Canadian Judicial Council

Final Instructions

(Revised – June 2012)

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Glossary

NOA = Name of Accused

NOC = Name of Complainant

NOD = Name of Declarant

NOW = Name of Witness

NOAW = Name of Accused Witness

NO3P = Name of Third Party

III - FINAL INSTRUCTIONS

8. Duties of Jurors

8.1 Introduction

(Last revised June 2012)

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

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

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

[4][1] First, I will explain your duties as jurors, and tell you about the general rules of law that apply to all jury cases.

[5] Second, I will advise you of the specific rules of law that govern this case. I will explain how those rules apply to the evidence. Even if I do not refer to all the evidence governed by a specific rule, you must apply each rule to all the evidence to which it relates.

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

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

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

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

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

8.2 Respective Duties of Judge and Jury

(Last revised June 2012)

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

[2] As judge of the law, it is my duty to preside over the trial. I am the sole judge of the law, and it is your duty to accept the law as I explain it to you. If I am wrong about the law, my error can be corrected by the court of appeal, because my instructions are recorded and will be available if there is an appeal. However, your deliberations are secret. If you wrongly apply the law there will be no record of your discussions for the court of appeal to review. Therefore, it is important that you accept the law from me without question; you must not use your own ideas about what the law is or should be.

[3] It is your duty to decide whether the Crown has proved *NOA*'s guilt beyond a reasonable doubt. It is not my role to express any view on the guilt or innocence of *NOA*. If I do so inadvertently, you must ignore it.

[4] You have now heard all the evidence that will be called in this case. There will be no more evidence. You must make your decision based on all the evidence presented to you in the courtroom and only on that evidence. I might comment on or express an opinion about the evidence. If I do that, you do not have to agree with me.

8.3 Prejudice and Sympathy

(Last revised June 2012)

[1] You must consider the evidence and make your decision without sympathy, prejudice or fear. You must not be influenced by public opinion. Your duty as jurors is to assess the evidence impartially.

8.4 Outside Information

(Last revised June 2012)

[1] The only information that you may consider is the evidence that has been put before you in the courtroom. You must disregard completely any information from radio, television, or newspaper accounts, Internet sources, Twitter, Facebook, or any other social media, that you have heard, seen or read about in respect of this case, or about any of the persons or places involved or mentioned in it. Any other information about the case from outside the courtroom, is not evidence.[2]

[2] As a precaution, most judges ensure that jurors do not take cellphones or other electronic devices into the jury room.

8.5 Sentence[3]

(Last revised June 2012)

[1] Possible penalties for the offence[s] charged have no place in your discussions or in your decision.

[3] This is an optional instruction to be given if the possible penalties have been referred to during the trial.

8.6 Jurors' Approach to Task

(Last revised June 2012)

[1] It is your duty to consult with one another and to try to reach a just verdict according to the law. Your foreperson will preside and assist you in the orderly discussion of the issues. You should each have the opportunity to express your own points of view without being unnecessarily repetitive. When you are discussing the issues, you should listen attentively to what your fellow jurors have to say. Approach your duties in a rational way and put your own points of view forward in a calm and reasonable manner. Avoid taking firm positions too early in your deliberations. Consider the views of your fellow jurors with an open mind before reaching your own decision.

[2] Any verdict you reach must be unanimous [on a count or counts]. Unless you are unanimous in finding *NOA* not guilty, you cannot acquit him/her. Nor can you return a verdict of guilty unless you agree unanimously that s/he is guilty.

[3] Each of you must make your own decision whether *NOA* is guilty or not guilty. You should reach your decision only after consideration of the evidence with your fellow jurors. Your duty is to try to reach a unanimous verdict. However, you are entitled to disagree if you cannot reach a unanimous verdict after a sincere consideration of the facts and the law and an honest discussion with your fellow jurors.

8.7 Judge's Review of Evidence

(Last revised June 2012)

[1] I will review some parts of the evidence and relate it to the issues you must decide. I might mention evidence you think is insignificant or not mention evidence you think is important. Counsel have also referred to the evidence in closing submissions. I remind you that you must consider all of the evidence, not just the parts that have been mentioned. If your recollection of the evidence differs from what counsel or I have said, it is your memory and understanding of the evidence that counts in this case - not mine or that of counsel.

9. General Principles

9.1 Presumption of Innocence

(Last revised June 2012)

(This instruction is merged in 9.2, Presumption of Innocence, Burden of Proof, and Reasonable Doubt.)

9.2 Presumption of Innocence, Burden of Proof and Reasonable Doubt

(Last revised June 2012)

[1] The first and most important principle of law applicable to every criminal case is the presumption of innocence. *NOA* enters the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the Crown, on the evidence put before you, satisfies you beyond a reasonable doubt that s/he is guilty.

[2] Two rules flow from the presumption of innocence. One is that the Crown bears the burden of proving guilt. The other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[3] The burden of proof rests with the Crown and never shifts. There is no burden on *NOA* to prove that s/he is innocent. S/he does not have to prove anything.[4]

[4] Now what does the expression "beyond a reasonable doubt" mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[5] It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. You must not find *NOA* guilty unless you are sure s/he is guilty. Even if you believe that *NOA* is probably guilty or likely guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to *NOA* and find him/her not guilty because the Crown has failed to satisfy you of his/her guilt beyond a reasonable doubt.

[6] In a few moments I will explain the essential elements that the Crown must prove beyond a reasonable doubt to establish *NOA's* guilt. For the moment, the important point for you to understand is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. You must decide, looking at the evidence as a whole, whether the Crown has proved *NOA's* guilt beyond a reasonable doubt.

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

[7] If you have a reasonable doubt about *NOA's* guilt arising from the evidence, the absence of evidence, or the credibility or the reliability of one or more of the witnesses, then you must find him/her not guilty.

[8] In short:

- The presumption of innocence applies at the beginning and continues throughout the trial, unless you are satisfied, after considering the whole of the evidence, that the Crown has displaced the presumption of innocence by proof of guilt beyond a reasonable doubt.

- If, based upon the evidence, you are sure that *NOA* is guilty of the offence(s) with which s/he is charged, that demonstrates that you are satisfied of his/her guilt beyond reasonable doubt, and you must find him/her guilty of that offence.

- If you have a reasonable doubt whether *NOA* is guilty of the offence(s) with which s/he is charged, you must give him/her the benefit of that doubt and find him/her not guilty.

9.3 Reasonable Doubt

(Last revised June 2012)

(This instruction is merged in 9.2, Presumption of Innocence, Burden of Proof, and Reasonable Doubt.)

9.4 Assessment of Evidence

(Last revised June 2012)

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

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

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

[4] Does the witness have any reason to give evidence that is more favourable to one side than to the other?[5]

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

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

[7][6] Did the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than

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[5] It must not be suggested to the jury that they can assume that the accused, by virtue of his or her status as the accused, would lie to escape conviction, as this undermines the presumption of innocence: *R.* v. *Laboucan* [2010] 1 S.C.R. 397, at paras 14-18.

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

personal observation?

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

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

[10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.[7]

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

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

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

9.5 Reasonable Doubt and Credibility

(Last revised June 2012)

[1] I am going to speak to you for just a moment about reasonable doubt and credibility. Reasonable doubt applies to the issue of credibility. On any given point, you may believe a witness, disbelieve a witness, or not be able to decide. You need not fully believe or disbelieve one witness or a group of witnesses. If you have a reasonable doubt about *NOA*'s guilt arising from the credibility of the witnesses, then you must find him/her not guilty.

9.6 Testimony of Person Charged (The *W. (D.)* Instruction)[8]

(Last revised June 2012)

[1] You have heard *NOA* testify. When a person charged with an offence testifies, you must assess that evidence as you would assess the testimony of any other witness, keeping in mind my instructions to you earlier about the credibility of witnesses. You may accept all, part, or none of *NOA*'s evidence.[9]

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

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

In "he said/she said" cases it has been suggested in R v. C.W.H. (1991), 68 C.C.C. (3d) 146 (B.C.C.A.) *that the following instruction be added*:

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

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

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8 *R.* v. *W. (D)*, [1991] 1 S.C.R. 742. This instruction is appropriate where the evidence of the accused constitutes a complete defence to the offence charged. Where the testimony of the accused would only lead to a guilty verdict on an included offence based on, for example, intoxication or provocation, this instruction will need to be modified.

9 It must not be suggested to the jury that they can assume that the accused, by virtue of his/her status as the accused, would lie to escape conviction, as this undermines the presumption of innocence: *R.* v. *Laboucan* [2010] 1 S.C.R. 397, at paras 14-18.

9.7 Co-Accused's Comment on the Failure of Person Charged to Testify (The *R.* v. *Prokofiew* Instruction)[10]

(November 2012)

[1] In his closing address *NOA2*'s counsel invited you to infer *NOA1*'s guilt from his/her failure to testify. This submission is wrong in law and you must ignore it. You cannot use *NOA1*'s silence at trial as evidence of his/her guilt.[11]

[2] Every accused person has the right to remain silent at trial. A person charged with an offence does not have to testify and has no obligation to prove anything. The burden of proof rests on the Crown from beginning to end.

