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# Acknowledgements

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The Law Courts Education Society of BC is grateful to the developers of this mock trial, Judge Cunliffe Barnett and Sandra Hawkins, for their permission to adapt the script for publication in this form.

The Society has several first-class resource materials, including other mock trials and *Guide to Mock Trials: The Basics*, that can help you and your group learn more about the courts and justice system in British Columbia and Canada. For more information, contact us or visit our website:

The Law Courts Education Society of B.C.  
260-800 Hornby Street  
Vancouver, B.C. V6Z 2C5  
Tel: (604) 660-9870  
Fax: (604) 660-3476  
[www.lawcourtsed.ca](http://www.lawcourtsed.ca)

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## The Law Courts Education Society

We are a non-profit organization providing educational programs and services about the justice system in British Columbia and Canada. We help the public understand how our justice system works and we also help those people working within the justice system to better understand the justice-related issues that different people in our community face.

We work in partnership with the Ministry of Attorney General, the Ministry of Education, the Judiciary, the Canadian Bar Association (BC Branch), schools and communities.

With the support of our partners, funders and volunteers, we strive to maintain an accessible justice system for everyone.



# Preface


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This script was originally developed to be produced by Columneetza Senior Secondary School Law 12 students in Williams Lake during Law Week in 1989.

This script is loosely based on the case of Louis Bayard who was charged with murder arising out of an incident in Vancouver on October 18, 1986. Bayard was acquitted by a jury. The British Columbia Court of Appeal ordered a new trial and that decision is reported: (1988) 29 B.C.L.R. (2d) 366. On March 22, 1989, the Supreme Court of Canada restored the verdict of acquittal. The five judges in that court unanimously adopted the dissenting reasons of Mr. Justice Lambert in the Court of appeal. A summary of these judgments can be found in the back of this book.

This is an advanced mock trial. It is produced for senior students who have some mock trial experience and who are ready for a new challenge. The trial demands that participants familiarize themselves with the responsibilities of various court personnel, and with the deeper issues raised by the case. For example, the students who play Crown and defence counsel should meet with local lawyers to discuss the case.

The role sheets included here are designed to be used in conjunction with "Guide to Mock Trials: The Basics."



You can modify this trial for your own use. For example, you may want to make the dates current, change the names of the characters, and modify the location for local relevance. The students involved in the trial can take part in the modification process, and you can incorporate appropriate suggestions.

We gratefully acknowledge assistance received from the British Columbia Branch of the Canadian Bar Association, Mr. Lorne Fisher, Mr. Michael Barbour, Mr. Rod Hawkins, members of the Williams Lake Court Registry staff, members of the Williams Lake RCMP, members of Columneetza Senior Secondary School's PACE 12 class, and others who have shown interest and offered assistance.

A few words of caution—the events portrayed in the script are violently unpleasant. The roles of some participants require the use of some coarse language. These features are not meant to offend; they are simply necessary to create a realistic scenario for the instruction of and use by senior students.

*Judge C.C. Barnett*  
*Sandra Hawkins*

# Getting Started

In **Regina v. James Irving**, the accused killed a man in a fight. His defence is that the killing was a justifiable act of self-defence.

The witness role sheets in this guide are designed to be used in conjunction with the companion publication, "Guide to Mock Trials: The Basics." This generic guide is available from the Law Court Education Society.

This mock trial has the following witness roles:

## FOR THE CROWN

John Sellars  
Susan Christopher  
Marty Lowe  
Constable R. Payne  
Dr. Jennifer Wheat

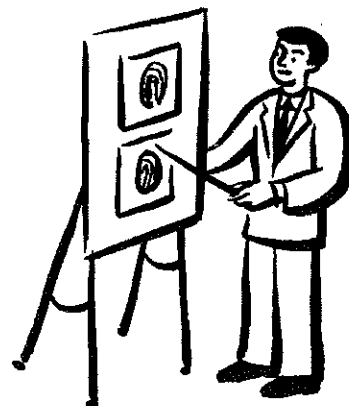
## FOR THE DEFENCE


James Irving  
Peter Stark

Students should be warned that counsel **must not** ask questions in direct or cross-examination that will get the witnesses into areas not outlined in the role sheets. Students are expected to develop the roles but to keep them within the framework outlined in the role sheets.

