



Canadian Judicial Council

Homicide

(Last revised – July 2012)

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HOMICIDE

Offence 222.5

Unlawful Act Manslaughter
(ss. 222(5)(a); 234)
(Last revised – July 2012)

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

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of manslaughter, unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.¹ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

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

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

If you are satisfied beyond a reasonable doubt of all of these essential elements, [and you have no reasonable doubt³ after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of manslaughter.

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

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

² If there is an issue about whether *NOC* is dead, further instructions will be required.

³ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

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

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

It is not always a crime to cause another person’s death. It is a crime, however, to cause the death of another person by an unlawful act.⁴

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

*(set out the underlying offence and its essential elements, including any defences)*⁵

(review relevant evidence and relate to issue)

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

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

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

The Crown must prove beyond a reasonable doubt that *NOA*’s unlawful act was dangerous. To decide whether *NOA*’s unlawful act was dangerous, ask yourselves whether a reasonable person in the same circumstances would have realized that he or she was exposing someone else to a risk of bodily harm.⁶ Bodily harm” is any hurt or injury that interferes with a person’s health or comfort and is more than just brief or minor.

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

⁴ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

⁵ Where a defence negates the unlawful character of the accused’s act, such as accident or self-defence, the appropriate defence instruction should be inserted here. It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35.

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

(review relevant evidence and relate to issue)

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

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

[6] Third – Did *NOA*'s unlawful act cause *NOC*'s death?⁷

To prove that *NOA*'s unlawful act caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁸ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁹ in

⁷ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused's conduct, such as non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here are directed to causation, not participation.

⁸ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court's decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

⁹ Delete the reference to expert evidence if none has been given.

determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA* caused *NOC*'s death, you must find *NOA* not guilty of manslaughter.¹⁰

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

¹⁰ Where causation is a live issue, it may be necessary to give an instruction on an included offence arising from the unlawful act itself.

Offence 229.a

Second Degree Murder
(s. 229(a))
(Last revised – July 2012)

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

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of second degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.¹¹ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

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

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

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

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

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

¹¹ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

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

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.¹³

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

*(set out the underlying offence and its essential elements, including any defences.)*¹⁴

(review relevant evidence and relate to issue)

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

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

[5] Second – Did *NOA*'s unlawful act cause *NOC*'s death?¹⁵

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.¹⁶ A person's conduct

¹³ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

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

¹⁴ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

¹⁵ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused's conduct as, for example, non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here relate to causation, not participation.

¹⁶ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court's decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at

may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,¹⁷ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

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

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

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

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

1. that *NOA* meant to cause *NOC*'s death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely¹⁸ to cause his/her death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that *NOA* meant to kill *NOC*, or that *NOA* meant to cause *NOC* bodily harm

para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

¹⁷ Delete the reference to expert evidence if none has been given.

¹⁸ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089, (1989), 51 C.C.C. (3d) 417 (S.C.C.).

that s/he knew was so dangerous and serious that s/he knew it was likely to kill *NOC* and proceeded despite his/her knowledge of that risk.

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

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may infer, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.¹⁹ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* had one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

¹⁹ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(review relevant evidence and relate to the issue²⁰)

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

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder [and you have no reasonable doubt with respect to (*specify defence*)], you must find *NOA* guilty of second degree murder.²¹

²⁰ Where a defence advanced relates to the accused's mental state, for example, intoxication or diminished capacity, the appropriate instruction should be inserted here and adjustments made to the common sense inference of intention.

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

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

²¹ Where provocation or intoxication is raised, the appropriate instruction must be given here.

Offence 229.b

Second Degree Murder
(Unintended Victim)
(s. 229(b))
(Last revised – July 2012)

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

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of second degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.²² Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOAC*'s²³ death; and
3. that *NOA* had the intent required for the murder of *NOIC* ²⁴.

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

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt²⁵ after considering the defence(s) (*specify defences*) about which I will instruct you] you must find *NOA* guilty of second degree murder.

²² Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

²³ *NOAC* refers to the actual victim, the person who died.

²⁴ *NOIC* refers to the intended victim, the person whom the accused intended to kill.

²⁵ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

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

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

It is not always a crime to cause another person’s death. It is a crime, however, to cause the death of another person by an unlawful act.²⁶

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

*(set out the underlying offence and its essential elements, including any defences.)*²⁷

(review evidence and relate to issue)

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

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

[5] **Second – Did *NOA*’s unlawful act cause *NOAC*’s death?**²⁸

To prove that *NOA* caused *NOAC*’s death, the Crown must prove beyond a reasonable doubt that *NOA*’s conduct contributed significantly to *NOAC*’s death.²⁹ A person’s

²⁶ The unlawful act could be a violation of either a provincial or federal statute, but not an offence of absolute liability.

