



SUPREME COURT OF CANADA

CITATION: R. v. Abdullahi, 2023
SCC 19

APPEAL HEARD: January 11, 2023
JUDGMENT RENDERED: July 14,
2023
DOCKET: 40049

BETWEEN:

Ahmed Abdullahi
Appellant

and

His Majesty The King
Respondent

- and -

Criminal Lawyers' Association of Ontario
Intervener

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer,
Jamal and O'Bonsawin JJ.

**REASONS FOR
JUDGMENT:** Rowe J. (Wagner C.J. and Karakatsanis, Martin, Kasirer,
Jamal and O'Bonsawin JJ. concurring)
(paras. 1 to 97)

DISSENTING Côté J.

REASONS:

(paras. 98 to 150)

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* Brown J. did not participate in the final disposition of the judgment.

Ahmed Abdullahi

Appellant

v.

His Majesty The King

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and

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2023 SCC 19

File No.: 40049.

2023: January 11; 2023: July 14.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal
and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Brown J. did not participate in the final disposition of the judgment.

Criminal law — Appeals — Charge to jury — Appellate review of jury instructions for legal error — Functional approach — Accused convicted by jury of participation in activities of criminal organization — Accused arguing on appeal that trial judge erred in law in jury instructions on required element of offence — Whether trial judge’s instructions properly equipped jury to decide case.

Criminal law — Participation in activities of criminal organization — Elements of offence — Existence of criminal organization — Definition of criminal organization — Accused convicted by jury of participation in activities of criminal organization — Accused arguing on appeal that trial judge erred in law in jury instructions on existence of criminal organization by failing to explain that criminal organization must have structure and continuity — Whether trial judge’s instructions properly equipped jury to decide if criminal organization existed — Criminal Code, R.S.C. 1985, c. C-46, ss. 467.1(1), 467.11.

An investigation into the trafficking of illegal firearms in Ontario culminated with the arrest of several persons, including the accused. A jury found him guilty of various firearms offences, and of one count of participation in the activities of a criminal organization for the purpose of trafficking weapons contrary to s. 467.11 of the *Criminal Code*. The accused appealed his convictions. With respect to the criminal organization count, he argued that the trial judge erred in law in his instruction to the jury on the first required element of that offence — the existence of a “criminal organization” — by failing to explain that a criminal organization must have structure

and continuity, as set out in *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211. The majority of the Court of Appeal dismissed the appeal and concluded that, viewing the jury charge in light of the evidence, the closing arguments of counsel and the lack of objection by defence counsel, the jury was properly equipped with respect to the requirement of structure and continuity, and therefore there was no error of law in the jury instructions. The dissenting judge was of the view that the charge did not properly equip the jury to deal with this element of the offence and would have ordered a new trial on that count.

Held (Côté J. dissenting): The appeal should be allowed, the conviction for participation in the activities of a criminal organization set aside and a new trial ordered on that count.

Per Wagner C.J. and Karakatsanis, **Rowe**, Martin, Kasirer, Jamal and O'Bonsawin JJ.: The trial judge erred in law in his instructions to the jury on the criminal organization count by failing to explain that a criminal organization is one that by virtue of its structure and continuity poses an enhanced threat to society. Without an explanation of this requirement in the judge's instructions, the jury was not sufficiently instructed on the legal standard to apply to the evidence in concluding that a criminal organization existed.

When reviewing a jury charge for potential legal error, appellate courts should adopt a functional approach by reading the charge as a whole and determining whether the overall effect of the charge achieved its function: to properly equip the jury

in the circumstances of the trial to decide the case according to the law and the evidence. The appellate court's task needs at all times to be directed to this function. It is helpful to view a properly equipped jury as one that is both accurately and sufficiently instructed. The appellate court should consider if the jury had an accurate understanding of the law from what the judge said in the charge, bearing in mind that an instruction does not need to meet an idealized model, nor must it use prescribed wording. The appellate court should also consider if the judge erred by failing to give an instruction, either with sufficient detail or at all. While some instructions are mandatory and their omission will constitute an error of law, whether other instructions are needed will be contingent on the circumstances of the case. Whenever an instruction is required, the judge needs to provide that instruction with sufficient detail for the jury to undertake its task.