## Exhibits

There are three **exhibits**. All are produced by Constable R. Payne. They can be prepared by Cst. Payne in cooperation with the court clerk. The first exhibit is the pocket knife that the bystander picked up on MacKenzie Avenue. The second exhibit is the jacket worn by Henry Sellars. The booklet of photographs taken by Cst. Payne at the scene is the third exhibit.





# Materials for the Participants


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## **CROWN AND DEFENCE COUNSEL NEED:**

- All the witness role sheets
- The indictment, and instructions to counsel
- Judge's charge to the jury
- Section 34 of the Criminal Code
- Crown and defence files from "Guide to Mock Trials: The Basics"

Crown and defence should each meet with a lawyer to discuss the details of this case.

## **THE JUDGE NEEDS:**

- 
- All the witness role sheets
  - The indictment, and instructions to counsel
  - Judge's charge to the jury
  - Judge's file from "Guide to Mock Trials: the Basics"
  - Section 34 of the Criminal Code

The judge should meet with a local member of the judiciary, if possible, to discuss the case.

## **THE COURT CLERK NEEDS:**

- The indictment
- Copies of section 235 (1) of the Criminal Code to hand to the jury when the judge has charged them
- Exhibits 1 to 3
- Court clerk's file from "Guide to Mock Trials: The Basics"

# Indictment

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CANADA  
PROVINCE OF BRITISH COLUMBIA  
SUPERIOR COURT OF BRITISH COLUMBIA

IN THE SUPERIOR COURT OF BRITISH COLUMBIA  
HER MAJESTY THE QUEEN  
AGAINST JAMES IRVING

**James Irving stand charged:**

THAT you, James Irving, on or about the 2nd day of September, A.D. 1998 at or near the City of Williams Lake, in the Province of British Columbia, did commit second degree murder on the person of Henry Sellars, CONTRARY TO SECTION 235 (1) OF THE CRIMINAL CODE OF CANADA AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND DIGNITY.

DATED this 29th day of February, A.D., 1989, at the City of Williams Lake, in the Province of British Columbia.

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*Agent of the Attorney General for  
The Province of British Columbia*

## Instructions to Counsel

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1. When Susan testifies and says that the accused is known as a racist, defense counsel will rise and object. He/she will say that it is a well known principle that the Crown cannot lead evidence to show that an accused person is a bad person, likely to commit a certain crime. Crown counsel will say that the decision of the Ontario Court of Appeal in *Regina vs. Scopelliti*; November 9, 1981; 63 C.C.C. (2d) 481 demonstrates that this sort of evidence is admissible.
2. When Constable Payne testifies and says that John said: "That son of a bitch murdered my brother," defence counsel will object. He/she will say that this statement is both hearsay and inflammatory.
3. When James testifies and is cross-examined by Crown counsel, defence counsel will object when Crown counsel attempts to get James to admit his record. He/she will say that this evidence would prove nothing and be prejudicial.

Crown counsel, of course, will say that the Evidence Act clearly allows him to question James about his record. Defence counsel will say the judge does not have to allow such evidence to be admitted. He/she will refer to the decision of the Supreme Court of Canada in *Regina vs. Corbett*; May 26, 1988; 41 C.C.C. (3d) 385.

4. When Peter is cross-examined by Crown counsel and says that his statement to Constable Grinstead is wrong, Crown counsel will ask the court to admit the statement into evidence. He will say that it is the truth. Defence counsel will, of course, object.



## Crown Witness #1 – John Sellars

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John is 18. He was with his brother, Henry, Henry's girlfriend, Susan Christopher, and some friends after a Friday night hockey game. Their team, the Deep Creek Eagles, had trounced a visiting team from Canim Lake and they had downed a few beers at the Lakeview after the game to celebrate the victory. Henry was not impaired. He was planning to drive home and had amorous intentions in regard to Susan.

