Court File No. 36506

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of New Brunswick)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and –

HARRY McKENNA

Respondent
(Appellant)

APPELLANT'S RECORD

(Pursuant to Rule 38 of the Rules of the *Supreme Court of Canada*)

VOLUME I of VI

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(The Accused is present in the dock.)

THE COURT: I notice that we have a number of people here. If you have to go in and out when I'm doing my charge, would you do it as quietly and unobtrusively as possible and, please don't speak to one another and talk to one another during my charge to the jury. They have to be able to listen to me and no one else. Okay? So, we'll bring them. Pardon?

(Jury called - all present.)

THE COURT: Thank you. Now, this may take me over an hour to read this. I'll try to do it slowly enough so that you can understand what I'm saying, but you will have a copy of this with you in the jury room. But if you need a break, as I'm reading this, please just put up your hand. Okay? Members of the Jury, the time has come for your most difficult duties to begin. I must now explain the law that concerns this case. But first I do want to thank you for your attentiveness and your attendance throughout this trial. I would also like to thank all counsel for the manner in which they have conducted this case. It was done in a fair and professional manner under somewhat difficult circumstances. I am now going to give you more instructions. These instructions will cover a number

of topics. Consider them as a whole. Do not single out some as more important and pay less or no attention to others. All are equally important, unless I tell you otherwise. First, I will explain your duties as jurors, and tell you about the general rules of law that apply to all jury cases. Second, I will advise you of the specific rules of law that govern this case and the evidence that you have heard. Next, I will explain what Crown counsel must prove beyond a reasonable doubt to establish the guilt of Harry McKenna and tell you about the defences and other issues that arise on the evidence that you have heard. Then, I will discuss the issues you need to decide and review with you the evidence that relates to those issues. By doing this, I hope I can help you recall the evidence and understand how it relates to the issues that you will be asked to decide. You must always keep in mind, however, that to decide this case, you rely on what you remember the evidence was, not what counsel or I say it was. That is why I will not be reviewing the evidence in any great detail; as well, counsel has carried out a review of the evidence in their closing statements. After that, I will briefly summarize the positions that counsel have put

forward in their closing addresses. Finally, I will discuss what verdicts you may return and how you should approach your discussions of the case in your jury room. It is important that you listen very carefully to all of these instructions. I am giving them to help you make a decision, not to tell you what decision to make. As you know, it is your duty to decide whether the accused is guilty or not guilty of the charge against him. On the one hand it is important that an innocent person should not be found guilty of a criminal offence. On the other hand, the community in which you live has the right to expect that those who commit crimes will be strictly but fairly dealt with. You are engaged in one of the most important duties that a Canadian citizen can be called upon to perform. You, members of the jury, are the sole judges of the facts of this case and you must make your judgment based on the assessments of these facts, not mine, not the prosecutors, nor defence counsel, nor anyone else. Although you are the final judges as to the weight to be given to the evidence tendered at this trial, you must take the law as I give it to you. It is your duty to be guided by my explanation of the law. Even if you disagree with or

you do not understand the reasons for the law, you are required to – what I – you are required to follow what I say about it. You are not allowed to pick and choose amongst my instructions on the law. You must not consult other sources or substitute your own views. If I make a mistake about the law, justice can still be done in this case. The court stenographer records everything I say. The Court of Appeal can correct my mistakes. But justice will not be done if you wrongly apply the law. Your decisions are secret. You do not give reasons. No one keeps a record of your discussions for the Court of Appeal to review. As a result, it is very important that you accept from me what the law is and follow it without question. I may express an opinion as to the importance of the evidence, which has been given in this case. Remember, you are in no way bound by my comments on the facts. You must weigh the evidence and come to your own conclusions. Irrelevance of outside information. You must disregard completely any radio, television, newspaper accounts or internet information you have heard, seen or read about this case, or about any of the persons or places involved or mentioned in it. Those reports, and any other information about

the case from the outside the courtroom, are not evidence. It would not be fair to decide this case on the basis of any evidence not introduced or tested by the parties in court and made part of the evidence at trial. You, not the media or anyone else, are the only judges of the facts. You must consider the evidence and make your decision without sympathy, prejudice or fear. You must not be influenced by public opinion. We expect and are entitled to your impartial assessment of the evidence. Punishment has nothing to do with your task, which is to determine whether Crown counsel has proved Harry McKenna guilty beyond a reasonable doubt. Punishment has no place in your discussions or in your decision. If you find Harry McKenna guilty of an offence, it is my job, not yours, to decide what punishment is appropriate. During the course of this trial, you may have heard counsel refer to a preliminary hearing. Before this trial began, a preliminary hearing was held before a Provincial Court judge and witnesses were examined and cross-examined under oath. Nothing is decided at that type of hearing as to whether the accused was guilty or not guilty but a transcript is kept and you may have heard it referred to. When you go to the jury

room to begin your discussions, it is very important that no one starts off by telling everybody else that he or she has already made up his or her mind and will not change it, whatever anyone else may say. That is not the way to decide a case. As jurors, it is your duty to talk with and listen to one another, discuss the evidence, put forward your own views, listen to what others have to say, try to reach an agreement, if you can. Each of you has to decide the case for yourself. You should only do so, however, after you have considered the evidence with your fellow jurors and applied the law that I have explained to you. During your discussions, do not hesitate to re-consider your own opinions. Change your mind, if you think you are wrong. Do not give up your honest beliefs, however, just because others think differently. Do not change your mind only to get the case over with. Your only responsibility is to determine whether Crown counsel has proved Harry McKenna guilty beyond a reasonable doubt. Your contribution to the administration of justice is a just and proper verdict. We ask for nothing more and, we are entitled to nothing less. Your verdict has to be unanimous. A verdict, whether of guilty or not

