



Canadian Judicial Council

Criminal Negligence

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CRIMINAL NEGLIGENCE

Offence 220 **Criminal Negligence Causing Death** **(Manslaughter by Criminal Negligence)** **(ss. 219, 220, 222 (5)(b), 234)**

[1] *NOA* is charged with criminal negligence causing death (manslaughter by criminal negligence). The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence) unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment¹. Specifically, the Crown must prove each of the following essential elements beyond reasonable doubt:

1. that *NOA* (*specify alleged act or omission*)²;
2. that *in* (*specify alleged act or omission*) *NOA* showed wanton or reckless disregard for the lives or safety of others; and
3. that *NOA*'s conduct caused *NOC*'s death.³

¹ Where identity is an issue, remember to include any further instructions that may be relevant (e.g. eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

² Where the Crown relies on an omission, this element should end with the words "...that it was his/her legal duty to do".

³ If there is an issue about whether *NOC* is dead, further instructions will be required.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence).

Unless you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁴ after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of criminal negligence causing death.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* (*specify alleged act or omission*)?**

Where the Crown relies on both an act and an omission:

The Crown must prove beyond a reasonable doubt either of the following:

1. that *NOA* (*specify alleged act*); or,
2. that *NOA* failed to (*specify alleged omission*), which s/he had a legal duty to do.

The Crown does not have to prove both. Nor do you all have to agree on the same act or omission as long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must find *NOA* not guilty. Your deliberations would be over.

⁴ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

If you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*), or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must go on to the next question.

Where the Crown relies only on an act:

The Crown must prove beyond a reasonable doubt that *NOA* (*specify alleged act*). It is for you to say, based on all the evidence, whether *NOA* (*specify alleged act*).

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must go on to the next question.

Where the Crown relies only on an omission:

The Crown must prove beyond a reasonable doubt that *NOA* had a legal duty to (*specify*), and that *NOA* failed to perform it.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt both that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must go on to the next question.

[5] **Second – Did NOA show a wanton or reckless disregard for the lives or safety of others?**

To prove that NOA showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to establish that NOA meant to kill or seriously harm NOC, or anybody else. Rather, the Crown must prove beyond a reasonable doubt:

1. that NOA’s conduct showed a marked departure from the conduct of a reasonable person in the circumstances;⁵ and
2. that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. “Bodily harm” is any hurt or injury that interferes with a person’s health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account NOA’s individual characteristics or experiences.⁶

(review relevant evidence, especially any explanation for NOA’s conduct, and relate to issue)

Unless you are satisfied beyond a reasonable doubt that what NOA did or failed to do showed a wanton or reckless disregard for the lives or safety of others, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA showed a wanton or reckless disregard for the lives or safety of others, you must go on to the next question.

⁵ In Quebec, the Court of Appeal has said that to prove criminal negligence in driving cases, the Crown must show a departure from the standard of reasonable conduct that is more marked than that required for dangerous driving. See: *R. v. Fortier* (1998), 127 C.C.C. (3d) 217 (Que.C.A.); *R. v. St-Germain*, [1999] JQ 2165 (C.A.); *R. v. Landreville* (1994), 91 C.C.C. (3d) 274 (Que. C.A.); *R. v. Palin* (1999), 135 C.C.C. (3d) 119 (Que. C.A.). This approach was followed by the Ontario Court of Appeal in *R. v. J.L.* 2006 CanLII 805.

⁶ This instruction may have to be modified where there is evidence that the accused did not have either the capacity to appreciate the nature and quality of his or her “intentional” act or the capacity to appreciate the risk that the alleged act or omission entailed. See: *R. v. Naglik*, [1993] 3 S.C.R. 122; 83 C.C.C. (3d) 526, at 546.

[6] **Third – Did *NOA*'s conduct cause *NOC*'s death?**

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁷ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁸ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused *NOC*'s death, you must find *NOA* not guilty of criminal negligence causing death (manslaughter by criminal negligence).

Insert instructions on any included offences.⁹

If you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused *NOC*'s death, you must find *NOA* guilty of criminal negligence causing death (manslaughter by criminal negligence).

⁷ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: "There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* only accelerated up *NOC*'s death from some existing disease or condition." You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.)

⁸ Delete the reference to expert evidence if none has been given.

⁹ Note that in driving cases consideration should be given to *Criminal Code*, s. 662(5) which incorporates included offences that are defined in s. 249 and s. 249.1(3). Other included offences may arise from the wording of the indictment.

Offence 221

Criminal Negligence Causing Bodily Harm

(s. 221)

[1] *NOA* is charged with criminal negligence causing bodily harm. The charge reads:

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of criminal negligence causing bodily harm unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.¹⁰ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* (*specify alleged act or omission*)¹¹;
2. that, in (*specify alleged act or omission*), *NOA* showed wanton or reckless disregard for the lives or safety of others; and
3. that *NOA*'s conduct caused bodily harm to *NOC*.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of criminal negligence causing bodily harm.

¹⁰ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

¹¹ Where the Crown relies on an omission, this element should end with the words, "that it was his/her duty to do".

