to perform that role. Get to know each other a little before you choose your foreperson.

[2] Every time you come back into the courtroom, please take the same seat that you have now.

²⁹ The timing of the choosing of a foreperson varies across the country. This instruction may need to be varied accordingly.

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6.2 Non-Disclosure

(Last revised February 2004)

[1] Please tell me about anything that may affect your ability to do your duty as jurors in this trial. If something happens, please write it down, put it in a sealed envelope and deliver it to the constable (or matron) who will give it to me.

[2] You should feel confident that what happens in the jury room will always be private and secret. This is to encourage full and frank discussion with your fellow jurors. Except for telling me about problems, you must not reveal anything about what happens in the jury room because to do so is a criminal offence. In other words, you must not worry that something you say in the jury room will be repeated anywhere else.

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6.3 Difficulties in Hearing or Seeing Witnesses

(Last revised February 2004)

[1] If at any time, you have trouble seeing or hearing any part of these proceedings, please let me know and I will correct it. Just put your hand up and tell me.

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6.4 Hours of Sitting

(Last revised February 2004)

[1] We will start each day at (*specify*) a.m. and continue until (*specify*) p.m., with a (*specify*) break around (*specify*) a.m. The precise time may vary from day to day by a few minutes.

[2] In the afternoon, we will start at (*specify*) p.m. and continue until (*specify*) p.m. with a (*specify*) break at about (*specify*) p.m.

[3] It may be that on some days we will finish somewhat earlier or later than our scheduled time. It is very difficult to predict precisely how long each witness will take to give his or her evidence. The lawyers do their best to ensure that each day is filled up, but it doesn't always work out that way.

[4] From time to time, a juror may have to go somewhere or do something when we would normally be sitting. We will do our best to help you out. You should remember, however, that we have to try this case in a timely and fair way. If something of this nature does happen, please let me know as soon as possible in a written note and the constable will give it to me.

I - PRELIMINARY INSTRUCTIONS

6. Concluding Instructions

6.5 Concluding Remarks

(Last revised February 2004)

[1] It is your duty to sit, watch and listen to all of the proceedings, including the addresses, the evidence and my instructions. You must listen to and observe these trial proceedings without prejudice, bias or sympathy.

[2] At the end of the sittings for each day, you may return to your homes. You do not have to stay together.

[3] When all of the evidence has been presented, counsel have addressed you and I have told you about the legal principles that apply to your discussions, you will go to the jury room together to decide the case. You must stay together until you have reached your verdict. Meals and overnight accommodation, if required, will be arranged for you.

II - MID-TRIAL INSTRUCTIONS

II - MID-TRIAL INSTRUCTIONS

II - MID-TRIAL INSTRUCTIONS

7.1 Formal Admissions of Facts³⁰ (s. 655)

(Last revised February 2004)

[1] The parties have admitted some facts.

[Specify the facts admitted.]

[2] You must accept what the parties have agreed on as facts without further evidence. This means that no witnesses have to be called or exhibits filed on those matters.

³⁰ This instruction applies only to formal admissions of fact made under the *Code*, s. 655. It does not apply to informal agreements, as for example, that certain witnesses need not be called to establish continuity, or that certain witnesses, if called, would give certain evidence. Jurors should be instructed specifically on the effect of any informal agreements made by counsel.

After giving this instruction, the judge must then outline the admitted facts, with reference to an exhibit setting them out in writing if appropriate.

In some jurisdictions, the Crown hands out copies of admitted facts and then reads them into the record. The admissions are then marked as an exhibit.

II - MID-TRIAL INSTRUCTIONS

7.2 Out of Court Statements of Person Charged ³¹

(Last revised February 2004)

[1] You have just heard the testimony of *NOW*. This witness stated that he/she heard *NOA* say something. You have to decide whether you believe *NOA* made the statement, or any part of it. Regardless of who the witness is, it is still up to you to decide whether you believe that witness's evidence.

[2] In deciding whether *NOA* said these things, or any of them, use your common sense. Consider the circumstances in which the conversation took place, and anything else that may make the witness's evidence more or less reliable.

³¹ This instruction is optional. It is not limited to statements made by the accused to persons in authority. It applies to all utterances attributed to an accused by any witness. It need be given only where the alleged utterance is material, or controversial. In joint trials, Mid-Trial 7.3 should be added to this general instruction.

Trial judges should put this instruction in context by specifically identifying the witness who has just given, or will give evidence of a statement by the accused.

Trial judges may also wish to repeat the instruction for subsequent witnesses, or simply advise the jury that the instruction previously given applies.

II - MID-TRIAL INSTRUCTIONS

7.3 Out of Court Statements of Person Charged (Joint Trial)³²

(Last revised February 2004)

[1] You have just heard the testimony of *NOW*. This witness stated that he/she heard *NOA*, say something. You have to decide whether you believe *NOA₁* made the statement, or any part of it. Regardless of who the witness is, it is still up to you to decide whether you believe that witness's evidence.

[2] When there is more than one person on trial, there is a special rule about how you may consider statements made by one of those persons outside the courtroom. Whatever *NOA₁* said to *NOW* (the witness) is only evidence concerning *NOA₁*, not *NOA₂*, even if it describes something that *NOA₂* said or did.

³² This instruction should be added to Mid-Trial 7.2 in joint trials where evidence is adduced of statements made by one or more of several co-accused. It requires modification or expansion where there is evidence upon which the jury could find adoption by an accused other than its maker. See, for example, *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, 538 (Ont. C.A.), per Martin J.A.

For statements made in furtherance of a common unlawful purpose, see Mid-Trial 7.25.

Trial judges should contextualize this instruction by identifying the witness who has just or will give evidence of an utterance or statement of one accused that is not admissible in relation to any other. The instruction should be added to Mid-Trial 7.2 in joint trials at the time that evidence of the utterance or statement is introduced. The instruction may be repeated for later witnesses or jurors may be reminded that the earlier instruction still applies.

II - MID-TRIAL INSTRUCTIONS

7.4 Previous Convictions of Accused Witness³³ (Credibility)

(Last revised February 2004)

[1] You have heard that *NOA* has previously been convicted of a criminal offence. You must not conclude that just because *NOA* has committed a crime in the past, s/he must have committed the crime charged.

[2] You may only consider the fact, (number) and nature of that (those) conviction(s) to help you decide how much or little of *NOA*'s testimony you will believe or rely on in deciding this case. Some convictions, for example, ones that involve dishonesty, may be more significant than others. Consider, as well, whether the previous conviction is recent, or happened a number of years ago.

[3] A previous conviction does not necessarily make the evidence of *NOA* unbelievable or unreliable. It is only one of many factors for you to consider in your assessment of *NOA*'s testimony.

³³ This instruction applies to accused persons who testify and are examined or cross-examined about previous criminal convictions. See s. 12, *Canada Evidence Act*. It should not be given where the witness is not an accused. For non-accused witnesses, see Mid-Trial 7.5.

Where evidence of an accused's prior conviction is used to rebut evidence of good character under the *Code*, s. 666, and counsel consider an instruction desirable, Final 11.5 may be adapted for use.

The caution contained in paragraph [1] might require emphasis or amplification in situations where, for example, the previous conviction is for the same or a similar offence.

II - MID-TRIAL INSTRUCTIONS

7.5 Previous Convictions of Non-Accused Witness³⁴ (Credibility)

(Last revised February 2004)

[1] You have heard that *NOW* has previously been convicted of a criminal offence. You may use that conviction to help you decide how much or little of *NOW*'s evidence you will believe or rely on.

[2] Some convictions, for example, ones that involve dishonesty, may be more significant than others. Consider, as well, whether the previous conviction is recent, or happened a number of years ago.

[3] A previous conviction does not necessarily make the evidence of *NOW* unbelievable or unreliable. It is only one of many factors for you to consider in your assessment of *NOW*'s testimony.

³⁴ See s. 12, *Canada Evidence Act*. It may not be necessary to give this instruction mid-trial. Counsel should be consulted. Where the non-accused witness is also alleged to be the perpetrator, and prior convictions are relied upon as evidence of disposition, Mid-Trial 7.6 should be given.

II - MID-TRIAL INSTRUCTIONS

7.6 Evidence of Disposition of Third Party³⁵ (Last revised February 2004)

[1] In this case, *NOA* is saying that *NO3P* may have committed the offence charged, and points to evidence that *NO3P* had an opportunity and a disposition to do it.

[2] At the end of the case, it will be up to you to determine whether this evidence, alone, or together with other evidence, raises a reasonable doubt that *NOA* committed the offence charged.

³⁵ Any person charged with an offence may adduce evidence that tends to show that a third party committed the offence. The evidence may be direct or circumstantial. It may include, but cannot consist only of, evidence of the third party's motive or disposition to commit the offence. Without some other connection of the third party to the offence charged, however, evidence of motive or disposition is not admitted because it lacks probative value.

This instruction should only be given in cases where the trial judge is satisfied

(i) that there is evidence, other than evidence of disposition, which sufficiently connects the third party to the offence charged to warrant admission of the disposition evidence; and

(ii) that the proposed evidence, whether of expert opinion, discrete acts of extrinsic misconduct, or both, alone or together with other evidence, is relevant and of sufficient probative value on the issue of disposition to justify its admission.

See *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 167-8 (Ont. C.A.), per Martin J.A.

II - MID-TRIAL INSTRUCTIONS

7.7 Evidence of Disposition of Co-Accused³⁶

(Last revised February 2004)

[1] In this case, *NOA₁* is saying that *NOA₂* committed the offence charged, and points to evidence that s/he had an opportunity and a disposition to do it.

[2] At the end of the case, it will be up to you to determine whether this evidence, alone, or together with other evidence, raises a reasonable doubt that *NOA₁* committed the offence charged. However you must not use the disposition evidence in any way when you consider whether the Crown has proven the case against *NOA₂*. No one can be convicted of a crime just for being the sort of person who might have committed it.

[3] In other words, you may consider evidence of *NOA₂*'s opportunity and disposition to commit the offence charged in deciding whether you have a reasonable doubt that *NOA₁* committed it, but you must not use evidence of *NOA₂*'s disposition to find *NOA₂* guilty of it.

³⁶ Any person charged with an offence may adduce evidence that tends to show that a third party committed the offence. The evidence may be direct or circumstantial. It may include evidence of the third party's motive or disposition to commit the offence. Without some other connection of the third party to the offence charged, however, evidence of motive or disposition is not admitted because it lacks probative value.

This instruction should only be given in cases where the trial judge is satisfied

(i) that there is evidence, other than evidence of disposition, which sufficiently connects the third party to the offence charged to warrant admission of the disposition evidence; and

(ii) that the proposed evidence, whether of expert opinion, discrete acts of extrinsic misconduct, or both, alone or together with other evidence, is relevant and of sufficient probative value on the issue of disposition to justify its admission.

See *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 167-8 (Ont. C.A.), per Martin J.A.

II - MID-TRIAL INSTRUCTIONS

7.8 Previous Convictions of Witness or Third Party as Evidence of Disposition³⁷ (Last revised February 2004)

- [1] You have heard that *NOW/NO3P* might have committed the offence charged.
- [2] *NOW/NO3P* has previously been convicted of (*describe nature of prior conviction*). This may help you decide whether *NOW/NO3P* is the sort of person who would commit the offence with which *NOA* is charged.
- [3] Evidence that *NOW/NO3P* is the sort of person who would commit the offence charged might, along with other evidence, cause you to have a reasonable doubt whether it was *NOA* who committed it. It will be for you to say.
- [4] At the end of this trial, I will explain in greater detail how you may use this and other evidence relating to *NOW/NO3P*.

³⁷ Any person charged with an offence may adduce evidence that tends to show that a third party committed the offence. The evidence may be direct or circumstantial. It may include evidence of the third party's motive or disposition to commit the offence. Without some other connection of the third party to the offence charged, however, evidence of motive or disposition is not admitted because it lacks probative value.

This instruction should only be given in cases where the trial judge is satisfied

- (i) that there is evidence, other than evidence of disposition, which sufficiently connects the third party to the offence charged to warrant admission of the disposition evidence; and,
- (ii) that the previous convictions, alone or together with other evidence, are relevant and of sufficient probative value on the issue of disposition to justify their admission.

See *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 167-8 (Ont. C.A.), per Martin J.A.

II - MID-TRIAL INSTRUCTIONS

7.9 General Instruction on Evidence of Limited Admissibility in Joint Trials³⁸ (Last revised February 2004)

[1] (*Specify testimony or exhibit*) relates only to *NOA*. You must not consider it in deciding the case against anyone else (*or, specify name of other accused*).

³⁸ This general instruction may not be necessary where the judge decides to give a specific direction with respect to individual items or categories of evidence, as for example, statements of a co-accused in a joint trial.