guilty, is the unanimous opinion of the whole jury. You must try to reach a unanimous verdict. However, you must not agree, only for the purpose of returning a unanimous verdict. If you cannot come to a unanimous verdict and I am satisfied that there is no possibility that you will, then I can discharge you and a new jury will be summoned and a new trial held. To decide what the facts are in this case, you must consider only the evidence that you saw and heard in the courtroom. Consider all of the evidence in reaching your decision. The evidence includes what each witness said in answering the questions the lawyers asked. The questions themselves are not evidence unless the witness agreed what - with what was - that what was asked was correct. The answers of the witness are his/her evidence. The evidence also includes any things that were made exhibits. The exhibits will go with you to the jury room. As I explained to you earlier, there are some things that are not evidence. You must not consider or rely upon them when you decide this case. The charge that you heard read out when we started this case is not evidence. What the lawyers and I said when we spoke to you during the trial, including what I am saying to

you now, is not evidence. Only the exhibits and the things witnesses say are evidence. Sometimes during the trial, one of the lawyers objected to a question that another asked a witness. Anything the lawyers said in making or answering the objection is not evidence. You must also take nothing from the fact that any objection was taken. I have told you that you are the sole judges of the facts in this case. One of the most important parts of that duty is that you must judge the truthfulness of what the witnesses have said. In my view, the best guide for this is to bring to bear your natural every day experience. In other words, use your common sense. Keep in mind in assessing a witness' testimony that a witness may be truthful in the sense of accurately reflecting reality when testifying to a matter; or a witness may be deliberately lying; or a witness may be honestly mistaken. Therefore, you may believe all of the evidence given by a witness, you may believe a part of the evidence or you may believe none of it. To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or how little you will believe and rely on the testimony of

any witness, as I said, you may believe some, none or all of it. When you go to the jury room to consider the case, use the same common sense that you use every day in deciding whether people know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness' testimony or how much to rely on it in deciding the case. But here are a few questions you may wish to keep in mind during your discussions. Did the witness seem honest? Is there any reason why that witness would not be telling the truth? Did the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than the other? Did the witness seem to be able to make accurate and complete observations about the event? Did she or he have a good opportunity to do so? What were the circumstances in which the observation was made? Was - was the condition of the witness? Was the event itself unusual or routine? Did the witness seem to have a good memory? Does the witness have any reason to remember things about which she or he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem

made up as an excuse to avoid answering questions? Did the witness seem to be reporting to you what she or he saw or heard, or was the witness simply putting together an account based on information obtained from other sources, rather than personal observation? Did the witness' testimony seem reasonable and consistent as she or he gave it? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion? Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or about a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does the explanation make sense? What was the witness' manner when they testified? How did they appear to you? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently.

Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision. You may consider other factors as well. These are only some of the factors you may keep in mind when you go to the jury room to make your decision. These factors might help you decide how much or how little you will believe of or rely upon a witness' evidence. There are a couple of special instructions I wish to deal with now. The first, presumption of innocence. There are fundamental - there are certain fundamental legal rules about a criminal trial such as this trial. The first one is that the accused is presumed to be innocent unless the Crown has satisfied you, beyond a reasonable doubt, of his guilt. It is a presumption that remains with the accused and for his benefit from the beginning of the trial until its end. It is only defeated, if and when, Crown Counsel satisfies you beyond a reasonable doubt that Harry McKenna is guilty of the crime charged. The fact an accused has been arrested or charged is in no way indicative of his guilt. The onus or burden of proving the guilt of an

accused person beyond a reasonable doubt rests upon the Crown and that burden never shifts. There is no burden, no obligation on an accused person to prove innocence. Harry McKenna did not have to present evidence or prove anything in this case, in particular that he is innocent of the crime charged. Reasonable doubt; I referred to reasonable doubt at the opening of this trial. What I said then bears repeating. The phrase, "beyond a reasonable doubt", is a very important part of our criminal justice system. A reasonable doubt is not a farfetched or frivolous doubt. It is not based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence, or the lack of evidence. It is not enough for you to believe that Harry McKenna is probably or likely guilty. In those circumstances, you must find him not guilty, because Crown counsel would have failed to satisfy you of his guilt beyond a reasonable doubt. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt. Crown counsel must prove all of the essential elements of the offence, as I shall define them for you, beyond a reasonable doubt. Reasonable doubt is about an essential element of the

case. It is inextricably linked to the presumption of innocence. You should also remember, however, that it is nearly impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high. It has been stated that if standards of proof were marked on a measure, proof beyond a reasonable doubt would low - would lie much closer to "absolute certainty" than to "a balance of probabilities". If, at the end of the case, based on all of the evidence, you are sure that Harry McKenna committed the offence, you should find Harry McKenna guilty of it, because you would have been satisfied of his guilt of that offence beyond a reasonable doubt. If, at the end of the case, based on all of the evidence or the lack of evidence, you are not sure that Harry McKenna committed the offence, then you should find him not guilty of it. Direct and circumstantial evidence; some of you may have heard of the term "direct evidence" and "circumstantial evidence". You may believe or rely upon either one as much or as little as the other in deciding this case. Sometimes witnesses tell us what they personally saw or heard. For example, a witness may say that he/she