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt¹² after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of criminal negligence causing bodily harm.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* (*specify alleged act or omission*)?**

Where the Crown relies on both an act and an omission:

This essential element requires the Crown to prove beyond a reasonable doubt either of the following:

1. that *NOA* (*specify alleged act*); or,
2. that *NOA* failed to (*specify alleged omission*), which s/he had a legal duty to do.

The Crown does not have to prove both. Nor do you all have to agree on the same act or omission as long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

The law imposes a duty on (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must find *NOA* not guilty. Your deliberations would be over.

¹² This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

If you are satisfied beyond a reasonable doubt that *NOA* either (*specify alleged act*) or failed to (*specify alleged omission*), which s/he had a legal duty to do, you must go on to the next question.

Where the Crown relies only on an act:

The Crown must prove beyond a reasonable doubt that *NOA* (*specify alleged act*). It is for you to say, based on all the evidence, whether *NOA* (*specify alleged act*).

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* (*specify alleged act*), you must go on to the next question.

Where the Crown relies only on an omission:

The Crown must prove beyond a reasonable doubt that *NOA* had a legal duty to (*specify*), and that *NOA* failed to perform it.

The law imposes a duty upon (*specify category of persons, e.g. parents, guardians, teachers, police officers, etc.*) to (*specify obligation or duty*). First, you must determine whether this duty applies to *NOA* in the circumstances of this case. Second, you must determine whether s/he failed to perform it.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* had a legal duty to (*specify*) and that s/he failed to perform it, you must go on to the next question.

[5] **Second – Did *NOA* show a wanton or reckless disregard for the lives or safety of others?**

To prove that *NOA* showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to prove that *NOA* meant to kill or seriously harm *NOC*, or anybody else. Rather, the Crown must prove beyond a reasonable doubt:

1. that *NOA*'s conduct showed a marked departure from the conduct of a reasonable person in the circumstances;¹³ and
2. that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account *NOA*'s individual characteristics or experiences.¹⁴

(review relevant evidence, especially any explanation for NOA's conduct, and relate to issue)

¹³ In Quebec, the Court of Appeal has said that to prove criminal negligence in driving cases, the Crown must show a departure from the standard of reasonable conduct that is more marked than that required for dangerous driving. See: *R. v. Fortier* (1998), 127 C.C.C. (3d) 217 (Que.C.A.); *R. v. St-Germain*, [1999] JQ 2165 (C.A.); *R. v. Landreville* (1994), 91 C.C.C. (3d) 274 (Que. C.A.); *R. v. Palin* (1999), 135 C.C.C. (3d) 119 (Que. C.A.). This approach was followed by the Ontario Court of Appeal in *R. v. J.L.* 2006 CanLII 805.

¹⁴ This instruction may have to be modified where there is evidence that the accused did not have either the capacity to appreciate the nature and quality of his or her "intentional" act or the capacity to appreciate the risk that the alleged act or omission entailed. See: *R. v. Naglik*, [1993] 3 S.C.R. 122; 83 C.C.C. (3d) 526, at 546.

Unless you are satisfied beyond a reasonable doubt that what *NOA* did (*or*, failed to do) showed a wanton or reckless disregard for the lives or safety of others, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that what *NOA* did (*or*, failed to do) showed a wanton or reckless disregard for the lives or safety of others, you must go on to the next question.

[6] **Third – Did *NOA*'s conduct cause *NOC* bodily harm?**

To prove that *NOA* caused bodily harm to *NOC* the Crown must prove beyond a reasonable doubt that *NOC* suffered bodily harm and that *NOA*'s conduct contributed significantly to it.¹⁵

“Bodily harm” is any hurt or injury that interferes with a person’s health or comfort and is more than just brief or minor.

A person’s conduct may contribute significantly to another person’s bodily harm even though that conduct is not its sole or main cause. You must consider all the evidence concerning the cause of bodily harm to *NOC*, including the expert evidence of *NOW*,¹⁶ in determining whether the Crown has proved that *NOC* suffered bodily harm and that *NOA*'s conduct contributed significantly to it. It is for you to decide.

(review relevant evidence and relate to issue)

¹⁵ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: “There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* did only accelerate *NOC*'s death from some existing disease or condition.” You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.)

¹⁶ Delete the reference to expert evidence if none has been given.

Unless you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused bodily harm to *NOC*, you must find *NOA* not guilty of criminal negligence causing bodily harm.

If you are satisfied beyond a reasonable doubt that *NOA*'s conduct caused bodily harm to *NOC*, you must find *NOA* guilty of criminal negligence causing bodily harm.

Insert instructions on any included offences.¹⁷

¹⁷ Note that in driving cases consideration should be given to *Criminal Code*, s. 662(5) which incorporates included offences that are defined in s. 249 and s. 249.1(3). Other included offences may arise from the wording of the indictment.

HOMICIDE AND RELATED CRIMES

Offence 222.5 **Unlawful Act Manslaughter** **(ss. 222(5)(a); 234)**

[1] *NOA* is charged with manslaughter. The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of manslaughter, unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.¹⁸ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act was dangerous; and
3. that *NOA*'s unlawful act caused *NOC*'s death.¹⁹

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all of these essential elements, you must find *NOA* not guilty of manslaughter.