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

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

²⁸ Where the defence advanced relates to the accused’s participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused’s conduct such as, for example, in the case of non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here relate to causation, not participation.

²⁹ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court’s decision in *R. v. Maybin*,

conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOAC*'s death, including the expert evidence of *NOW*,³⁰ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOAC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

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

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

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

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

1. that *NOA* meant to cause *NOIC*'s death, or
2. that *NOA* meant to cause *NOIC* bodily harm that s/he knew was likely³¹ to cause his/her death and was reckless whether death ensued or not.

2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

³⁰ Delete the reference to expert evidence if none has been given.

³¹ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074 at 1089, (1989), 51 C.C.C. (3d) 417 (S.C.C.).

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

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

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.³² However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* had one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOIC* was likely to die. It is for you to decide.

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

*(review relevant evidence and relate to issue)*³³

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

³² This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

³³ Where a defence advanced relates to the accused’s mental state, for example, intoxication or diminished capacity, the appropriate instruction should be inserted here and adjustments made to the use of the common sense inference of intention.

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

Offence Instructions
Offence 229.b

If you are satisfied beyond a reasonable doubt that *NOA* had the intent required for murder of *NOIC* [and you have no reasonable doubt with respect to (*specify defence*)], you must find *NOA* guilty of second degree murder.³⁴

³⁴ Where provocation is raised, the appropriate instruction must be given here.

Offence 231.2

First Degree Murder
Planned and Deliberate
(s. 231(2))
(Last revised – July 2012)

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

(read relevant part of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.³⁵ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

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

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

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt³⁶ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find *NOA* guilty of first degree murder.

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

³⁵ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

³⁶ This instruction will have to be modified where the accused has a legal burden of proof, such as mental disorder and non-insane automatism.

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

It is not always a crime to cause another person’s death. It is a crime, however, to cause the death of another person by an unlawful act.³⁷

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

(*set out the underlying offence and its essential elements, including any defences.*)³⁸

(*review relevant evidence and relate to issue*)

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

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

[5] Second – Did *NOA*’s unlawful act cause *NOC*’s death?³⁹

To prove that *NOA* caused *NOC*’s death, the Crown must prove beyond a reasonable doubt that *NOA*’s conduct contributed significantly to *NOC*’s death.⁴⁰ A person’s conduct

³⁷ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

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

³⁸ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

³⁹ Where the defence advanced relates to the accused’s participation in the killing, such as alibi or lack of proof of identity, or to the voluntary character of the accused’s conduct as, for example, non-mental disorder automatism, the applicable instruction should be included here. The instructions here relate to causation not participation.

⁴⁰ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be “not insignificant.” The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court’s decision in *R. v. Maybin*,

may contribute significantly to another person’s death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*’s death, including the expert evidence of *NOW*,⁴¹ in determining whether the Crown has proved that *NOA*’s conduct contributed significantly to *NOC*’s death. It is for you to decide.

(review relevant evidence and relate to issue)

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

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

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

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

1. that *NOA* meant to cause *NOC*’s death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁴² to cause his/her death and was reckless whether death ensued or not.

2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

⁴¹ Delete the reference to expert evidence if none has been given.

⁴² The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

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

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

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁴³ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*) you have a reasonable doubt whether *NOA* had the one of the intents required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

(*review and relate relevant evidence to the issue*⁴⁴)

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

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

[7] Fourth – Was *NOA*'s murder of *NOC* both planned and deliberate?⁴⁵

⁴³ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

⁴⁴ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

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

To prove first degree murder, the Crown must prove beyond a reasonable doubt not only that *NOA* had the intent required for murder, but also that the murder was both planned and deliberate.⁴⁶ “Planning and deliberation” are not the same as “intention”. For example, a murder committed intentionally, but on a sudden impulse or without prior consideration, is not planned and deliberate.

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

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

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

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

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

It is for you to say whether the murder of *NOC* was both planned and deliberate. To decide this issue, you must consider all the evidence, including [*specify evidence of intoxication, or mental illness short of a s. 16 defence of mental disorder, self-defence or provocation*]⁴⁷ and anything said or done in the circumstances.

