Canadian Judicial Council

Preliminary Instructions

(June 2012 version)

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

Table of Contents

1 Instructions to the Jury Panel

1.1 Introduction[1]

(Last revised June 2012)

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

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

[3] We will now choose twelve[2] of you as jurors, whose duty will be to consider the evidence and in the end decide whether *NOA* is guilty or not guilty. (We will also choose (one/two) alternate juror(s) in case one or more of the original twelve is unable to act when the trial starts.)[3]

This instruction is to be used in place of paragraph [3] where thirteen or fourteen jurors are selected pursuant to s. 631(2.2)

> *A jury trial normally begins with twelve jurors. However, in certain cases, the trial may begin with thirteen or fourteen jurors. Given the anticipated length of the trial, I have decided that it is in the interest of justice to select thirteen/fourteen jurors in this case. This is to ensure that a complete jury is available to deliberate.*

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

[2] These instructions will have to be modified if an order is made pursuant to s. 631(2.2) of the *Criminal Code* for the selection of thirteen/fourteen jurors.

[3] If the trial is not expected to start immediately following the jury selection, alternates should always be chosen.

All jurors chosen will have the duty to watch and listen to all of the proceedings.

You should be aware, however, that the law allows only twelve to deliberate, and therefore I will have to reduce the jury to twelve before deliberation by drawing numbers at random. The remaining twelve jurors will have the duty to decide whether *NOA* is guilty or not guilty.

All jurors selected, whether they end up deliberating or not, will have performed an essential role in the administration of justice.

1.2 Knowledge of Witnesses or Other Participants (s. 632)

(Last revised March 2011)

[1] The charge against *NOA* is:

(*Read or summarize applicable part of indictment*)

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

[3] A person who has or ever had an association with anyone involved in this case might not be able to be impartial, that is, to approach the case with an open mind.

[4] If you have or ever had such an association with anyone involved in the case -- for example, *NOA*; Crown or defence counsel (*identify by name*); the witnesses, the investigating officer(s); or (me) the trial judge,[4] or if you have any doubt about it, please come forward. I am now going to ask Crown counsel to read out the names of the witnesses and investigating officers.

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

1.3 Knowledge of Witnesses

(Last revised March 2011)

This section has been merged with 1.2, Knowledge of Witnesses or Other Participants.

1.4 Knowledge of the Case

(Last revised March 2011)

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

[2] If anyone has personal knowledge of the circumstances of this case, please come forward.

1.5 Prior Involvement in or Knowledge of Similar Offences[5]

(Last revised March 2011)

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

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

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

[5] See ***R. v. Betker*** (1997), 115 C.C.C. (3d) 421, 443 (Ont. C.A.). See also ***R. v. Barrow***, [1987] 2 S.C.R. 694.

1.6 Citizenship Requirement

(Last revised March 2011)

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

1.7 Ability to Hear[6]

(Last revised March 2011)

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

1.8 Understanding the Language of Trial[7]

(Last revised March 2011)

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

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

1.9 Juror Health

(Last revised March 2011)

[1] The lawyers estimate that this trial will last about (*specify*) but, in reality, nobody

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

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

knows for sure. It depends on many things. As a general rule, jurors sit each day, from Monday to Friday, from (*specify time*) to (*specify time*), with a morning, (and) lunch (and afternoon) break (*or, specify*). There might be a need to vary this schedule, depending on how the trial unfolds.

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

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

1.10 Personal Hardship

(Last revised March 2011)

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

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

2 Instructions Relating to the Jury Selection Process

2.1 Choosing Jurors and Peremptory Challenges[8] Only

(Last revised June 2012)

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

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

[3] As each number is read, each lawyer will say "content" or "challenge", without saying why. If any lawyer says "challenge" when your number is called, you will not become a juror in this case. If both (all) lawyers say "content", you will become a juror in this case. We will repeat the procedure until we have chosen twelve jurors[9] (and one/two alternates).

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

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

[9] These instructions will have to be modified if an order is made pursuant to s. 631(2.2) of the *Criminal Code* for the selection of thirteen/fourteen jurors.

2.2 Challenges for Cause – Procedure[10]

(Last revised June 2012)

[1] It is fundamental that a fair, impartial, and unbiased jury try any person charged with a criminal offence. As part of the jury selection process, each prospective juror will be asked (a) question(s) about whether (*e.g.*, publicity, notoriety, bias) would affect their ability to judge *NOA* impartially. This is called "challenge for cause". Here is what will happen.