[3] You cannot find *NOA1* guilty of an offence unless you are satisfied on the basis of all the evidence that his/her guilt has been proven beyond a reasonable doubt. In reaching your verdict, you must not use *NOA1*'s silence at trial as evidence of his/her guilt.

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[10]. This is a remedial instruction, based on *R.* v. *Prokofiew*, 2012 SCC 49, that should be used only where there are multiple accused and counsel for one of the accused has improperly invited the jury to infer the guilt of another accused from his or her failure to testify.

[11]. The instruction above corrects an improper comment that has been made before the jury. Even if there has been no improper comment on a co-accused's failure to testify, the judge has a discretion to give a limiting instruction where there is a realistic concern that the jury may place evidential value on an accused's decision not to testify (see: *Prokofiew*, at paras 3-11). In crafting the instruction, care must be taken not to undermine the defence of the testifying accused. A possible instruction would use paragraphs [2]-[3] above, but substitute the following for paragraph [1], although this may need to be modified in light of the particular circumstances of the case:

> In closing submissions you have heard mention of the fact that one of the accused did not testify. Bear in mind, however, that *NOA1*'s silence at trial is not evidence of his/her guilt.

10. Types of Evidence

10.1 Evidence Defined

(Last revised June 2012)

[1] You must consider only the evidence presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits. It may also consist of admissions.

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

[3] The Crown and the defence (or, *NOA*) have agreed about certain facts. This is called an "admission" [12]. You must accept those admitted facts without further proof.

[4] The indictment that you heard read out when we started this case is not evidence. What the lawyers and I say when we speak to you during the trial is not evidence.

[5] When you go to the jury room to decide this case, the exhibits will go with you.[13] Consider them along with the rest of the evidence.[14]

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

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

It is helpful to list for the jury the admissions and refer to them by exhibit number.

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

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

[14] Not all exhibits are evidence of the truth of their contents (*e.g.*, expert's report, transcript of video statement, etc.). In those cases, further elaboration of this instruction will be required.

10.2 Direct and Circumstantial Evidence

(Last revised June 2012)

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

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

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

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

[5] In reaching a verdict, you can take both kinds of evidence into account. In each case, your job is to decide what conclusions you will reach based upon the evidence as a whole, both direct and circumstantial.

Where the evidence for the prosecution is entirely or substantially circumstantial, it is necessary to give a further instruction:

However, you cannot reach a verdict of guilty based on circumstantial evidence unless you are satisfied beyond a reasonable doubt that *NOA*'s guilt is the only rational[15] conclusion to be drawn from the whole of the evidence.

[15] *Regina* v. *Griffin*, 2009 SCC 28, at para. 33.

10.3 Expert Opinion Evidence (General Instructions)[16]

(Last revised June 2012)

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

[2] As with other witnesses, you may give the expert's testimony as much or as little weight as you think it deserves. Just because an expert has given an opinion does not require you to accept it. You should consider the expert's (*specify: education, training and experience*), the reasons given for the opinion, the suitability of the methods used and the rest of the evidence in the case when you decide how much or little to rely on the opinion. [17]

[3] *NOW* was asked to assume certain facts. What an expert assumes or relies on as a fact for the purpose of offering his or her opinion may be the same or different from what you find as facts from the evidence introduced in this case.[18]

[4] How much or little you rely on the expert's opinion is up to you. But the closer the facts assumed or relied on by the expert are to the facts as you find them to be, the more helpful the expert's opinions may be to you. To the extent the expert relies on facts that you do not find supported by the evidence, you may find the expert's opinion less helpful. [19]

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

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

18 If an expert witness relies on facts that are not otherwise in evidence it will likely be necessary to give the jury a limiting instruction that the expert's statement of these facts is not evidence that those facts exist. See, *R.* v. *Abbey*, [1982] 2 S.C.R. 24; *R.* v. *Lavallee*, [1990] 1 S.C.R. 852.

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

10.4 Expert Opinion Evidence
(Conflict in Opinions of Experts of Opposing Parties in Relation to an Essential Element that the Crown Must Prove)

(Last revised June 2012)

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

[2] The issue on which these experts (or, *NOW*s) differ is an essential element that the Crown must prove beyond a reasonable doubt. Before you accept the opinion of the Crown's expert on this issue you must be satisfied beyond a reasonable doubt that s/he is correct. If you are not sure that s/he is correct, then the Crown has failed to prove beyond a reasonable doubt that essential element of the offence charged.[20]

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

10.5 Exhibits

(Last revised June 2012)

(This instruction is covered in 10.1 Evidence Defined.)

10.6 Admissions (s. 655)

(Last revised June 2012)

(This instruction is covered in 10.1 Evidence Defined.)

11. Rules of Evidence

11.1 Evidence of Good Character[21]

(Last revised June 2012)

[1] You have heard evidence about *NOA*'s good character (*briefly summarize character evidence*).

[2] Good character, by itself, is not a defence to a charge, but you may infer that a person with these character traits would be less likely to commit the offence charged. Evidence of *NOA*'s good character might cause you to have a reasonable doubt about *NOA*'s guilt. It is for you to decide how much or how little weight you will give to this evidence. Consider the good character evidence, along with the rest of the evidence, in deciding whether the Crown has proved *NOA*'s guilt beyond a reasonable doubt.

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

[3] *NOA* has testified. Evidence of his/her good character may make his/her testimony more worthy of belief. This is because it is reasonable to consider, although it is not always the case, that a person of good character is more likely to tell the truth[22]. You should consider this evidence, along with the rest of the evidence, to help you decide how much or little of *NOA*'s testimony you will believe or rely on.

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

[4] The Crown has cross-examined *NOW* about whether s/he had heard anything that contradicted *NOA*'s reputation for (*describe relevant character trait*). You may consider *NOW*'s answers only in deciding whether you accept *NOW*'s description of *NOA* as a person of good character. You must not use *NOW*'s answers to find that *NOA* is a person of bad character and therefore likely to have committed the offence charged.

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

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[21] This instruction may require some modification in cases of sexual assault involving children. The Supreme Court of Canada noted that such sexual misconduct often occurs in private and therefore may not be reflected in the accused's reputation for morality in the community. (*R.* v. *Profit*, [1993] 3 S.C.R. 637).

[22] This language tracks *R.* v. *C.W.H.* (1991), 68 C.C.C. (3rd) 146 (BCCA).

(*Where the Crown has called adverse witnesses in reply, add*:)[23]

[5] The Crown has called *NOW2* who testified that *NOA* does not have the good reputation for (*describe relevant character trait*) described by *NOW1*. You may consider this evidence only in deciding whether or how much you will rely on *NOW1*'s testimony and whether *NOA* has a good reputation for (*describe relevant character trait*). You must not use *NOW2*'s evidence to find that *NOA* is a person of bad character and therefore likely to have committed the offence charged.

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

11.2 Previous Convictions of Non-Accused Witness[24] (Credibility)

(Last revised June 2012)

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

[2] Some convictions, for example ones that involve dishonesty, may be more significant than others. As well, an old conviction may be less important than a more recent one.

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

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

11.3 Evidence that a (Non-Accused) Third Party Committed the Offence[25]

(Last revised June 2012)

[1] You have heard evidence that (it was/could have been) *NO3P* who committed the offence charged. (*Summarize relevant evidence*).

(*Where there is evidence of a previous conviction, add* :) [26]

[2] You have also heard evidence that *NO3P* has previously been convicted of (*describe nature of prior conviction*). This may help you decide whether *NO3P* is the sort of person who would commit the offence with which *NOA* is charged.

(*In all cases* :)

[3] You should consider this evidence, along with all the other evidence, in deciding whether you have a reasonable doubt about whether it was *NOA* who committed the offence charged.

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[25] You may want to consider giving this instruction during a discussion of defences rather than during a discussion of the rules of evidence. Any person charged with an offence may adduce evidence that tends to show that a third party committed the offence provided it has sufficient probative value to justify its admission: *R.* v. *Grandinetti* (2005), 191 C.C.C. (3d) 449 (S.C.C.). The evidence may be direct or circumstantial. It may include, but cannot consist only of, evidence of the third party's motive or disposition to commit the offence. Without some other connection of the third party to the offence charged, however, evidence of motive or disposition is not admitted because it lacks probative value.

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

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

(ii) that the proposed evidence, whether of expert opinion, discrete acts of extrinsic misconduct, or both, alone or together with other evidence, is relevant and of sufficient probative value on the issue of disposition to justify its admission. See *R.* v. *McMillan* (1975), 23 C.C.C. (2d) 160, 167-8 (Ont. C.A.), *per* Martin J.A.