Furthermore, the circumstances of the trial cannot replace the judge's duty to ensure the jury is properly equipped. However, they do inform what the jury needed to understand to decide the case. Appellate courts should carefully consider how those circumstances are relevant to the central inquiry on appellate review: whether the judge's instructions properly equipped the jury to decide the case. Evidence at trial can inform the sufficiency of certain instructions, but it does not inform the sufficiency of every instruction — the existence of evidence relevant to a given issue cannot replace an accurate and sufficient instruction on the law. Similarly, the closing arguments of counsel can inform the sufficiency of the judge's instructions and can be relevant to whether a contingent instruction was required. They can also fill gaps in the judge's

review of the evidence, but they cannot replace an accurate and sufficient instruction on the law. As for the silence of counsel, it can be a relevant consideration, but it is not determinative, and the responsibility of the charge lies with the trial judge, not counsel.

In order to obtain a conviction for a criminal organization offence, the Crown must first prove the existence of a criminal organization. “Criminal organization” is defined, in s. 467.1(1) of the *Criminal Code*. The Court in *Venneri* interpreted Parliament’s direction in s. 467.1(1) that a criminal organization be “organized” in some fashion as requiring the group to have some form of structure and degree of continuity, before the exceptional regime of the organized crime provisions of the *Criminal Code* is engaged. The purpose of the *Criminal Code*’s criminal organization regime, which has exceptional procedural and substantive consequences, is to identify and undermine groups that pose an enhanced threat to society due to the institutional advantages of structure and continuity. Criminal organizations can take forms that do not fit stereotypical models of organized crime but nonetheless can pose the type of enhanced threat to society contemplated by Parliament. The definition of a criminal organization must therefore be applied flexibly. However, flexibility in the acceptable forms of structure and degree of continuity does not mean that structure and continuity are optional. Further, the flexibility with which the definition of a criminal organization is applied must not become an invitation for irrelevant considerations or improper reasoning. While characteristics such as ethnicity, cultural background, neighbourhood, religion, language or dialect may indicate a common social or cultural identity among persons who commit offences, they are irrelevant in identifying the

existence of a criminal organization. Just as the definition of a criminal organization must not be limited to stereotypical models of organized crime, care must also be taken not to identify a criminal organization merely because the group appears to satisfy some stereotypical model. The trier of fact's focus when tasked with identifying a criminal organization needs at all times to remain fixed on whether the particular group in question possesses the distinguishing qualities of a criminal organization, i.e., structure and continuity.

In the instant case, the trial judge's instructions did not sufficiently equip the jury to determine whether a criminal organization existed. An instruction on this required element was mandatory. The judge merely recited the definition in s. 467.1(1) of the *Criminal Code*. This would not have equipped the jury with an understanding that a criminal organization must pose an enhanced threat to society by virtue of its structure and continuity, as such a requirement is not apparent from the bare text of the definition. The majority of the Court of Appeal's reliance on portions of the evidence at trial, closing arguments of counsel and the lack of objection from defence counsel as indicating that the instructions were sufficient was misplaced. The majority's focus strayed from the ultimate function of jury instructions and the central inquiry on appellate review — whether the jury was properly equipped to decide the case. At the end of the day, the jury was left insufficiently equipped to decide a required element of the offence.

Per Côté J. (dissenting): The appeal should be dismissed. Examined as a whole and in context, the trial judge’s charge properly equipped the jury to decide the count of participation in the activities of a criminal organization according to the law and the evidence. The jury knew it had to decide whether the accused was a member of a group that (1) was organized; (2) existed for some period of time; and (3) went beyond one formed randomly for the immediate commission of a single offence. While the judge’s charge was not perfect, it would not have made any difference if he had used the precise words “structure” and “continuity” in explaining the definition of a criminal organization.