[2] The clerk will select at random two individuals who will decide whether a potential juror is impartial. These two individuals, called "triers", will take an oath, and I will explain their duties to them.

[3] The clerk will then select the numbers of (*e.g.*, 20) potential jurors, who will come forward when their numbers are called. They will be asked one by one to take a seat in the witness box, take an oath or affirmation, and answer (a) question(s). The question(s) will not pry unduly into your privacy. Each person will be asked the same question(s).

[4] I will then instruct the triers. They will decide whether the prospective juror has opinions about the case that they cannot set aside and that would prevent them from reaching a verdict based solely on the evidence at trial.

[5] Once the triers have found a person to be acceptable, either counsel may still challenge that person. If not challenged, that person will then be sworn in by the clerk and will sit as a juror.

[6] When the first juror is sworn, he or she will replace the first trier. As subsequent

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

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

jurors are sworn, they will replace the triers who preceded them.[11]

2.3 Challenges for Cause – Introductory Instructions to Triers

(Last revised March 2011)

[1] You have been selected as triers in this case. It is your task to listen to the answer(s) you will hear and decide whether or not the person is acceptable as a juror in this case.

[2] An acceptable juror is a person who would likely approach jury duty with an open mind and decide the case solely on the evidence given at trial and the legal instructions given by the trial judge. A person who is not likely to approach jury duty in that way is not acceptable.

[3] If you conclude that the person is likely impartial, you must find that person "acceptable". If not, you must find that person "not acceptable".

2.4 Challenges for Cause – Final Instructions to Triers

(Last revised March 2011)

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

(*Where pre-trial publicity is the basis for the challenge, select [2-A] or [2-B], or both, always followed by [3] and [4].*)[12]

[2-A] Just because a person has read, watched or listened to reports of matters

[11] There are two methods of conducting a challenge for cause. The first is that as each juror is selected, he or she replaces a trier. The second, on application by the accused, is to permit the same triers to decide all of the challenges: see. s. 640(2.2). Where the second method is used, this instruction will have to be modified.

[12] [1], [3] and [4] should be read in all cases.

relating to this case does not mean, by itself, that the person is not acceptable as a juror to try this case.

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

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

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

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

[4] Discuss the matter with one another. You may do so in private if you wish. A person will be found acceptable or not acceptable only if you both agree. Advise me of your decision simply by saying “acceptable” or “not acceptable”. If you disagree, which you are entitled to do, then tell me that you are unable to reach a decision.

2.5 Concluding Instructions to Jury Panel[13]

(Last revised June 2012)

[1] Jury selection will continue until twelve jurors[14] [and (one or two) alternates] have been chosen. Then we will take a short break. Court staff will show you to the jury room. At that time, you may contact your families and employers to tell them you were selected as a juror. We will then continue the trial (*or, specify*).

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

[14] These instructions will have to be modified if an order is made pursuant to section 631(2.2) of the *Criminal Code* for the selection of thirteen/fourteen jurors.

3 Opening Instructions to the Trial Jury

3.1 Introduction

(Last revised June 2012)

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

This instruction is to be used when thirteen or fourteen jurors are selected pursuant to s. 631(2.2).

> *As I told you, a jury trial normally begins with twelve jurors. Given the anticipated length of this trial, I decided that it is in the interest of justice to select thirteen/fourteen jurors in this case. This is to ensure that a complete jury is available to deliberate.*

[2] The oath or affirmation you have taken requires you to listen closely to the evidence that will be presented and to decide this case solely on that evidence and the instructions that I give you.

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

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

This instruction is to be used when thirteen or fourteen jurors are selected pursuant to s. 631(2.2).

I remind you that the law allows only twelve jurors to deliberate, and therefore I

will have to reduce the jury to twelve before deliberation by drawing numbers at random. The remaining twelve jurors will have the duty to deliberate and decide whether *NOA* is guilty or not guilty.

3.2 Duties of Jurors

(Last revised March 2011)

[1] You are the sole judges of the facts. You must decide this case only on the evidence presented to you in this courtroom.

[2] I am the sole judge of the law, and it is your duty to accept the law as I explain it to you. You must not use your own ideas about what the law is or should be, and you must not rely on information about the law from any other source.

3.3 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. The questions are not evidence unless the witness agrees that what is asked is correct. Only the answers are evidence.

[3][15] The Crown and the defence (or, *NOA*) may also agree about certain facts. When that happens, no evidence is required. Whatever they agree about is a fact in this case. This is called an "admission".