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

11.4 Previous Convictions of Accused Witness[27] (Credibility)

(Last revised June 2012)

[1] You have heard that *NOA* has previously been convicted of a criminal offence. You must not use the fact that *NOA* has committed a crime in the past as evidence that s/he committed the crime charged.

[2] You may consider the prior conviction(s) only to help you decide how much weight to give to *NOA*'s testimony. Consider the number, nature, and dates of prior convictions. Some convictions, for example ones that involve dishonesty, may be more significant than others. As well, an old conviction may be less important than a more recent one.

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

[4] I emphasize that you must not use evidence of a previous conviction to find that *NOA* is a person of bad character and therefore likely to have committed the offence charged.

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

11.5 Previous Convictions of Accused to Impeach and Rebut Evidence of Good Character[28] (s. 666)

(Last revised June 2012)

[1] You have heard evidence about *NOA*'s good character (*briefly summarize character evidence*). You have also heard that *NOA* has previously been convicted of a criminal offence (*specify*).

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

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

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

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

(*In all cases*:)

[4] Some convictions may be more significant than others. As well, an old conviction may be less important than a more recent one.

[5] I emphasize that you must not use evidence of a previous conviction to find that *NOA* is a person of bad character and therefore more likely to have committed the offence charged.

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

11.6. Propensity or Disposition of Co-Accused, Including Previous Convictions

(Last revised June 2012)

(*This instruction is given only when there is a "cutthroat" defence – that is, when one accused claims the co-accused committed the offence*.)

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

[2] *NOA2* claims that *NOA1* committed the offence, not him/her. In advancing this claim, s/he points to a number of factors, including evidence of *NOA2*'s disposition or propensity to commit the offence. With respect to evidence of disposition or propensity, there is a special rule that I will now explain to you.

[3] The Crown cannot rely on evidence of disposition or propensity in order to prove that a person is guilty of an offence. However, one person charged is entitled to rely on this kind of evidence with respect to another in order to raise a reasonable doubt about whether the first person committed the offence.

[4] Therefore, in considering the question of *NOA2*'s guilt, you are entitled to consider evidence of *NOA1'*s propensity or disposition to commit the offence, (including evidence of his/her criminal record) together with the other evidence, for the purpose of deciding whether this evidence raises a reasonable doubt about whether *NOA2* committed the offence.

[5] However, I emphasize that you must not use evidence of *NOA1'*s propensity or disposition when you decide whether the Crown has proved *NOA1'*s guilt beyond a reasonable doubt.

11.7 Out of Court Statements of Person Charged (General Instruction)[29]

(Last revised June 2012)

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

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

(*Where the accused contests the accuracy of the police evidence concerning his or her unrecorded statement) add instruction [2-A].*)

[2-A] In this case, there is evidence from which you may infer that the police deliberately set out to question *NOA* and did not attempt to make a reliable video or audio recording, although recording facilities were readily available. If you reach that conclusion, then the failure to make a recording is an important factor for you to consider in deciding whether to rely on the police version of *NOA's* statement.

(*In all cases*:)

[3] Unless you decide that *NOA* made a particular remark or statement, you must not use it against him/her in deciding this case.

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

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

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[29] If there is no issue about whether the statement was made, it may not be necessary to give the instructions in paragraphs [1] – [3].

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

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

11.8 Out of Court Statements of Person Charged (Joint Trial)[30]

(Last revised June 2012)

[1] You have heard *NOW1* testify that he/she heard *NOA1* say something. Any statement that you find *NOA1* made can only be considered as evidence in relation to *NOA1* and not as evidence in relation to *NOA2* (or others).

[2] Even if the statement refers to something *NOA2* did or said, you must not consider that statement as evidence in relation to *NOA2*.

[30] If the co-conspirator exception to the hearsay rule applies, the instruction at 11.27 should be given.

11.9 Evidence of Person Charged

(Last revised June 2012)

[1] You have heard the testimony of *NOAW* [*NOA1, NOA2, etc*]. You can consider the testimony of *NOAW* to help you decide the case of anyone (*or name accused*) who is on trial - not just the case of *NOAW.*

(*The following instruction should be given where 11.8 has been used*:)

[2] In this way, the testimony of *NOAW* is treated differently from his out-of-court statement, which, as I have just told you, can only be used in relation to his/her case.

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

(Last revised June 2012)

[1] If you find that a witness said one thing in the witness box and something different about the same subject on an earlier occasion, this may be a factor in assessing the witness's credibility.

[2] It is for you to determine what effect any differences will have on your overall assessment of the witness's credibility. They may have a huge effect, or no effect, or somewhere in between. Not every difference is important. Consider the extent and nature of any difference. Was it on a central point or something peripheral? Consider any explanation the witness gave. Was the explanation satisfactory?

[3] Generally, the earlier statement may be used only in assessing the witness's credibility. However, there is an exception when the witness, while testifying at trial, accepts all or part of the earlier statement as true. In that event, the earlier statement may also be considered as evidence of what happened, but only to the extent the witness accepted it as true. It is for you to decide what weight if any to give to the part of the earlier statement that the witness accepts as true.

(*When the prior statement is under oath (e.g., preliminary inquiry or under oath at police station*):)

[4] If you conclude that a witness has given significantly different versions of the same story while under oath, you should evaluate that witness's testimony very carefully, as this may suggest that the witness does not take the oath seriously.[31]

(*Review relevant evidence and relate to the rule*.)

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[31] There may be circumstances when this instruction should be strengthened. For example, when a principal Crown witness's testimony on a vital issue conflicts with his or her earlier sworn statement, it may be appropriate to tell the jury that it is dangerous to rely on the witness's evidence. See: *Binet* v. *The Queen*, [1954] S.C.R. 52 at 54. Also, *R.* v. *Maxwell*, [1979] 2 S.C.R. 1072.

11.11 Prior Inconsistent Statements of Accused Witness

(Last revised June 2012)

[1] If you find that *NOAW* said one thing in the witness box and something different about the same subject on an earlier occasion, this may be a factor in assessing his/her credibility.

[2] It is for you to determine what effect any differences will have on your overall assessment of *NOAW*'s credibility. They may have a huge effect, or no effect, or somewhere in between. Not every difference is important. Consider the extent and nature of any difference. Was it on a central point or something peripheral? Consider any explanation *NOAW* gave.

[3] Unlike statements by other witnesses, however, you may also consider *NOAW*'s earlier statement(s) as evidence of what happened, whether or not *NOAW* testified that what s/he said earlier was true. It is for you to say how much or little of what *NOAW* said earlier you will believe or rely on.

(*Review relevant evidence and relate to the rule*.)

[4] As I have said to you earlier, you must find *NOAW* not guilty if you believe his/her statement(s) that s/he did not commit the offence charged.[32]

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

[6] Even if *NOAW*'s statement(s) does not raise a reasonable doubt about his/her guilt (or, about an essential element of the offence charged (or, an offence)), you still must acquit if after considering all the evidence you are not satisfied beyond a reasonable doubt of his/her guilt.

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[32] *R.* v. *W. (D)*, [1991] 1 S.C.R. 742. This instruction is appropriate where the evidence of the accused constitutes a complete defence to the offence charged. Where the testimony of the accused will only lead to a guilty verdict on an included offence such as, based, for example on intoxication or provocation, this instruction will need to be modified.

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

(Last revised June 2012)

[1] *NOW* has testified. S/he also made an earlier statement that is exhibit [number] in this case. In her testimony before you s/he has said that her earlier statement [or parts of it] was/were false. Both the testimony and the earlier statement are evidence of what happened. It is for you to say how much or little of the witness's testimony before you and the earlier statement you will believe or rely on in deciding this case. (*Describe particulars of statement*).

If 11.10 has been given:

You will recall what I have already said about the prior inconsistent statements of a witness which is that they can only be used for assessing the credibility of that witness's testimony unless adopted by the witness. In the case of *NOW*, however, the situation is different. Both the testimony and the earlier statement are evidence for you to consider. I will now explain in more detail how you can use this evidence.

[2] Both the testimony and the earlier statement are evidence of what happened. It is for you to say how much or little of the witness's testimony before you and the earlier statement you will believe or rely on in deciding this case. (*Describe particulars of statement*).

[3] I have already given you instructions about how to assess a witness's testimony. Those instructions apply to *NOW*'s evidence. I will give you additional instructions concerning *NOW*.

[4] *NOW* made an earlier statement that is different than his/her testimony in court. You should consider the fact, nature and extent of any differences that you find between what *NOW* said here and what s/he said in the earlier statement.

[5] As I have said, *NOW*'s earlier statements as well as his/her testimony before you are evidence of what happened. You must assess both carefully. You should consider several factors in deciding how much or little of the testimony and the earlier statement you will believe or rely on. Do any of these factors affect their reliability?

(*To prevent speculation, refer only to the factors that arise on the evidence*.)

[6] Consider the evidence about what occurred before *NOW* made the statement in exhibit (number). Were there other interviews? How many? What was discussed? What happened during them? Was *NOW* coached? Was s/he shown things? Or were suggestions made to help his or her memory or to contradict what s/he had said earlier?