An accused is entitled to a jury that is properly — and not necessarily perfectly — instructed. This functional approach to appellate review of jury instructions requires consideration of the impugned portion of the charge in context and in the circumstances of the trial as a whole. Further guidance on this established framework is unnecessary. The majority’s rigid characterization of errors in jury instructions as those related to “accuracy” or “sufficiency”, and within the latter category, instructions which are “mandatory” or “contingent” is unhelpful. In all cases, the relevant question is simply whether the charge properly equipped the jury to decide the case according to the law and the evidence. Furthermore, the submissions of counsel should not be limited to filling gaps in the judge’s review of the evidence. Counsel’s submissions cannot serve to correct a misstatement or legal error made by a trial judge, but it may be possible for the submissions of counsel to help fill an alleged gap in the judge’s charge. As always, this must be assessed in the context of the trial as a whole.

“Criminal organization” is defined in s. 467.1(1) of the *Criminal Code*. By insisting that criminal groups be “organized”, Parliament has made plain that “some form” of structure and degree of continuity are required. As explained in *Venneri*, Parliament sought to identify groups that pose an elevated threat to society due to the ongoing and organized association of their members. What is relevant is the substance of this requirement, not the precise form or exact words used.

In the instant case, there is no dispute that the trial judge accurately set out the statutory definition of a criminal organization. By instructing the jury that the group had to be “organized”, the trial judge made plain that some form of structure and degree of continuity were required. Jurors do not check their common sense at the door of the deliberation room. The jury would have understood “organized” to necessarily connote some form of structure and co-ordination. This is further evident or obvious when reviewing the context in which the judge’s instructions were given: the trial judge elaborated on the legal elements of a criminal organization, including that the formation must not be random or for the purpose of committing an offence; the charge summarized the defence’s position on the lack of an “organizational structure”; the judge emphasized that the accused was required to be a member of the alleged organization for some period of time; the parties agreed that a criminal organization required “cohesiveness and continuity” (as put by the Crown) or “structure and continuity” (as put by the defence); counsel for the accused did not object to the draft charge; and the jury asked three supplemental questions, but did not ask for clarification on the count of participation in the activities of a criminal organization.

While certain legal requirements are not obvious or plain from the statutory text, the point of law at issue in this case was obvious or plain to the jury, in the context of the entire charge and the trial as a whole. A failure to say all that could have been said does not amount to legal error. The jury understood that the group had to be organized, that membership had to be for some period of time, and that the legal requirements of the offence were not met if the group was formed randomly for the immediate commission of a single offence. A group could not meet these requirements — as the jury must have found in order to convict — but nonetheless lack some form of structure and degree of continuity.

Cases Cited

By Rowe J.

Considered: *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157; **referred to:** *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280; *R. v. Saikaley*, 2017 ONCA 374, 135 O.R. (3d) 641; *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Khill*, 2021 SCC 37; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Ménard*, [1998] 2 S.C.R. 109; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R.*

v. Jaw, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Brydon*, [1995] 4 S.C.R. 253; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Morin*, [1988] 2 S.C.R. 345; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745; *R. v. Goforth*, 2022 SCC 25; *R. v. Athwal*, 2017 ONCA 222; *R. v. Subramaniam*, 2022 BCCA 141, 413 C.C.C. (3d) 56; *R. v. Bryce* (2001), 140 O.A.C. 126; *R. v. Naglik*, [1993] 3 S.C.R. 122; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Aalders*, [1993] 2 S.C.R. 482; *R. v. Maxwell* (1975), 26 C.C.C. (2d) 322; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. R.V.*, 2021 SCC 10; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Connors*, 2007 NLCA 55, 269 Nfld. & P.E.I.R. 179; *R. v. Smith*, 2010 BCCA 35, 282 B.C.A.C. 145; *R. v. Krasniqi*, 2012 ONCA 561, 291 C.C.C. (3d) 236; *R. v. P.J.B.*, 2012 ONCA 730, 298 O.A.C. 267; *R. v. Gray*, 2012 ABCA 51, 522 A.R. 374; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R. v. Terezakis*, 2007 BCCA 384, 223 C.C.C. (3d) 344; *R. v. Williams*, [1998] 1 S.C.R. 1128.