II - MID-TRIAL INSTRUCTIONS

7.10 Prior Inconsistent Statements of Non-Accused Witness (Credibility)

(Last revised February 2004)

[1] You have just heard the evidence of *NOW*. Common sense tells you that when a witness says one thing in the witness box, but has said something quite different on an earlier occasion, this may reduce the value of his/her evidence.

(Where there is a dispute about whether the prior statement was made, include paragraph [1-A] to [1-C] as follows.³⁹ Where there is no dispute that the witness made the prior statement used for impeachment purposes, [1-A] - [1-C] should be omitted.)

[1-A] The first thing for you to decide is whether *NOW*, in fact, gave an earlier and different version from his/her testimony of the same events.

[1-B] If you find that the witness gave an earlier and different version of events, please listen carefully to what I tell you about how to use that version to help you decide this case.

[1-C] If you do not find that s/he gave an earlier and different version of events, please ignore what I am going to tell you about how you can use that version to help you decide this case.

[2] Not every difference or omission is important. You should consider any explanation the witness gives for the differences. You should also consider the fact, nature and extent of any differences when you decide whether to rely on *NOW*'s testimony.

[3] When you are taking the differences into account, you may use only the testimony given under oath in this trial as evidence of what actually happened. You must not use the earlier statement as evidence of what actually happened, unless you conclude that the witness accepted it as true while in the witness box.

[4] Even then, as with the evidence of any witness, it is for you to say whether or how much you will rely on it.

³⁹ Where there is a dispute that the witness made the prior statement used for impeachment purposes, [1-A] - [1-C] should be included. Where it is expected that the statement will be proven subsequently, it may be imprudent to give this instruction. The views of counsel should be sought in the absence of the jury.

II - MID-TRIAL INSTRUCTIONS

7.11 Prior Inconsistent Statements of Accused Witness

[1] Like any witness, *NOAW* may be cross-examined about what s/he said before to other persons. The fact that *NOAW* has previously said something different from what s/he testified here is one of many factors for you to consider when you decide how much or little of *NOAW*'s evidence you will believe or rely on in deciding this case.

[2] It is for you to say whether there is any difference between what *NOAW* said before, and what s/he testified here on the same subject. It is also up to you to decide whether any difference affects how much of *NOAW*'s evidence you will believe or rely on. Consider the nature and extent of the difference between the earlier and current versions, and any explanation offered for it (them) by *NOAW*. Take into account, as well, whether the difference relates to a matter of importance, or a minor detail. Use your common sense.

[3] Unlike statements by other witnesses, however, you may also consider what *NOAW* said before as evidence of what actually happened, even though *NOAW* does not testify that what s/he said before was true. It is for you to say how much or little you will rely on what *NOAW* said before as evidence of what actually happened.

II - MID-TRIAL INSTRUCTIONS

7.12 Prior Inconsistent Statements as Substantive Evidence (The *R. v. B. (K.G.)* Instruction)⁴⁰ (Last revised February 2004)

[1] *NOW* has testified. S/he also made a previous statement (*describe particulars of statement*) that is an exhibit in this case. In this situation, both the testimony and the previous statement are evidence of what was said and done.

[2⁴¹] That is to say, you may consider the statement, exhibit (*specify exhibit number*) and *NOW*'s testimony as evidence of what actually took place. It is for you to say how much or little of the witness's testimony or statement you will believe or rely on in deciding this case.

⁴⁰ This instruction may not be necessary if Mid-Trial 7.10 has not been given.

⁴¹ Paragraph [2] may not need to be given at this stage but should certainly be given as a final instruction.

II - MID-TRIAL INSTRUCTIONS

7.13 Statements of Declarant Not Called as Witness⁴²

(*R. v. Khan* - Admissible Hearsay)

(Last revised February 2004)

[1] You have just heard *NOW* give evidence of what *NOD* said to him/her about (*describe briefly hearsay statement*). *NOD* is not here to testify.

[2] When you consider this evidence, you have to decide what, if anything, *NOD* said to *NOW*. In deciding whether *NOD* said these things, or any of them, you should use your common sense. Consider the circumstances in which the conversation took place, and anything else that may make *NOW*'s evidence more or less believable.

[3] If you find that *NOW* has accurately reported any or all of what *NOD* said, you may rely on those parts of *NOW*'s testimony.

[4] You should be careful when you determine how much or little of this evidence you will believe or rely on. It might be less reliable than other evidence that has been given. *NOD* was not under oath or affirmation. S/he did not promise to tell the truth. You did not see or hear *NOD* testify. Unlike the witnesses who testified before you, s/he could not be cross-examined.

⁴² Further instruction may be required where the declarant has been declared incompetent, rather than simply not called as a witness.

This instruction is appropriate in cases in which a statement of an absent hearsay declarant has been introduced through a witness who is the hearsay recipient and admitted otherwise than in accordance with *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. The fact situations in *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) and *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.) exemplify the circumstances in which this instruction may be helpful.

II - MID-TRIAL INSTRUCTIONS

7.14 Evidence of Similar Acts (Extrinsic Evidence)⁴³ (Last revised February 2004)

[1] You have heard evidence that *NOA* has (*briefly specify conduct admitted as similar act evidence*). At the end of the trial, I will tell you how that evidence may be used. For now, however, it is important that you realize that you must not conclude from that evidence alone that *NOA* is guilty of the offence charged.

⁴³ This instruction is negative in nature. It advises jurors how they must not use evidence of similar acts and tells them that instructions on how they may use the evidence will be given at the end of the trial. Whether positive instructions, which advise jurors of the permitted use of the evidence, should be given is a matter that should be discussed with counsel. Positive instructions may be adapted from Final 11.15.

II - MID-TRIAL INSTRUCTIONS

7.15 Audio Tape Recordings and Transcripts⁴⁴

(Last revised February 2004)

[1] You are about to hear a tape recording of (*describe briefly nature of recording(s)*). Please listen to it very carefully.

[2] Each of you has a transcript of the tape. The transcript is just an aid to help you follow the recording as it is played. The transcript is not evidence. Only the tape itself is evidence.

[3] If what you read on the transcript differs from what you hear on the tape, you are to go by what you hear for yourself, and not what you read in the transcript. If the speakers you hear are different from those identified in the transcript, it is for you to decide who was speaking and what was said. You decide this from what you hear on the recording and any other evidence given about the identity of the speakers.

[4] The tape will be available to you in the jury room, where you may listen to it if you need to. It is up to you to decide whether or how often you want to listen to it, or any part of it again. You may listen to it as many times as you wish to help you determine who is speaking and what s/he is saying.⁴⁵

(*Where transcripts are not filed as exhibits:*)

[5] Please follow carefully as the tape is played in the courtroom. The tape will be available to you in the jury room, but not the transcript. We will collect the transcripts after the tape has been played.

(*Where transcripts are filed as exhibits:*)

[6] You may take the transcript with you to the jury room to help you determine what is actually on the tapes. But remember, if you find any differences between the tape and the transcript you must rely on what you hear on the tapes, rather than on what is in the transcripts.

(*Where a single accused is a speaker and the common purpose exception to the hearsay rule does not apply, add:*)

[7] In listening to this tape, be careful to distinguish between what *NOA* says and what others on the tape are saying. What the others say might help you figure out what *NOA* says and what

⁴⁴ Audio tape recordings may include statements made by an accused to a person in authority, dying declarations, statements which are part of the *res gestae*, previous statements admitted for substantive purposes under *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 and declarations made in furtherance of a common unlawful purpose. The identity of the speaker may vary.

⁴⁵ Where a trial judge decides that further instructions should be given mid-trial concerning the purpose for which the evidence may be used, the relevant final instructions may be adapted.

II - MID-TRIAL INSTRUCTIONS

his/her words mean. But *NOA* can be held responsible only for what s/he actually says, not for what others say. It is only what *NOA* said that is evidence concerning *NOA*.

In other words, what others say may provide a context for understanding what *NOA* says; but only *NOA*'s words, as understood in this context, are evidence of what *NOA* has done or intended to do.

(Where more than one accused are speakers and the common purpose exception to the hearsay rule does not apply, add:)

[8] In listening to this tape, be careful to distinguish between what each person on trial says and what others on the tape are saying. Anything on the tape may be helpful in determining what a particular person says and what his/her words mean. But each person charged can be held responsible only for what s/he actually says, not for what others say. Only that person's words, as understood in context, can be used as evidence of what s/he has done or intended to do.

II - MID-TRIAL INSTRUCTIONS

7.16 Video Tape Recordings and Transcripts⁴⁶

(Last revised February 2004)

[1] You are going to see a video tape of (*describe briefly nature of video tape*). Please watch and listen to it very carefully.

[2] Each of you has a transcript of the tape. The transcript is just an aid to help you follow the recording as it is played. The tape is the only evidence. The transcript is just an aid. It is not evidence.

[3] If what you read on the transcript differs from what you hear or see on the tape, you are to go by what you hear or see on the tape. If the words you hear are different from those you read in the transcript, or if the speakers you hear or see are different from those identified in the transcript, it is for you to decide who was speaking and what was said. You decide this from what you hear and see on the tape and any other evidence given about the identity of the speakers.

[4] The tape will be available to you in the jury room, where you may watch it again if you need to. It is up to you to decide whether you want to watch it, or any part of it again. You may watch it as many times as you wish to help you determine who the speakers are and what they are saying.⁴⁷

(*Where transcripts are not filed as exhibits:*)

[5] Please follow carefully as the tape is played in the courtroom. The tape will be available to you in the jury room, but not the transcript. We will collect the transcript after the tape has been played.

(*Where transcripts are filed as exhibits:*)

[6] You may take the transcript with you to the jury room to help you determine what is actually on the tapes. But remember, if you find any differences between the tape and the transcript you must rely on what you see or hear on the tapes, rather than on what is in the transcript.

⁴⁶ Video tape recordings may include statements made by an accused to a person in authority, dying declarations, statements which are part of the *res gestae*, previous statements admitted for substantive purposes under *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740 and declarations made in furtherance of a common unlawful purpose. The identity of the speaker may vary.

Where a trial judge decides that further instructions should be given mid-trial concerning the purpose for which the evidence may be used, the relevant final instructions may be adapted.

A separate instruction is required where the video tape is admitted under *Code*, s. 715.1. See Final 11.21.

II - MID-TRIAL INSTRUCTIONS

(Where a single accused is a speaker and the common purpose exception to the hearsay rule does not apply, add:)

[7] As you watch and listen to this tape, be careful to distinguish between what *NOA* says and what others on the tape are saying. What the others say might help you figure out what *NOA* says and what his/her words mean. But *NOA* can be held responsible only for what s/he actually says, not for what others say. It is only what *NOA* said that is evidence concerning *NOA*.

In other words, what others say may provide a context for understanding what *NOA* says; but only *NOA*'s words, as understood in this context, can be used as evidence of what *NOA* has done or intended to do.

(Where more than one accused are speakers and the common purpose exception to the hearsay rule does not apply, add:)

[8] As you watch and listen to this tape, be careful to distinguish between what each person on trial says and what others on the tape are saying. Anything on the tape may be helpful in determining what a particular person says and what his/her words mean. But each person charged can be held responsible only for what s/he actually says, not for what others say. In other words, what others say may provide a context for understanding what a particular person says; but only that person's words, as understood in this context, can be used as evidence of what that person has done or intended to do.

II - MID-TRIAL INSTRUCTIONS

7.17 Evidence Previously Given (s. 715)⁴⁸ (Last revised February 2004)

[1] *NOW* gave evidence at (*describe proceedings*), but is not available to testify here. A court reporter recorded his/her testimony. It will now be read to (played for) you, and will be evidence for you to consider in this case.

[2] It is for you to decide how much or little of this evidence you will believe or rely on. You may believe some, none or all of it. In making that decision, remember that you did not see or hear this witness testify.

⁴⁸ This instruction requires modification where the evidence has been recorded on audio tape and is played back for the jury.

II - MID-TRIAL INSTRUCTIONS

7.18 Expert Opinion Evidence

(Last revised February 2004)

[1] You are about to hear the evidence of *NOW*, an expert witness. S/he will give an opinion about some technical matters for you to consider in deciding this case. S/he is qualified by his/her training, education and experience to give an expert opinion.

[2] The opinions of experts are just like the testimony of any other witness. Just because an expert has given an opinion does not mean you have to accept it. You may rely on the opinion as much or as little as you choose. Here are some things to consider as the expert testifies:

- the expert's qualifications and experience;
- the reasons given for the opinion;
- the suitability of the methods used;
- other evidence in the case.

It is up to you to decide how much or little to rely on the expert's opinion.

[3] When an expert such as *NOW* is asked to give evidence, s/he may be asked to assume or rely on certain facts. The facts that an expert assumes or relies on for the purpose of offering his or her opinion may be the same or different from what you later find as facts on the basis of the evidence in this case.

[4] How much or little you rely on the expert's opinion is up to you. But the closer the facts assumed or relied on by the expert are to the facts as you find them to be, the more helpful the expert's opinion may be to you. To the extent the expert relies on facts that you do not find supported by the evidence, you may find the expert's opinion less helpful.