[7] Consider the circumstances of the interview at which the statement was made. Was the statement completely and accurately recorded? Was the statement made under oath or affirmation? Was *NOW* in some other way reminded of the importance of telling the truth? Did *NOW* give the statement in his or her own words or did the questioner put words in *NOW*'s mouth?

[8] Consider *NOW*'s behaviour during the interview, even though you do not have the same opportunity to observe his or her behaviour that you would have had if s/he had made the statement in court. Consider that *NOW* did not make the statement in open court or in *NOA*'s presence. You should also consider that there was no opportunity to test *NOW*'s statement through cross-examination at the time s/he made it.

[9] Consider any reason that *NOW* may have had for not telling the whole truth. Did *NOW* explain why the statement was not the truth?

[10] Consider how much or little a denial of making the statement, or of the truth of all or some of its parts, limits the effectiveness of cross-examination on it and your ability to assess accurately how much or little it helps you decide the case.

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

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

11.13 Motive[33]

(Last revised June 2012)

[1] You have heard counsel speak about motive. We often use the words "motive" and "intent" interchangeably, but in law they do not mean the same thing. In a legal context, when we say that a person did something intentionally, we are conveying that he or she meant to do what he or she did, and that it was not done accidentally. When we speak of motive, however, we are referring to the reason a person did what he or she did.[34]

[2] A person may do something intentionally whether or not the person had a motive for doing it. For example, a man goes into a department store, tries on a watch, gets distracted and walks out without paying. If he forgot to pay, he did not have the intent to steal. Next, suppose the man knew that the watch was on his wrist, but still walked out without paying. In that case, he did have the intent to steal the watch. If he was rich, had plenty of money in his wallet, and still took the watch, one might conclude he had no motive, or at least that his motive is unknown. However, if the man stole the watch in order to sell it, he had the intent to steal and his motive was financial gain.

[3] Later, I will explain the essential elements that the Crown must prove for the offence(s) with which *NOA* is charged. Motive is not one of those elements. In deciding whether people are guilty of an offence, what matters is what they did and whether they did it intentionally, and not their reasons for doing it.

[4] You need not find a motive for *NOA*'s actions in order to find him or her guilty of an offence.

[5] But motive can be relevant. If a person had a reason for doing a certain thing, then you might conclude that it is more likely that he or she in fact did that thing and did so intentionally. Conversely, if you find that a person had no reason to do a certain thing, that might cause you to doubt whether he or she did that thing or did it intentionally. [35]

[6] In this case (*describe the position of the parties as to motive, or absence of motive*). It is for you to decide what weight, if any, you will give to the evidence of motive, or lack of motive, in this case.

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

34 The significance of motive and its relationship to intent was examined in *R.* v. *Lewis*, [1979] 2 S.C.R. 821.

35 There is a significant difference between absence of proven motive, on the one hand, and proven absence of motive, on the other. There is no acceptable definition of "proven absence of motive". See *R.* v. *White* (1996), 108 C.C.C. (3d) l, 33-4 (Ont. C.A.) aff'd., [1998] 2 S.C.R. 72, 125 C.C.C. (3d) 385, 415.

11.14 After-the-Fact or Post-Offence Conduct (Consciousness of Guilt) [36]

(Last revised June 2012)

Depending on the circumstances of each case, you, as the trial judge, may find that after-the-fact conduct has no probative value with respect to one or more issues. In that event, if the evidence has been admitted, an appropriate limiting instruction must be given telling the jury the issues on which they may not draw an inference from the after-the-fact conduct. Such instructions must be drafted to fit the individual circumstances of the case. What follows is an example that may be appropriate where NOA has admitted committing the actus reus, but has denied a specific level of culpability. [37]

Example: NOA is charged with first degree murder and has admitted shooting NOC. There is evidence that s/he then fled and threw the gun in a dumpster. NOA claims the shooting was accidental. In this circumstance, the following instruction could be used:

> *You have heard evidence that NOA fled the scene and threw away a gun in a dumpster shortly after NOC was shot. You have also heard NOA admit that s/he shot NOC. You must not use the evidence of NOA's conduct after the shooting to infer that the shooting was intentional or that it was planned and deliberate. This is because his/her conduct may be explained as simply being a reaction to the shooting, and tells*

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

[37] The leading cases on this point from the Supreme Court of Canada are *R.* v. *Arcangioli*, [1994] 1 S.C.R. 129 and *R.* v. *White*, [1998] 2 S.C.R. 72.

In *Arcangioli*, at p. 145, the Court held:

> [W]here an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence.

In *White*, at paragraph 26, the Court explained:

> Whether a jury should be permitted to consider evidence of post-offence conduct will depend on the facts of each case. The question that should be asked at the outset is: What does the Crown seek to prove by means of the evidence? An admission by the accused may have the effect of narrowing the issue in dispute considerably, as was the case in *Arcangioli*. If, as a result of such an admission, the accused's conduct can no longer be attributed to the offence being tried rather than some other offence, then the jury should be so instructed. The evidence of post-offence conduct may still be used by the jury for other purposes where appropriate, for example to connect the accused to the scene of the crime or to a piece of physical evidence, or to undermine the credibility of the accused generally.

you nothing about whether it was intentional or accidental, or if it was intentional, whether the shooting was planned and deliberate.

In addition, it is important to instruct the jury not to draw an inference against an accused from the exercise of his or her right to silence in the face of police questioning: R. v. Turcotte, [2005] 2 S.C.R. 519. As well, the British Columbia Court of Appeal in R. v. Henry, 2010 BCCA 462, relying on R. v. Marcoux and Solomon, [1976] S.C.R. 763, held that no inference may be drawn from an accused's refusal to enter a police line-up.

[1] You have heard evidence about certain things that *NOA* is alleged to have said or done after the incident charged in the indictment. For convenience, I shall refer to this as "after-the-fact conduct." In this case it is alleged that *NOA* (*here summarize the alleged conduct*: *e.g.,* that *NOA* fled the scene of the offence or fled the jurisdiction; that *NOA* made false or misleading statements; that *NOA* tried to conceal evidence; that *NOA* attempted to commit suicide; *etc*.).

[2] After-the-fact conduct is simply a type of circumstantial evidence. As with all circumstantial evidence, you must consider what inference, if any, is proper to draw from this evidence. You may use this evidence, along with all the other evidence in the case, in deciding whether the Crown has proved *NOA*'s guilt beyond a reasonable doubt. However, you must not infer *NOA*'s guilt from this evidence unless, when you consider it along with all the other evidence, you are satisfied that it is consistent with his/her guilt and is inconsistent with any other reasonable conclusion.

Keep in mind that evidence of after-the-fact conduct has only an indirect bearing on the issue of *NOA's* guilt. You must be careful about inferring *NOA*'s guilt from this evidence because there might be other explanations for this conduct. You may use evidence of after-the-fact conduct to support an inference of guilt only if you have rejected any other explanation for this conduct.

[3] When considering what inference, if any, to draw from evidence of after-the-fact conduct, keep in mind that people sometimes (*specify, e.g.,* flee, lie, *etc.*) for entirely innocent reasons. Even if *NOA* was motivated by a feeling of guilt, that feeling might be attributable to something other than in the offence with which he/she is now charged.

(*Where NOA has offered an explanation for the after-the-fact conduct, give the instruction in paragraph [4]*.)

[4] You must also consider the explanation that *NOA* offered for his after-the-fact conduct. You will recall that he/she (*specify, e.g. NOA* testified, or told the police that: *summarize relevant evidence*). Keep in mind that *NOA* does not have to prove anything. The Crown must prove *NOA*'s guilt beyond a reasonable doubt.

Where the after-the-fact conduct is making false or misleading statements, such as a false alibi, give the instruction below in paragraph [5].

Note: This direction should be given only when the trial judge has determined that there is some evidence of fabrication other than the statement itself.

[5] You have heard evidence that *NOA* made false or misleading statements after the alleged offence (*summarize evidence of false or misleading statements*). Keep in mind, however, that not every falsehood is a lie. A lie is an *intentional* falsehood. You may disbelieve a person's statement without concluding that the statement was a deliberate lie. You should look for independent evidence of lying before using this evidence to support a finding of guilt. Unless you conclude that the false or misleading statements were lies, you must not use them to infer guilt.

(*Where NOA has raised a defence that might be affected by the after-the-fact conduct, give the instruction in paragraphs [6] and [7].*)

[6] In this case *NOA* has raised the defence of (*here specify the defence that may be affected by the evidence of after-the-fact conduct, such as accident, self-defence, intoxication, or not criminally responsible by reason of mental disorder, pursuant to s. 16 of the Criminal Code.*)

[7] You may use the evidence you have heard of *NOA*'s alleged after-the-fact conduct when you are considering whether you have a reasonable doubt about *NOA*'s guilt based on that defence. (*Explain how the jury may use the evidence. For example, if the defence is intoxication and there is evidence of flight, it may be appropriate to instruct the jury to consider whether the evidence of flight could be seen as purposeful conduct from which they might infer that the accused had the mental capacity to form the intent for the offence.*)

11.15 Evidence of Similar Acts to Prove Identity (Extrinsic Misconduct)[38]

(Last revised June 2012)

[1] You have heard evidence that *NOA* (allegedly) did other acts that are similar to those charged in the indictment (*specify conduct admitted as similar act evidence*). This evidence may relate to the question of whether *NOA* is the person who committed the offence alleged in the indictment (*specify*). I will now explain the law concerning the use of this evidence.