By Côté J. (dissenting)

R. v. Goforth, 2022 SCC 25; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Niemi*,

2017 ONCA 720, 355 C.C.C. (3d) 344; *R. v. Saikaley*, 2017 ONCA 374, 135 O.R. (3d) 641; *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157; *R. v. Maxwell* (1975), 26 C.C.C. (2d) 322; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Cooper*, [1993] 1 S.C.R. 146.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 “criminal organization offence”, 82(2), 92(1), 99(1), 185(1.1), 186(1.1), 186.1, 231(6.1), 239(1)(a), 244(2)(a), 244.2(3)(a), 279(1.1)(a), 279.1(2)(a), 344(1)(a), 346(1.1)(a), 354(1), 465(1)(c), 467.1(1) “criminal organization”, 467.11 to 467.13, 467.14, 492.1(6)(a), (b), 492.2(5)(a), (b), 515(6)(a)(ii), 650.1, 686(1)(a), (b)(iii), 718.2(a)(iv), 742.1(d), 743.6(1.1).

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APPEAL from a judgment of the Ontario Court of Appeal (Brown, Trotter and Paciocco JJ.A.), 2021 ONCA 82, 399 C.C.C. (3d) 397, [2021] O.J. No. 601 (QL), 2021 CarswellOnt 1438 (WL), affirming the conviction of the accused for participation in the activities of a criminal organization. Appeal allowed, Côté J. dissenting.

Alexander Ostroff, for the appellant.

Katie Doherty, for the respondent.

Colleen McKeown and Emily Lam, for the intervener.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

ROWE J. —

[1] This appeal presents an opportunity to provide guidance on two issues: (1) the approach to appellate review for legal error in jury instructions and (2) the definition of a “criminal organization” under the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] A jury found the appellant, Ahmed Abdullahi, guilty of various offences relating to the possession of and conspiracy to transfer illegal firearms. The jury also found the appellant guilty of one count of participation in the activities of a criminal organization for the purpose of trafficking weapons, contrary to s. 467.11 of the *Criminal Code*. Only the conviction on the criminal organization count is at issue before this Court.

[3] The Court of Appeal for Ontario unanimously dismissed an appeal from other convictions but divided on the criminal organization count. On that count, the appellant argued that the trial judge erred in law in his instructions to the jury on the first required element of the offence — the existence of a “criminal organization” — by failing to explain that a criminal organization must have structure and continuity, as

set out by this Court in *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211. The majority of the Court of Appeal concluded that, viewing the charge in light of the evidence, the closing arguments of counsel, and the lack of objection by defence counsel, the jury was properly equipped with respect to the requirement of structure and continuity, and so there was no error of law in the jury instructions. The dissenting judge was of the view that the charge did not properly equip the jury to deal with this element of the offence. On this basis, the appellant asks this Court to allow the appeal and to order a new trial on the criminal organization count.

[4] This Court has indicated that appellate courts should adopt a “functional approach” to the review of jury instructions for legal error. This respects the jury’s role as the trier of fact while enabling effective review of the trial judge’s duty to ensure the jury understands the law that it is to apply. The approach supports the function of jury instructions: to equip the jury properly to decide the case according to the law and the evidence. The meaning of “properly” equipping a jury is therefore essential to understanding the appellate court’s task of identifying legal error in jury instructions. Such errors have been described using a variety of terms in the jurisprudence, notably “misdirection” and “non-direction”. In these reasons, I will explain why it is helpful to understand the concept of “misdirection” in terms of whether the instructions would have equipped the jury with an *accurate* understanding of the law to decide the case. Similarly, it is helpful to understand the concept of “non-direction” in terms of whether the instructions would have equipped the jury with a *sufficient* understanding of the law to decide the case. These concepts direct the appellate court’s focus to the function of

the instructions and the overall understanding of a given issue in the mind of the jury. Thus, a properly equipped jury can be understood as one that is both *accurately* and *sufficiently* instructed to decide the case.