II - MID-TRIAL INSTRUCTIONS

7.19 Charts and Summaries (Demonstrative Aids)⁴⁹ (Last revised February 2004)

[1] The Crown/defence has used charts, summaries or (*describe*) to help illustrate or explain some of the evidence. These were used for convenience. They are not exhibits. They are not evidence in this case. They will not go to the jury room with you. This is because they may or may not be accurate. They may have contained mistakes.

[2] You must make your findings of fact from the evidence given at trial, not from the charts (schedules, summaries *or describe document*).

⁴⁹ Where the charts or summaries have been filed as exhibits, a mid-trial instruction may not be necessary. If a mid-trial instruction is thought to be desirable, Final 11.33 may be adapted to the circumstances.

This instruction will rarely be necessary. It may be required, however, where counsel use demonstrative aids, not filed as exhibits, in their closing addresses to the jury.

II - MID-TRIAL INSTRUCTIONS

7.20 Evidence of Other Sexual Activity (ss. 276; 276.4)⁵⁰ (Last revised February 2004)

[1] You have heard evidence that *NOC* (*describe briefly nature of sexual activity*) with (*specify name of other party*) on (*specify date, or otherwise identify occasion*).

[2] You may use that evidence to help you (*specify purpose for which evidence may be used*).

[3] You must not use that evidence, however, to help you decide that, because of the sexual nature of what happened, *NOC* is more likely to have consented to what the person on trial is alleged to have done here.

[4] You must also not use that evidence to help you decide that *NOC* is less believable or reliable as a witness in this case.

⁵⁰ This instruction is mandatory under *Code*, s. 276.4.

II - MID-TRIAL INSTRUCTIONS

7.21 Evidence of Children

(Obstructed view and sequestered testimony, ss. 486(1.1), (2.1))⁵¹

(Last revised February 2004)

[1] *NOA* will testify from behind a screen (or, outside the court room).

[2] This procedure is used simply to help young people give evidence by providing more comfortable surroundings for them to do so. It means no more than that. It has nothing to do with the guilt or innocence of *NOA*. Do not use it as evidence that *NOA* is guilty of the offence charged.

⁵¹ This instruction may be modified for use in cases in which the presiding judge permits a support person to be present and close to the child witness while testifying. See *Code*, s. 486(1.2).

II - MID-TRIAL INSTRUCTIONS

7.22 Evidence of Children (Videotaped Complaint – s. 715.1)⁵² (Last revised February 2004)

[1] *NOW* testified in this case. You also watched a videotape in which s/he described the circumstances of the offence charged. We permit this procedure in cases like this where the witness was under 18 years old when the offence was alleged to have happened. It is used simply to help such witnesses present their evidence. It has nothing to do with the guilt or innocence of *NOA*. Do not use it as evidence that *NOA* is guilty of the offence charged.

[2] *NOW* has testified that what s/he said on the videotape was true. But, as for all witnesses, it is for you to decide how much or little you will rely on what *NOW* said on the videotape.

[3] In making this decision, you should consider the following factors.⁵³

The circumstances in which the videotape was made.

Consider, for example, anything that happened before the tape was made, and any discussions that preceded it. Take into account the nature of the questions asked, for example, whether they suggested answers to *NOW*.

The behaviour of *NOW* when s/he made the videotape and testified here.

Think about whether you should rely less on the videotape because *NOW* was not cross-examined immediately after giving it, as s/he was when s/he testified here. Keep in mind any reason or chance s/he had for not telling the truth on the videotape or in the courtroom.

The similarities and differences between the videotape and *NOW*'s evidence at trial.

Were they similar, or different? In important or minor details? Is there an explanation?

The rest of the evidence.

Is what *NOW* said on the videotape either supported or contradicted by other evidence in the trial?

[4] You may also consider what *NOW* said in the videotape for another purpose. It may help you decide how much or little of *NOW*'s testimony you will believe or rely on in this case.

[5] When a witness says one thing in the witness box, but has said something you find to be quite different on an earlier videotape, your common sense tells you that the fact that the witness

⁵² The general instruction concerning the evidence of children is Final 11.19 below.

⁵³ There may well be other factors.

II - MID-TRIAL INSTRUCTIONS

has given different versions may be important in deciding how much or little of the witness's testimony you will believe or rely on.

[6] Not every difference or omission will be important. You should consider the fact, nature and extent of any difference between the videotape and testimony in deciding their importance to you in deciding how much of *NOW*'s testimony you will believe or rely on in reaching your verdict. You should also consider any explanation the witness gives for any differences.

[7] In a similar way, you may also consider the fact, nature and extent of any differences between the videotape and testimony at trial in deciding how much or little of the videotape you will believe or rely on in reaching your verdict.

II - MID-TRIAL INSTRUCTIONS

7.23 Plea of Guilty of Another⁵⁴

(Last revised February 2004)

[1] In this case, *NOW* and *NOA* have each been charged with (*specify offence*). *NOW* has pleaded guilty to (*specify offence*). *NOA* has pleaded not guilty.

[2] *NOW*'s guilty plea has absolutely no bearing on whether *NOA* is guilty. *NOW* may have had any number of reasons for pleading guilty. You must not think that because *NOW* has pleaded guilty, *NOA* must be guilty as well.⁵⁵

⁵⁴ This instruction should only be given in relation to prosecution witnesses. See, for example, *R. v. Hoilett* (1991), 4 C.R. (4th) 372 (Ont. C.A.).

⁵⁵ This instruction is not intended as a substitute for a *Vetrovec* warning. See *R. v. Vetrovec* (1982), 67 C.C.C. (3d) 1 (S.C.C.). It may require modification where a *Vetrovec* warning is given and includes reference to the reasons underlying the plea and/or testifying against the accused. For a *Vetrovec* warning, see Final 11.23.

II - MID-TRIAL INSTRUCTIONS

7.24 Outstanding Charges Against Prosecution Witness (*Titus Instruction*)⁵⁶

(Last revised February 2004)

[1] This Crown witness (or, *NOW*) is charged with (*briefly describe offence charged*). The trial has not yet been held.

[2] *NOW* might have an interest in testifying favourably for the Crown in this trial. Favourable testimony here may help the witness out with his/her own case later, or the witness might believe that it will do so.

[3] You should approach the evidence of *NOW* with care. When you consider how much or little of this evidence you will believe or rely on to decide this case, take into account the fact that s/he is her/himself awaiting trial on another charge. It is a factor for you to consider.

⁵⁶ This instruction should only be given in relation to prosecution witnesses. See, for example, *R. v. Hoilett* (1991), 4 C.R. (4t) 372 (Ont. C.A.).

This instruction is not intended as a substitute for a *Vetrovec* warning. See *R. v. Vetrovec* (1982), 67 C.C.C. (3d) 1 (S.C.C.) and Final 11.23.

II - MID-TRIAL INSTRUCTIONS

7.25 Common Purpose Exception to Hearsay Rule⁵⁷ **(Co-conspirator's exception)** (Last revised February 2004)

[1] You have just heard *NOA₁* give evidence about what *NOA₂* said earlier. Usually, it is only a person's own words or acts that are evidence for you to consider in deciding the case of that person. What one person on trial says or does is usually not evidence in relation to another (any other).

[2] In a case like this, however, in certain circumstances, you may use evidence of what one person charged said or did as part of a common goal to help you decide the case of the (any) other.

[3] At the end of the case, I will give you a complete explanation of this rule.

⁵⁷ This instruction is optional. It applies to substantive, as well as preliminary crimes, provided they are alleged to be joint ventures.

III - FINAL INSTRUCTIONS
8. Duties of Jurors

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III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.1 Introduction

(Last revised February 2004)

[1] You will soon leave this court room and start discussing this case in the jury room. It is time for me to tell you about the law you must follow in making your decision.

[2] When we started this case, and at different times during the trial, I told you about several rules of law that apply in general, or to some of the evidence as it was received. Those instructions still apply.

[3] Now I am going to give you further instructions. These instructions will cover a number of topics. Consider them as a whole. Do not single out some as more important and pay less or no attention to others. I am giving them to help you make a decision, not to tell you what decision to make.

[4]⁵⁸ First, I will explain your duties as jurors, and tell you about the general rules of law that apply to all jury cases.

[5] Second, I will advise you of the specific rules of law that govern this case and the evidence that you have heard.

[6] Next, I will explain to you what the Crown must prove beyond a reasonable doubt in order to establish the guilt of the person charged (or *NOA*), and tell you about the defences and other issues that arise from the evidence you have heard.

[7] Then I will discuss with you the issues that you need to decide and will review for you the evidence that relates to those issues.

[8] After that, I will summarize the positions that counsel (*or, specify names*) have put forward in their closing addresses.

[9] The last thing I will explain for you is what verdicts you may return and how you should approach your discussion of the case in the jury room.

⁵⁸ The order of paragraphs [4] - [9] is flexible. It should, however, follow the order in which the Final Instructions are given.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.2 Respective Duties of Judge and Jury

(Last revised February 2004)

[1] In this trial, I am the judge of the law. You are the judges of the facts.

[2] As judge of the law, it is my duty to preside over the trial. I decide what evidence you may hear and consider, and what procedure we will follow in the case. I explain to you the rules of law that you must follow and apply to make your decision.

[3] Your duty is to decide what are the facts in this case. You make that decision from all of the evidence given during the trial. There will be no more evidence. You must consider nothing else.

[4] I might comment on or express an opinion about the evidence. If I do that, you do not have to agree with me.⁵⁹

[5] The evidence does not have to answer every question raised in this case. It would be an unusual case in which a jury could say “We now know everything there is to know about this case”. You only have to decide those matters that are essential for you to say whether the charge has been proved beyond a reasonable doubt.

[6] You must accept all of the rules of law that I tell you apply in this case. Even if you disagree with or do not understand the reasons for the law, you are required to follow what I say about it. You must not consult other sources.

⁵⁹ Do not comment on or express an opinion about the guilt of the accused. If you do so inadvertently, inform the jurors that they should ignore it.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.3 Irrelevance of Prejudice and Sympathy

(Last revised February 2004)

[1] I remind you, as I said at the beginning of the trial, that you must consider the evidence and make your decision without sympathy, prejudice or fear. You must not be influenced by public opinion. We expect and are entitled to your impartial assessment of the evidence

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.4 Irrelevance of Outside Information

(Last revised February 2004)

[1] Similarly, you must disregard completely any radio, television, newspaper accounts or Internet information you have heard, seen or read about this case, or about any of the persons or places involved or mentioned in it. Those reports, and any other information about the case from outside the court room, are not evidence.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.5 Irrelevance of Sentence⁶⁰

(Last revised February 2004)

[1] Your sole task is to determine on the whole of the evidence whether *NOA* is guilty. Sentencing has no place in your discussions or in your decision. If you find *NOA* guilty of an offence, it is for me to decide what sentence is appropriate.

⁶⁰ This instruction will require modification where mental disorder is raised in a one-stage trial and the trial judge decides that it is appropriate to instruct the jury about the consequences of a finding of not criminally responsible on account of mental disorder.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.6 Jurors' Approach to Task

(Last revised February 2004)

[1] When you go to the jury room to begin your discussions, you must talk and listen to one another. Discuss the evidence. Put forward your own views. Listen to what others have to say. Try to reach an agreement, if you can. If you cannot, you are entitled to disagree.

[2] However, you must make all reasonable efforts to reach a unanimous decision. Discuss your differences with an open mind. Each of you has the right to change your mind; this is not a sign of weakness.

[3] Each of you has to decide the case for yourself. You should only do so, however, after you have considered the evidence and the views of your fellow jurors, and have applied the law that I have explained to you.

[4] Remember, you swore an oath, or solemnly affirmed, to reach a just and proper verdict based solely on the evidence.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.7 Transcript of Evidence

(Last revised February 2004)

[1] Although the testimony of every witness has been recorded by our court reporter, we will not have a written transcript of the evidence available for you to review when you go to the jury room to discuss your decision in this case. If you need help to recall any parts of the evidence, just ask and I will provide the appropriate assistance.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.8 Procedure for Questions

(Last revised February 2004)

[1] If, during your discussions, you have any questions, please put them in writing and give them to the court constable who will be outside the door of the jury room. The constable will bring the questions to me and I will discuss them with the lawyers. You will be brought back into the courtroom and I will reply to your questions.

[2] I ask that you put your questions in writing so that I understand exactly what it is that you want done or answered. In that way, I can be more accurate and helpful in my reply.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.9 Judge's Review and Comments on Evidence

(Last revised February 2004)

[1] I will now briefly review what I think are the important parts of the evidence given at this trial and will relate them to the issues you must decide. I might mention evidence you think is insignificant or overlook evidence you think is important. I might make a mistake about what a witness said. You should always remember that it is only your memory and understanding of the evidence that counts in this case - not mine or that of counsel. I remind you that you must consider all of the evidence, not just the parts of it that I mention.