saw it raining outside. That is called *direct evidence*. Often, however, witnesses say things from which you are asked to draw certain conclusions. For example, a witness may say that he or she had seen someone enter the courthouse lobby wearing a raincoat, carrying an umbrella, both dripping wet. If you believed that witness, then you might conclude that it was raining outside, even though the evidence was indirect. Indirect evidence is sometimes called *circumstantial evidence*. Like witnesses, things filed as exhibits may provide direct or circumstantial evidence. In making your decision, both counts – both kinds of evidence count. The law treats both equally. Neither is necessarily better or worse than the other. In each case, your job is to decide what conclusions you will reach based upon the evidence as a whole, both direct and circumstantial. To make your decision, again, use your common sense and experience. In this trial you heard from 19 witnesses. It is not my plan to detail the evidence of each witness. I will, however, relate some of the evidence to the essential elements of the offence at a later stage. Expert opinion evidence; sometimes, knowledge of a technical subject may help jurors decide a case.

Persons who are qualified in that subject, by education, training or experience, may state their opinions about it. They may also give the reasons for their opinion. You also heard from four experts. The first was Dr. Ken Obensen. You heard that he is a forensic pathologist with several specialties. He is also licensed to practice in Canada, the USA and Jamaica. He is also an Assistant Professor with the Dalhousie University Medical School at the University of New Brunswick, Saint John. He was qualified by me as an expert in anatomical and forensic pathology and entitled to give his opinion with regard to the cause of injury and the cause of death. He determined that the cause of death was from a gunshot wound to Mr. Blair's right flank and it was a homicide as opposed to a suicide. He compared the hole in the T-shirt and said it had been caused by the gunshot - a gunshot wound. He said that with all things considered that Mr. Blair died by someone else's hand. He did not kill himself. He said:

> **"A homicide - from a medical perspective is that this person died by someone else's hand, whether first degree, second degree, manslaughter or whatever is not our determination to make. We just make the determination as to what the manner is and what is the - what the cause of death is."**

Dr. Obensen is not qualified to determine whether it is accidental or not and he has no legal expertise with regard to the classification of a homicide. The next expert was Terry Pipes. He is a civilian member of the RCMP and he was qualified as an expert to give his opinion as fire - firearm and tool marks examiner in the operation and identification of firearms and the theory and practice of a ballistic assessment. He testified that the shotgun used to kill Mr. Blair was a Winchester 37A Model 16 gauge. He testified that the shotgun was probably more than three feet and less than seven feet from Mr. Blair when the shot was fired. He said that he tested this from various distances and he can state the probable distance because of the residue from the various ranges. He indicated that because of certain variations there is no definitive range. The two expended shells were different - the one that shot Mr. Blair contained a slug and the other contained a No. 6 birdshot. The next expert was Nicole McCullough. She was qualified as an expert in DNA typing, DNA procedures, and the significance and the results of DNA typing involving the calculation of frequency estimates for particular DNA profiles in the population generally. Other than

Mr. Blair's DNA, which was found on the shells under his body, she said it was no one else's DNA, to an estimate of one in 15 trillion. There was no other known match on anything else she tested. The last expert called was Sergeant Ben Sirois. He was qualified as a forensic identification specialist and entitled to give his - give his opinion in relation to the identification, examination, and comparison of fingerprint - fingerprint characteristics and physical matching and also footwear comparisons. He testified that the footprint impression that you will see in photographs in Exhibit C-1 may be from the shoes that we know were taken from Mr. McKenna. On cross-examination he stated it is possible that the prints could be from other footwear. He testified that there was no discernible footprints of Mr. Doucette. The opinions are - of experts are just like the opinion of any other witnesses. Just because an expert has given an opinion does not require you to accept it. You may believe or rely upon the opinion as much or as little as you see fit. You should consider the education, training and experience of the expert. The reasons given for the opinions, the suitability of the methods used, and the rest of the evidence in the case when

you decide how much or how little to rely on the opinion. It is up to you to decide. Experts usually form their opinions by applying their training, education and experience to a number of facts that the expert assumes or relies on as the basis for his or her analysis. What an expert assumes or relies on for - as - as a fact for the purpose of offering his or her opinion may be the same as what you find as facts from the evidence introduced in this case. Or it may be different. To the extent that the facts you find are different from the facts assumed or relied upon by the experts in reaching his or her conclusion, you may consider the expert's opinion less helpful to you in deciding the case. How much or how little you believe of or rely upon an expert's opinion is entirely up to you. I'm going to give you an overview of the evidence. Would you like a glass of water? Okay. You will recall that the first witness was Constable Tara Tremblay. She was the first peace officer to respond to the area of 410 Branch Road in Geary, New Brunswick. She had received a call at about 0013 hours May 1st, 2013. A 911 call had been received by dispatch but no one was on the line. She arrived at the site around 0042 hours in a marked police car and