[5] Applying the foregoing, I conclude that the trial judge erred in law in his instructions to the jury by failing to explain that a criminal organization is one that by virtue of its structure and continuity poses an enhanced threat to society. This requirement distinguishes criminal organizations from other groups of offenders who act in concert; it also helps guard against improper reasoning, notably reliance on stereotypes, as a basis for identifying a criminal organization. Without an explanation of this requirement in the judge's instructions, the jury was not sufficiently instructed on the legal standard to apply to the evidence in concluding that a criminal organization existed. The evidence at trial, the closing arguments of counsel for the parties, and the lack of objection to the charge by defence counsel could not make up for this error by the trial judge.

[6] I would therefore allow the appeal, set aside the appellant's conviction for participation in the activities of a criminal organization, and order a new trial on that count.

I. Trial

[7] In March 2013, the Toronto Police Service ("TPS"), along with the Ontario Provincial Police, began investigation "Project Traveller" into the trafficking of illegal

firearms. The TPS obtained a court order authorizing wiretap intercepts of phone conversations. The languages in the calls were English, Jamaican Patois, and Somali. These wiretaps led to further police surveillance and search warrants.

[8] The charges against the appellant revolved around an incident on March 31, 2013. Based on wiretap information, police believed the appellant and his associates were transporting five illegal firearms from Windsor to Toronto in a rental vehicle. Police followed what they believed was the vehicle and, when it began driving erratically, pursued it to an apartment complex on Dixon Road in Toronto. There, they found the vehicle abandoned in the parking garage. A grocery bag was found in the front passenger seat containing three illegal firearms. The other two firearms were never recovered.

[9] In the following days, the wiretaps captured discussions alluding to the police pursuit. One individual referred to himself as Ahmed Abdullahi; his voice was heard in other calls, where he was referred to as “H” and “HNI”. Discussions between other individuals referred to “HNIC”.

[10] Project Traveller culminated in June 2013 with the arrest of several persons, including the appellant. He was charged with five counts of possession of an unauthorized firearm (s. 92(1) of the *Criminal Code*), one count of possession of property obtained by crime in respect of one of the five firearms (s. 354(1)), one count of conspiracy to commit weapons trafficking (ss. 99(1) and 465(1)(c)), and one count

of participation in the activities of a criminal organization for the purpose of weapons trafficking (s. 467.11).

[11] The appellant was tried jointly with a co-accused before a judge and jury. The primary issue was identity — namely, whether the appellant was one of those heard in the intercepts, and whether the appellant was in the rental vehicle on March 31, 2013. Circumstantial evidence identifying the appellant included forensic evidence and the wiretap intercepts. One task for the jury was to identify who was speaking or referred to in the intercepts. The Crown alleged that the appellant was the person referred to as “H”, “HNI”, or “HNIC”.

[12] In order to obtain a conviction on the count of participation in the activities of a criminal organization, the Crown first had to prove that a “criminal organization” existed. Section 467.1(1) of the *Criminal Code* defines a “criminal organization” as follows:

criminal organization means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[13] The Crown alleged that the individuals heard in the intercepts, including the appellant, were members of an “urban street gang” whose “turf” was an area of apartment buildings on Dixon Road. In closing argument, the Crown pointed to the group’s organized strategies to conceal their criminal activity, which reflected “a cohesiveness that is characteristic of urban street gangs” and “a continuous enterprise” (A.R., vol. XXXI, at pp. 94-95). The Crown suggested, for example, that the group had lookouts near apartment buildings, escape routes to avoid arrest, places to conceal contraband, and assigned roles; the co-accused, for example, was alleged to be a “courier”. The Crown also alleged that the members of the group hid their criminal activities by speaking Somali and by using gang terminology.