If you are satisfied beyond a reasonable doubt of all of these essential elements, [and you have no reasonable doubt²⁰ after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of manslaughter.

¹⁸ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.*, eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

¹⁹ If there is an issue about whether *NOC* is dead, further instructions will be required.

²⁰ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did NOA commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.²¹

The unlawful act alleged in this case is *(describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code)*.

*(set out the underlying offence and its essential elements, including any defences)*²²

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that NOA committed the unlawful act of *(specify offence)*, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA committed the unlawful act, you must go on to the next question.

[5] **Second – Was NOA's unlawful act dangerous?**

The Crown must prove beyond a reasonable doubt that NOA's unlawful act was dangerous. To decide whether NOA's unlawful act was dangerous, ask yourselves whether a reasonable person in the same circumstances would have realized that he or she was exposing someone else to a risk of bodily harm.²³ Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than just brief or minor.

²¹ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

²² Where a defence negates the unlawful character of the accused's act, such as accident or self-defence, the appropriate defence instruction should be inserted here. It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35.

²³ The Crown does not have to prove objective foreseeability of the risk of death. See: *R. v. Creighton*, [1993] 3 S.C.R. 3, at 45-6; 83 C.C.C. (3d) 346, at 373.

In deciding what a reasonable person would have realized, you must not take into account *NOA*'s individual characteristics or experiences.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA*'s unlawful act was dangerous, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA*'s unlawful act was dangerous, you must go on to the next question.

[6] **Third – Did *NOA*'s unlawful act cause *NOC*'s death?**²⁴

To prove that *NOA*'s unlawful act caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.²⁵ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,²⁶ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

²⁴ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused's conduct, such as non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here are directed to causation, not participation.

²⁵ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: "There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* did only accelerate *NOC*'s death from some existing disease or condition." You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.).

²⁶ Delete the reference to expert evidence if none has been given.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*'s death, you must find *NOA* not guilty of manslaughter.²⁷

If you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*'s death, you must find *NOA* guilty of manslaughter.

²⁷ Where causation is a live issue, it may be necessary to give an instruction on an included offence arising from the unlawful act itself.

Offence 229.a

Second Degree Murder

(s. 229(a))

[1] *NOA* is charged with second degree murder. The charge reads:

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of second degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.²⁸ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOC*'s death; and
3. that *NOA* had the intent required for murder.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of second degree murder.

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt²⁹ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find *NOA* guilty of second degree murder.

²⁸ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

²⁹ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did NOA commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.³⁰

The unlawful act alleged in this case is (*describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code*).

(*set out the underlying offence and its essential elements, including any defences.*)³¹

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that NOA committed the unlawful act of (*specify offence*), you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA committed the unlawful act, you must go on to the next question.

³⁰ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

It is usually unnecessary in murder cases to include an instruction that the unlawful act must be objectively dangerous. Where this is an issue, include an instruction along the lines of Offence 222.5[5] (the second essential element of unlawful act manslaughter).

³¹ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

[5] **Second – Did NOA’s unlawful act cause NOC’s death?**³²

To prove that *NOA* caused *NOC*’s death, the Crown must prove beyond a reasonable doubt that *NOA*’s conduct contributed significantly to *NOC*’s death.³³ A person’s conduct may contribute significantly to another person’s death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*’s death, including the expert evidence of *NOW*,³⁴ in determining whether the Crown has proved that *NOA*’s conduct contributed significantly to *NOC*’s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*’s death, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*’s death, you must go on to the next question.

³² Where the defence advanced relates to the accused’s participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused’s conduct as, for example, non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here relate to causation, not participation.

³³ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: “There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*’s conduct no longer being a contributing cause of *NOC*’s death. If you find that *NOA*’s conduct contributed significantly to *NOC*’s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*’s life. Nor does it matter that what *NOA* did only accelerate *NOC*’s death from some existing disease or condition.” You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.).

³⁴ Delete the reference to expert evidence if none has been given.

[6] **Third – Did *NOA* have the intent required for murder?**

To prove that *NOA* had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that *NOA* meant to cause *NOC*'s death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely³⁵ to cause his/her death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that *NOA* meant to kill *NOC*, or that *NOA* meant to cause *NOC* bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOC* and proceeded despite his/her knowledge of that risk.

The Crown does not have to prove both. Nor do you all have to agree on the same intent, so long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may infer, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.³⁶ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* had one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

³⁵ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089, (1989), 51 C.C.C. (3d) 417 (S.C.C.).

³⁶ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(*review relevant evidence and relate to the issue*³⁷)

Unless you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder, you must find *NOA* not guilty of second degree murder, but guilty of the included offence of manslaughter.

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder [and you have no reasonable doubt with respect to (*specify defence*)], you must find *NOA* guilty of second degree murder.³⁸

³⁷ Where a defence advanced relates to the accused's mental state, for example, intoxication or diminished capacity, the appropriate instruction should be inserted here and adjustments made to the common sense inference of intention.

According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the "common sense inference" of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

In some cases it will be appropriate to give a "rolled-up" charge in which the cumulative effect of evidence relating to certain defences such as mental disorder, intoxication, self-defence and provocation, short of full defences, may still be considered in deciding whether the accused formed the requisite intent.