dressed in RCMP work uniform. She noted there were two mobile homes with the lights on only in one. There were four vehicles in the yard. She alerted dispatch that she was in the yard. The visibility was dark but the one trailer - but one trailer was well lighted. She looked into the trailer and saw a male come to the window, leaned with his hands on the window sill. He did not speak but just looked at her. She indicated that as she kept watching the male, a woman came running out and yelled "Help! Help! He shot my husband with a shotgun." As Cst. Tremblay moved along the trailer she indicated that the male moved along the windows inside the trailer. She noted that he did not have anything in his hands. Cst. Tremblay put her foot in the doorway and the male was to her left near a table. He was concerned that his two dogs might get outside. She looked around and saw a band - a band with shotgun shells and several beer cans on a table. You will recall that she asked him what happened and he said "Not much". He said that his name is Charlie McKenna and that "the three of us were in a relationship". The dogs were causing a commotion, she said. Mr. McKenna offered that he had "done a job and did not get paid". Cst. Tremblay said

to Mr. McKenna "you were pissed", and he agreed. Cst. Tremblay called for backup. Mr. McKenna said he had reached his breaking point and Cst. Tremblay asked "What was your breaking point?", and he stated "Do you want me to show you?" Cst. Tremblay stated that Mr. McKenna had a can of beer in his hand and nodded to go outside. They proceeded to the long trailer and Mr. McKenna said "Look". Cst. Tremblay noted the shattered glass and said to Mr. McKenna "Bang-bang" and he said "Yes". At that point Cst. Tremblay arrested Mr. McKenna for assault with a weapon. He asked if he could have some of the beer and said to her "it could be my last for a long time". He took three drinks from the can and then she took it from him. The woman, who we now know was Mrs. Blair, was shouting. Mr. McKenna responded by saying "He was an asshole". Cst. Tremblay said that Mr. McKenna was calm, co-operative, polite and articulate. He was steady on his feet and could carry on a conversation. Cst. Tremblay testified that Mr. McKenna appeared to have a functional level of intoxication, from her experience. She arrested him, cuffed his hands behind his back and placed him in the police cruiser in the back seat. At that point Mr. McKenna thanked her for

not bringing in 15 cars. She then went and checked the man on the floor in the long trailer, who we know was Kirk Blair. She put on surgical gloves but found no pulse. She called for an ambulance and let her counterpart know she had a shooting. She then spoke to Mrs. Blair who she determined had not been drinking. She found a chair for her to sit in. Cst. Tremblay testified that Mrs. Blair did not look well. At that point backup arrived. The ambulance arrived and they carried out their duties. She returned to the police car where she read the standard caution and right to counsel. She testified that Mr. McKenna appeared to understand at all times. Cst. Tremblay got out of the police vehicle, gathered her thoughts and realized the charge would be murder. At approximately 0144 she arrested Mr. McKenna for murder and she re-chartered and re-cautioned him. She notified dispatch that she will be taking Mr. McKenna to the Oromocto Detachment. Before leaving, you will recall that she loosened his handcuffs and she searched him, but found nothing and they proceeded to the detachment. Cst. Tremblay turned Mr. McKenna over to Cst. - Cst. Blake - Blakely and she had no further involvement. Johanna Blair, the wife of the deceased,

Kirk Blair, testified. You will recall that she said she and her husband were watching an NHL hockey game when they heard a bang on the door. She recalls saying to her husband "It is late for visitors". She also said they had only moved to the Geary area from Ontario in the fall of 2012. They resided in a mobile home at 410 Branch Road and Harry, or Charlie as she knew him, lived in the mobile home adjacent to the Blair home. It was her evidence that she lived with her husband, Kirk Blair, and that Mr. McKenna lived with his girlfriend and her daughter. She believed that others had also resided with Mr. McKenna but they had moved out. At some point before this incident Mr. Blair transferred title to the property to Johanna Blair, his wife. Mrs. Blair told us about people coming and going at the McKenna residence throughout the day. On the evening of April 30th, 2013 the Blairs had settled into their lazy-boy chairs to watch the hockey game. She had her pyjamas on, you will recall. When the knock came to the door, Mr. Blair got up to answer it and in the process turned on the outside light. You'll recall that Mrs. Blair testified that Mr. Blair must have opened the door because it had been locked. She testified that she heard a loud

bang; she went toward the kitchen and saw Harry McKenna with a gun. She saw Mr. Blair on the floor. Mr. McKenna wanted Mr. Blair's bank PIN number. Mrs. Blair responded that she did not have the number but Mr. McKenna persisted. Mr. McKenna told D.J. Doucette, who accompanied Mr. McKenna, to get a paper and pen so that Mrs. Blair could write down the PIN number. D.J. Doucette returned with an envelope and asked - and again Mr. McKenna told Mrs. Blair to give him the PIN number. According to Mrs. Blair's testimony, Mr. Blair "gasped out his PIN" and she wrote it down. Mrs. Blair testified that after D.J. Doucette gave the piece of paper to Mr. McKenna that both she and Mr. Doucette tried to pull Mr. McKenna toward the door. As they were trying to get Mr. McKenna out the door Mrs. Blair grabbed the frying pan from the stove and hit Mr. McKenna on the back of the head. Mr. Doucette and Mr. McKenna went out the door and Mrs. Blair locked it. She then heard two "smashes" and heard another "bang". Mr. McKenna entered the house again with the gun. Mrs. Blair said that she was so frightened that she let her bowels let go. She went to the bathroom to clean up. Mr. McKenna stood in the doorway of the bathroom as she