[14] In support of its view that the group had the characteristics of an “urban street gang”, the Crown called Detective Constable Steven Kerr of the TPS, whom the judge qualified to give expert opinion evidence on “the nature, culture, customs, characteristics, identifiers, including geographical areas and symbols, terminology, including street and gang language and coded language and behaviour and activities of street gangs in Toronto” (A.R., vol. XXVI, at p. 3). Detective Kerr explained that members of street gangs often speak in slang and in “coded” or “covert” language. He sought to explain terms used by gangs, such as “hood”, “crew”, “homies”, “my boy”, “fam”, and “bless”. His evidence also compared Toronto street gangs with the Bloods and the Crips, notorious American street gangs. He was shown photographs of the appellant and identified him as exhibiting a “Blood[s] hand sign” while wearing red clothing, which could be “indicia” of a Bloods-like gang.

[15] On cross-examination, Detective Kerr acknowledged that individuals will often mimic gang culture for social — but not criminal — reasons. He agreed that the terms he described are also regularly used by people who are not members of a gang and that wearing red does not necessarily indicate Bloods association. He also agreed that the alleged Bloods hand sign could be interpreted as simply an “A-Okay” sign.

[16] The defence did not present evidence. In closing argument, defence counsel told the jury that the offence requires a criminal organization to have “some form of structure and a degree of continuity to the group” (A.R., vol. XXXII, at p. 18). Defence counsel argued that no organizational structure was discussed in the intercepts and that the evidence was instead consistent with people from the same neighbourhood and cultural background who “formed randomly” for the immediate commission of a single offence.

[17] After closing arguments, the judge held a pre-charge conference. The defence repeated its argument that the alleged criminal organization lacked structure and continuity, citing this Court’s decision in *Venneri*. The judge provided counsel with a draft of his final jury instructions. Changes were discussed and made, but defence counsel raised no concern regarding the judge’s explanation of what constitutes a criminal organization within the meaning of the offence.

[18] In his charge to the jury, the judge referred to the evidence and to the parties’ positions on the criminal organization count; this included a summary of Detective Kerr’s evidence on “urban street gangs” in Toronto. The judge dealt with the

required elements of the offence toward the end of his charge. He told the jury that there are three required elements: (1) the existence of a criminal organization; (2) knowing participation in or contribution to any activity of the criminal organization by the accused; and (3) the intention of the accused to enhance the ability of the criminal organization to facilitate or commit an indictable offence. On the first element, the judge explained:

The first element is the existence of a criminal organization. A criminal organization is

(a) a group, however organized, that is composed of three or more persons in or outside Canada; and that

(b) has, as one of its main purposes or activities, the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit including a financial benefit by the group or any one of the persons who constitute the group.

It is necessary to elaborate upon each of the components of that definition. A requirement of a group of three or more persons is not met if the group of three or more persons was formed randomly for the immediate commission of a single offence. The formation must not be random. The formation must not be for the purpose of committing an offence.

(A.R., vol. I, at pp. 203-4)

[19] The balance of the judge's charge on the elements of the criminal organization offence related to the second and third elements: whether the accused participated in the activities of the organization and the purpose of that participation.

[20] Defence counsel raised no objection to the charge. The jury's deliberations continued to the next day. The jury asked and received answers to several questions

unrelated to the criminal organization count. In the evening, the jury returned its verdicts: the appellant was found guilty of all charges. The jury also found his co-accused guilty of several charges, including participation in the activities of a criminal organization.

[21] In its sentencing submissions, the Crown argued that the designation “HNIC” was an abbreviation of “Head N-word in Charge” (A.R., vol. XXXV, at p. 27) and that the appellant was the leader of the criminal organization. The judge treated this as an aggravating factor in his reasons for sentence (2015 ONSC 4163).

II. Court of Appeal for Ontario, 2021 ONCA 82, 399 C.C.C. (3d) 397

[22] The appellant appealed his convictions on three grounds. The Court of Appeal unanimously dismissed two of the three but divided on the third — that relating to the count of participation in the activities of a criminal organization. On that ground, the appellant argued that the trial judge failed to instruct the jury adequately as to the definition of a “criminal organization”; on this basis, the appellant sought a new trial regarding that offence. The majority did not give effect to this ground of appeal. Justice Paciocco, in dissent, would have allowed the appeal on this ground and ordered a new trial on that count.