John will say that he, Henry, and Susan left the Lakeview about 11 p.m. As they walked past the Heritage Inn, they passed a group of youths, including James Irving, the accused. James made a flicking motion and another of the youths made a remark like, "Some candy for the squaw." Henry was angered by that racist remark and by the fact that something hit him on the side of the head.

John will say that although he looked and could see no injury, Henry was insistent that they turn around, confront the other youths, and "find out why they did that."

John will say that he and Henry instantly became involved in fights. John was fighting with a person he identifies as "Shortstop" while Henry was fighting with the accused.

John will say that Henry was a good fighter and that he and the accused "really went at it," but, because he was occupied with Shortstop, he could not really follow the progress of the fight between Henry and the accused.

John will say that Henry and the accused suddenly separated, that Henry took a few steps, stumbled, and fell dead.

John will say that when Henry fell, the accused threw something across MacKenzie Avenue. He recalls that the police arrived almost immediately after that.





## Crown Witness #2 – Susan Christopher

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Susan is 20. She is employed as a waitress at the Great Soda Creek Food & Beverage Emporium and had been Henry's girlfriend for three years. She and Henry were planning to get married in June. Susan will say that after watching the hockey game, she went with Henry, John, and other friends to the Lakeview where she drank only one bottle of beer.

Susan will say that after they left the Lakeview, they walked by a group of white boys outside the Heritage Inn. She will say that one of these youths rudely propositioned her and that caused Henry to become angry. He turned around and approached the group of white youths.

Susan will say that the accused responded immediately by producing a large knife and that he repeatedly stabbed Henry despite her screams for him to stop.

Susan will say that, although Henry was known as a young man who could "take care of himself in a fight," he was always a fair fighter, unarmed, and never had a chance against the accused, who is well known to be a racist, and exceedingly hostile toward all persons who are not "WASPS"—white, Anglo-Saxon, and Protestant.

## Crown Witness #3 – Marty Lowe

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Mr. Lowe will say that he had just finished a late dinner at Ming's Palace and was walking to his car which he had parked in the Lakeview Hotel lot. The time was about 11:30 p.m. He was walking along MacKenzie Avenue when he encountered a fight. He will say that there appeared to be two groups of youths although only four young men were actively fighting.

Mr. Lowe will say that a First Nations man (Henry) was fighting a white man (the accused) and that both were on the ground.

He will say that it appeared to him that the native man "seemed to have control of what was happening." His attention was distracted briefly when he called for assistance to help him break up the fight. When Mr. Lowe next looked, the native man was getting up. He walked a short distance and then collapsed. The accused then got up and staggered a few steps away. He looked dazed, and there was blood on his face.

Mr. Lowe will say that he did not see a knife or any other weapon being used by either man. He also did not see the accused throw anything away after the incident.

Mr. Lowe recalls that the police arrived at the time he was trying to administer first aid to the First Nations man.

## Crown Witness #4 – Constable R. Payne

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Constable Payne will say that she has been a member of the RCMP for six years and a general duties member of the Williams Lake detachment for twenty-one months. She will say that she received a radio dispatch to attend at the Heritage Inn on an emergency basis at approximately 23:37 hours on December 2, 1988. She proceeded there immediately and arrived at approximately 23:41 hours. She will say that the Heritage Inn is located at the intersection of Oliver and MacKenzie in the city of Williams Lake, British Columbia.

Constable Payne noticed there were a number of persons gathered around a First Nations youth lying on the sidewalk. Marty Lowe was kneeling beside the youth as Constable Payne approached. Lowe looked up and said, "He's gone!"

Constable Payne will say that John Sellars then pointed to the accused and said, "That son of a bitch murdered my brother!" He went on to say that the accused had used a knife to do the deed and had then thrown the knife across the street.

Constable Payne will say that an unidentified bystander then ran across MacKenzie Avenue, stopped and picked something up, then returned to give the constable a small pocket knife which was wet with red liquid. Constable Payne will say that she immediately took possession of this knife and it has since been kept under secure conditions. She will produce it as Exhibit #1.