cleaned up. She went into her bedroom to get clean underwear, she put her pyjama bottoms back on, all the while Mr. McKenna watched her. She said he mumbled something about a motor and four tires. She was allowed to get a bottle of water from the fridge. She testified she then noticed Mr. Blair and "all the blood". At that point Mrs. Blair testified that her "heart tightened up and could not breathe". She testified that she was going out to sit on the porch and needed a cigarette. At that point she testified "Charlie said no, you are going to my place". She told the Court that she did not want to go there because there are dogs there and she is allergic to them. She also said that when she was trying to get the PIN number he threatened to shoot her too if she didn't get it. She also recalled that while she was in the bedroom Mr. McKenna said, "I should put a bullet in the back of Kirk's head." She also indicated that when Mr. McKenna returned to her home D.J. Doucette was not with him nor was he at Mr. McKenna's house when they went there. While at the McKenna residence Mrs. Blair testified that they each sat on a couch, and that Mr. McKenna always had the gun. She indicated that Mr. McKenna talked about

things including that she would not know her grandchildren - children or grandchildren and that Mr. Blair was about to sell everything and get rid of her. At this point she saw the car lights and Mr. McKenna went to the window and that it was the police. Mrs. Blair said that at this point Mr. McKenna had put the gun under the couch cushions. When he went to the window she got up and ran out of the house. After Mrs. Blair exited Mr. McKenna's home, she told the police officer "He shot my husband" and then she hid by the police cruiser. Mrs. Blair indicated on cross-examination that she had known Mr. McKenna for about two years and that he and her husband sometimes worked together doing jobs such as drywall. You will then recall that several police officers with the RCMP testified as well as two paramedics. I am not going to detail their testimony. Each of these witnesses identified the residence as 410 Branch Road in Geary, New Brunswick as the place they attended. The paramedic, Melissa Christie, indicated that Mr. Blair had no pulse in his neck. The area was secured by police officers. They also took various photographs entered as Exhibit C-1, which you have seen, and will have with you in the jury room. Constable Mark

Blakely testified that he interviewed Mr. McKenna on the night of his arrest and on the next afternoon. You will recall watching both DVDs. You will recall that he provided Mr. McKenna with an opportunity to speak with counsel. He testified that Mr. McKenna had been drinking but that he was walking okay. He testified that Mr. McKenna's eyes were red and that his speech was not perfect. He told you that Mr. McKenna was very angry against Mr. Blair. You will recall from the DVD video that Mr. McKenna said "you burned me once, you burned me twice, you burned me three times and you're fucked." He also said at one point "I'm not your man". Also he stated that Mr. Blair was "a piece of shit". At another point he said that he would "do it again in a heartbeat". He said "He fucked me around big time and did not pay me for work I had done." Mr. McKenna said several times that he had no intention of killing Mr. Blair. He said it was all about money. You'll also recall that he said it was to scare Mr. Blair. He said "Kirk pulled it", meaning the shotgun. He said that Mr. Blair grabbed the barrel and Mr. McKenna said "I don't know why he did that." Mr. McKenna said that Mr. Blair grabbed the barrel like he was going to push it away. The

next three witnesses were called by the defence. The first was Corey Robert Galbraith. You will recall that he testified that between 11:00am and noon Mr. McKenna arrived at Mr. Galbraith's mother's home. He asked them if they wanted a beer. There were at least three others at Mr. Galbraith's home and according to Mr. - mother's home - and according to Mr. Galbraith they sat around doing nothing other than drinking beer. There was a discussion about whether Mr. Galbraith had paid Mr. Blair for him - some work that he had done on Mr. Galbraith's home. Mr. Galbraith indicated on his direct testimony that they had consumed 5 - 6 cases of beer during the afternoon. Mr. Galbraith stated that he only two or three beer and that Mr. McKenna may have consumed 15 or 16 beer. You will recall that after Mr. McKenna and Mr. Doucette left Mr. Galbraith's mother's home that later in the day Mr. Galbraith went to the liquor store and bought two cases of beer which he later took to Mr. McKenna's. He indicated that five people drank the two cases of beer. He said that when Mr. McKenna's - when he left Mr. McKenna's, he said "you couldn't get no drunker." Did I miss a page? I don't think I did.

MS. DRAIN: I don't think so either.

THE COURT: You'll recall that after Mr. McKenna and Mr. Doucette left Mr. Galbraith's home that later in the day Mr. Galbraith went to the liquor store and bought two cases of beer which he later took to Mr. McKenna's. He indicated that five people drank the beer. He said that when Mr. McKenna - when he left Mr. McKenna's "you couldn't get no drunker." in reference to Mr. McKenna. He also testified that Mr. McKenna was passed out on the sofa when Mr. Galbraith left. You will recall on cross-examination that on the day of the shooting, May 1st, 2013, that Mr. Galbraith had said that Mr. McKenna had only a couple of beer at Mr. Galbraith's mother's home. He also told the RCMP that no one was really drinking. You may consider the discrepancy in Mr. Galbraith's testimony in your assessment of his credibility and not for the truth of his statement to the RCMP. When assessing the evidence consider all that I told you previously about how to assess the credibility of any witness. The next two witnesses were Brent Merrill and Ashley Taverner. Basically they testified that Mr. McKenna was at their home between 4:30 and 5:00pm. They sat in the backyard and had a couple of beer. Their observation was that no one was really drunk.