³⁸ Where provocation or intoxication is raised, the appropriate instruction must be given here.

Offence 229.b
Second Degree Murder
(Unintended Victim)
(s. 229(b))

[1] *NOA* is charged with second degree murder. The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of second degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.³⁹ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOAC*'s⁴⁰ death; and
3. that *NOA* had the intent required for the murder of *NOIC*⁴¹.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all of these essential elements, you must find *NOA* not guilty of second degree murder.

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁴² after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of second degree murder.

³⁹ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

⁴⁰ *NOAC* refers to the actual victim, the person who died.

⁴¹ *NOIC* refers to the intended victim, the person whom the accused intended to kill.

⁴² This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did NOA commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.⁴³

The unlawful act alleged in this case is *(describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code)*.

*(set out the underlying offence and its essential elements, including any defences.)*⁴⁴

(review evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that NOA committed the unlawful act of *(specify offence)*, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA committed the unlawful act, you must go on to the next question.

⁴³ The unlawful act could be a violation of either a provincial or federal statute, but not an offence of absolute liability.

It is usually unnecessary in murder cases to include an instruction that the unlawful act must be objectively dangerous. Where this is an issue, include an instruction along the lines of Offence 222.5[5] (the second essential element of unlawful act manslaughter).

⁴⁴ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

[5] **Second – Did *NOA*'s unlawful act *cause NOAC*'s death?**⁴⁵

To prove that *NOA* caused *NOAC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOAC*'s death.⁴⁶ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOAC*'s death, including the expert evidence of *NOW*,⁴⁷ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOAC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOAC*'s death, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* caused *NOAC*'s death, you must go on to the next question.

⁴⁵ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused's conduct such as, for example, in the case of non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here relate to causation, not participation.

⁴⁶ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: "There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* did only accelerate *NOC*'s death from some existing disease or condition." You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.)

⁴⁷ Delete the reference to expert evidence if none has been given.

[6] **Third – Did *NOA* have the intent required for murder?**

To prove that *NOA* had the intent required for murder, the Crown has to prove beyond a reasonable doubt either:

1. that *NOA* meant to cause *NOIC*'s death, or
2. that *NOA* meant to cause *NOIC* bodily harm that s/he knew was likely⁴⁸ to cause his/her death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt that *NOA* meant to kill *NOIC*, or that *NOA* meant to cause *NOIC* bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOIC* and proceeded despite his/her knowledge of that risk.

The Crown does not have to prove both. Nor do you have to agree on the same intent, so long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁴⁹ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* had one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOIC* was likely to die. It is for you to decide.

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder in relation to *NOIC*, it makes no difference in law that *NOA* actually killed *NOAC* instead.

⁴⁸ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074 at 1089, (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁴⁹ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(review relevant evidence and relate to issue) ⁵⁰

Unless you are satisfied beyond a reasonable doubt that when *NOA* killed *NOAC*, *NOA* had the intent required for murder of *NOIC*, you must find *NOA* not guilty of second degree murder.

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder of *NOIC* [and you have no reasonable doubt with respect to *(specify defence)*], you must find *NOA* guilty of second degree murder. ⁵¹

⁵⁰ Where a defence advanced relates to the accused's mental state, for example, intoxication or diminished capacity, the appropriate instruction should be inserted here and adjustments made to the use of the common sense inference of intention.

According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the "common sense inference" of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference. In some cases it will be appropriate to give a "rolled-up" charge in which the cumulative effect of evidence relating to certain defences such as mental disorder, intoxication, self-defence and provocation, short of full defences, may still be considered in deciding whether the accused formed the requisite intent.

⁵¹ Where provocation is raised, the appropriate instruction must be given here.

Offence 231.2
First Degree Murder
Planned and Deliberate
(s. 231(2))

[1] NOA is charged with first degree murder. The charge reads:

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁵² Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOC*'s death;
3. that *NOA* had the intent required for murder; and
4. that *NOA*'s murder of *NOC* was both planned and deliberate.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of first degree murder.

⁵² Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁵³ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find *NOA* guilty of first degree murder.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.⁵⁴

The unlawful act alleged in this case is (*describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code*).

(*set out the underlying offence and its essential elements, including any defences.*)⁵⁵

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* committed the unlawful act of (*specify offence*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* committed the unlawful act, you must go on to the next question.

⁵³ This instruction will have to be modified where the accused has a legal burden of proof, such as mental disorder and non-insane automatism.

⁵⁴ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

It is usually unnecessary in murder cases to include an instruction that the unlawful act must be objectively dangerous. Where this is an issue, include an instruction along the lines of Offence 222.5[5] (the second essential element of unlawful act manslaughter).

⁵⁵ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

[5] **Second – Did NOA’s unlawful act cause NOC’s death?**⁵⁶

To prove that *NOA* caused *NOC*’s death, the Crown must prove beyond a reasonable doubt that *NOA*’s conduct contributed significantly to *NOC*’s death.⁵⁷ A person’s conduct may contribute significantly to another person’s death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*’s death, including the expert evidence of *NOW*,⁵⁸ in determining whether the Crown has proved that *NOA*’s conduct contributed significantly to *NOC*’s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*’s death, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*’s death, you must go on to the next question.