Constable Payne will say that when she was given the knife, the accused suddenly gave a loud curse, broke free from the persons who had been restraining him, and ran down MacKenzie. Constable Payne gave pursuit and caught up with the accused within two blocks. Constable Payne will say that after handcuffing the accused, she told him:

"I am arresting you for murder. You do not have to say anything. Everything you do say will be repeated in court. It is my duty to tell you that you have the right to instruct a lawyer without delay."

Constable Payne will say that the accused's only response was, "What is this...Street Legal or something?"

Constable Payne will also say that when she arrested the accused, she noticed the accused was bleeding around the mouth and his hands were covered in blood that appeared to be partially dried. The accused did not exhibit any other obvious injuries.

#### Crown Witness #4 – Constable R. Payne *(continued)*

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When Constable Payne “booked in” the accused, she found a package of Dare jellybeans in the right-hand pocket of the accused’s black leather motorcycle jacket.

Finally, Constable Payne will say that although the accused had obviously been drinking, he appeared to be reasonably alert and in control of himself. In Constable Payne’s opinion, the accused was definitely not drunk.

Constable Payne will introduce the jacket worn by Henry Sellars as Exhibit #2. She will note that it has numerous cut marks in the chest area. Constable Payne will say that she took some photographs at the scene and will introduce a booklet of photographs as Exhibit #3.

#### Crown Witness #5 – Dr. J. Wheat

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Dr. Wheat will say that she is a medical doctor specializing in forensic pathology. She will say that on December 3, 1988, in Prince George she performed an autopsy on a body identified to her as that of Henry Sellars.

(At this point the defence counsel will rise and say that he/she is prepared to formally admit that Sellars died from multiple stab wounds inflicted upon him by the accused. Counsel will say that fact has never been in dispute. Crown counsel will acknowledge this admission in an appropriate manner and continue questioning Dr. Wheat.)

Dr. Wheat will say that, upon examination, she counted thirteen stab wounds in Sellars’ chest area. One of these wounds penetrated the heart and caused death within no more than two minutes, in Dr. Wheat’s opinion.

## Defence Witness #1 – James Irving

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James is 19. He and some friends had spent the evening at the beer parlour in the Heritage Inn. They were saying goodbye to a friend who was going off to work at an aquaculture farm near Sechelt. James will say that he drank a lot of beer and got "pretty loaded." He will go on to say he knows how to hold his beer and he still knew what he was doing on the night in question. In his words, "I was drunk, all right, but not that drunk!"

After leaving the Heritage Inn, James and his friends were standing on the street "just talking and horsing around." James had bought a bag of jellybeans at the Trading Post earlier that evening, and he was eating them. James will say that as a group of young Indian people walked by he said something like, "Hey, that's a good looking chick there," and that he playfully flicked a jellybean at nobody in particular.

James will say that the young native men stopped in their tracks and then approached his group, obviously looking for trouble. He will say that the deceased came up to him saying, "You damn gravel pit cowboy; I'll teach you not to mess with me."

James will say that he was working as a ranch hand at the Gang Ranch and always carried a pocket knife to cut the strings in the hay bales. James will say that he has no memory how the fight actually began. But he does recall being on the sidewalk on his back with a man – it was the deceased – on top of him. There were several others standing around and one of them was putting the boots to him.

James will say that he does not remember getting his knife out or opening it, but that he does remember wildly stabbing at the man who was on top of him.

James will say that his next memory is that of awakening in a police cell about 4 a.m. the next day. He will say that he was very hung over and did not know why he was there until a guard told him.

James will say that he had a cut inside his mouth that needed three stitches, a black eye and other facial bruises, and that one tooth was chipped and loose. He will say that his dentist tells him the tooth may have to be pulled.

James will say that he is sure he never meant to really hurt Henry and that he is absolutely positive he never meant to kill him. He will say that he loves everything and everybody and even has a pet rabbit. But he was very scared, afraid for his own safety, and he was only trying to defend himself. He will say that, looking back on it, he does not know what else he could have done although he is very sorry that Henry is dead.