[2] You must decide whether the Crown has proved that *NOA* likely[39] committed these other acts. If the Crown has not proved this, you must disregard this evidence in reaching your verdict.

[3] If you conclude that *NOA* likely committed the other acts, this may suggest to you that s/he has a general disposition or character to do bad things, perhaps even very bad things. However, you must not infer from *NOA's* general character or disposition that s/he is more likely to have committed the offence charged. Remember that *NOA* is on trial only for the charges set out in the indictment. It would be unfair to find someone guilty simply on the basis of a general disposition or character, since general disposition or character does not tell you anything useful about what happened on this specific occasion charged in the indictment. Finally, it is most important that you not find *NOA* guilty of the offences charged to punish him/her for the past misconduct.

[4] There is only one way you can use the evidence of other acts that you find *NOA* likely committed. If you conclude that *NOA* likely committed the other acts, then you must consider whether the other acts and the offence are so similar that they were likely committed by the same person. Consider the similarities and dissimilarities between those other acts and the offence charged. Ask yourself whether any of those other acts and the offence charged are so similar that it defies coincidence that they would have been committed by different people. If so, then you may use that evidence in deciding whether the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence charged. This is the only way you can use this evidence.

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

[39] Where the Crown's case on the issue of identity is based entirely on the underlying unity between a single similar act and the offence charged, the standard of proof beyond reasonable doubt governs the jury's determination whether one person must have committed both acts. In such a case, this instruction must be modified accordingly: *R.* v. *Arp*, [1998], 3 S.C.R. 339, at para.73.

When there is some evidence of collusion, collaboration or tainting, give the following instruction:

> The potential value of this evidence comes from the similarity and independence of the accounts. If the accounts were not truly independent, the value of the evidence may be undermined.
>
> You must consider all of the circumstances that affect the reliability of this evidence, including the possibility of collusion, collaboration or tainting of the evidence of the other acts that are similar to those charged. (*Review evidence of the possibility of collusion, collaboration or tainting whether intentional or innocent*.)
>
> If you conclude that the similarity of the witnesses' testimony is the result of collusion, collaboration or tainting, you must not use it to support the Crown's case. (*Specify similar act evidence that must be disregarded*.)
>
> Even if you do not reach that conclusion, you must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and whether it should be given less weight or no weight because it may not be independent.

(*Review similarities and dissimilarities.*)

[5] I remind you that you must not convict *NOA* on any count unless you are satisfied that the Crown has proven his/her guilt on that count beyond a reasonable doubt.

11.16 Evidence of Similar Acts on Other Counts to Prove Identity of Perpetrator[40] (R. v. Arp)

(Last revised June 2012)

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

[2] Generally each count must be considered separately to determine if the evidence in relation to that count proves *NOA*'s guilt beyond reasonable doubt.

[3] In particular, you must not use the evidence in one count to infer that *NOA* is a person whose general disposition or character is such that s/he is likely to be the person who committed the offences charged in the other counts.

[4] There is one way you can use the evidence from one count to reach your verdict on another count, provided the circumstances relating to the counts are so similar that it defies coincidence that they would have been committed by different people.

[5] Consider the similarities and dissimilarities in the manner in which the offences were allegedly committed. You may find that the degree of similarity makes it likely[41] that two or more offences were committed by the same person. If you do, you can consider the evidence relating to each of those similar offences in deciding whether the Crown has proved, beyond a reasonable doubt, that *NOA* is the person who committed the other similar offence or offences. This is the only purpose for which you may use the evidence in relation to one count in deciding whether *NOA* is guilty on another count.

When there is some evidence of collusion, collaboration or tainting, give the following instruction:

The potential value of this evidence comes from the similarity and independence of the accounts. If the accounts were not truly independent, the value of the evidence may be undermined.

You must consider all of the circumstances that affect the reliability of this evidence,

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

[41] Where the Crown's case on the issue of identity is based entirely on the underlying unity between a single count and another count or counts, the standard of proof beyond reasonable doubt governs the jury's determination whether one person must have committed the similar offence(s). In such a case, this instruction must be modified accordingly. See *R.* v. *Arp*, [1998] 3 S.C.R. 339, at para.73.

including the possibility of collusion, collaboration or tainting of the evidence of the other acts that are similar to those charged. (*Review evidence of the possibility of collusion, collaboration or tainting whether intentional or innocent*.)

If you conclude that the similarity of the witnesses' testimony is the result of collusion, collaboration or tainting, you must not use it to support the Crown's case. (*Specify similar act evidence that must be disregarded*.)

Even if you do not reach that conclusion, you must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and whether it should be given less weight or no weight because it may not be independent

(*Review the similarities and dissimilarities between the other acts and the offence charged.*)

[6] Unless you find that it is likely that the same person committed the similar offences, you must reach your verdict by considering the evidence related to each count separately and ignore the evidence relating to any other count or counts.

[7] I remind you that you must not convict *NOA* on any count unless you are satisfied that the Crown has proven his/her guilt on that count beyond a reasonable doubt.

11.17 Evidence of Extrinsic Similar Acts to Support Credibility of Complainant (Extrinsic Misconduct)[42]

(Last revised June 2012)

[1] You have heard evidence that *NOA* (allegedly) has done other acts that are similar to those charged in the indictment (*specify conduct admitted as similar act evidence*). This evidence may relate to the question of whether the incident occurred in the way that the complainant testified (*specify issue in which the evidence is directed, e.g., consent, actus reus*)[43]. I will now explain the law concerning the use of this evidence.

[2] You must decide whether the Crown has proved that *NOA* likely[44] committed these other acts. If the Crown has not proved this, you must disregard this evidence in reaching your verdict.

[3] If you conclude that *NOA* likely committed the other acts, this may suggest to you that s/he has a general disposition or character to do bad things, perhaps even very bad things. However, you must not infer from *NOA's* general character or disposition that s/he is more likely to have committed the offence charged. Remember that *NOA* is on trial only for the charges set out in the indictment. It would be unfair to find someone guilty simply on the basis of a general disposition or character, since general disposition or character does not tell you anything useful about what happened on this specific occasion charged in the indictment. Finally, it is most important that you not find *NOA* guilty of the offences charged to punish him/her for the past misconduct.

[4] There is one way you can use the evidence of any other acts that you find *NOA* likely committed. Consider whether the evidence discloses a distinctive pattern of conduct of *NOA*. Ask yourself whether it would defy coincidence that two or more people independently would lie or be mistaken in their testimony about *NOA*'s conduct. If there is such a distinctive pattern, you may use this evidence in assessing the complainant's credibility. This is the only way you can use this evidence.

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

[43] See *R.* v. *Handy*, 2002 S.C.C. 56, [2002] S.C.R. 908, at paras. 69-75.

[44] Where the Crown's case on the issue of identity is based entirely on the underlying unity between a single similar act and the offence charged, the standard of proof beyond reasonable doubt governs the jury's determination whether one person must have committed both acts. In such a case, this instruction must be modified accordingly: *R.* v. *Arp*, [1998], 3 S.C.R. 339, at para.73.

When there is some evidence of collusion, collaboration or tainting, give the following instruction:

> The potential value of this evidence comes from the similarity and independence of the accounts. If the accounts were not truly independent, the value of the evidence may be undermined.
>
> You must consider all of the circumstances that affect the reliability of this evidence, including the possibility of collusion, collaboration or tainting of the evidence of the other acts that are similar to those charged. (*Review evidence of the possibility of collusion, collaboration or tainting whether intentional or innocent.*)
>
> If you conclude that the similarity of the witnesses' testimony is the result of collusion, collaboration or tainting, you must not use it to support the Crown's case. (*Specify similar act evidence that must be disregarded*.)
>
> Even if you do not reach that conclusion, you must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and whether it should be given less weight or no weight because it may not be independent.

[5] Consider the similarities and dissimilarities between those other acts which you find likely occurred and the offence charged.

11.18 Evidence of Similar Acts on Other Counts[45] to Support Credibility of Complainant[46]

(Last revised June 2012)

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

[2] Generally each count must be considered separately to determine if the evidence in relation to that count proves *NOA*'s guilt beyond reasonable doubt.

[3] In particular, you must not use the evidence in one count to infer that *NOA* is a person whose general disposition or character is such that s/he is more likely to have committed the offences charged in the other counts.