⁵⁶ Where the defence advanced relates to the accused’s participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused’s conduct as, for example, non-mental disorder automatism, the applicable instruction should be included here. The instructions here relate to causation not participation.

⁵⁷ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: “There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*’s conduct no longer being a contributing cause of *NOC*’s death. If you find that *NOA*’s conduct contributed significantly to *NOC*’s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*’s life. Nor does it matter that what *NOA* did only accelerate *NOC*’s death from some existing disease or condition.” You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.).

⁵⁸ Delete the reference to expert evidence if none has been given.

[6] **Third – Did *NOA* have the intent required for murder?**

To prove that *NOA* had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that *NOA* meant to cause *NOC's* death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁵⁹ to cause his/her death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt that *NOA* meant to kill *NOC*, or that *NOA* meant to cause *NOC* bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOC* and proceeded despite his/her knowledge of that risk.

The Crown does not have to prove both. Nor do you all have to agree on the same intent, so long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁶⁰ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*) you have a reasonable doubt whether *NOA* had the one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

⁵⁹ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁶⁰ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(*review and relate relevant evidence to the issue*⁶¹)

Unless you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder, you must find *NOA* not guilty of murder, but guilty of the included offence of manslaughter.

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder, you must go on to the next question.

[7] **Fourth – Was *NOA*'s murder of *NOC* both planned and deliberate?**⁶²

To prove first degree murder, the Crown must prove beyond a reasonable doubt not only that *NOA* had the intent required for murder, but also that the murder was both planned and deliberate.⁶³ “Planning and deliberation” are not the same as “intention”. For example, a murder committed intentionally, but on a sudden impulse or without prior consideration, is not planned and deliberate.

It is the murder itself that must be both planned and deliberate, not something else that *NOA* did (*e.g. the underlying offence, if there is one*).

The words “planned” and “deliberate” do not mean the same thing.

“Planned” means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed.

⁶¹ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

In some cases it will be appropriate to give a “rolled-up” charge in which the cumulative effect of evidence relating to certain defences such as mental disorder, intoxication, self-defence and provocation, short of full defences, may still be considered in deciding whether the accused formed the requisite intent.

⁶² Where the offence alleged is a contract killing, reference should be made to s. 231(3), either in addition or as an alternative to the instructions set out under this heading.

⁶³ Planning and deliberation applies to both intents to commit murder – ss. 229(a)(i) and (ii). See: *R. v. Nygaard and Schimmens* [1989] 2 S.C.R. 1074, (1989), 51 C.C.C. (3d) 489 (S.C.C.).

The plan does not have to be complicated. It may be very simple. Consider the time it took to develop the plan, not how much or little time it took between developing it and carrying it out. One person may prepare a plan and carry it out immediately. Another person may prepare a plan and wait a while, even quite a while, to carry it out.

“Deliberate” means “considered, not impulsive”, “slow in deciding”.

It is for you to say whether the murder of *NOC* was both planned and deliberate. To decide this issue, you must consider all the evidence, including [*specify evidence of intoxication, or mental illness short of a s. 16 defence of mental disorder, self-defence or provocation*]⁶⁴ and anything said or done in the circumstances.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that the murder of *NOC* was both planned and deliberate, you must find *NOA* not guilty of first degree murder, but guilty of second degree murder.

If you are satisfied beyond a reasonable doubt that the murder of *NOC* was both planned and deliberate, [and you have no reasonable doubt with respect to (*specify defence*)], you must find *NOA* guilty of first degree murder.

⁶⁴ Where there is evidence of intoxication, mental illness short of a s. 16 defence of mental disorder, self-defence and/or provocation, the jury must be instructed separately as to how this might affect planning and deliberation as well as intention. In particular, even if the jury finds intention proved beyond a reasonable doubt, intoxication or mental illness short of a s. 16 defence of mental disorder, self-defence and provocation may still give rise to a reasonable doubt regarding planning and deliberation: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 30; *R. v. Wallen*, [1990] 1 S.C.R. 827; (1990), 54 C.C.C. (3d) 383 (S.C.C.).

Offence 231.4
First Degree Murder of Police Officer
(s. 231(4))

[1] *NOA* is charged with first degree murder. The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁶⁵ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOC*'s death;
3. that *NOA* had the intent required for murder;
4. that, at the time of the murder, *NOC* was a police officer acting in the course of his/her duties; and
5. that, at the time of the murder, *NOA* knew that *NOC* was a police officer acting in the course of his/her duties.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of first degree murder.

⁶⁵ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁶⁶ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find *NOA* guilty of first degree murder.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did *NOA* commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.⁶⁷

The unlawful act alleged in this case is (*describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code*).

(*set out the underlying offence and its essential elements, including any defences*)⁶⁸

(*review relevant evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that *NOA* committed the unlawful act of (*specify offence*), you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* committed the unlawful act, you must go on to the next question.

⁶⁶ This instruction will have to be modified where the accused has a legal burden of proof, such as mental disorder and non-insane automatism.

⁶⁷ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

It is usually unnecessary in murder cases to include an instruction that the unlawful act must be objectively dangerous. Where this is an issue, include an instruction along the lines of Offence 222.5[5] (the second essential element of unlawful act manslaughter).