(If he is asked, upon cross-examination, James will admit to a drug record. He was given a discharge for possession of marijuana in 1986 and then fined \$75 for a similar offence later that year. In 1987, he was sentenced to three months for possession for the purpose of trafficking.)

## Defence Witness #2 – Peter Stark

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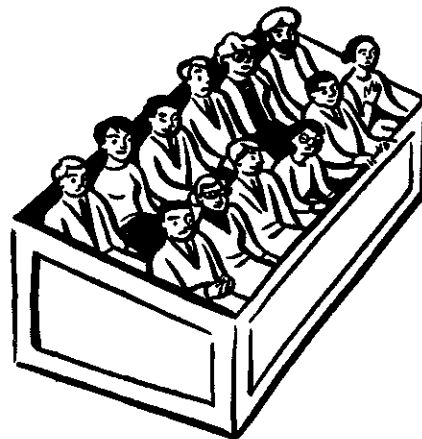
Peter will say that he was with James Irving and other friends drinking that evening. They all got happily drunk and were just horsing around outside the Heritage Inn when, almost before he knew what was going on, James was being challenged to fight by a First Nations youth – the deceased, Henry Sellars.

Peter will say that the fight got really vicious right away. He will say that James went down with Henry on top of him and that a bunch of Indians then crowded around and started kicking James in the head. Peter says that he has no idea how James managed to get out his knife, or when he was able to do this.

Peter will say, although James was yelling for help, he did not become involved in the fight as he has a heart condition which is controlled by medication and a pace-maker. His doctor has told him he cannot participate in any strenuous physical activities.

Peter will say that the fight ended rather suddenly. Somebody yelled, "They called the \*\*\*\* cops." The deceased got up, staggered around a bit, and fell dead on the sidewalk.

On cross-examination Peter will admit that he made a written statement in which he said that James pulled out and opened his knife before the fight actually began. But he will insist that his testimony is true, and his statement is wrong.



## Judge's Role – Charge to the Jury

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You can develop your opening statement to the jury by using the Judge's File in "Guide to Mock Trials: The Basics."

For your charge to the jury, you can draw upon the following statement:

Mr./Madam Foreman, ladies and gentlemen of the jury, it is now my duty to give you certain instructions before you begin your deliberations.

We have separate responsibilities in this case. It is my responsibility to instruct you concerning the legal principles you must consider during your deliberations. You must accept my statements defining and explaining the law. It is your collective responsibility to assess the events that gave rise to the charge against James Irving and to decide what happened. You are not obliged to accept the submissions of counsel or my own observations concerning the facts of this case.

There is a fundamental principle which you must understand and always recall during your deliberations. In Canada, when a person is accused of criminal wrongdoing, he or she does not have to prove innocence. It is the task of the prosecution to prove guilt beyond all reasonable doubt. If the evidence before you does not go that far, Mr. Irving is entitled to be acquitted or, possibly, to be found not guilty of murder, but guilty of the lesser offence of manslaughter.

The evidence in this case, like the evidence in almost every case was, at times, surprising, conflicting and confusing. It is your task to sort through the testimony of the various witnesses. You will use common sense and the wisdom that experience has taught you during your own lives. You may accept all or most of the testimony given by some witnesses. You may reject all or most of the testimony given by other witnesses. You may decide that some witnesses were honest, observed well, and recalled the events accurately. You may feel that other witnesses were untruthful or that their testimony cannot safely be relied upon for any number of reasons. Honest persons can be mistaken in their observations and recollections of traumatic events.

I am required to review those areas of the evidence which may be particularly important to your deliberations.

We know that James Irving admits those facts. But he claims that the killing was an act of justifiable self-defence and that he is therefore innocent of any crime. Alternatively, he says that if you find he acted in a criminally wrongful way, you should find the crime was manslaughter, not murder.

It will be important for you to decide how the incident between Irving and Sellars commenced. I suggest that it seems clear that Irving made some remark and flicked a jellybean. I instruct you as a matter of law that while this behaviour may have been foolish, it was not criminally wrong. In a legal sense, it did not justify retaliation by Sellars.