[4] There is one way you can use the evidence from one count to reach a verdict on another count. Consider whether the evidence discloses a distinctive pattern of conduct of *NOA*. Ask yourself whether that pattern is so distinctive that it would defy coincidence that two or more people independently would lie or be mistaken in their testimony about *NOA*'s conduct. If there is such a distinctive pattern, this may assist you in assessing the complainants' credibility. This is the only purpose for which you may use this evidence of a distinctive pattern. If you do not find such a distinctive pattern of conduct, then you must consider each count separately to determine if the evidence in relation to that count proves *NOA*'s guilt beyond a reasonable doubt.

When there is some evidence of collusion, collaboration or tainting, give the following instruction:

The potential value of this evidence comes from the similarity and independence of the accounts. If the accounts were not truly independent, the value of the evidence may be undermined.

You must consider all of the circumstances that affect the reliability of this evidence, including the possibility of tainting, collusion, collaboration of the complainants in the various counts. (*Review evidence of the possibility of*

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

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

collusion, collaboration or tainting whether intentional or innocent.)

If you conclude that the similarity of *NOC1's* testimony is the result of tainting, collusion, collaboration with *NOC2*, you must not you use the evidence of one to support the Crown's case with respect to the other. (*Specify similar act evidence to be disregarded.)*[47]

Even if you do not reach that conclusion, you must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration or tainting, and whether it should be given less weight or no weight because it may not be independent.

[5] Do not assume that just because you conclude that one complainant is telling the truth, the others must be telling the truth as well. Similarly, do not assume that just because you conclude that one complainant is not telling the truth, that the other(s) are not telling the truth either.

[6] Consider the similarities and dissimilarities between those other counts which you find likely occurred and the offence charged.

(*Review the similarities and dissimilarities.*)

[7] Unless you find that it is likely that the same person committed the similar offences, you must reach your verdict by considering the evidence related to each count separately and ignore the evidence relating to any other count or counts.

[8] I remind you that you must not convict *NOA* on any count unless you are satisfied that the Crown has proven his/her guilt on that count beyond a reasonable doubt.

[47] When there are more than two complainants this instruction will have to be modified.

11.19 Testimony of Children Under Fourteen (*Canada Evidence Act*, s. 16.1)

(Last revised June 2012)

[1] You have heard the testimony of *NOW.* He/she promised to tell the truth when s/he gave his/her evidence. His/her promise to tell the truth has the same effect as an oath or affirmation.

[2] When you consider this evidence, take into account *NOW*'s ability to recall events, to understand questions and to give reliable answers.

[3] A child may perceive the world differently from adults and may not be complete and accurate when describing details such as time and place. This does not necessarily mean that the child has misconceived essential matters. Remember, you must carefully assess the credibility of every witness including the testimony of (*NOW*).

(*Where the evidence gives rise to serious concerns about the reliability of a child's evidence, the following discretionary warning may be appropriate*:[48])

[4] You may rely on the evidence of *NOW* if you are convinced he/she is telling the truth. You are not required to find evidence that confirms or supports *NOW's* testimony. However, due to (*review the evidence and the circumstances giving rise to the concern, such as*: immaturity, inability to answer questions, inconsistent statements *etc*.), there are dangers in relying on the evidence of *NOW* to convict *NOA* without some evidence that could confirm or support what he/she says. Whether or not there is confirming evidence, it is for you to decide what weight to give to *NOW's* evidence.

(*Summarize the evidence which could confirm NOW's evidence.*)

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[48] See *R.* v. *K (V)* (1991), 68 C.C.C. (3d) 18 at p. 30, cited with approval in *R.* v. *Marquard*, [1993] 4 S.C.R. 223.

11.20 Obstructed View or Sequestered Testimony[49] (s. 486.2)

(Last revised June 2012)

[1] *NOW* testified (behind a screen or on a closed-circuit television). I ordered that this procedure be followed in this case, which is not unusual. You must not draw any adverse inference against the accused because this procedure has been used.

[49] *R.* v. *Levogiannis*, [1993] 4 S.C.R. 475.

11.21 Evidence of Children (Videotaped Complaint)[50] (s. 715.1)

(Last revised June 2012)

[1] You have seen a video statement of *NOW*. This is a procedure we often use when a witness is under the age of 18 years. *NOW* has also testified and said that what he/she said in the video-statement was true. Both the video and his/her testimony are her evidence.

[2] It is for you to decide whether you accept all, part or none of *NOW*'s evidence.

[3] Consider the circumstances under which the video was made, any discrepancies between the video and his/her evidence in court, as well as any other evidence which supports or contradicts *NOW*'s evidence.

If the jury is permitted to watch the video in the jury room, the following instruction must be given:

[4] You will be permitted to watch the video in the jury room, but you must not place undue weight on the video simply because it is a live recording. Also remember that you must not consider items of evidence in isolation. You should consider every part of the witnesses' testimony, including any portion that may explain or put what you see on the video into context. You must reach your verdict by considering the whole of the evidence in the case.

Where the witness has no independent memory of the event, the video may be admissible but the jury should be given the following special warning of the dangers of convicting based on the video alone:

[5] *NOW* has testified he/she has no recollection, at this time, of the events he/she described on the video. It is dangerous to rely on the evidence of *NOW* to convict *NOA* without some evidence that could confirm or support what he/she said on the video. Whether or not there is confirming evidence, it is for you to decide what weight to give to *NOW's*

[50] The general instruction concerning the evidence of children is Final 11.19.

evidence.

11.22 Evidence Previously Given[51] (s. 715)

(Last revised June 2012)

[1] *NOW* testified at an earlier proceeding (*describe proceeding*) under oath or affirmation.[52]

[2] *NOW* is not available to testify. His/her earlier testimony was therefore (read to you, or played for you) as evidence in this trial.

[3] In weighing this evidence, you must consider that you have not had the opportunity to observe *NOW* while giving evidence before you and that the defense has not had the opportunity to cross-examine *NOW* in this trial. In other words, you have not had the same opportunity to assess *NOW*'s evidence as you have had with respect to the witnesses who have testified before you. You must take these factors into account in deciding how much weight, if any, you give to *NOW*'s evidence.[53]

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

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

[53] If there is no dispute on this evidence, the Mid-Trial instruction will usually be adequate (see Mid-Trial 7.17).

11.23 Crown Witnesses of Unsavoury Character[54] (Vetrovec Warning)

(Last revised June 2012)

[1] *NOW* testified for the Crown. You have heard that (*identify for the jury the characteristics of the witness that bring his or her credibility as a witness into serious question, e.g., accomplice, jailhouse informant, unsavoury witness*[55]). Testimony from this kind of Crown witness must be approached with the greatest care and caution because experience tells us (*identify for the jury the reasons why evidence from witnesses with these characteristics is suspect, e.g., having an interest in the outcome of the case, a strong motivation to lie, the ability to conceal true motives, a desire to minimize his or her own involvement, etc*.).

[2] It is dangerous to base a conviction on unconfirmed evidence of this sort. You should consider whether *NOW*'s testimony is confirmed by other evidence in deciding whether the Crown has proved *NOA*'s guilt beyond a reasonable doubt.[56]

[3] You should look for independent evidence tending to show that *NOW*'s testimony implicating *NOA* is true. By "independent", I mean from a source unconnected to *NOW*.

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

Where allegations have been made of collusion between NOW and the potentially confirming witness, the jury should be reminded of this and told that they should look for confirmatory evidence that is independent of NOW and that relates to an important and relevant aspect of NOW's testimony: R. v. Khela, 2009 SCC 4, [2009] S.C.J. No. 4, at para. 37 and 52.

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

(1) the credibility of the witness; and,

(2) the importance of the witness to the Crown's case.

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

[55] See *R.* v. *Khela*, 2009 SCC 4, [2009] S.C.J. No. 4, at paras 3, 4 and 35.

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

Generally, the instruction must allow the jury to identify the evidence they are entitled to consider as being confirmatory. This will usually involve giving examples drawn from the evidence preceded by the instruction set out below. If there is extensive potentially confirmatory evidence an exhaustive review of the evidence is not appropriate as it may result in the charge being unbalanced in favour of the Crown. (R. v. Bevan (1993), 82 C.C.C. (3d) 310 at 325 (S.C.C.)).

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

[5] I now want to illustrate the kind of evidence from this case that you might find confirmatory by giving you some examples. I emphasize that these are only examples. You may not find the evidence I am about to mention helpful in confirming NOW's testimony, or you may find confirmation in other evidence that I do not mention. It is up to you to decide.

(*Refer to potentially confirmatory evidence.*)

11.24 Eyewitness Identification Evidence[57]

(Last revised June 2012)

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

[2] You must be very careful about relying on eyewitness testimony to find *NOA* guilty of any criminal offence. Innocent people have been wrongly convicted because reliance was placed on mistaken eyewitness identification. Even a number of witnesses can be honestly mistaken about identification. Eyewitness identification may seem more reliable than it actually is because it comes from a credible and convincing witness who honestly but mistakenly believes that the accused person is the one he or she saw committing the offence.