⁶⁸ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 S.C.C. 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

[5] **Second – Did NOA’s unlawful act cause NOC’s death?**⁶⁹

To prove that NOA caused NOC’s death, the Crown must prove beyond a reasonable doubt that NOA’s conduct contributed significantly to NOC’s death.⁷⁰ A person’s conduct may contribute significantly to another person’s death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of NOC’s death, including the expert evidence of NOW,⁷¹ in determining whether the Crown has proved that NOA’s conduct contributed significantly to NOC’s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that NOA caused NOC’s death, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA caused NOC’s death, you must go on to the next question.

⁶⁹ Where the defence advanced relates to the accused’s participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused’s conduct, as for example, non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here are directed to causation, not participation.

⁷⁰ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: “There must not be anything that somebody else does later (or some other subsequent event) that results in NOA’s conduct no longer being a contributing cause of NOC’s death. If you find that NOA’s conduct contributed significantly to NOC’s death, it does not matter that proper or timely (medical) treatment might have saved NOC’s life. Nor does it matter that what NOA did only sped up NOC’s death from some existing disease or condition.” You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.).

⁷¹ Delete the reference to expert evidence if none has been given.

[6] **Third – Did *NOA* have the intent required for murder?**

To prove that *NOA* had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that *NOA* meant to cause *NOC's* death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁷² to cause his death *NOC*, and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt that *NOA* meant to kill *NOC*, or that *NOA* meant to cause *NOC* bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOC* and proceeded despite his/her knowledge of that risk.

The Crown does not have to prove both. Nor do you all have to agree on the same intent, as long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁷³

However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* had the intent required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

⁷² The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074 at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁷³ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(review and relate relevant evidence to the issue⁷⁴)

Unless you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder, you must find *NOA* not guilty of first-degree murder, but guilty of the included offence of manslaughter.

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder, you must go on to the next question.

[7] Fourth – Was *NOC* a police officer acting in the course of his/her duties?

The Crown must prove beyond a reasonable doubt two things about *NOC* at the time s/he was killed:

1. that *NOC* was a police officer; and
2. that *NOC* was acting in the course of his/her duties when s/he was killed.

Both must be proven. One is not enough.

Consider first whether *NOC* was a police officer at the time.

(review relevant evidence and relate to issue)

It is not enough for the Crown to prove that *NOC* was a police officer. The Crown must also prove that *NOC* was a police officer acting in the course of his/her duties.

“Acting in the course of his/her duties” includes the whole time span of a police officer’s work shift. It also includes any activity that a police officer does that is related to the performance of a duty, or to the ability of the officer to perform his/her duty. It requires proof of something more than the mere fact that *NOC* was a police officer. The officer must be acting in the course of his/her duties.

⁷⁴ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

In some cases it will be appropriate to give a “rolled up” charge in which the cumulative effect of evidence relating to certain defences such as mental disorder, intoxication, self-defence and provocation, short of full defences, may still be considered in deciding whether the accused formed the requisite intent.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that, when s/he was killed, *NOC* was a police officer acting in the course of his/her duties, you must find *NOA* not guilty of first degree murder, but guilty of second degree murder. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that when s/he was killed, *NOC* was a police officer acting in the course of his/her duties, you must go on to the next question.

[8] Fifth – Did *NOA* know that *NOC* was a police officer acting in the course of his/her duties?

The Crown must prove beyond a reasonable doubt that *NOA* was aware that *NOC* was a police officer acting in the course of his/her duties. To prove that *NOA* was aware that *NOC* was a police officer acting in the course of his/her duties, the Crown must prove one of the following:

1. that *NOA* actually knew that *NOC* was a police officer acting in the course of his/her duties; or
2. that *NOA* knew there was a risk that *NOC* was likely a police officer acting in the course of his/her duties, and that *NOA* proceeded despite that risk;⁷⁵ or
3. that *NOA* was aware of indications that *NOC* was a police officer acting in the course of his/her duties, but deliberately chose to ignore them because s/he did not want to know the truth.

Any one of these is sufficient to establish *NOA*'s awareness that *NOC* was a police officer acting in the course of his/her duties. You do not all have to agree on the same one. If each of you is satisfied about any one of them beyond a reasonable doubt, the Crown will have proved the essential element of knowledge.

⁷⁵ See: *R. v. Collins* (1989), 48 C.C.C. (3d) 343 (Ont.C.A.), at 372. Further, the instruction here includes “likely” which is a higher standard of proof than “might” or “could”. This standard has been included because the offence is first degree murder.

In deciding this issue, you must consider all the evidence, including anything said or done in the circumstances.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* knew that *NOC* was a police officer acting in the course of his/her duties, you must find *NOA* not guilty of first degree murder, but guilty of second degree murder.

If you are satisfied beyond a reasonable doubt that *NOA* knew that *NOC* was a police officer acting in the course of his/her duties, [and you have no reasonable doubt with respect to *(specify defences)*], you must find *NOA* guilty of first degree murder.