They were intoxicated but having a good time. They had no concerns about Mr. McKenna driving his car when he left there about 6:30pm. Post offence conduct. You have heard evidence that, after the offence charged took place, Mr. McKenna came back into the residence of Mr. Blair and he still had the shotgun. He shot the window and entered the residence and he insisted that Mrs. Blair accompany him to the McKenna home. They sat in the living room on separate sofas and Mr. McKenna still had the shotgun in his hands until the police arrived, when he hid it. You also heard that he was co-operative with Cst. Tremblay and she indicated he was polite and did not resist her in any way. What a person says or does after a crime was committed, may help you decide whether that - whether it was that person who committed it. It may help, it may not. The words or conduct may indicate that Mr. McKenna committed the crime. On the other hand, the words or conduct may be of those of an innocent person who simply wants to avoid involvement in a police investigation or embarrassment for himself. The first thing to decide is whether Mr. McKenna actually did or said these things. If you find that he did not do or say these things, you must not consider this evidence

in reaching your verdict. If you find that Mr. McKenna did in fact do or say these things, you should consider next whether this was because Mr. McKenna committed the offence or for some other reason. If you find that what Mr. McKenna said or did afterwards is consistent with him being conscious of having done what is - what is alleged against him, and not for some other reason, you may consider this evidence, together with all the other evidence, in reaching your verdict. If you do not or cannot find that Mr. McKenna said or did those things for that reason, you must not consider this evidence in any way. The date, excuse me, the time, date and the place of the offence is not in issue. If the offence occurred, the date, time and place is as described in the Indictment. Second degree murder; Harry Edward Charlie McKenna is charged with second degree murder. The formal charge reads:

> **Harry Edward Charlie McKenna, 410 Branch Road, Geary, New Brunswick, stands charged that he, on or about the 1st day of May, A.D. 2013, at or near Geary, in the County of Sunbury and Province of New Brunswick, did commit second degree murder on the person of Kirk BLAIR, contrary to Section 235(1) of the Criminal Code of Canada and amendments thereto;**

I'm going to give you the definition of murder:

229. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes the death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that person; or

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

For you to find Harry McKenna guilty of second degree murder, Crown counsel must prove each of these essential elements beyond a reasonable doubt. One; that Harry McKenna caused Kirk Blair's death. Two; that Harry McKenna caused Kirk Blair's death unlawfully. And three; that Harry McKenna had the state of mind required for murder. If Crown counsel has not satisfied you beyond a reasonable doubt of each of these essential elements, you must find Harry McKenna not guilty of second degree murder. If Crown

counsel has satisfied you beyond a reasonable doubt of each of these essential elements, you must find Harry McKenna guilty of second degree murder. Each essential element may be made into question for you to care - consider carefully and answer. Did Harry McKenna cause Kirk Blair's death. For an act or omission to cause someone's death, it must be at least a contributing cause, one that is beyond something that is trifling or minor in nature. There must not be anything that somebody else does later that results in Harry McKenna's act or omission no longer being a contributing cause of Kirk Blair's death. It is of no concern to you that proper medical treatment might have saved Kirk Blair's life. It also does not matter that what Harry McKenna did only speeded up Kirk Blair's death from some existing disease or condition. To answer this question, you must consider all the evidence. Do not limit your consideration only to the opinions of the experts about what caused Kirk Blair's death. Take into account, as well, the testimony of any witness who described the events that took place around the time that Kirk Blair was hurt and died. Use your good common sense. The evidence is that Mr. McKenna went to Mr. Blair's home after midnight on May

1st, 2013. He was accompanied by D.J. Doucette. Mr. McKenna had a bullet in the shotgun he had with him. The bullet contained a slug. Mr. and Mrs. Blair were watching the NHL hockey game. Mr. Blair answers the door and you will recall that Mrs. Blair heard a bang. She went into the kitchen, saw her husband on the floor and Mr. McKenna holding a shotgun. You will recall that Mr. McKenna insisted on getting Mr. Blair's PIN number. After Mr. Doucette retrieved an envelope and pen, Mr. Blair gasped out the PIN number and Mrs. Blair wrote it down on the paper. Eventually Mr. McKenna and Mr. Doucette left the residence, but before leaving Mrs. Blair had hit Mr. McKenna on the head with a fry pan. He returned to the Blair home and you will recall that Mr. McKenna took Mrs. Blair to his home. You heard Dr. Obensen testify that Mr. Blair died within two or three minutes of the gunshot wound. You also heard Terry Pipes indicate that it was the shotgun we have as an exhibit that the bullet was discharged from and that killed Mr. Blair. If you are not satisfied beyond a reasonable doubt that Harry McKenna caused Kirk Blair's death, you must find Harry McKenna not guilty. Your deliberations would be over. If you are satisfied beyond a reasonable doubt that

Harry McKenna caused Kirk Blair's death, you must go on to the next question. Did Harry McKenna cause Kirk Blair's death unlawfully? 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. The unlawful act alleged in this case is murder. You will recall that I already defined murder for you. To decide this question, you should consider all the circumstances of Harry McKenna's conduct. Take into account not only the nature of the act alleged, but also anything said at or about the time. You heard the testimony of Mrs. Blair. I will not repeat - repeat what I've already said, except that you must consider that evidence - evidence disclosed that Mr. McKenna and Mr. Doucette came to the home of the Blairs and Mr. McKenna had a loaded shotgun. You heard Dr. Obensen tell you that that bullet killed Mr. Blair. You heard the firearms expert tell you that it was the shotgun we have in evidence from which the bullet exited and killed Mr. Blair. You have heard Mr. McKenna acknowledge that the gun he discharged - that the gun had discharged and it killed Mr. Blair. You heard that the dispute alleged by Mr. McKenna was over money. You heard Corey Galbraith testify that