[3] There is little connection between great confidence of the witness and the accuracy of the identification. Even a very confident witness may be honestly mistaken. A very confident witness may be entirely wrong with respect to his or her identification evidence.

[4] Eyewitness identification is a conclusion based on the witness's observations. The reliability of the identification depends on the basis for the witness's conclusion.

[5] Consider the various factors that relate specifically to the (each) eyewitness and his/her identification of *NOA* as the person who committed the offence charged:

(Select the applicable factors from each category below and review them with the jury. The list is not intended to be exhaustive.)

1. Reliability of the eyewitness

Did the witness have good eyesight?

Was the witness's ability to observe impaired by alcohol or drugs?

Does the witness have a reliable memory?

Is the witness capable of communicating the observations s/he made at the time?

How accurate was the eyewitness's judgment of distance?

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

(*Review relevant evidence and relate to the issues.*)

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

Had the witness seen the person on a previous occasion?

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

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

How good or bad was the visibility?

Was there anything that prevented or hindered a clear view?

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

How good was the lighting?

Did anything distract the witness's attention at the time s/he made the observations? (*e.g.*, stress from the production of a weapon, injuries, another event occurring simultaneously)

Was the perpetrator wearing a disguise?

(*When cross-racial identification is in issue it may be appropriate to caution the jury regarding the frailties of this type of identification.*)

(*Review relevant evidence and relate to the issues.*)

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

How long after the events did the eyewitness give the first description?

How specific was the description? For example: details of the physical description - weight, height, clothing, hair colour, facial hair, glasses

Did the witness describe any features which are peculiar to the accused? (*e.g.*, tattoos, scars)

Did the witness miss any obvious physical feature of the accused?

How does the description compare to the way *NOA* actually looked at the time?

Did the witness ever give a different description of this person?

What are the differences between the descriptions? Are they significant or minor?

Has the eyewitness expressed uncertainty about his/her identification?

(*Review evidence and relate to issue.*)

4. The circumstances of the procedure followed for identification

(*These factors are to be used when there was a photo or physical line-up*.)

How long was it between the observation and identification procedure?

Did the eyewitness see a picture of *NOA* prior to the identification procedure, such a television newscast? Or on the internet?

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

Was anything done to draw the witness's attention to a specific photo or person.

Was anything done to confirm the witness's selection?

Was the line-up procedure fair? Did the other participants in the line-up share the physical characteristics of the accused? Were the photos similar? (e.g., size of the photo and colour).

Were photographs of other people shown at the same time?

Was anyone else present when the witness made the identification?

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

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

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

Was the witness exposed to other persons' accounts or descriptions?

Did the witness change his or her description after such exposure?

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

(*Review relevant evidence about the circumstances of identification.*)

Read paragraph [6] when the in-court identification of NOA is the eyewitness' first identification of NOA as the offender. Otherwise go directly to paragraph [7].

[6] *NOW* identified *NOA* for the first time in the courtroom while *NOA* was sitting in the prisoner's dock. This identification is entitled to little weight. This is because there is a

danger that a witness will assume that the person sitting in the prisoner's dock is the offender. (*Read the following sentence if NOW was shown a line-up or previous procedure to identify and failed to identify NOA.)* As well, *NOW* did not identify *NOA* in the line-up (or previous occasion) after the event and this seriously undermines any subsequent identification.

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

In the rare case where the jury could conclude that the in-dock identification is the only evidence of identification read the following instruction.

[8] If you conclude that the in-dock identification is the only evidence of identification then it would be unsafe to convict *NOA.*

11.25 Audio or Video Recordings and Transcripts[58]

(Last revised June 2012)

[1] During the trial, you heard an audio (or video) recording of (*describe briefly nature of the recording*).[59]

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

[3] Only the recording is evidence. It will be available to you in the jury room where you may replay it if you wish.

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

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

(*Where transcripts are filed as exhibits*:)

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

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

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

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

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

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

[7] In listening to this recording, be careful to distinguish between what each person charged says and what anyone else on the recording says. Anything on the recording may be helpful in determining what a particular person says and what his/her words mean. But each person on trial can be held responsible only for what s/he actually says, or adopts, not for what anyone else says.[60]

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

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

11.26 Video Recordings and Transcripts

(Last revised June 2012)

(This instruction has been deleted.)

11.27 Co-Conspirators' and Common Design Hearsay Exception

(Last revised June 2012)

[1] You have heard evidence of statements made out of court by (*NOA1, NOA2*, other alleged co-conspirators, other alleged unindicted co-conspirators, or alleged participants in the common design). There are two general rules that apply to out-of-court statements.

[2] The two general rules are:

(1) an out-of-court statement by anyone other than a person charged is not evidence of the truth of its contents; and

(2) an out-of-court statement made by a person charged may only be considered as evidence in relation to that person.

[3] I will now explain an exception that may apply to some of the out-of-court statements in this case.

In the case of a conspiracy charge, use paragraphs [4] – [8].

In the case of an alleged common design, use paragraphs [9] – [13].

Conspiracy

[4] If you find beyond a reasonable doubt that there was a conspiracy to (*specify unlawful object*), you may decide to use out-of-court statements made in furtherance of it by anyone who was probably a member, in relation to any person charged who was also probably a member.

[5] You must approach your decision in three steps.

[6] First, you must decide whether the Crown has proved beyond a reasonable doubt that there was a conspiracy between (*the dates specified in the indictment*) to (*specify unlawful object*). Consider this question in light of all the evidence you have heard.[61] At

[61] There are two schools of thought as to what evidence may be considered at step one. One view is that the jury may consider evidence that is admissible under the usual rules and, in addition, evidence of statements made by alleged members of the conspiracy in furtherance of it which are provisionally admissible under the co-conspirators' exception to the hearsay rule. The other view is that only evidence which is admissible under the usual rules of evidence may be considered at step one. The various decisions are reviewed in *R.* v. *Smith* (2007),

this step, the question is whether there was a conspiracy, not who the members were.

(*Review evidence related to the existence of a conspiracy.*)

[7] Second, if you find beyond a reasonable doubt that there was a conspiracy to (*specify unlawful object*), you must decide whether (*identify the author of the acts or statements and the person against whom they were tendered*) were probably members. Consider each person individually. On this question, you must determine whether it is more likely than not that he or she was a member of the conspiracy. Unless I tell you otherwise[62], in deciding whether a person was probably a member of the conspiracy, consider only his or her own acts and statements in the context in which they occurred. At this step, evidence of acts or statements of an alleged member of the conspiracy may be considered only in relation to that person's participation, and not that of anyone else.

It is for you to decide whether the acts or statements were done or made and what they meant.

(*Review evidence directly admissible in relation to each person concerning his or her membership in the conspiracy.*)

[8] Third, if you find beyond a reasonable doubt that there was a conspiracy to (*specify unlawful object*), and you have decided which persons were probably members of it, you may then consider out-of-court statements by any probable member in relation to any other probable member, but only those statements that you find were made in furtherance of the conspiracy. That means that the statements must have been made to advance or accomplish (*specify unlawful object*) while the conspiracy was ongoing and the maker of the statement was a member of it.

It is for you to decide whether the statements were made and what they meant.

Insert if appropriate:

You may not use the statements you have heard that *NOA1* or *NOA2* or any alleged co-conspirator made to the police after his/her membership in the conspiracy had come to an end as evidence in relation to the guilt of anyone other than the person who made that statement.

Give similar limiting instructions in relation to other statements clearly not made in furtherance of the conspiracy, keeping in mind that whether the statement was "in furtherance"

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216 C.C.C. (3d) 490 (N.S.C.A), at paras 225-239.

62 In some cases, other evidence may be directly admissible to establish that a person was a probable member of a conspiracy, such as non-hearsay evidence, or evidence admissible under other hearsay exceptions or the principled approach to hearsay. In this situation, this evidence should be included in the review of the evidence directly admissible against each member of the conspiracy.

is a question of fact for the jury to determine.

Insert if a conspiracy count is being tried with a substantive offence that does not involve a common design:

The special rules I have just told you about apply only to the charge of conspiracy. The general rules I mentioned earlier apply to the charge of (*specify*).

Common Design

[9] If you find beyond a reasonable doubt[63] that there was a common design to (*specify unlawful object*), you may decide to use out-of-court statements made in furtherance of it by anyone who was probably a participant, in relation to any person charged who was also probably a participant.

[10] You must approach your decision in three steps.

[11] First, you must decide whether the Crown has proved beyond a reasonable doubt that there was a common design to (*specify unlawful object*). Consider this question in light of all the evidence you have heard.[64] At this step, the question is whether there was a common design, not who the participants were.