[23] The majority began its review of the trial judge’s instructions on the criminal organization count by setting out “[t]he basic principles governing appellate review of a trial judge’s jury instructions” (para. 61), as summarized in *R. v. Araya*,

2015 SCC 11, [2015] 1 S.C.R. 581, at para. 39, including that the alleged error must be examined in the context of the entire charge and of the trial as a whole. The majority also reviewed this Court’s decision in *Venneri*, as well as the Court of Appeal’s decisions in *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280, and *R. v. Saikaley*, 2017 ONCA 374, 135 O.R. (3d) 641, as to the meaning of a “criminal organization”. The majority considered that the existence of a criminal organization must be assessed on a “flexible basis” and that “[w]hile the group . . . must have some form of structure and degree of continuity, ‘even a minimal amount may suffice’” (paras. 69-70, citing *Beauchamp*, at para. 155). The majority concluded that the trial judge’s instructions on the definition of a criminal organization, “assessed in the context of the trial as a whole” (para. 72), did not constitute an error of law.

[24] The majority referred to three circumstances from the “trial as a whole” in support of this conclusion. First, there was Detective Kerr’s evidence on “urban street gangs” in Toronto and the designations “H”, “HNI”, and “HNIC”, which “referred to the appellant as standing at the head of the gang’s hierarchy as the ‘head’, ‘head n**’ or ‘head n** in Canada’” (para. 74). Second, there were closing arguments by counsel. The Crown told the jury that the intercepts revealed the alleged gang’s hierarchy and territory and “a cohesiveness that is characteristic of urban street gangs”. Defence counsel referred the jury to the need for structure and continuity and argued that the group was formed randomly for a single criminal offence. Thus, the closing arguments by counsel both indicated that a criminal organization required structure or cohesiveness and continuity. Third, defence counsel did not object to the judge’s

instructions. The majority concluded that, while defence counsel's failure to object is not determinative, the lack of objection indicated the adequacy of the trial judge's instructions on the definition of a criminal organization, given the evidence and closing submissions by both Crown and defence counsel.

[25] Justice Paciocco, dissenting, took the view that although the existence of a criminal organization is to be assessed flexibly and that a low level of organization suffices, nonetheless the group must have structure and continuity. These were important issues in this case, yet the trial judge failed to explain this to the jury and instead merely repeated the definition set out in the *Criminal Code*, without reference to what was set out in *Venneri*.

[26] Justice Paciocco considered that the three circumstances from the "trial as a whole" relied on by the majority did not make up for the judge's failure to instruct the jury on the requirement for structure and continuity. The existence of evidence relating to structure and continuity would not itself inform the jury that this is a requirement in order to convict. Defence counsel's closing arguments, in illustrating that structure and continuity were live issues, underlined the need for the judge to instruct the jury on these matters. In Justice Paciocco's view, only in rare circumstances, if ever, can counsel's words make up for a trial judge's failure to provide a needed instruction. Although defence counsel ought to have objected to the charge, there was no indication that the failure to object was tactical; the only

reasonable inference was that defence counsel failed to notice the problem. In the end, the appellant was entitled to a properly instructed jury and did not have one.

III. Issue

[27] The issue in this appeal is whether the trial judge erred in law in his instructions to the jury on the count of participation in the activities of a criminal organization, such that a new trial should be ordered on that count.

IV. Analysis

[28] Both the majority and the dissenting judge at the Court of Appeal sought to give effect to this Court's guidance as to the proper approach to reviewing jury instructions for legal error. They also referred to the legal requirements for the definition of a criminal organization, as set out by this Court in *Venneri*. However, while referring to the same authorities, they came to markedly different conclusions. This points to the value of reviewing and reiterating this Court's guidance on how an appellate court should review jury instructions for legal error, as well as what this Court set out in *Venneri* regarding structure and continuity under s. 467.1(1) of the *Criminal Code*.

[29] I will begin my analysis by discussing the legal framework for appellate review of jury instructions. The appellate court's task needs to be directed to whether the instructions properly equipped the jury to decide the case. I will explain why it is

helpful to view a properly equipped jury as one that is both accurately and sufficiently instructed to decide the case, as well as how the circumstances of the trial can inform the analysis. I will then turn to the definition of a criminal organization. Finally, I will consider whether the judge's instructions in this case properly equipped the jury to decide the count of participation in the activities of a criminal organization.