Mr. McKenna had asked him if he had paid Mr. Blair in full and he said that he had paid him. You will also recall that Mr. McKenna indicated that Mr. Blair owed him about $15,000. You will also recall that he came back to the residence of Mr. Blair and insisted that Mrs. Blair go to his home with him. He still carried the shotgun. When the police arrived he had hid the shotgun under the sofa pillows. It is Mr. McKenna's position that the shooting was an accident. I will refer this - I will refer to this as the defence later in my charge to you. If you are not satisfied beyond a reasonable doubt that Harry McKenna unlawfully caused the death of Kirk Blair, you must find Mr. McKenna not guilty. Your deliberations would be over. If you are satisfied beyond a reasonable doubt that Harry McKenna unlawfully caused the death of Kirk Blair, you must go on to the next question. Before going to the last element of the offence, I will give you my instructions on a defence raised by the accused. Accident. It is Mr. McKenna's position that what happened to Mr. Blair was an accident. To be more specific, Mr. McKenna claims that Mr. Glare (sic) - Blair grabbed the shotgun causing it to discharge. It is this outside force that the defence claims

caused the shooting. The criminal law punishes people only for their conscious voluntary acts. If a person has no voluntary control over what he is doing, because of the outside force as claimed by the defence in this case, the criminal law does not hold the person responsible for that conduct, whatever its consequences may be. Mr. McKenna does not have to prove that what happened to Mr. Blair happened by accident. Crown counsel must satisfy you beyond a reasonable doubt that what happened to Mr. Blair was not an accident. The other evidence that you may consider when you decide whether the Crown has satisfied you beyond a reasonable doubt that it was not an accident as claim - as claimed by Mr. McKenna is in the DV - DVD video - excuse me, is claimed by Mr. McKenna in the DVD video, is other words spoken by Mr. McKenna such as "burn me once, burn me twice, you burn me three times and you are fucked." The other evidence that you may consider is that Mr. McKenna - it was Mr. McKenna who went to Mr. Blair's house. He went there with a loaded shotgun and with a bullet containing a slug. You'll recall the evidence of Dr. Obensen that a slug was taken from Mr. Blair's body. You also will recall that Mr. McKenna was angry

because Mr. Blair allegedly owed him money. You should also consider the evidence of the firearm expert about the operation of the shotgun and the probable distance Mr. McKenna was from Mr. Blair when the gun discharged. He testified and you will recall that the shotgun was probably more than three feet and less than seven feet from Mr. Blair when it was discharged. If you have a reasonable doubt about whether Mr. McKenna abandoned or withdrew from the original common, unlawful venture before the shotgun was discharged by Mr. Blair grabbing it you must find Mr. McKenna not guilty of murder or manslaughter. If you are satisfied beyond a reasonable doubt that Mr. McKenna did not abandon or withdraw from the original unlawful venture or if you determine that Mr. Blair did not grab the shotgun, you must go on to decide what offence Mr. McKenna has committed in accordance with the instructions that I will give you about Mr. McKenna's state of mind. Did Harry McKenna have the state of mind required for murder? The crime of murder requires proof of a particular state of mind. For an unlawful - unlawful killing to be murder, Crown counsel must prove that Harry McKenna meant either to kill Kirk Blair or meant to cause Kirk Blair bodily

harm that Harry McKenna knew was likely to kill Kirk Blair, and was reckless whether Kirk Blair died or not. The Crown does not have to prove both. One is enough. All of you do not have to agree on the same state of mind, as long as everyone is sure that one of the required states of mind has been proven beyond a reasonable doubt. If Harry McKenna did not mean to do either, Harry McKenna committed manslaughter. To determine Harry McKenna's state of mind, what he meant to do, you should consider all the evidence. You should consider: what he did or did not do, how he did or did not do it, and what he said or did not say. You should look at Harry McKenna's words and conduct before, at the time, and after the unlawful act that caused Kirk Blair's death. All of these things, and the circumstances in which they happened, may shed light on Harry McKenna's state of mind at the time. They may help you decide what he meant or didn't mean to do. In considering all the evidence, use your good common sense. You may conclude, as a matter of common sense, that if a sane and sober person does something that has predictable consequences, that person usually intends or means to cause those consequences. But that is simply one way for you to determine a person's

actual state of mind, what he actually meant to do. It is a conclusion that you may only reach, however, after considering all of the evidence. It is not a conclusion that you must reach. It is for you to say whether you will reach that conclusion in this case. To determine Mr. McKenna's state of mind, review all of the evidence. You have heard that he had been drinking on the day of April 30th, 2013. You have heard some contradictory evidence about how much he drank but you also heard that he was able to drive a vehicle, speak with the police in an articulate manner, and he appeared somewhat intoxicated but able to function. You also saw him on the video tape a few hours after the incident. You heard what Mr. McKenna said to Cst. Blakely "You know what buddy? Would I do it again? In a fucking heartbeat. He is a fucking creep." And, this was in reference to Mr. Blair. You also heard what I said before about the discharge of the shotgun. Mr. McKenna, on the DVD video, stated several times that he only meant to scare Mr. Blair. He said that Mr. Blair grabbed it and it discharged. You heard the firearms expert testify about the shooting mechanism of the shotgun. He described it as a full choke firearm with a broken spacer. He