[12] Second, if you find beyond a reasonable doubt that there was a common design to (*specify unlawful object*), you must decide whether (*identify the author of the acts or statements and the person against whom they were tendered*) were probably participants. Consider each person individually. On this question, you must determine whether it is more likely than not that he or she was a participant in the common design. Unless I tell

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63 This instruction is based on the assumption that the standard of proof at step one in a case of common design is beyond a reasonable doubt, the same as for conspiracy in *R.* v. *Carter*, [1982] 1 S.C.R. 938, 67 C.C.C. (2d) 568: See *R.* v. *Koufis*, [1941] S.C.R. 481, 76 C.C.C. 161 and *R.* v. *Sutton*, [2000] 2 S.C.R. 595, 148 C.C.C. (3d) 613 at para. 8. However, the Coerts of Appeal of New Brunswick, British Columbia and Quebec have held that the standard of proof at step one in a common design case is the balance of probabilities and, therefore, paragraphs [9] and [11] of this instruction should be modified in those provinces: *R.* v. *Sutton* (1999), 140 C.C.C. (3d) 336 (N.B.C.A.); *R. v. Lambert*, 2007 BCCA 26 and *R.* c. *Sebbag*, [2004] JQ no. 7397 (Qué. C.A.). There is no authority from the Supreme Court of Canada supporting this difference between conspiracy and common design cases with respect to the hearsay exception; nor is there any authority specifically dealing with the standard of proof where both conspiracy and a substantive offence are charged.

64 There are two schools of thought as to what evidence may be considered at step one in conspiracy cases. Presumably, the same question is relevant to the common design hearsay exception (see footnote 2).

you otherwise,[65] in deciding whether a person was probably a participant, consider only his or her own acts and statements in the context in which they occurred. At this step, evidence of acts or statements of an alleged participant in the common design may be considered only in relation to that person's participation, and not that of anyone else.

It is for you to decide whether the acts or statements were done or made and what they meant.

(*Review evidence directly admissible in relation to each person concerning his or her participation in the common design.*)

[13] Third, if you have find beyond a reasonable doubt that there was a common design to (*specify unlawful object*) and you have decided which persons were probably participants in it, you may then consider out-of-court statements by any probable participant in relation to any other probable participant, but only those statements that you find were made in furtherance of the common design. That means that the statements must have been made to advance or accomplish (*specify unlawful object*) while the common design was ongoing and the maker of the statement was a participant in it.

Insert if appropriate:

You may not use the statements you have heard that *NOA1* or *NOA2* or any alleged participant made to the police after his/her participation in the common design had come to an end as evidence in relation to the guilt of anyone other than the person who made that statement.

Give similar limiting instructions in relation to other statements clearly not in furtherance of the common design, keeping in mind that whether the statement was "in furtherance" is a question of fact for the jury to determine.

Insert if a common design count is being tried with a separate substantive offence that does not involve a common design:

The special rules I have just told you about apply only to the charge of (*specify offence involving a common design)*. The general rules I mentioned earlier apply to the charge of (*specify*).

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[65] In some cases, other evidence may be directly admissible to establish that a person was a probable participant in a common design such as non-hearsay evidence, or evidence admissible under other hearsay exceptions or the principled approach to hearsay. In this situation, this evidence should be included in the review of the evidence directly admissible against each participant in the common design.

11.28 Statements of Hearsay Declarant Not Called as Witness[66]

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

(Last revised June 2012)

[1] *NOW* testified about what *NOD*[67] said to him/her about (*describe briefly hearsay statement*). *NOD* was not here to testify.[68]

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

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

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

[5] Do not consider this evidence by itself. It is only part of the evidence in this case. Take it into account, along with other evidence that may make it more or less reliable. It is up to you to decide how much or little of it you will believe or rely on to decide this case.[69]

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

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

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

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

11.29 Judicial Notice[70]

(Last revised June 2012)

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

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[70] It would only be in rare situations that this instruction would be appropriate. A jury should not be instructed to take judicial notice of a fact unless the judge has first given counsel an opportunity, in the absence of the jury, to make submissions about whether judicial notice is appropriate. Judicial notice is the acceptance of a fact without formal proof. It applies to:

(i) facts that are so notorious that they are not the subject of dispute among reasonable persons; and,

(ii) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

See *R.* v. *Williams*, [1998] 1 S.C.R. 1128; *R.* v *Spence*, [2005] 3 S.C.R. 458.

11.30 Plea of Guilty of Another[71]

(Last revised June 2012)

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

[2] *NOW*'s guilty plea is not evidence that *NOA* is guilty. You must not think that because *NOW* has pleaded guilty, *NOA* is guilty too.[72]

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

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

11.31 Evidence of Other Sexual Activity[73] (ss. 276; 276.4)

(Last revised June 2012)

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

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

[3] You must not use that evidence to infer that, because of the sexual nature of what happened, *NOC* is more likely to have consented to the sexual activity with which *NOA* is charged or that *NOC* is less worthy of belief.

[73] This instruction is mandatory under *Code*, s. 276.4.

11.32 Charts And Summaries (Demonstrative Aids)[74]

(Last revised June 2012)

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

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

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

11.33 Charts And Summaries (Filed as Exhibits)

(Last revised June 2012)

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

11.34 Outstanding Charges Against Crown Witness[75] (*Titus*[76] Instruction)

(Last revised June 2012)

[1] *NOW* testified for the Crown. S/he is charged with (*briefly describe offence charged*). The trial has not yet been held.

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

[3] You should approach the evidence of *NOW* with care. When you consider how much or little of this evidence you will believe or rely on to decide this case, take into account the fact that s/he is her/himself awaiting trial on another charge. It is a factor for you to consider.[77]

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

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

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

12. Deliberations

12.1 Transcript of Evidence

(Last revised June 2012)

[1] Although the testimony of every witness has been recorded, we will not have a written transcript of the evidence available for you to review when you go to the jury room to discuss your decision in this case. I think you will find that your collective memory of the evidence is good. However, if there is something you cannot recall or your recollections differ, counsel and I will try to assist you by reviewing our notes or I may direct that the evidence be played back from the recorder. Normally, we would play back both the direct evidence and the cross-examination on any point.[78]

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[78] In the province of Quebec, jurors are instructed that if they wish to re-hear a part of the testimony of a witness, they will be allowed to do so in the jury room but they must be instructed to listen to every part of the witnesses' testimony that bears on the subject of their inquiry, including any portion that may explain, attenuate or put it into context : *R.* v. *Hovington*, [2007] J.Q. No. 7780 ; 75 W.C.B. (2d) 269 (C.A.); *R.* v. *Robert*, [2004] J.Q. No. 8562 (C.A.).

12.2 Procedure for Questions

(Last revised June 2012)

[1] If, during your discussions, you have any questions, please put them in writing in a sealed envelope and give it to the (*specify, sheriff, constable or other*) who will be outside the door of the jury room. S/he will bring the envelope to me and I will discuss the questions with the lawyers. You will be brought back into the courtroom and I will reply to your questions.

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

12.3 Requirements for a Verdict

(Last revised June 2012)

[1] A verdict, whether of guilty or not guilty, is the unanimous decision of the jury. To return a verdict (with respect to each person charged) on a count requires that all of you agree on your verdict. While your verdict on any count must be unanimous, your route to the verdict need not be. You could all be satisfied of *NOA*'s guilt beyond a reasonable doubt even though individually you have different views of the evidence. Similarly, you could all have a reasonable doubt about *NOA*'s guilt but not agree why. It matters not, provided that your verdict on the count is unanimous.

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

[3] I am now handing you a verdict sheet[79] (*provide explanation for recording the verdict*). If you reach a unanimous verdict (*on a count or counts*), your foreperson should record it on your verdict sheet and notify the (*specify, sheriff, constable or other*). We will come back into court to receive it. Your foreperson will tell us your verdict in the courtroom.

[4] If you cannot reach a unanimous verdict [on a count or counts], you should notify the (*specify, sheriff, constable or other*) in writing. S/he will bring me your message.

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[79] The verdict sheet should set out the possible verdicts on each count for each accused. For included offences, the option should read "not guilty of (*offence charged*), but guilty of the included offence of (*specify*)". The verdict sheet should be discussed with counsel before it is given to the jury to ensure that it accurately sets out all the available verdicts.

12.4 Further Instructions

(Last revised June 2012)

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

(*If the jury is recalled, state*:)

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

12.5 Discharge of Jurors in Excess of Twelve (s. 652.1(2))

(June 2012)

Instruction to be given when an order has been made under s. 631(2.2) and more than twelve jurors are remaining at the end of the charge.

[1] I am now required to identify the twelve jurors who will participate in the deliberations. Your juror numbers have been written on cards of equal size and placed in a box that will be thoroughly shaken. The clerk will draw at random one/two card(s) and that juror (those jurors) will be discharged.

[2] If you are discharged, I want to stress that by your participation in this case you have performed an essential service in the administration of justice. On behalf of myself and all Canadians I would like to extend my sincere gratitude for your dedication to this case.

[3] I remind you that all jury discussions are secret. You must not tell anyone anything about your discussions unless that information was disclosed in open court. To do so would be a criminal offence.