(review relevant evidence and relate to issue)

⁴⁵ Where the offence alleged is a contract killing, reference should be made to s. 231(3), either in addition or as an alternative to the instructions set out under this heading.

⁴⁶ Planning and deliberation applies to both intents to commit murder – ss. 229(a)(i) and (ii). See: *R. v. Nygaard and Schimmens* [1989] 2 S.C.R. 1074, (1989), 51 C.C.C. (3d) 489 (S.C.C.).

⁴⁷ Where there is evidence of intoxication, mental illness short of a s. 16 defence of mental disorder, self-defence and/or provocation, the jury must be instructed separately as to how this might affect planning and deliberation as well as intention. In particular, even if the jury finds intention proved beyond a reasonable doubt, intoxication or mental illness short of a s. 16 defence of mental disorder, self-defence and provocation may still give rise to a reasonable doubt regarding planning and deliberation: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 30; *R. v. Wallen*, [1990] 1 S.C.R. 827; (1990), 54 C.C.C. (3d) 383 (S.C.C.).

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

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

Offence 231.4

First Degree Murder of Police Officer
(s. 231(4))
(Last revised – July 2012)

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

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁴⁸ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

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

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

⁴⁸ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁴⁹ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find *NOA* guilty of first degree murder.

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

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

It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.⁵⁰

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

(*set out the underlying offence and its essential elements, including any defences*)⁵¹

(*review relevant evidence and relate to issue*)

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

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

[5] **Second – Did *NOA*'s unlawful act cause *NOC*'s death?**⁵²

⁴⁹ This instruction will have to be modified where the accused has a legal burden of proof, such as mental disorder and non-insane automatism.

⁵⁰ The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

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

⁵¹ It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35. However, instructions relating to any defences specific to murder (*e.g.*, intoxication and provocation) should be given after the direction on the element of intent to murder.

⁵² Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused's conduct, as for example, non-mental disorder automatism, the applicable instruction should be inserted here. The instructions here are directed to causation, not participation.

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁵³ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁵⁴ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

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

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

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

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

1. that *NOA* meant to cause *NOC*'s death; or

⁵³ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court's decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

⁵⁴ Delete the reference to expert evidence if none has been given.

2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁵⁵ to cause his death *NOC*, and was reckless whether death ensued or not.

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

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

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁵⁶

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

(review and relate relevant evidence to the issue⁵⁷)

⁵⁵ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074 at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁵⁶ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

⁵⁷ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

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

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

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

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

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

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

Both must be proven. One is not enough.

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

(review relevant evidence and relate to issue)

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

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

(review relevant evidence and relate to issue)

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

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

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

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

1. that *NOA* actually knew that *NOC* was a police officer acting in the course of his/her duties; or
2. that *NOA* knew there was a risk that *NOC* was likely a police officer acting in the course of his/her duties, and that *NOA* proceeded despite that risk;⁵⁸ or
3. that *NOA* was aware of indications that *NOC* was a police officer acting in the course of his/her duties, but deliberately chose to ignore them because s/he did not want to know the truth.

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

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

(review relevant evidence and relate to issue)

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

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

⁵⁸ See: *R. v. Collins* (1989), 48 C.C.C. (3d) 343 (Ont. C.A.), at 372. Further, the instruction here includes “likely” which is a higher standard of proof than “might” or “could”. This standard has been included because the offence is first degree murder.

Offence 231.5

First Degree Murder in the Commission of Another Offence
(s. 231(5))
(Last revised – July 2012)

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

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of first degree murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁵⁹ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* committed an unlawful act;
2. that *NOA*'s unlawful act caused *NOC*'s death;
3. that *NOA* had the intent required for murder;
4. that *NOA* committed *(specify listed offence or attempt)*; and
5. that the *(specify listed offence or attempt)* and the murder of *NOC* were part of the same series of events;
6. [that *NOA* actively participated in the killing.]⁶⁰

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

If you are satisfied beyond a reasonable doubt of all these essential elements, [and you have no reasonable doubt⁶¹ after considering the defence(s) (specify defences) about which I will instruct you], you must find *NOA* guilty of first degree murder.

⁵⁹ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, etc.). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

⁶⁰ This element should be included only where there is more than one perpetrator. See: *R. v. Harbottle*, [1993] 3 S.C.R. 306.

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

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

It is not always a crime to cause another person’s death. It is a crime, however, to cause the death of another person by an unlawful act.⁶²

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

*(set out the underlying offence and its essential elements, including any defences.)*⁶³

(review relevant evidence and relate to issue)

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

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

⁶¹ This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder and non-insane automatism.