testified that the shotgun opened easily and to fire it the hammer must be cocked manually. When it opens again the spent shell will be expelled. The shotgun was working properly. You will recall again that it was the firearms expert's opinion that probably the shotgun was fired more than three feet and less than seven feet from the wound on Mr. Blair. To determine Mr. McKenna's state of mind you should also consider his interaction with Cst. Tara Tremblay shortly after the shooting. To determine his state of mind recall that after the shooting he insisted on getting Mr. Blair's PIN number and had Mrs. Blair write it down as Mr. Blair gasped out the numbers. If you are not satisfied beyond a reasonable doubt that Harry McKenna had either state of mind required to make his unlawful killing of Kirk Blair murder, you must find Harry McKenna not guilty of second degree murder, but guilty of manslaughter. If you are satisfied beyond a reasonable doubt that Mr. McKenna had the state of mind to make his unlawful killing of Kirk Blair murder, you must find Harry McKenna guilty of second degree murder as charged. You will record your decision on the verdict sheet provided for you. Position of the Crown; the Crown's position is that

Mr. McKenna stated that Mr. Blair, the deceased, owed him $15,000. That on the evening of the 30th of April/ 1st of May 2013, he went to the Blair residence with a shotgun that was loaded with a slug. There was a knock on the door, the gun discharged and Mr. Blair is dead. Mr. McKenna went inside the residence and demanded the PIN number from Mrs. Blair. Mr. McKenna acknowledged on the video that alcohol had nothing to do with it. Mr. McKenna returned to Mr. Blair's residence and he broke the window, took Mrs. Blair back to his residence and held her there while holding the shotgun until the police arrived. He hid the gun under the sofa cushions. The Crown is of the view that when you look at the definition of murder in section 229 of the *Criminal Code of Canada*, culpable murder is -

> **culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.**

The Crown's position is that Mr. McKenna intended to cause the death of Mr. Blair and that this is not a manslaughter situation. The position of the defence is that the Crown has not proved beyond a reasonable doubt the specific intent to murder Kirk Blair.

Evidence given by the accused through his statement to the police was to the effect that the deceased had grabbed at the firearm and the firearm had discharged. The discharging of the firearm caused the death of the deceased and the Crown has not established beyond a reasonable doubt the - the necessary degree of intent for a conviction on the charge of second degree murder. The written material prepared to help you during your deliberations includes a decision tree. The decision tree presumes that you've already made your decisions with respect to the elements of identity, time and place. There will be several rectangles and arrows pointing in different directions on the document. The words "Yes" and "No" are printed above or beside the arrows. Every block that contains a question also has a number. You will begin with question 1 and follow the arrows until you have reached your verdict. Each question has to do with the - an essential element of the crime charged. The questions are in the same words and in the same order as they were in the instructions I have just given you earlier. To answer a question, any question, you must consider: the principles of law that govern your decision on that question, as I have explained them to

you, and all the evidence that relates to that question. I remind you again that each element must be proved beyond a reasonable doubt and you must first determine the elements of identity, time and place beyond a reasonable doubt. I don't think you'll have much trouble with that. Included in the things that will go with you to the jury room is the verdict sheet. On this sheet, I have listed the verdicts that you may reach in this case. There is no significance to the order in which the verdicts are listed. I have set out the verdicts for the accused. If you reach a verdict, your foreperson shall place a check mark in the box opposite the verdict that you have reached. There is a place at the bottom of the sheet for the foreperson to sign. You must now consult with one another and deliberate with a view to reaching a just verdict. You have a heavy responsibility. Your verdict, as I said earlier, must be based upon the facts as you have found them and upon the law as I have explained it to you. You will take a copy of the Indictment with you. And, I remind you that the Indictment is not evidence. Keep an open mind. Listen in a calm and impartial manner to what is said by your fellow jurors and put your own views forward

in a reasonable way. As I mentioned in the beginning, you must be unanimous in your verdict. It is your right to disagree but I know you will do your best to come to an agreement. The trial has caused a disruption of your lives and others who have participated in the process. I am sure no other jury could deal with this matter better than you can. Do not concern yourselves with the consequences of your verdict. Your only role is to decide if Harry McKenna is guilty or not guilty. The subject of penalty or punishment should not be discussed or considered by you at this time. As you retire, I shall be discussing my charge with counsel for both the Crown - the Defence and the Crown. They may have some other matters they wish corrected or some matters on which they may wish me to give you further instructions. This is quite proper. I may have made a mistake, or left something out. Perhaps what I have said could be stated more clearly to help you understand it. If I should call you back, please do not give any special emphasis to what I may say to you on such an occasion. It should be considered just as additional instructions as if I had dealt with those matters at this time. If during your discussions you have any

questions, please have the chairperson put it in writing and give it to the court constable who will be outside the door of your jury room. The constable will bring the questions to me and I will discuss them with the lawyers. You will be then brought back into the courtroom. Your question will be repeated and I will answer them to whatever extent the law allows. I will reply to your questions as quickly as I can. I want to thank you for your attentiveness during these instructions and all that - I meant, and all that I have to say is this completes my remarks to you. This is appropriate time for me to swear in all the constables who will be in charge of the jury.

(Sheriffs sworn in)

THE COURT: Have you picked your chairperson yet? Who is it?

THE JURY: Juror number six.

THE COURT: Now, members of the jury, as I told you before, the case is now in your hands. You may retire and consider your verdict. Thank you. The Indictment and the written charge to the jury that I just gave will be given to you. The decision trees and the verdict sheets and all of the exhibits will be brought in. Okay.