Offence 231.5

First Degree Murder in the Commission of Another Offence (s. 231(5))

[1] *NOA* is charged with first degree murder. The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁷⁶ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOC*'s death;
3. that *NOA* had the intent required for murder;
4. that *NOA* committed *(specify listed offence or attempt)*; and
5. that the *(specify listed offence or attempt)* and the murder(?) of *NOC* were part of the same series of events;
6. [that *NOA* actively participated in the killing.]⁷⁷

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find *NOA* not guilty of first degree murder.

⁷⁶ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, etc.). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the Criminal Code and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

⁷⁷ This element should be included only where there is more than one perpetrator. See: *R. v. Harbottle*, [1993] 3 S.C.R. 306.

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁷⁸ after considering the defence(s) (specify defences) about which I will instruct you], you must find NOA guilty of first degree murder.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did NOA commit an unlawful act?**

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.⁷⁹

The unlawful act alleged in this case is *(describe briefly unlawful act alleged including a reference to the relevant statute, e.g. the Criminal Code)*.

*(set out the underlying offence and its essential elements, including any defences.)*⁸⁰

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that NOA committed the unlawful act of *(specify offence)*, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA committed the unlawful act, you must go on to the next question.

⁷⁸ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

⁷⁹ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

It is usually unnecessary in murder cases to include an instruction that the unlawful act must be objectively dangerous. Where this is an issue, include an instruction along the lines of Offence 222.5[5] (the second essential element of unlawful act manslaughter).

⁸⁰ Where a defence negates the unlawful character of the accused's act, such as accident or self-defence, the appropriate instruction should be inserted here. It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35.

[5] **Second – Did *NOA*'s unlawful act cause *NOC*'s death?**⁸¹

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁸² A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁸³ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*'s death, you must find *NOA* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*'s death, you must go on to the next question.

⁸¹ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused's conduct, as for example, non-mental disorder automatism, the applicable Instruction should be inserted here. The instructions in this specimen are directed to causation, not participation.

⁸² Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it.

If the facts of the case require it, you may have to include one or more of the following statements: "There must not be anything that somebody else does later (or some other subsequent event) that results in *NOA*'s conduct no longer being a contributing cause of *NOC*'s death. If you find that *NOA*'s conduct contributed significantly to *NOC*'s death, it does not matter that proper or timely (medical) treatment might have saved *NOC*'s life. Nor does it matter that what *NOA* did only sped up *NOC*'s death from some existing disease or condition." You may also wish to refer to *Criminal Code*, ss. 224-228. In Nova Scotia, the Court of Appeal has prescribed a more extensive instruction on intervening cause which has not been applied in other provinces: See: *R. v. Reid*, [2003] NSCA 104, [2003] N.S.J. No. 360 (C.A.).

⁸³ Delete the reference to expert evidence if none has been given.

[6] **Third – Did *NOA* have the intent required for murder?**

To prove that *NOA* had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that *NOA* meant to cause *NOC*'s death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁸⁴ to cause his death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt that *NOA* meant to kill *NOC*, or that *NOA* meant to cause *NOC* bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOC* and proceeded despite his/her knowledge of that risk.

The Crown does not have to prove both. Nor do you all have to agree on the same intent, so long as each of you is satisfied that one or the other has been proven beyond a reasonable doubt.

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁸⁵ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (specify evidence of intoxication, mental disorder or other), you have a reasonable doubt whether *NOA* had the intent required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

⁸⁴ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁸⁵ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

*(review and relate relevant evidence to the issue*⁸⁶)

Unless you are satisfied beyond a reasonable doubt that NOA had the intent required for murder, you must find *NOA* not guilty of murder, but guilty of included offence of manslaughter.

If you are satisfied beyond a reasonable doubt that NOA had the intent required for murder, you must go on to the next question.

[7] **Fourth – Did *NOA* commit (or, attempt to commit) (specify listed offence)?**

*(insert instruction on elements of listed offence)*⁸⁷

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* committed (or, attempted to commit) (specify listed offence), you must find *NOA* not guilty of first degree murder, but guilty of second degree murder. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* committed (or, attempted to commit) (specify listed offence), you must go on to the next question.

[8] **Fifth – Were the (specify listed offence or attempt) and the killing of *NOC* part of the same series of events?**

In order for *NOA* to be guilty of first degree murder, the Crown must also prove beyond a reasonable doubt that *NOA* murdered *NOC* while s/he was committing the offence of (specify listed offence or attempt).

⁸⁶ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

In some cases it will be appropriate to give a “rolled up” charge in which the cumulative effect of evidence relating to certain defences such as mental disorder, intoxication, self-defence and provocation, short of full defences, may still be considered in deciding whether the accused formed the requisite intent.

⁸⁷ The listed offence may be an attempt or the completed offence. The essential elements may be found in the relevant Offence Instruction.

This does not mean that the murder and the (*specify listed offence or attempt*) had to happen at exactly the same moment, but it does mean that the murder and the (*specify listed offence or attempt*) must have been closely connected with one another, in the sense that they must have been part of the same series of events.⁸⁸

To answer this question, you have to consider the entire course of *NOA*'s conduct. Look at the whole series of events in deciding whether the killing and the (*specify listed offence or attempt*) were part of a continuous series of events that was a single ongoing transaction⁸⁹.