[2] I may also comment on or express an opinion about issues of fact. If I do that, however, you do not have to reach the same conclusion. You, not I, decide what happened in this case.

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.10 Requirements for a Verdict⁶¹

(Last revised February 2004)

[1] A verdict, whether of guilty or not guilty, is the unanimous decision of the whole jury. To return a verdict in this case requires that all of you agree on what your verdict should be (on each count) (for each person charged).

[2] There are times, however, when a jury is unable to reach a verdict. Jurors have the right to disagree.

[3] You should make every reasonable effort, however, to reach a verdict. Consult with one another. Express your own views. Listen to the views of others. Discuss your differences with an open mind. Try your best to decide this case.

[4] If you reach a unanimous verdict, your foreperson should record it on your verdict sheet and notify the court constable. We will come back into court to receive it. Your foreperson will tell us your verdict in the courtroom.

[5] If you cannot reach a unanimous verdict, you should notify the court constable in writing. The constable will bring me your message. I will discuss what has happened with Crown and defence counsel. We will then return to the courtroom to see what we should do next.

⁶¹ Where appropriate, an instruction re *R. v. Thatcher*, [1987] 1 S.C.R. 652 may be necessary.

III - FINAL INSTRUCTIONS

9. General Principles

9.General Principles

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9. General Principles

9.1 Presumption of Innocence

(Last revised February 2004)

[1] Every person charged with an offence (or, *NOA*) is presumed to be innocent, unless and until the Crown has proved his/her guilt beyond a reasonable doubt.

[2] The indictment tells you and *NOA* what offence the Crown alleges against *NOA*. The charge is not evidence. It is not proof of guilt.

[3] The presumption of innocence lasts throughout the trial. This presumption only ceases to apply if, at the end of the case and on the whole of the evidence, the Crown has proved beyond a reasonable doubt that *NOA* is guilty of the crime charged.

III - FINAL INSTRUCTIONS

9. General Principles

9.2 Burden of Proof⁶²

(Last revised February 2004)

[1] The person charged (or, *NOA*) does not have to present evidence or prove anything in this case, in particular, that s/he is innocent of the offence charged.

[2] From start to finish, it is the Crown who must prove the guilt of *NOA* beyond a reasonable doubt. You must find *NOA* not guilty of the (an)⁶³ offence unless the Crown proves beyond a reasonable doubt that he/she is guilty of it.

⁶² This instruction will require modification where the burden of proof is reversed, as for example, where the accused denies criminal responsibility on account of mental disorder.

⁶³ The word “an” should be used in paragraph [2] where included offences will be left to the jury.

III - FINAL INSTRUCTIONS

9. General Principles

9.3 Reasonable Doubt⁶⁴

(R. v. Lifchus)

(Last revised February 2004)

[1] The principle of “proof beyond a reasonable doubt” is an essential part of the presumption of innocence.

[2] A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells you but also on what that evidence does not tell you.

[3] It is not enough for you to believe that *NOA* is probably or likely guilty. In those circumstances, you must find him/her not guilty, because the Crown would have failed to prove his/her guilt beyond a reasonable doubt. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[4] You should also remember, however, that it is nearly impossible to prove anything with absolute certainty. The Crown is not required to do so. Absolute certainty is a standard of proof that does not exist in law.

[5] If, at the end of the case, and after an assessment of all of the evidence, you are not sure that *NOA* committed the (an) offence, you must find him/her not guilty.

[6] If, at the end of the case, based on all of the evidence, you are sure that *NOA* committed the (an)⁶⁵ offence, you should find *NOA* guilty.

⁶⁴ This instruction will require modification where the burden of proof is reversed as, for example, where the accused denies criminal responsibility on account of mental disorder. The substantive offence instructions make it clear that proof beyond a reasonable doubt relates only to the essential elements of the crime charged or being considered. Some judges may wish to emphasize this in the instructions about reasonable doubt. The following may be added, for example, in [2]:

“It is a doubt about an essential element of the (an) offence (charged).”
or, in [4]:

“What the Crown must prove beyond a reasonable doubt are the essential elements of the (an) offence, as I shall define them for you.”

⁶⁵ The word “an” should be used in paragraph [6] where included offences will be left to the jury.

III - FINAL INSTRUCTIONS

9. General Principles

9.4 Assessment of Evidence

(Last revised February 2004)

[1] To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or little of the testimony of any witness you will believe or rely on. You may believe some, none or all of the evidence given by a witness.

[2] When you go to the jury room to consider the case, use your collective common sense to decide whether the witnesses know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind during your discussions.

[3] Did the witness seem honest? Is there any reason why the witness would not be telling the truth?

[4] Did the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?

[5] Was the witness in a position to make accurate and complete observations about the event? Did s/he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?

[6] Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which s/he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

[7]⁶⁶ Did the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?

[8] Did the witness's testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion?

[9] Do any inconsistencies in the witness's evidence make the main points of the testimony

⁶⁶ Paragraph [7] is directed at witnesses who may have put their testimony together, or embellished their account from outside sources, such as media accounts or other sources. It may require modification where the source is records whose accuracy, and the propriety of consulting them, is not in issue.

III - FINAL INSTRUCTIONS

9. General Principles

more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because s/he failed to mention something? Is there any explanation for it? Does the explanation make sense?

[10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.⁶⁷

[11] These are only some of the factors that you might keep in mind when you go to your jury room to make your decision. These factors might help you decide how much or little of a witness's evidence you will believe or rely on. You may consider other factors as well.

[12] In making your decision, do not consider only the testimony of the witnesses. Take into account, as well, any exhibits that have been filed and decide how much or little you will rely on them to help you decide this case. I will be telling (or, have already told) you about how you use admissions in making your decision.

⁶⁷ Where a witness is testifying through an interpreter, this instruction may be expanded to point out the particular difficulties in assessing such a witness's testimony.

III - FINAL INSTRUCTIONS

9. General Principles

9.5 Numbers of Witnesses

(Last revised February 2004)

[1] How much or little of the evidence of the witnesses you will believe or rely on does not depend on the number of witnesses who testify for one side or the other.

[2] Your duty is to consider all of the evidence. You may decide that the testimony of fewer witnesses is more reliable than the evidence of a larger number. It is up to you to decide.

[3] Your task is to consider carefully the testimony of each witness. Decide how much or little you believe of what each witness has said. Do not decide the case simply by counting witnesses.

III - FINAL INSTRUCTIONS

9. General Principles

9.6 Testimony of Person Charged

(The *W. (D.)* Instruction)⁶⁸

(Last revised February 2004)

[1] If you believe the testimony of *NOA* that s/he did not commit the offence charged, you must find him/her not guilty.

[2] Even if you do not believe the testimony of *NOA*, if it leaves you with a reasonable doubt about his/her guilt (or, about an essential element of the offence charged (or, an offence)), you must find him/her not guilty (of that offence).

[3] If you don't know whom to believe, it means you have a reasonable doubt and you must find *NOA* not guilty.⁶⁹

[4] Even if the testimony of *NOA* does not raise a reasonable doubt about his/her guilt, (or, about an essential element of the offence charged (or, an offence)), if after considering all the evidence that you do accept you are not satisfied beyond a reasonable doubt of his guilt, you must acquit.

⁶⁸ *R. v. W. (D)*, [1991] 1 S.C.R. 742. This instruction is appropriate where the evidence of the accused, or a statement introduced by Crown counsel, constitutes a complete defence to the offence charged.

⁶⁹ This instruction is appropriate in “he said/she said” cases.

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.Types of Evidence

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.1 Evidence Defined

(Last revised February 2004)

[1] To decide what the facts are in this case, you must consider only the evidence that you hear and see in the courtroom. Evidence is the testimony of witnesses and things produced as exhibits. It may also consist of admissions.

[2] The evidence includes what each witness said in answering the questions asked. The questions themselves are not evidence unless the witness agreed that what was asked was correct. Only the answers of the witness are his/her evidence.

[3] The evidence also includes any things that were made exhibits. When you go to the jury room to decide this case, the exhibits will go with you.⁷⁰ You may, but do not have to examine them there. Whether you do so, how and how much, is up to you. Consider them along with the rest of the evidence and in exactly the same way.

[4]⁷¹ The Crown and the defence have also agreed on certain facts. Whatever they agree about is a fact in this case. This is called an “admission”.

[5] As I explained to you earlier, there are also some things that are not evidence. You must not consider or rely upon them to decide this case.

⁷⁰ Where exhibits do not go to the jury room (*e.g.* narcotics), or will not be sent at the same time (*e.g.* guns and ammunition), this instruction should be modified.

⁷¹ Paragraph [4] applies only to s. 655 admissions. It should be omitted where no formal admissions have been made.

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.2 Direct and Circumstantial Evidence⁷²

(Last revised February 2004)

[1] As I explained at the beginning of the trial, you may rely on direct evidence and on circumstantial evidence in reaching your verdict. Let me remind you what these terms mean.

[2] Usually, witnesses tell us what they personally saw or heard. For example, a witness might say that he or she saw it raining outside. That is called direct evidence.

[3] Sometimes, however, witnesses say things from which you are asked to draw certain conclusions. For example, a witness might say that he or she had seen someone enter the courthouse lobby wearing a raincoat and carrying an umbrella, both dripping wet. If you believed that witness, you might conclude that it was raining outside, even though the evidence was indirect. Indirect evidence is sometimes called circumstantial evidence.

[4] Exhibits, also, may provide direct or circumstantial evidence.

[5] In making your decision, both kinds of evidence count. The law treats both equally. One is not better or worse than the other. In each case, your job is to decide what conclusions you will reach based upon the evidence as a whole, both direct and circumstantial. To make your decision, use your common sense and experience.

⁷² Where the evidence for the prosecution is entirely or substantially circumstantial, it may be necessary to give a further instruction. The jury should be told that the accused should be found guilty only where they are satisfied that the guilt of the accused is the only reasonable conclusion to be drawn from the whole of the evidence.

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.3 Expert Opinion Evidence

(General Instructions)⁷³

(Last revised February 2004)

[1] You heard the evidence of *NOW*, an expert witness. S/he gave an opinion about some technical matters that you may have to consider in deciding this case. S/he is qualified by his/her training, education and experience to give an expert opinion.

[2] Remember, the opinions of experts are just like the testimony of any other witnesses. Just because an expert has given an opinion does not require you to accept it. You may give the opinion as much or as little weight as you think it deserves. You should consider the expert's education, training and experience, the reasons given for the opinion, the suitability of the methods used and the rest of the evidence in the case when you decide how much or little to rely on the opinion. It is up to you to decide.⁷⁴

[3] *NOW* was asked to assume certain facts. What an expert assumes or relies on as a fact for the purpose of offering his or her opinion may be the same or different from what you find as facts from the evidence introduced in this case.

[4] How much or little you rely on the expert's opinion is up to you. But the closer the facts assumed or relied on by the expert are to the facts as you find them to be, the more helpful the expert's opinions may be to you. How much or little you rely on the expert's opinion is entirely up to you. To the extent the expert relies on facts that you do not find supported by the evidence, you may find the expert's opinion less helpful⁷⁵.

⁷³ Where there is a conflict in the expert opinion evidence on an essential element of the prosecutor's case, see Final 10.4.

⁷⁴ Where the expert's opinion is not contested and the primary facts on which it is based are not in dispute, it may be prudent to instruct the jury about the lack of any good reason to reach a contrary conclusion on the issue.

⁷⁵ Where the expert relies on what the person charged said to him/her during an interview, an account that is not otherwise before the trier of fact, the limiting instruction must be carefully worded to avoid comment on the person's failure to testify.

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.4 Expert Opinion Evidence (Conflict in Opinions)

(Last revised February 2004)

[1] There is a disagreement between (among) the expert opinions of (*identify witnesses by name*) about (*describe briefly subject-matter of dispute*).

[2] The issue on which these experts (or, *NOWs*) differ is an important fact. (It is an essential element that the Crown must prove beyond a reasonable doubt.) You must not decide this issue by feeling that you must choose one opinion over the other.

(*Where proof of an essential element does not depend entirely on expert evidence add:*)

[3] Examine the evidence of each expert with equal care and attention, in the way that I have just described. Consider their evidence together with the other evidence that relates to this issue in deciding whether the Crown has proved this issue beyond a reasonable doubt

(*Where proof of an essential element depends entirely upon expert evidence, give the following:*)

[4] The issue on which these experts (or, *NOWs*) differ is an essential element that the Crown must prove beyond a reasonable doubt. Before you accept the opinion of the Crown's expert on this issue, however, you must be satisfied beyond a reasonable doubt that s/he is correct. If you are not sure that s/he is correct, then the Crown has failed to prove beyond a reasonable doubt that essential element of the offence charged.⁷⁶

⁷⁶ It may be preferable to add a brief statement of the effect of a reasonable doubt on the verdict to be returned. In some cases, the result may be a complete acquittal. In others, it may only be an acquittal on the principal offence, or an exclusion of a particular basis of liability.