It also seems clear that the fighting began after Sellars turned to speak to Irving. The only witness who recalls any words that may have been spoken is the accused person himself. He says that Sellars said, "You damn gravel pit cowboy; I'll teach you not to mess with me." You might reasonably decide that Irving's foolish behaviour caused Sellars to become angry and then to threaten Irving.

If you decide this is what happened you will, I expect, conclude that it was Sellars who started the fight.

Alternatively, you may decide that both Irving and Sellars were willing participants when the fight began. You might reasonably decide that Irving's comment about Susan Christopher and his flicking of the jellybean demonstrate that he was spoiling for a fight.

If you decide that the fight began when Sellars assaulted Irving, you will then have to consider whether s.34 of the Criminal Code provides a defence for the accused. I shall read that section to you:

(Read s.34 of the Criminal Code)

If you decide that both men consented to fight, then you must consider and apply different legal principles. A fair fight is not unlawful in Canada. If you decide that Sellars fought fairly, then I suggest you will have little trouble deciding that it was unfair and unlawful for Irving to stab and kill Sellars. But you may decide that persons did put the boots to Irving in an unfair effort to assist Sellars. If such violence was in fact inflicted upon Irving, it would have been an unlawful assault again requiring you to consider s.34 of the Criminal Code.

If you decide that Irving's actions in stabbing Sellars were justifiable self-defence, then you will find him not guilty.

If, however, you decide that Irving's actions were not justified or if you find that they were excessive, then you will find Irving guilty of murder or, possibly, of manslaughter.

If you find that Irving's actions were unlawful, you will find him guilty of murder if you also find that Irving intended to cause either death or grievous bodily harm to Sellars.

If you are satisfied that Irving's actions were unlawful but cannot be sure beyond a reasonable doubt that Irving intended to kill Sellars or cause grievous bodily harm to him, then you will find Irving not guilty of murder but guilty of manslaughter.

When you are considering the evidence concerning Irving's intentions, you will, of course, recall the evidence to the effect that Irving was not sober. That evidence may cause you to believe that Irving did not intend to kill Sellars or cause grievous bodily harm to him. Alternatively, that evidence may leave you in some real doubt upon that issue. Once again, I remind you that you must always give the benefit of reasonable doubt to the accused. Therefore, if you are satisfied that Irving's actions were unlawful but have some real doubts surrounding the issue of intent, you will find Irving guilty of manslaughter, not murder.

I also remind you once again that if you find Irving acted justifiably in self-defence, you must find him not guilty. And you must give him the benefit of all reasonable doubts in deciding this issue also.

Ladies and gentlemen, you may now retire and begin your deliberations. The clerk will give you a copy of the indictment and a copy of s.34 of the Criminal Code. You may also wish to take the exhibits with you into the jury room.

*CAUTION: This "charge to the jury" was prepared for use during a mocktrial only. It is necessarily abbreviated and simplified. It is not intended that any person should presume that the law is stated definitively here.*





# Actual Judgments

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## **Regina v. Louis Bayard (1988) 29 BCLR 9 (2ND) 366**

### **Facts**

The accused stabbed the victim 13 times with a pocketknife and killed him. The victim had been fighting with the accused and had him pinned down and was punching him. A bystander also kicked the accused. The accused was charged with 2nd degree murder. He admitted the stabbing but claimed self-defense. The jury acquitted him both on manslaughter and 2nd degree murder. The Crown appealed and the B.C. Court of Appeal ordered a new trial. The accused appealed to the Supreme Court of Canada.

### **Issue**

Whether or not the jury charge was in error. The trial judge said that if the jury found use of excessive force by the accused then they should convict of manslaughter rather than of 2nd degree murder.

### **Decision**

The Supreme Court of Canada followed the dissenting opinion of Judge Lambert in the B.C. Court of Appeal which said there was sufficient evidence to support a verdict of acquittal based on the correct charge of the trial judge. The judge's charge was not in error with respect to excessive force and it did not mislead the jury.