⁶² The unlawful act could be a violation of either a provincial or a federal statute, but not an offence of absolute liability.

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

⁶³ Where a defence negates the unlawful character of the accused’s act, such as accident or self-defence, the appropriate instruction should be inserted here. It is incumbent upon the trial judge to instruct the jury on the law in respect of the underlying offence, including any defences that arise on the evidence. See: *R. v. Gunning*, 2005 SCC 27, at para. 35.

[5] Second – Did *NOA*'s unlawful act cause *NOC*'s death?⁶⁴

To prove that *NOA* caused *NOC*'s death, the Crown must prove beyond a reasonable doubt that *NOA*'s conduct contributed significantly to *NOC*'s death.⁶⁵ A person's conduct may contribute significantly to another person's death even though that conduct is not the sole or main cause of death. You must consider all the evidence concerning the cause of *NOC*'s death, including the expert evidence of *NOW*,⁶⁶ in determining whether the Crown has proved that *NOA*'s conduct contributed significantly to *NOC*'s death. It is for you to decide.

(review relevant evidence and relate to issue)

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

⁶⁴ Where the defence advanced relates to the accused's participation in the killing, such as alibi or lack of proof of identity, or one that relates to the voluntary character of the accused's conduct, as for example, non-mental disorder automatism, the applicable Instruction should be inserted here. The instructions in this specimen are directed to causation, not participation.

⁶⁵ Following *R. v. Nette*, [2001] 3 S.C.R. 488, it would appear that this formulation of the general test of causation is not reversible. It expresses the central element of the test in *R. v. Smithers*, [1978] 1 S.C.R. 506, which stipulated that a cause should be "not insignificant." The two formulations are equivalent. Thus *Nette* is regarded as affirming the standard in *Smithers*, but providing a positive alternative for expressing it. This interpretation is reinforced by the Court's decision in *R. v. Maybin*, 2012 SCC 24, in which it confirmed that the correct test is found in *Smithers* and *Nette*. Note also that the Court stated:

Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context (at para. 17).

If the facts of the case require it, you may have to include one or more of the following statements:

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

⁶⁶ Delete the reference to expert evidence if none has been given.

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

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

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

1. that *NOA* meant to cause *NOC*'s death; or
2. that *NOA* meant to cause *NOC* bodily harm that s/he knew was likely⁶⁷ to cause his death and was reckless whether death ensued or not.

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

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

To determine whether the Crown has proved that *NOA* had one of the intents required for murder, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁶⁸ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (specify evidence of intoxication, mental disorder or other), you have a reasonable doubt whether *NOA* had the intent required for murder. In particular, consider whether this evidence causes you to have a reasonable doubt whether *NOA* knew that *NOC* was likely to die. It is for you to decide.

⁶⁷ The word “likely” means “probably”. See: *R. v. Nygaard and Schimmens*, [1989] 2 S.C.R. 1074, at 1089; (1989), 51 C.C.C. (3d) 417 (S.C.C.).

⁶⁸ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

(review and relate relevant evidence to the issue⁶⁹)

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

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

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

(insert instruction on elements of listed offence)⁷⁰

(review relevant evidence and relate to issue)

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

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

[8] Fifth – Were the (specify listed offence or attempt) and the killing of *NOC* part of the same series of events?⁷¹

⁶⁹ According to *R. v. Seymour*, [1996] 2 S.C.R. 252, at pp. 263-4, where there is evidence suggesting that the accused may have been in an impaired or reduced mental state at the time of the killing, instructions about the “common sense inference” of intention should be immediately followed by a reference to any evidence that would tend to blunt or negate the inference.

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

⁷⁰ The listed offence may be an attempt or the completed offence. The essential elements may be found in the relevant Offence Instruction.

⁷¹ The underlying offence and the killing must be two distinct criminal acts in order for a murder to be first degree under Section 231(5): see *R. v. Pritchard*, 2008 SCC 59; *R. v. Kimberley* (2001), 56 O.R. (3d) 18 (C.A.); *R. v. Menard*, 2009 BCCA 462. Where there is a live issue on the evidence whether the underlying offence and the killing were distinct criminal acts, this instruction must be modified, for example, by adding the following language:

Offence Instructions
Offence 231.5

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

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

They will be distinct if one act can be committed without committing the other, but they will not be distinct if the confinement and the killing are essentially one and the same act.