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.5 Exhibits⁷⁷

(Last revised February 2004)

[1] Several exhibits have been presented during this trial. They are part of the evidence. You may rely upon them, along with the rest of the evidence.

[2] The exhibits go with you to the jury room. You may, but do not have to, examine them there. Whether you do so, how, and how much, is up to you.

⁷⁷ Finals 9.4 and 10.1 also include instructions about exhibits as part of the evidence in the case. Some judges may consider the references there as sufficient. Final 10.5 may be used for emphasis in appropriate cases.

Specific instruction may be required with respect to certain exhibits, as for example, audio tapes and video tapes. See Mid-Trial 7.15 and 7.16, and Finals 11.25 and 11.26. For certain exhibits, the jury should be advised that it should only handle the items with gloves

III - FINAL INSTRUCTIONS

10. Types of Evidence

10.6 Admissions (s. 655)⁷⁸

(Last revised February 2004)

[1] The parties have admitted some facts.

[Specify the admissions.]

[2] You must take what the parties have agreed on as facts without further evidence. This means that no witnesses had to be called or exhibits filed on those matters.

⁷⁸ This instruction applies only to formal admissions of fact made under *Code s. 655*. It does not apply to informal agreements, as for example, that certain witnesses need not be called to establish continuity, or that certain witnesses, if called, would give certain evidence. Jurors should be instructed specifically on the effect of any informal agreements made by counsel.

It is often helpful to list for the jury the admissions or refer to them by exhibit number if they have been reduced to writing and filed as an exhibit.

Final 10.1 also includes instructions about admissions as part of the evidence in the case. Some judges may consider that reference as sufficient to deal with the evidentiary use of admissions. Others may view it as too slight, especially in cases where there are several admissions of importance. Final 10.6 may be used for emphasis in appropriate cases.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

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III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.1 Evidence of Good Character

(Last revised February 2004)

[1] You have heard evidence about *NOA*'s good character for (*describe relevant character trait*). That evidence may help you decide this case.

[2] Good character, by itself, is not a defence to a charge. Evidence of *NOA*'s good character, however, may be important for you to consider in deciding this case. You should consider the good character evidence, along with the rest of the evidence, in deciding whether the Crown has proved the guilt of *NOA* beyond a reasonable doubt. Evidence of good character might create a reasonable doubt in your minds and lead you to find *NOA* not guilty.

(*Where the person charged has testified, add:*)

[3] *NOA* has testified. Evidence of his/her good character for (*describe relevant character trait*) may make his/her evidence more worthy of belief (supports his/her credibility as a witness). You should consider this evidence, along with the rest of the evidence, to help you decide how much or little of *NOA*'s testimony you will believe or rely on.

[4] You may also consider whether the evidence of good character raises a reasonable doubt that *NOA* committed the offence charged. Ask yourselves whether the evidence of *NOA*'s good character for (*repeat relevant trait*), along with the other evidence, makes it less likely that s/he committed the offence.

(*Where the Crown has cross-examined character witnesses concerning reported conduct inconsistent with the claimed good character, add:*)

[5] The Crown has cross-examined *NOW* about whether s/he had heard anything bad about *NOA*'s reputation for (*describe relevant character trait*). You may consider that cross-examination only in deciding whether you will rely on the evidence of the character witness and whether s/he described *NOA* fairly as a person of good character. You must not use this evidence, alone or with any other evidence, to conclude or to help you conclude that *NOA* committed the offence charged because s/he is a person of bad character (or, the sort of person who would likely do so).

(*The preceding paragraph, with appropriate modifications, should also be given where the Crown has cross-examined NOA*).

(*Where the Crown has called adverse witnesses in reply, add:*)⁷⁹

⁷⁹ Where the Crown offers prior convictions to rebut evidence of good character, Final 11.5 should be given.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

[6] The Crown has called *NOW* who testified that *NOA* does not have the good character for (*describe relevant character trait*) described by the character witness whom s/he called to testify. You may consider this evidence only in deciding whether you will rely on *NOA*'s character witness and whether *NOA* has a good character for (*describe relevant character trait*). You must not use this evidence, alone or together with other evidence, to conclude or to help you conclude that *NOA* committed the offence charged because s/he is a person of bad character (or, the sort of person who would likely do so).

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.2 Previous Convictions of Non-Accused Witness⁸⁰ (Credibility)

(Last revised February 2004)

[1] You have heard that *NOW* has previously been convicted of a criminal offence. This instruction applies only to *NOW*. It does not apply to *NOA*. (If *NOA* has a previous conviction, add the following and instruct as required by Final 11.4 or 11.5). I will give you separate instructions about how you may use *NOA*'s previous conviction to help you reach your decision.

[2] You may only use the fact, (number) and nature of *NOW*'s conviction to help you decide how much or little of the testimony of *NOW* you will believe or rely on.

[3] Some convictions, for example, ones that involve dishonesty, may be more significant than others. Consider, as well, whether the previous conviction is recent, or happened a number of years ago.

[4] A previous conviction does not necessarily make the evidence of *NOW* unbelievable or unreliable. It is only one of many factors for you to consider in your assessment of *NOW*'s testimony.

⁸⁰ Where the prior convictions of a witness are tendered to prove the witness's disposition in support of a defence that a third party (the witness) committed the offence, Final 11.3 should be given.

Where a prosecution witness has been impeached by evidence of bad character or other misconduct, Final 11.24 should be adapted.

Where there is evidence that the accused has a lifestyle that includes other misconduct, instructions like Final 11.24 should be given to guard against jury misuse. See *R. v. Chambers*, [1992] S.C.R. 1293, 59 C.C.C. (3d) 321.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.3 Previous Convictions of Non-Accused Witness or Third Party as Evidence of Disposition⁸¹

(Last revised February 2004)

[1] You have heard that *NOW/NO3P* has previously been convicted of (*describe nature of prior convictions*). These previous convictions might help you decide whether *NOW/NO3P* is the sort of person who would commit the offence with which *NOA* is charged.

[2] In this case, there is evidence that *NOW/NO3P* might have committed the offence charged. That evidence, along with the evidence of *NOW/NO3P*'s previous conviction for (*describe nature of prior convictions*), might leave a reasonable doubt in your mind whether it was *NOA* who committed it. It is for you to say.

[3] Later in these instructions, I will explain in greater detail how you may use the evidence concerning *NOW/NO3P*, including the evidence of previous convictions.

⁸¹ This is intended as an introductory instruction about the use of previous convictions of a third party to prove disposition or propensity. Some judges may prefer to omit it in favour of the more complete instruction on third party participation and a review of the evidence that supports the claim that a third party committed the offence.

This instruction should be added to Final 11.2 where the alleged third party perpetrator is a witness at trial.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.4 Previous Convictions of Accused Witness ⁸²

(Credibility)

(Last revised February 2004)

[1] You have heard that *NOA* has previously been convicted of a criminal offence (or, specify). You must not conclude that just because *NOA* has committed a crime in the past, s/he must have committed the offence charged.

[2] You may only use the fact, (number) and nature of that conviction to help you decide how much or little of the testimony of *NOA* you will believe or rely on.

[3] Some convictions, for example, ones that involve dishonesty, may be more important than others. Consider, as well, whether the previous conviction is recent, or happened a number of years ago.

[4] A previous conviction does not necessarily make the evidence of *NOA* unbelievable or unreliable. It is only one of many factors for you to consider in your assessment of *NOA*'s testimony.

[5] I emphasize that you must not use the fact, (number) or nature of the previous conviction to decide, or help you decide, that *NOA* is the sort of person who would commit the offences s/he is charged with in this trial.

⁸² This instruction should be given where the only purpose of the prior convictions is impeachment. Additional instructions are required where the prior convictions are offered to rebut evidence of good character (Final 11.5), or as evidence of disposition in a joint trial (Final 11.6).

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.5 Previous Convictions of Accused to Impeach and Rebut Evidence of Good Character⁸³

(s. 666)

(Last revised February 2004)

[1] You have heard that *NOA* has a good character for (*describe relevant character trait*).

(*Specify the evidence given on good character and specify whether it was given by character witnesses or by the accused*).

[2] You have also heard that *NOA* has previously been convicted of a criminal offence (*or specify*). You may also consider this evidence for the purpose of determining whether it rebuts or contradicts the evidence presented concerning *NOA*'s good character for (*specify trait*).

(*Where evidence of good character is led from character witnesses*).

[3] You may consider the evidence of *NOA*'s previous conviction to help you decide how much or little you will rely on the testimony of his/her character witnesses that *NOA* has a good character for (*describe relevant character trait*).

(*Where evidence of good character is given in NOA's testimony*).

[4] You may consider the evidence of *NOA*'s previous conviction to help you decide how much or little you will rely on *NOA*'s testimony that s/he has a good character for (*describe relevant character trait*).

[5] Some convictions, for example, ones that involve dishonesty, may be more important than others. Consider, as well, whether the previous conviction is recent, or happened a number of years ago.

[6] I emphasize that you must not use the fact, (number) or nature of the previous conviction to decide, or help you decide, that *NOA* is the sort of person who would commit the offence s/he is charged with in this trial.

⁸³ This instruction also includes the substance of Final 11.4, but deletes "only" from its [2]. Where the only purpose of the prior convictions of the accused is impeachment, Final 11.4 should be given.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.6 Previous Convictions of Co-Accused as Evidence of Disposition

(Last revised February 2004)

[1] Where more than one person has been charged with a criminal offence, each person is entitled to a decision based on a proper application of the evidence that relates to him/her. Some evidence may relate to one person, but not to another, or it may relate to more than one (or, both) in different ways. It is very important for you to know what this evidence is, and how you may use it to help you decide the case. It is even more important, however, that you understand how you must not use it to make your decision.

[2] You may use the evidence of NOA_1 's previous conviction for (*describe offence*) to help you decide whether NOA_1 has the disposition or propensity to commit the offence with which NOA_2 is charged. Evidence that NOA_1 has the disposition or propensity to commit the offence charged, either by itself or along with other evidence, may help you decide whether the Crown has proven beyond a reasonable doubt that NOA_2 committed the offence charged. It is for you to say.

[3] But you must not use the fact, (number) or nature of the previous conviction to decide or to help you decide that NOA_1 committed the offence charged because s/he has the disposition or propensity to do so.

[4] In other words, the disposition or propensity of NOA_1 , either by itself or along with other evidence, may raise a reasonable doubt in your mind that NOA_2 committed the offence charged, but you must not use it to satisfy yourself beyond a reasonable doubt that NOA_1 committed the offence charged because s/he had the disposition or propensity to do so.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.7 Out of Court Statements of Person Charged

(General Instruction)⁸⁴

(Last revised February 2004)

[1] You heard the testimony of *NOW* who claimed to have heard *NOA* say something. You have to decide whether you believe *NOA* made the statement, or any part of it. Regardless of who the witness is, it is still up to you to decide whether you believe that witness's evidence.

[2] In deciding whether *NOA* actually said these things, or any of them, use your common sense. Take into account the condition of *NOA* and of the witness (or, *NOW*) at the time of the conversation (interview, discussion). Consider the circumstances in which the conversation (interview, discussion) took place. Bear in mind anything else that may make the witness's evidence more or less reliable.

[3] Whether a witness has recorded a conversation, or taken notes about it, does not in itself determine how reliable that witness's testimony may be. It is, however, one of the things that you may consider in deciding whether or how much of the witness's testimony to believe.

[4] Unless you decide that *NOA* made a particular remark or statement, you must not consider it in deciding this case.

(Where at least part of the statement is or may be exculpatory, add:)

[5] Some or all of the statement may help *NOA* in his/her defence. You must consider those remarks that may help *NOA*, along with all of the other evidence, unless you conclude that s/he did not make them. In other words, you must consider all the remarks that might help *NOA* even if you are not entirely sure whether s/he said them.

[6] If you decide that *NOA* made a statement that may help him/her in his/her defence, or if you cannot decide whether s/he made it, you will consider that statement along with the rest of the evidence in deciding whether you have a reasonable doubt about *NOA*'s guilt.

(In all cases:)

[7] You may give anything you find *NOA* said as much or as little importance as you think it deserves in deciding this case. It is for you to say. Anything you find *NOA* said, however, is only part of the evidence in this case. You should consider it along with and in the same way as all the

⁸⁴ Where the statement is exculpatory, an instruction similar to Final 9.6 should be given.

Where a statement is adduced in a joint trial, Final 11.8 should be added.

Where an accused whose statement has been admitted in a joint trial testifies, Final 11.9 should be included.

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other evidence.

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11.8 Out of Court Statements of Person Charged (Joint Trial)⁸⁵

(Last revised February 2004)

[1] During the trial, I told you about a special rule that applies when someone testifies about something that one of the persons on trial said outside the courtroom. You may only use anything you find one person charged (or, *NOA*) said outside the courtroom for a limited purpose in deciding this case.