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

[5] In particular, the charge in the indictment that you heard read out when we

[15] 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.

started this case is not evidence. What the lawyers and I say when we speak to you during the trial is not evidence.

[6] What you hear outside this courtroom about this case or about any of the persons involved in it is not evidence. What you hear on radio, or see on television, in the newspaper or any Internet source, or what you may have heard from other persons is not evidence. You must ignore it completely. You must avoid all media coverage of this case. You must not do your own research. You must consider only the evidence presented to you in the courtroom.[16]

3.4 Evidence Admitted for a Limited Purpose[17]

(Last revised March 2011)

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

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

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

3.5 Direct and Circumstantial Evidence[18]

(Last revised March 2011)

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

[2] Suppose the question is whether it was raining outside. A witness testifies that he or she saw it raining outside. That is direct evidence of the fact that it was raining.

[3] Contrast this with a witness who testifies that he or she saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet. You might infer from this testimony that it was raining outside. This is circumstantial evidence of the fact that it was raining outside.

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

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

3.6 Irrelevance of Prejudice and Sympathy

(Last revised March 2011)

[1] Keep an open mind as the evidence is being presented. Do not be influenced by sympathy for or prejudice against anyone.

---

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

(i) that there need not be direct evidence of every essential element of the offence charged;

(ii) that the essential elements of the offence may be proved by circumstantial evidence;

(iii) that circumstantial evidence involves drawing an inference; and,

(iv) that circumstantial evidence is perfectly good evidence, not an inferior form of proof.

3.7 Irrelevance of Sentence

(Deleted March 2011)

3.8 Conduct of Jury

(Last revised June 2012)

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

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

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

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

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

[6] Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, Apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything

about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom.

4 Instructions on Trial Procedure

4.1 Introduction

(Last revised March 2011)

[1] Let me now explain to you the procedure that we will follow in this trial.

[2] Crown counsel is (*identify counsel by name*). The Crown prosecutes the case.

[3] Defence counsel is (*identify counsel by name*). S/he represents *NOA*, who is on trial here. (*Or, where NOA is unrepresented*: *NOA* is representing her/himself. The fact that *NOA* is not represented by a lawyer must not affect your decision in this case.)

4.2 Self-Represented Persons

(Deleted March 2011)

4.3 The Order of Presentation

(Last revised March 2011)

[1] The Crown will present its evidence first because it has the burden of proving the charge. Before presenting evidence, the Crown may make an opening address.

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

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

beyond a reasonable doubt.[19]

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

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

4.4 Questioning Witnesses

(Last revised March 2011)

[1] When lawyers ask witnesses questions, they have to follow certain rules.

[2] One set of rules applies when they are asking questions of witnesses they have called. These questions are called “examination in chief.”

[3] Another set of rules applies when lawyers are questioning witnesses that the other side has called. These questions are called “cross examination.”

[4] Examination in chief always comes first; then the lawyer from the other side has an opportunity to cross-examine the same witness.[20]

[5] After a witness has been cross-examined, the lawyer who first called that witness may be permitted to ask additional questions to clarify or explain matters that have come up in cross-examination. This is called “re-examination”.

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

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

4.5 Note-Taking by Jurors[21]

(Last revised March 2011)

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

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

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

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

4.6 Questioning of Witnesses by Jurors[22]

(Last revised March 2011)

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

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

---

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

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

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

4.7 Exclusions of the Jury from the Courtroom

(Last revised March 2011)

[1] From time to time during this trial, you may be asked to go to the jury room while counsel and I discuss legal issues. This is normal and should not concern you. I ask you to be patient if and when this happens. I assure you that any time you are excluded, it is because it is necessary to do so.

4.8 The Closing Addresses of Counsel

(Last revised March 2011)

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

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

4.9 The Summing-Up

(Last revised March 2011)

[1] My final instructions will also include a review of some of the evidence given during the trial. You should always remember, however, that it is only your

memory and understanding of the evidence that counts in this case - not mine or that of counsel.

4.10 Multiple Accused Tried Jointly

(Last revised March 2011)

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

4.11 Assessing Testimony[23]

(Last revised March 2011)

[1] Next, I want to speak to you about assessing a witness's testimony. 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. You must ask yourself whether the witness is truthful and whether the witness is reliable.

Here are a few questions to consider during your discussions.

[2] Did the witness have a good opportunity to observe the event that he or she described? How long was the witness watching or listening? Did anything interfere with the witness's ability to observe? Was there anything else happening at the same time that might have distracted the witness?