This does not mean that the murder and the (*specify listed offence or attempt*) had to happen at exactly the same moment, but it does mean that the murder and the (*specify listed offence or attempt*) must have been closely connected with one another, in the sense that they must have been part of the same series of events.⁷²

To answer this question, you have to consider the entire course of *NOA*'s conduct. Look at the whole series of events in deciding whether the killing and the (*specify listed offence or attempt*) were part of a continuous series of events that was a single ongoing transaction⁷³.

(*review evidence and relate to issue*)

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

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

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

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

⁷² As long as the connection exists it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same. See *R. v. Russell*, [2001] 2 S.C.R. 804. The order of the offences is also immaterial where the connection exists. See: *R. v. Westergard* (2004), 24 C.R. (6th) 375 (Ont. C.A.).

⁷³ Where there is a live issue as to whether the offence and the murder are part of the same transaction, see: *R. v. Russell*, [2001] 2 S.C.R. 804, and *R. v. Paré*, [1987] 2 S.C.R. 618.

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

[9] Sixth – Did *NOA* actively participate in the killing?⁷⁴

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

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

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

(review relevant evidence and relate to issue)

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

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

⁷⁴ This instruction will be necessary only where there is more than one participant. See: *R. v. Harbottle*, [1993] 3 S.C.R. 306. Where there is evidence of more than one participant, the earlier instructions will need to include the provisions of *Criminal Code*, s. 21 (parties to an offence).

Offence 239

Attempted Murder

(s. 239)

(Last revised – May 2011)

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

(read relevant parts of indictment or count)

[2] You must find *NOA* not guilty of attempted murder unless the Crown has proved beyond a reasonable doubt that *NOA* is the person who committed the offence on the date and in the place described in the indictment.⁷⁵ Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that *NOA* meant to kill *NOC*;⁷⁶
2. that *NOA* *(describe alleged conduct)*.⁷⁷

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

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

⁷⁵ Where identity is an issue, remember to include any further instructions that may be relevant (*e.g.* eyewitness identification, alibi, similar fact, *etc.*). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

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

⁷⁶ In most cases, the actual victim and the intended victim are the same person. If not, see *R. v. Gordon* (2009), 241 C.C.C. (3d) 388 (Ont. CA). See also *R. v. Gingras*, [1996] A.Q. No. 1341 (Que. C.A.).

⁷⁷ Section 24(2) requires the judge to decide, as a matter of law, whether the accused's conduct amounts to an attempt or mere preparation. It is up to the jury, however, to make the necessary findings of fact from which the legal conclusion follows.

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

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

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

The Crown must prove beyond a reasonable doubt that *NOA* meant to kill *NOC*.⁷⁹

To determine whether *NOA* meant to kill *NOC*, you must consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances. You may take into account, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about.⁸⁰ However, you are not required to draw that inference about *NOA*. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether *NOA* meant to kill *NOC*. It is for you to decide.

(review relevant evidence and relate to issue)

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

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

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

In this case, *NOA* is alleged to have (*describe briefly conduct alleged to amount to an attempt*)⁸¹. If you are satisfied beyond a reasonable doubt that the accused (*identify conduct*), then this amounts to an attempt to kill *NOC*.

⁷⁹ Where the indictment includes a count or counts of murder, in addition to one or more counts of attempted murder, it may be advisable to distinguish between the mental elements of each crime. The following instruction may make the point:

“Unlike murder, where proof of either of two intents is sufficient, there is only one intent that will do for attempted murder: an intent to kill”.

⁸⁰ This instruction is a plain-language expression of what in case law is referred to as the “common sense inference” that a person intends the natural and probable consequences of his or her actions.

⁸¹ For example, “stabbed *NOC* in the chest” or “fired two shots at *NOC*”. The description should reflect what is required to constitute an attempt.

(review relevant evidence and relate to issue)

Unless you are satisfied beyond a reasonable doubt that *NOA (identify conduct)*, you must find *NOA* not guilty of attempted murder.⁸²

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

⁸² A count that makes no reference to the means by which the offence was committed may not give rise to any included offences, or only attempting unlawfully to cause bodily harm. See: *R. v. Simpson* (No. 2) (1981), 58 C.C.C. (2d) 122, 143 (Ont. C.A.) per Martin, J.A.; and *R. v. Colburne* (1991), 66 C.C.C. (3d) 235 (Que. C.A.). Where the wording of the indictment and the evidence leave open the possibility of an included offence, the relevant instruction should be inserted here.