[2] Whatever *NOA*₁ said to a witness (or, *NOW*) outside the courtroom is only evidence concerning *NOA*₁, not *NOA*₂, even if it describes what *NOA*₂ said or did. You must not consider it in deciding the case of *NOA*₂.

[3] It is for you to say how much or little importance you will place on anything you find *NOA*₁ said in deciding that *NOA*₁'s case. It is only part of the evidence. Consider it along with and in the same way as the rest of the evidence relating to that person (or, *NOA*₁).

⁸⁵ Where the common purpose exception to the hearsay rule applies to the statement, Final 11.27 should be given.

There may also be cases in which one accused adopts what another has said out of court. See, for example, *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, 538 (Ont. C.A.), per Martin J.A. Adoption may be based on words, action, conduct, demeanour or silence at least where the accused should reasonably have been expected to reply. See, for example, *R. v. Govedarov* (1974), 16 C.C.C. (2d) 238, 25 C.R.N.S. 1 (Ont. C.A.) aff'd on other grounds, [1976] 2 S.C.R. 308, 25 C.C.C. (2d) 161, 32 C.R.N.S. 54. Where there is evidence on which the jury could find adoption by a co-accused, specific instruction is required.

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11. Rules of Evidence

11.9 Evidence of Person Charged (Joint Trial)⁸⁶

[1] *NOAW* testified. S/he is not required and cannot be forced to do so.

[2] When a person charged testifies, he or she is just like any other witness. You may believe some, none or all of what he or she says. You consider his or her testimony by applying the same tests and considering the same factors as with any other witness. Like any other witness, you decide how much or little of his or her testimony you will believe or rely on.

[3]⁸⁷ Unless I tell you otherwise,⁸⁸ you may consider the testimony of *NOAW* to help you decide the case of everyone (both persons) who is on trial - not just the case of *NOAW*.

⁸⁶ Where the evidence of the accused witness, if believed, would warrant an acquittal, it is desirable to add an instruction that conforms with *R. v. W.(D.)*, [1991] 1 S.C.R. 742. See, for example, Final 9.6.

⁸⁷ It may be desirable to modify [3] in cases where a statement of the accused witness has also been admitted and makes reference to the words and conduct of other accused. Final 11.8 may be adapted for this purpose.

⁸⁸ In rare cases, where one accused gives evidence that damages the case of a co-accused, or implicates the co-accused in the offence charged, it may be appropriate to caution the jury about that evidence. An instruction like the following may assist:

“*NOAW* has given evidence that tended to show that *NOA* was involved in some way in committing the offence that you are trying. You should consider that testimony of *NOAW* with particular care because s/he may or may not have been more concerned about his/her own interests. Bear that in mind when you decide how much or little you can believe of or rely upon what *NOAW* told you about *NOA*'s involvement in deciding this case.”

These instructions should not invite the jury, expressly or impliedly, to place undue weight on the status of the accused in the proceedings as a factor in deciding how much or little to believe of or rely upon his or her evidence. See, *R. v. Murray* (1997), 115 C.C.C. (3d) 225, 230 (Ont. C.A.), per Charron J.A. and, *R. v. B. (L.)* (1993), 82 C.C.C. (3d) 189, 190-1 (Ont. C.A.), per Arbour J.A.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.10 Prior Inconsistent Statements of Non-Accused Witness (Credibility)

(Last revised February 2004)

[1] You heard *NOW*'s testimony. Common sense tells you that when a witness says one thing in the witness box, but has said something quite different on an earlier occasion, this may reduce the value of his or her evidence.

*(Where there is a dispute about whether the prior statement was made, include paragraph [1-A] to [1-C] as follows:)*⁸⁹

[1-A] The first thing for you to decide is whether *NOW*, in fact, gave an earlier and different version from his/her testimony of the same events.

[1-B] If you find that the witness gave an earlier and different version of events, please listen carefully to what I tell you about how to use that version to help you decide this case.

[C] If you do not find that s/he gave an earlier and different version of events, please ignore what I am going to tell you about how you can use the version to help you decide this case.

(In all cases:)

[2] Not every difference or omission is important. You should consider any explanation the witness gives for the differences. You should also consider the fact, nature and extent of any differences when you decide whether to rely on the *NOW*'s testimony.

[3] When you are taking the differences into account, you may only use the testimony given under oath in this trial as evidence of what actually happened. You must not use the earlier statement as evidence of what actually happened, unless you conclude that the witness accepted it as true while in the witness box.

[4] Even then, as with the evidence of any witness, it is for you to say whether or how much you will rely on it.

⁸⁹ Where there is no dispute that the witness made the prior statement used for impeachment purposes, [1-A] - [1-C] should be omitted. Where there is a dispute that the witness made the prior statement used for impeachment purposes, [1-A] - [1-C] should be included.

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11. Rules of Evidence

11.11 Prior Inconsistent Statements of Accused Witness

(Last revised February 2004)

[1] Like any witness, *NOAW* may also be cross-examined about what s/he said before to other persons. The fact that *NOAW* has previously said something different from what s/he testified here is one of many factors for you to consider when you decide how much or little of the evidence of *NOAW* you will believe or rely on in deciding this case.

[2] It is for you to say whether there is any difference between what *NOAW* said before, and what s/he testified here on the same subject. It is also up to you to decide how much or little any difference affects your belief and reliance upon the evidence of *NOAW*. Consider the nature and extent of the difference between the earlier and current versions, and any explanation offered for it by *NOAW*. Take into account, as well, whether the difference relates to a matter of importance, or a minor detail. Use your common sense.

[3] Unlike statements by other witnesses, however, you may also consider what *NOAW* said before as evidence of what actually happened, even though *NOAW* does not testify that what s/he said before was true. It is for you to say how much or little of what *NOAW* said before you will believe or rely on as evidence of what actually happened.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.12 Prior Inconsistent Statements of Non-Accused Witness as Substantive Evidence (*R. v. B. (K.G.)*)⁹⁰

(Last revised February 2004)

[1] *NOW* has testified. S/he also made a previous statement (*describe particulars of statement*) that is an exhibit in this case. Both the testimony and the previous statement are evidence of what was said and done.

[2] In deciding whether or how much to rely on the testimony of *NOW*, you should apply the same principles, in the same way that you do with any other witness who testifies. You should also consider the fact, nature and extent of any differences that you find between what the witness said here and what s/he said in the earlier statement in deciding how much or little of his/her testimony at trial you will believe or rely on.

[3] You may also consider the statement, exhibit (*specify exhibit number*) as evidence that what it said happened actually took place. It is for you to say how much or little of the witness's testimony or statement you will believe or rely on in deciding this case.

[4] You should consider several factors in deciding how much or little of the statement you will believe or rely on as evidence of what happened in this case.

[5] Take into account what happened before *NOW* made the statement that is filed as an exhibit. Were there interviews before the statement was made? How many? What was discussed? What happened during them? Was the witness coached? Was s/he shown things? Or were suggestions made to help his/her memory or contradict things s/he said earlier?

[6] Consider the circumstances of the interview at which the statement was made. Did the questions that were asked let the witness provide the answers? Or did the words used in the questions suggest to the witness the answers the questioner expected or wanted? Did the questioner let the witness tell the story? Were words put in the witness's mouth?

[7] Examine, to the extent that you can do so, the behaviour of the witness during the interview. Bear in mind that you do not have the same chance to consider the witness's behaviour when s/he made the statement that you would have had if s/he had made the statement in court. Take into account that the witness did not make the statement in your presence and, unlike the evidence given at trial, s/he was not cross-examined when s/he made the statement.

[8] Keep in mind any reason or chance that the witness had or may have had for not giving the whole account, or for not telling the whole truth in giving the statement or in giving evidence here.

⁹⁰ This instruction may not be necessary if Final 11.11 has not been given.

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11. Rules of Evidence

[9] Take into account how the witness appeared when s/he made the statement, as well as when s/he said that it was untrue and testified here. What reasons, if any, did s/he give for his/her story that the statement is, in whole or in part, not the truth?⁹¹

[10] Consider how much or little a denial of making the statement, or of the truth of all or some of its parts, limits the effectiveness of cross-examination on it and your ability to assess accurately how much or little it helps you decide the case. Is the denial itself truthful or merely used to avoid answering difficult questions?

(List any other specific factors of relevance in the case)

[11] Examine the rest of the evidence in the case to see how much or little it supports or contradicts what *NOW* said in the statement, or in his/her evidence at trial.

⁹¹ This instruction may have to be modified where the witness says he or she simply does not remember. See *Khan v. College of Physicians and Surgeons* (1992), 94 D.L.R. (4th) 193 (Ont. C.A.).

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11. Rules of Evidence

11.13 Motive⁹²

(Last revised February 2004)

[1] Motive is a reason why somebody does something. Evidence of motive is just part of the evidence for you to consider in determining whether *NOA* is guilty or not guilty. Motive is not one of the essential elements that the Crown must prove.

[2] In this case, the Crown relies on (*briefly describe nature of motive alleged*) as a motive for *NOA* to commit the offence charged (*or, specify*). It is for you to decide whether *NOA* had such a motive, or any motive at all, and how much or little you will rely on it to help you decide this case⁹³

⁹² This instruction need only be given where some evidence of motive has been led.

⁹³ There is a significant difference between absence of proven motive, on the one hand, and proven absence of motive, on the other. There is no acceptable definition of “proven absence of motive”. See *R. v. White* (1996), 108 C.C.C. (3d) 1, 33-4 (Ont. C.A.) aff’d. [1998] 2 S.C.R. 72, 125 C.C.C. (3d) 385, 415. In a case where there is proven absence of motive, the jury should be expressly told:

“You have heard evidence that *NOA* had no motive to commit the offence charged. This is an important fact for you to consider in this case. You must consider it along with the other evidence in this case.”

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11. Rules of Evidence

11.14 Post-Offence Conduct (Consciousness of Guilt)⁹⁴

(Last revised February 2004)

[1] You have heard evidence that *NOA* (*describe briefly relevant words and/or conduct occurring after the alleged offence*)⁹⁵.

[2] What *NOA* did or said might help you decide whether s/he is guilty or not guilty of the offence⁹⁶.

(Review relevant evidence and relate to alternative explanation)

[3] The first thing to decide is whether *NOA* actually did or said these things. If you find that s/he did not do or say these things, you must not consider this evidence in reaching your verdict.

[4] If you find⁹⁷ that *NOA* did in fact do or say these things, you should consider next whether this was because *NOA* committed the offence charged. If so, you should consider this evidence, together with all the other evidence, in reaching your verdict.

[5] If, however, you find that *NOA* did or said these things for some other reason, you should not consider that as evidence of guilt.

⁹⁴ The term “consciousness of guilt” should not be used to describe post-offence conduct. The trial judge should tell the jury about any other explanations for the conduct and make certain that the jurors appreciate that they should not make a decision about the meaning of the conduct until all the evidence has been considered. See *R. v. White* (1998), 125 C.C.C. (3d) 385, 415 (S.C.C.), per Major J.

⁹⁵ In limited circumstances, a trial judge may be required to give a “no probative value” instruction about post-offence conduct. This instruction is most likely warranted where the accused has admitted participation in the culpable event and the issue requiring jury decision is the extent or legal significance or character of that participation. There are two situations where this is likely to occur:

(i) where the accused admits committing the *actus reus* of a crime, but denies a specific level of culpability; or,

(ii) where the accused acknowledges committing some related offence arising from the same set of facts.

See *R. v. White* [1998] 2 S.C.R. 72, 125 C.C.C. (3d) 385, 401 per Major J.

⁹⁶ A person may be running from the police after committing an offence to avoid apprehension by the police for a matter distinct from an offence, or simply because the person is scared. The trial judge should tell the jury to consider any explanation given in evidence by the accused in relation to running from the area where the crime was committed.

⁹⁷ Where instructions are given on post-offence conduct, a trial judge should not instruct the jury that the criminal standard of proof applies to evidence of post-offence conduct before the jury may use it in deciding the case.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.15 Evidence of Similar Acts to Prove Identity of Perpetrator of Known Crime (Extrinsic Misconduct)⁹⁸

(Last revised February 2004)

[1] You are trying *NOA* on a charge of (*briefly describe offence charged*). You are not trying him/her for any other conduct.

[2] You have heard evidence that *NOA* has (might have) done other acts that are similar to those for which s/he has been charged in this case (*specify*). Do not assume that just because these acts are similar that they must have been committed by the same person.

[3] Even if you conclude that *NOA* committed these acts in the past, do not assume that *NOA* is guilty of the offence charged.

[4] However, if you conclude that these other acts and the crime charged are so similar that the same person committed them, you may consider the evidence of the other act(s), along with the rest of the evidence, in reaching your verdict.

[5] If you do not conclude that these other acts and the crime charged are so similar that the same person committed them, you must not use the evidence of this (these) other act(s) in reaching your verdict.