[3] Did the witness have a good memory? Keep in mind the length of time that has passed since the date of the alleged offence. Was there something specific that helped the witness remember the details of the event that he or she described? Was there something unusual or memorable about the event so that you would expect the witness to remember the details, or was the event relatively unimportant at the time, so the witness might easily have forgotten or been

[23] Some judges prefer not to mention the factors that appear in question form in [2] – [11] in their Preliminary Instructions. For those who prefer this approach, para. [1] may be read, omitting the last sentence.

mistaken about some of the details? Was any inability or difficulty that the witness had in remembering events genuine, or was the witness's memory selective in order to avoid answering questions?

[4] Was the witness able to communicate clearly and accurately?

[5] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. 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 intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.

[6] Was the witness forthright and responsive to questions, or was the witness evasive, hesitant, or argumentative?

[7] Did the witness give his or her testimony fairly, or was it tainted by self-interest or bias? Does the evidence disclose any reason why the witness might tend to favour the Crown or *NOA*?

[8] Was the witness's testimony consistent with the testimony of other witnesses? As you know, people hear and see things differently. This means we should not be surprised to find discrepancies in their testimony. Minor discrepancies are often unimportant, but you may attach greater importance to more significant discrepancies.

[9] Are there any inconsistencies in the witness's own testimony? If so, do these inconsistencies make the testimony more or less believable and reliable? Are the inconsistencies about something important, or minor details? Could they be honest mistakes? Could they be deliberate lies? Are there any explanations for them? Do the explanations make sense?

[10] You must not decide an issue simply by counting which side has more witnesses. You may decide that the testimony of fewer witnesses is more reliable than the evidence of a larger number. It is the force of the evidence that counts, not the number of witnesses.

[11] Consider these questions in the context of the whole of the evidence. Use your common sense to decide how much weight or importance you wish to give to the testimony of the witnesses.

5 Fundamental Principles

5.1 Presumption of Innocence, Burden of Proof and Reasonable Doubt

(Last revised March 2011)

[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 inextricably 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.[24]

[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.

[24] 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.

[6] I will explain to you 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.

[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, you must convict him/her of that offence since that demonstrates that you are satisfied of his/her guilt beyond a reasonable doubt.

- 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.

5.2 Reasonable Doubt

(Last revised March 2011)

[This instruction has been merged with 5.1, Presumption of Innocence, Burden of Proof and Reasonable Doubt.]

5.3 Elements of Offence[25]

(Last revised March 2011)

[1] To help you follow the evidence in this case, I will describe the essential elements of the offence charged. After all of the evidence has been presented, I will give you complete instructions on the law that applies to these essential elements and to any other issues that you must consider.[26]

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

(*Read or summarize applicable part of indictment)*

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

[4] The Crown is required to prove each of these essential elements beyond a reasonable doubt.

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

[26] Except in the rarest of cases, Preliminary Instructions should not include any reference to substantive defences as the evidence may unfold differently than anticipated.

[27] Where there are several offences charged, each count, or group of counts charging the same offence, should be referred to separately.

6 Concluding Instructions

6.1 Selection of Foreperson[28]

(Last revised June 2012)

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

6.2 Secrecy

(Last revised June 2012)

[1] All jury discussions are secret. Except for telling me about any problems, 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. You should feel confident that what happens in the jury room will always be private. This is to encourage full and frank discussion with your fellow jurors. In other words, you need not worry that something you say in the jury room will be repeated anywhere else.

[2] If something happens during the course of the trial that may affect your ability to do your duty as a juror, please write it down, put it in a sealed envelope and deliver it to the [*specify - sheriff, constable or other*] who will give it to me.

---

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

Where thirteen or fourteen jurors have been selected under s. 631(2.2), it may be preferable to delay the choice of the foreperson until the final twelve have been determined.

6.3 Difficulties in Hearing or Seeing Witnesses

(Last revised March 2011)

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

6.4 Hours of Sitting

(Last revised March 2011)

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

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

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

[4] From time to time, a juror may not be able to avoid having to go somewhere or do something when we would normally be sitting. We will do our best to help you out. You should remember, however, that we have to try this case in a timely and fair way. If something of this nature does happen, please let me know as soon as possible in a written note and the [*specify - sheriff, constable or other*] will give it to me.

6.5 Concluding Remarks

(Last revised March 2011)

[1] It is your duty to watch and listen to all of the proceedings, including the addresses, the evidence and my instructions. You must listen to and observe

these trial proceedings without prejudice, bias or sympathy.

[2] At the end of the sittings for each day, you are free to go. You do not have to stay together.

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