(*review evidence and relate to issue*)

Unless you are satisfied beyond a reasonable doubt that the (*specify listed offence or attempt*) and murder of *NOC* were part of the same series of events, you must find *NOA* not guilty of first degree murder, but guilty of second degree murder.

Where there is only one perpetrator, give the following instruction:

If you are satisfied beyond a reasonable doubt that the (*specify listed crime or attempt*) and murder of *NOC* were part of the same series of events, you must find *NOA* guilty of first degree murder.

⁸⁸ As long as the connection exists it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same. See *R. v. Russell*, [2001] 2 S.C.R. 804. The order of the offences is also immaterial where the connection exists. See: *R. v. Westergard* (2004), 24 C.R. (6th) 375 (Ont.C.A.).

⁸⁹ Where there is a live issue as to whether the offence and the murder are part of the same transaction, see: *R. v. Russell*, [2001] 2 S.C.R. 804, and *R. v. Paré*, [1987] 2 S.C.R. 618.

Where there is more than one perpetrator, give the following instruction:

If you are satisfied beyond a reasonable doubt that *the (specify listed crime or attempt)* and murder of *NOC* were part of the same series of events, you must go on to the next question.

[9] **Sixth – Did *NOA* actively participate in the killing?**⁹⁰

The Crown must prove beyond a reasonable doubt that (*NOA*)’s participation in the murder was a substantial cause of *NOC*’s death.

To prove this essential element, the Crown must show that *NOA* played an active role in the events that brought about *NOC*’s death. It is not enough that *NOA* was present, or that s/he played some minor role in the events.

To decide this issue, you must consider all the evidence.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* actively participated in the killing, you must find *NOA* not guilty of first degree murder, but guilty of second degree murder. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *NOA* actively participated in the killing, you must find *NOA* guilty of first degree murder.

⁹⁰ This instruction will be necessary only where there is more than one participant. See: *R. v. Harbottle*, [1993] 3 S.C.R. 306. Where there is evidence of more than one participant, the earlier instructions will need to include the provisions of *Criminal Code*, s. 21 (parties to an offence).

Offence 239

Attempted Murder

(s. 239)

[1] *NOA* is charged with attempted murder. The charge reads:

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of attempted murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁹¹ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* meant to kill *NOC*; ⁹²
2. that *NOA* *(describe alleged conduct)*. ⁹³

Unless you are satisfied beyond a reasonable doubt that the Crown has proved both of these essential elements, you must find *NOA* not guilty of attempted murder.

If you are satisfied beyond a reasonable doubt of both of these essential elements, [and you have no reasonable doubt⁹⁴ after considering the defence(s) *(specify defences)* about which I will instruct you], you must find *NOA* guilty of attempted murder.

⁹¹ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment. However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R. v. B. (G)*, [1990] 2 S.C.R. 3.

⁹² In most cases, the actual victim and the intended victim are the same person. If not, Offence 229.b may be adapted for use here.

⁹³ Section 24(2) requires the judge to decide, as a matter of law, whether the accused's conduct amounts to an attempt or mere preparation. It is up to the jury, however, to make the necessary findings of fact from which the legal conclusion follows.

⁹⁴ This instruction will have to be modified where the accused has a legal burden of proof, such as mental disorder and non-insane automatism.

[3] To determine whether the Crown has proved these essential elements, consider the following questions:

[4] **First – Did NOA mean to kill NOC?**

The Crown must prove beyond a reasonable doubt that NOA meant to kill NOC.⁹⁵

To determine whether NOA meant to kill NOC, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁹⁶ However, you are not required to draw that inference about NOA. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether NOA meant to kill NOC. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that NOA meant to kill NOC, you must find NOA not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that NOA meant to kill NOC, you must go on to the next question.

[5] **Second – Did NOA (*describe alleged conduct*)?**

In this case, NOA is alleged to have (*describe briefly conduct alleged to amount to an attempt*)⁹⁷. If you are satisfied beyond a reasonable doubt that the accused (*identify conduct*), then this amounts to an attempt to kill NOC.

⁹⁵ Where the indictment includes a count or counts of murder, in addition to one or more counts of attempted murder, it may be advisable to distinguish between the mental elements of each crime. The following instruction may make the point:
“Unlike murder, where proof of either of two intents is sufficient, there is only one intent that will do for attempted murder: an intent to kill”.

⁹⁶ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

⁹⁷ For example, “stabbed NOC in the chest” or “fired two shots at NOC”. The description should reflect what is required to constitute an attempt.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA (identify conduct)*, you must find *NOA* not guilty of attempted murder.⁹⁸

If you are satisfied beyond a reasonable doubt that *NOA (identify conduct)*, you must find *NOA* guilty of attempted murder.

⁹⁸ A count that makes no reference to the means by which the offence was committed may not give rise to any included offences, or only attempting unlawfully to cause bodily harm. See: *R. v. Simpson* (No. 2) (1981), 58 C.C.C. (2d) 122, 143 (Ont. C.A.) per Martin, J.A.; and *R. v. Colburne* (1991), 66 C.C.C. (3d) 235 (Que. C.A.). Where the wording of the indictment and the evidence leave open the possibility of an included offence, the relevant instruction should be inserted here.