[6] You should consider these circumstances:

(List alleged similarities and dissimilarities between similar act(s) and offence charged.)

⁹⁸ This instruction should be used when the evidence of similar acts is offered to prove identity and involves conduct not charged as a count in the indictment. When the evidence of similar acts offered to prove identity involves conduct charged in other counts, the appropriate instruction is Final 11.16.

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11. Rules of Evidence

11.16 Evidence of Similar Acts on Other Counts to Prove Identity of Perpetrator⁹⁹

(R. v. Arp)

(Last revised February 2004)

[1] *NOA* is charged with (*specify number*) offences. The Crown must prove each charge beyond a reasonable doubt. Do not assume that just because the offences are similar that they must all have been committed by *NOA*.

[2] You may use the evidence on one count to reach your verdict on the other (any) count only if you conclude that the acts involved are so similar that the same person likely did both (all) of them.

[3] If you do not conclude that the acts charged in one (some) count(s) are so similar to those charged in another (others) that the same person committed both (all) of them, you must not use the evidence on that (those, each) count(s) in reaching your verdict on the (any) other charge. You must then reach your verdict using only the evidence that corresponds to each count.

[4] You should consider these circumstances:

(List alleged similarities and dissimilarities between counts)

⁹⁹ This instruction should be used when the evidence of similar acts is offered to prove identity and involves conduct charged as other counts in the indictment. When the evidence of similar acts offered to prove identity involves conduct not charged in other counts, the appropriate instruction is Final 11.15.

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11. Rules of Evidence

11.17 Evidence of Extrinsic Similar Acts to Support Credibility of Complainant¹⁰⁰ (Extrinsic Misconduct)¹⁰¹ (Last revised February 2004)

- [1] *NOA* is charged with (*briefly describe offence*). You are trying him/her only for that offence.
- [2] You must decide whether the offence charged ever actually took place.
- [3] You have heard evidence that *NOA* has (might have) committed other acts that are similar to that for which s/he has been charged in this case. You are not trying *NOA* for that other conduct. Do not assume that just because the acts are similar that the offence charged must have taken place.
- [4] You should consider whether there is a pattern of similar behaviour that confirms *NOC*'s testimony that the offence took place. It is for you to say. In considering this evidence, bear in mind the relationship between *NOA* and *NOC* and the witnesses who testified about the other conduct, as well as the circumstances of both (each) situation(s).
- [5] You should consider these circumstances:
- (List alleged similarities and dissimilarities between similar act(s) and offence charged)*
- [6] Whether or not you use the evidence of the other acts (conduct) to help you decide this case, you must not find *NOA* guilty of any offence unless the Crown has proved all the essential elements of that offence beyond a reasonable doubt.

¹⁰⁰ This instruction should be used when there is a dispute about whether the offence charged actually occurred.

¹⁰¹ This instruction should be used when evidence of similar acts not charged as a count in the indictment is offered to support complainant's evidence that the offence actually occurred. When the evidence of similar acts offered to support complainant's evidence involves conduct charged in other counts, the appropriate instruction is Final 11.18.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.18 Evidence of Similar Acts on Other Counts¹⁰² to Support Credibility of Complainant¹⁰³

(Last revised February 2004)

[1] *NOA* is charged with (*specify number*) offences. There are (*specify number*) complainants. The Crown must prove each charge beyond a reasonable doubt.

[2] You must decide whether the offence alleged by each complainant (or any of them) ever actually took place.

[3] Do not assume that just because you conclude that one complainant is telling the truth, the others must be telling the truth as well. Nor should you assume that just because the complainants testified that *NOA* committed similar acts, they all must have occurred if any one of them is proved.

[4] You should consider whether there is a pattern of similar behaviour that confirms each complainant's testimony that the offence took place. It is for you to say. In considering this evidence, bear in mind the relationship between *NOA*, the complainants (or *NOC*), as well as the circumstances of both (each) of the situations.

[5] You should consider these circumstances:

(List alleged similarities and dissimilarities between counts.)

¹⁰² This instruction should be used when the evidence of similar acts from counts involving different complainants is offered to prove that an offence alleged against a particular complainant was committed.

¹⁰³ This instruction should be used when evidence of similar acts charged in other counts in the indictment is offered to support a complainant's evidence that the offence alleged by him/her actually occurred. When the evidence of similar acts offered to prove that an offence was committed involves extrinsic misconduct, the appropriate instruction is Final 11.17.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.19 Evidence of Children¹⁰⁴

(General Instructions)

(Last revised February 2004)

[1] You have heard testimony from a young witness. Young witnesses do not always have the same ability as adults to observe and recall precise details or to describe events fully and accurately.

[2] Consider *NOW*'s ability to understand the questions that were asked and to give truthful and accurate answers. Take into account whether s/he understands the duty to tell the truth, and the difference between truth and falsehood. Use your common sense.

¹⁰⁴ There is no standard formula for instructing jurors about the evidence of children.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.20 Evidence of Children¹⁰⁵ (Obstructed View or Sequestered Testimony)

(s. 486(1.1); (2.1))

(Last revised February 2004)

[1] *NOW* testified from behind a screen (outside the courtroom). This procedure is used simply to help young people give evidence by providing more comfortable surroundings for them to do so. It means no more than that. It has nothing to do with the guilt or innocence of *NOA*. Do not use it as evidence that *NOA* is guilty of the offence charged.

¹⁰⁵ These instructions may be modified for use where the presiding judge permits a support person to be present and close to the child witness while testifying: *Code*, s. 486(1.2).

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.21 Evidence of Children (Videotaped Complaint)¹⁰⁶

(s. 715.1)

(Last revised February 2004)

[1] *NOW* testified in this case. You also watched a videotape in which s/he described the circumstances of the offence charged. We permit this procedure in cases like this where the witness was under 18 years old when the offence was alleged to have happened. It is used simply to help such witnesses present their evidence. It has nothing to do with the guilt or innocence of *NOA*. Do not use it as evidence that *NOA* is guilty of the offence charged.

[2] *NOW* has testified that what s/he said on the videotape was true. But, as for all witnesses, it is for you to decide how much or little you will rely on what *NOW* said on the videotape.

[3] You should consider the following factors:¹⁰⁷

The circumstances in which the videotape was made.

The behaviour of *NOW* when s/he made the videotape and testified here.

The similarities and differences between the videotape and *NOW*'s evidence at trial.

The rest of the evidence.

¹⁰⁶ The general instruction concerning the evidence of children is Final 11.19.

¹⁰⁷ There may well be other factors. These factors may be elaborated on. See, for example, Mid-Trial 7.22.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.22 Evidence Previously Given¹⁰⁸

(s. 715)

(Last revised February 2004)

[1] *NOW* testified at the (*describe proceedings*), but was not available to testify here.¹⁰⁹ A court reporter recorded his/her testimony and it was read to (played for) you.

[2] You may consider this testimony as evidence to help you decide this case.

[3] It is for you to decide how much or little of this evidence you will believe or rely on. You may believe some, none or all of it. In making that decision, remember that you did not see or hear¹¹⁰ the witness testify.¹¹¹

¹⁰⁸ This instruction may be modified for use where commission evidence is received and read to the jury. Where the commission evidence has been videotaped, Final 11.26 may be modified for use.

¹⁰⁹ It is advisable to discuss with counsel in advance how specific the reference to nature of the prior proceedings and the reason for the absence of the witness should be.

¹¹⁰ This reference will require modification if an audio or videotape of the witness's prior testimony is played for the jury.

¹¹¹ If there is no dispute on this evidence, the mid-trial instruction will usually be adequate. (See Mid-Trial 7.17). If there is a dispute, the trial judge should alert the jury to the fact that there is a real dispute about what the witness said in his/her testimony, or point out the absence of cross-examination in front of the jury. Where prior testimony has been edited, the trial judge may wish to canvas with counsel the desirability of an explanatory instruction.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.23 Witnesses of Unsavoury Character¹¹²

(Vetrovec Warning)

(Last revised February 2004)

[1] *NOW* testified for the Crown. You have heard that (*specify briefly reasons why evidence should be treated with caution*).

[2] There is good reason to look at *NOW*'s evidence with the greatest of care and caution. You should consider whether *NOW*'s evidence is confirmed by other evidence before you rely on it in deciding whether the Crown has proved the case against *NOA* beyond a reasonable doubt.¹¹³

[3] However, you may believe *NOW*'s testimony if you find it trustworthy, even if it is not confirmed by other evidence.

*(Where there is confirmatory evidence, the following may be added):*¹¹⁴

[4] You may find that there is some evidence in this case that confirms or supports some parts of *NOW*'s testimony. It is for you to say whether it does or it doesn't. It is also for you to say whether that evidence affects how much or little of the witness's testimony you will believe or rely on in deciding this case.

The evidence to which I am about to refer illustrates the kind of evidence that you may find confirms or supports *NOW*'s testimony. It may help you. It may not. It is for you to say.

(Illustrate potentially confirmatory evidence).

¹¹² These warnings are discretionary. In deciding whether to give a special warning, there are two main factors for the trial judge to consider in combination:

- the credibility of the witness; and,
- the importance of the witness to the Crown's case.

See *R. v. Brooks* (2000), 141 C.C.C. (3d) 321, 347-8 (S.C.C.). No specific formula has to be followed.

¹¹³ The term "corroboration" should not be used. See *R. v. Vetrovec* (1982), 67 C.C.C. (2d) 1, 17-18 (S.C.C.) per Dickson J.

¹¹⁴ This instruction is discretionary. See *R. v. Vetrovec, supra*, at pp. 17-18 per Dickson J. Where it is given, it should be made clear that the items of evidence mentioned are only illustrative not exhaustive of the potentially confirmatory evidence in the case. The evidence does not have to meet the standard required for corroboration under the former accomplice rule: evidence independent of the witness that implicates the accused in a material particular in the commission of the offence.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.24 Eyewitness Identification Evidence¹¹⁵

(Last revised February 2004)

[1] Identification is an important issue in this case. The case against *NOA* (or, the persons charged) depends entirely, or to a large extent, on eyewitness testimony.

[2] You must be very careful about relying on eyewitness testimony to find *NOA* (or, anyone) guilty of any criminal offence (or, the offence charged). There have been cases where persons have been wrongfully convicted because eyewitnesses made mistakes. It is quite possible for an honest witness to make a mistake in identification. Even a number of witnesses can be honestly mistaken about identification.

[3] You may wish to consider several factors that relate specifically to the eyewitness and his/her identification of *NOA* as the person who committed the offence charged:

The circumstances in which the witness made his/her observations.

Did the witness know the person before s/he saw him/her at the time?

Had the witness seen the person on a previous occasion?

How long did the witness watch the person s/he says is the person on trial?

How good or bad was the visibility?

Was there anything that prevented or hindered a clear view?

How far apart were the witness and the person whom s/he saw?

How good was the lighting?

Did anything distract the witness's attention at the time s/he made the observations?

(Review relevant evidence about circumstances).

The description given by the witness after s/he made the observations.

How specific was the description?

Was the description close to the way *NOA* actually looked at the time?

Did the witness give another description of this person?

Was the other description similar to or different from the first?

How certain was the witness about the other description?

(Review description provided by witness).

The circumstances of the witness's identification of *NOA* as the person whom s/he saw.

How long was it between the observation and identification?

¹¹⁵ This instruction should be given where the Crown's case depends entirely or largely on eyewitness identification evidence that is challenged by the defence. In other cases, where there is eyewitness identification evidence that occupies a position of lesser prominence because of other evidence in the case, counsel should be asked in the pre-charge conference about the need for or form of instruction.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

Did anybody show *NOA*'s picture to the witness to assist in the identification?

Were photographs of other people shown at the same time?

Was anyone else present when the witness made the identification?

What did the witness say when s/he identified (*NOA*)?

Did the witness ever fail to identify *NOA* as the person whom s/he saw?

Has the witness ever changed his/her mind about the identification?

Has the witness ever expressed uncertainty about or questioned his/her identification?

Is the identification the witness's own recollection of his/her observations or something put together from pictures shown or information received from a number of other sources?

(Review relevant evidence about circumstances of identification).

[4] Remember, the Crown must prove beyond a reasonable doubt that it was *NOA* who committed the offence charged. Consider the evidence of the identification witness along with the other evidence you have seen and heard in deciding that question.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.25 Audio Tape Recordings and Transcripts¹¹⁶

(Last revised February 2004)

[1] During the trial, you heard a tape recording of (*describe briefly nature of tape*).¹¹⁷

[2] When the tape was played, you also had a transcript of the tape. The transcript is just an aid to help you follow what was said on the tape, and by whom, as it was being played.

[3] Only the tape is evidence. It will be available to you in the jury room where you may listen to it if you need to. It is up to you to decide whether or how often you want to listen to it, or any part of it again. You may listen to it as many times as you wish to help you determine who is speaking and what s/he is saying.

(*Where transcripts are not filed as exhibits:*)

[4] The transcript was not filed as an exhibit. It will not be available to you in the jury room.

(*Where transcripts are filed as exhibits:*)

[5] The transcript was also filed as an exhibit. It will be available to you in the jury room to help you determine what is actually on the tape. But remember, if you find any differences between the tape and the transcript, either about what was said or by whom, you must rely on what you hear on the tape, rather than what is in the transcript.

(*Where a single accused is a speaker and the common purpose exception to the hearsay rule does not apply, add:*)

[6] In listening to this tape, be careful to distinguish between what *NOA* says and what anyone else on the tape is saying. What another person says might help you determine what *NOA* says and what his/her words mean. But *NOA* can be held responsible only for what s/he actually says, not for what anyone else says. It is only what *NOA* said that is evidence concerning *NOA*.

In other words, what another person says may provide a context for understanding what *NOA* says; but only *NOA*'s words, as understood in this context, are evidence of what *NOA* has done or intended to do.

¹¹⁶ Audio tape recordings may include statements made by an accused to a person in authority, dying declarations, statements that are part of the *res gestae*, previous statements admitted for substantive purposes under *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 and declarations made in furtherance of a common unlawful purpose. The identity of the speaker may vary.

¹¹⁷ In some instances, the tapes may not be played, as for example where the language of the speakers is not the language of trial. Where this occurs, counsel may agree about the filing and reading of the transcript of translations. Several aspects of this instruction will require modification in these cases.

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(Where more than one accused are speakers and the common purpose exception to the hearsay rule does not apply, add:)

[7] In listening to this tape, be careful to distinguish between what each person charged says and what anyone else on the tape is saying. Anything on the tape may be helpful in determining what a particular person says and what his/her words mean. But each person on trial can be held responsible only for what s/he actually says, not for what anyone else says.

In other words, only a person's own words, as understood in context, can be used as evidence of what that person has done or intended to do.¹¹⁸

¹¹⁸ Where a trial judge decides that further instructions should be given concerning the purpose for which the evidence may be used, the relevant Final instructions may be adapted. See, for example, Finals 11.7 and 11.8 relating to out of court statements of an accused.

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11. Rules of Evidence

11.26 Video Tape Recordings and Transcripts¹¹⁹

(Last revised February 2004)

[1] During the trial, you saw and heard a video tape recording of (*describe briefly nature of video tape*).¹²⁰

[2] When the tape was played, you also had a transcript of the tape. The transcript is just an aid to help you follow what was said on the tape, and by whom, as it was being played.

[3] Only the tape is evidence. It will be available to you in the jury room where you may watch and listen to it if you need to. It is up to you to decide whether or how often you want to watch and listen to it, or any part of it again. You may watch and listen to it as many times as you wish to help you determine who is speaking and what s/he is saying.

(*Where transcripts are not filed as exhibits:*)

[4] The transcript was not filed as an exhibit. It will not be available to you in the jury room.

(*Where transcripts are filed as exhibits:*)

[5] The transcript was also filed as an exhibit. It will be available to you in the jury room to help you determine what is actually on the tape. But remember, if you find any differences between the tape and the transcript, either about what was said or by whom, you must rely on what you hear on the tape, rather than what is in the transcript.

(*Where a single accused is a speaker and the common purpose exception to the hearsay rule does not apply, add:*)

[6] In watching and listening to this tape, be careful to distinguish between what *NOA* says and what anyone else on the tape is saying. What another person says might help you determine what *NOA* says and what his/her words mean. But *NOA* can be held responsible only for what s/he actually says, not for what anyone else says.

In other words, what another person says may provide a context for understanding what *NOA* says; but only *NOA*'s words, as understood in this context, are evidence of what *NOA* has

¹¹⁹ Video tape recordings may include statements made by an accused to a person in authority, dying declarations, statements which are part of the *res gestae*, previous statements admitted for substantive purposes under *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 and declarations made in furtherance of a common unlawful purpose. The identity of the speaker may vary.

¹²⁰ In some instances, the tapes may not be played, as for example where the language of the speakers is not the language of trial. Where this occurs, counsel may agree about the filing and reading of the transcript of translations. Several aspects of this instruction will require modification in these cases.

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done or intended to do. It is only what *NOA* said that is evidence concerning *NOA*.

(Where more than one accused are speakers and the common purpose exception to the hearsay rule does not apply, add:)

[7] In watching and listening to this (these) tape(s), be careful to distinguish between what each person charged says and what anyone else on the tape(s) is (are) saying: Anything on the tape(s) may be helpful in determining out what a particular person says and what his/her words mean. But each person on trial can be held responsible only for what s/he actually says, not for what anyone else says. In other words, only a person's own words, as understood in context, can be used as evidence of what that person has done or intended to do.¹²¹

¹²¹ Where a trial judge decides that further instructions should be given concerning the purpose for which the evidence may be used, the relevant Final instructions may be adapted. See, for example, Finals 11.7 and 11.8 relating to out-of-court statements of an accused.

A separate instruction is required where the video tape is admitted under *Code* s. 715.1. See Final 11.21.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.27 Common Purpose (Co-Conspirator's) Exception to the Hearsay Rule¹²²¹²³ (Last revised February 2004)

[1] *NOW* testified about what *NOA* said earlier.¹²⁴

(Specify relevant testimony.)

[2] Usually, you only consider a person's own words or acts as evidence in deciding the case of that person. What one person who is charged says or does is usually not evidence for you to consider in deciding the case of any other person charged.

[3] In a case like this, however, there are some circumstances in which you may use evidence of what one person charged said or did to help you decide the case of any the other person charged.¹²⁵

[4] Later in my instructions, I will explain in more detail how this rule may help you make your decision in this case.

¹²² This instruction is optional. It applies to substantive and preliminary crimes, provided they are alleged to be joint ventures and the necessary conditions precedent to the operation of this hearsay exception have been met.

¹²³ This instruction should be used in conjunction with an instruction on conspiracy in cases where proof of *NOA*'s participation in a conspiracy is made by reliance on this exception.

¹²⁴ In some cases, all alleged members of the conspiracy or common unlawful purpose will be jointly charged and tried. In other cases, however, some may be on trial and others unindicted or the subject of separate proceedings. [1] may require modification as a result.

¹²⁵ In some cases, all alleged members of the conspiracy or common unlawful purpose will be jointly charged and tried. In other cases, however, some may be on trial and others unindicted or the subject of separate proceedings. [2] and [3] may require modification as a result.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.28 Statements of Hearsay Declarant Not Called as Witness¹²⁶

(R. v. Khan; R. v. Smith)

(Last revised February 2004)

[1] *NOW* testified about what *NOD*¹²⁷ said to him/her about (*describe briefly hearsay statement*). *NOD* was not here to testify.¹²⁸

[2] When you consider this evidence, you have to decide what, if anything, *NOD* said to *NOW*. In deciding whether *NOD* said these things, or any of them, use your common sense. Take into account the condition of *NOD* and *NOW* at the time of the conversation, the circumstances in which the conversation took place, and anything else that may make *NOW*'s story more or less reliable.

[3] If you find that *NOW* has accurately reported any or all of what *NOD* said, you may rely on those parts of *NOW*'s testimony.

[4] You should be careful when you determine how much or little you will rely on this evidence. It might be less reliable than other evidence that has been given. *NOD* was not under oath or affirmation. S/he did not promise to tell the truth. You did not see or hear *NOD* testify. Unlike the witnesses who testified before you, s/he could not be cross-examined.

[5] Do not consider this evidence, however, by itself. It is only part of the evidence in this case. Take it into account, along with other evidence that may make it more or less reliable. It is up to you to decide how much or little of it you will believe or rely on to decide this case.¹²⁹

¹²⁶ This instruction is appropriate in cases in which a statement of an absent hearsay declarant has been introduced through a witness who is the hearsay recipient and admitted otherwise than in accordance with *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.) and *R. v. Starr* [2000] 2 S.C.R. 144 are examples of the circumstances in which this instruction may be helpful.

¹²⁷ *NOD* means "name of declarant"; *i.e.*, the person who makes the statement introduced through the witness who is the recipient.

¹²⁸ Further instruction may be required where the declarant has been declared incompetent, rather than simply not called as a witness.

¹²⁹ This instruction may be amplified to point out evidence that makes the hearsay statement more or less reliable.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.29 Judicial Notice¹³⁰

(Last revised February 2004)

[1] There is no dispute that (*specify what is judicially noticed*). Although no one gave evidence about it, you may treat it as a fact.

¹³⁰ Judicial notice is the acceptance of a fact without formal proof. It applies to:

- (i) facts that are so notorious that they are not the subject of dispute among reasonable persons; and,
- (ii) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

See *R. v. Williams*, [1998] 1 S.C.R. 1128.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.30 Plea of Guilty of Another¹³¹

(Last revised February 2004)

[1] In this case, *NOW* and *NOA* have each been charged with (*specify offence*). *NOW* has pleaded guilty to (*specify offence*). *NOA* has pleaded not guilty.

[2] *NOW*'s guilty plea has absolutely no bearing on whether *NOA* is guilty. *NOW* may have had any number of reasons for pleading guilty. You must not think that because *NOW* has pleaded guilty, *NOA* must be guilty too.¹³²

¹³¹ This instruction should only be given in relation to prosecution witnesses. See, for example, *R. v. Hoilett* (1991), 4 C.R. (4th) 372 (Ont. C.A.)

¹³² This instruction is not intended as a substitute for a *Vetrovec* warning. See *R. v. Vetrovec* (1982), 67 C.C.C. (3d) 1 (S.C.C.). It may require modification where a *Vetrovec* warning is given and includes reference to the reasons underlying the plea and/or testifying against the accused. For a *Vetrovec* warning, see Final 11.23.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.31 Evidence of Other Sexual Activity¹³³

(ss. 276; 276.4)

(Last revised February 2004)

[1] You have heard evidence that *NOC* (*describe briefly nature of sexual activity*) with (*specify name of other party*) on (*specify date, or otherwise identify occasion*).

[2] You may use that evidence to help you (*specify purpose for which evidence may be used*).

[3] You must not use that evidence, however, to help you decide that, because of the sexual nature of what happened, *NOC* is more likely to have consented to what *NOA* (or, the person charged) is alleged to have done here.

[4] You must also not use that evidence to help you decide that *NOC* is less believable or reliable as a witness in this case.

¹³³ This instruction is mandatory under *Code*, s. 276.4.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.32 Charts And Summaries (Demonstrative Aids)¹³⁴

(Last revised February 2004)

[1] The Crown/defence have used charts, summaries or (*describe*) to help illustrate or explain some of the evidence. These were used for convenience. They are not exhibits. They are not evidence in this case. They do not go to the jury room with you. This is because they may or may not be accurate. They may have contained mistakes.

[2] You must make your findings of fact from the evidence given at trial, not from the charts (schedules, summaries or *describe document*).

¹³⁴ This instruction will rarely be necessary. It may be required, however, where counsel use demonstrative aids, not filed as exhibits, in their closing addresses to the jury.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.33 Charts And Summaries (Filed as Exhibits)

(Last revised February 2004)

[1] Several charts (summaries, schedules, *or describe document*) were filed as exhibits and, therefore, are part of the evidence for you to consider.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.34 Outstanding Charges Against Prosecution Witness¹³⁵

(*Titus*¹³⁶ Instruction)

(Last revised February 2004)

[1] *NOW* is charged with (*briefly describe offence charged*). The trial has not yet been held.

[2] *NOW* might have an interest in testifying favourably for the Crown in this trial. Favourable testimony here may help the witness out with his/her own case later, or the witness might believe that it will do so.

[3] You should approach the evidence of *NOW* with care. When you consider how much or little of this evidence you will believe or rely on to decide this case, take into account the fact that s/he is her/himself awaiting trial on an other charge. It is a factor for you to consider.¹³⁷

¹³⁵ This instruction should only be given in relation to prosecution witnesses. See, for example, *R. v. Hoilett* (1991), 4 C.R. (4th) 372 (Ont. C.A.).

¹³⁶ See *R. v. Titus* (1983), 2 C.C.C. (3d) 321 (S.C.C.).

¹³⁷ This instruction is not intended as a substitute for a *Vetrovec* warning. See *R. v. Vetrovec* (1982), 67 C.C.C. (3d) 1 (S.C.C.). See Final 11.23.

III - FINAL INSTRUCTIONS

11. Rules of Evidence

11.35 Further Instructions

(Last revised February 2004)

[1] When you retire to the jury room, do not begin deliberating until the sheriff tells you to do so. I need to consult with the lawyers to see if I have overlooked anything. If so, I will call you back in for further instructions.

(If the jury is recalled, state:)

[2] I have some further instructions to give you. Unless I tell you otherwise, do not consider these further instructions to be any more or less important than anything else I have said about the law. All the legal instructions, whenever they may be given, are part of the same package.