A. *Legal Framework for Appellate Review of Jury Instructions*

(1) The Role of Appellate Courts in Reviewing Jury Instructions

[30] On a conviction appeal, an appellate court may allow an appeal pursuant to s. 686(1)(a) of the *Criminal Code* where it identifies any error of law, unreasonable verdict, or miscarriage of justice. These reasons focus on the first basis for appellate intervention, as challenges to a judge's instructions to the jury are analyzed as an error of law (*R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134, at para. 21).

[31] When reviewing a trial judge's instructions to the jury for legal error, appellate courts need to be mindful of the division of duties in a jury trial. The jury is the sole trier of fact. But a jury is not presumed to know the law that it must apply when reaching its verdict. The judge regulates and orders the proceedings, including any legal rulings needed during the trial, and instructs the jury as to the law. Counsel for the Crown and the defence place evidence before the jury, argue what facts the jury should find based on the evidence, and advocate for a given verdict (see *R. v. Daley*, 2007 SCC

53, [2007] 3 S.C.R. 523, at paras. 27-28; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 30).

[32] Appellate courts need to respect the role of jurors as triers of fact (see *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 (“*White 2011*”), at para. 56; *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692). Since the determination of guilt or innocence is the responsibility of the jury (*R. v. White*, [1998] 2 S.C.R. 72, at para. 27), appellate courts should exercise restraint and not routinely interfere with jury verdicts absent an error of law. However, appellate courts need also to be mindful that the trial judge bears the responsibility to instruct the jury on the law (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 37; *R. v. Khill*, 2021 SCC 37, at para. 144). In addition, juries do not have the benefit of judicial experience on certain issues; for example, a *Vetrovec* caution may be required “to bring home to lay jurors the accumulated wisdom of the law’s experience with unsavoury witnesses” (*R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 4; see also *Rodgerson*, at para. 34; *White 2011*, at paras. 44 and 55-56). The trial judge needs to ensure that the jury understands its task and is properly equipped to make its decision. The appellate court ensures that the trial judge has fulfilled their role to properly instruct the jury (*Jacquard*, at paras. 14, 32 and 62; *R. v. Ménard*, [1998] 2 S.C.R. 109, at para. 27; *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163).

[33] Finally, the appellate court’s role in reviewing the jury instructions for legal error needs to be distinguished from the operation of the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*. The approach described in these reasons is used

to determine *whether* there is an error of law in a judge’s instructions to the jury. The curative proviso, on the other hand, is to be considered only where an error of law has already been identified; it deals with whether such an error can be “cured” such that it is not warranted for the appellate court to set aside the verdict and order a new trial. Although certain considerations can inform whether an error has occurred as well as whether it can be “cured”, the two analyses need to remain conceptually distinct. An accused must demonstrate the existence of a legal error. Once that burden has been met, the Crown, if it seeks to rely on the proviso, bears the burden to establish one of the requirements of the proviso: that (1) the error of law is “harmless”, or (2) despite a potentially prejudicial error of law, there is an “overwhelming” case against the accused (*R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25). The curative proviso imposes a heavy burden on the Crown. The accused has the “right to the verdict of a properly instructed jury, and appellate courts must exercise prudence so as not to trespass on that fundamental right” (para. 23).

(2) A Functional Approach to Appellate Review of Jury Instructions

[34] It is not possible to set out an exhaustive step-by-step framework for appellate review of jury instructions — each case depends on the nature of the alleged errors. Rather, this Court has provided guidance to appellate courts to adopt a “functional approach” when reviewing instructions for legal error.

[35] Let me reiterate principles underlying this functional approach. The accused is entitled to a jury that is properly, not perfectly, instructed (*Jacquard*, at

paras. 2 and 62; *Daley*, at para. 31; *Araya*, at para. 39; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 9). The charge must be read as a whole (*Cooper*, at p. 163; *Daley*, at paras. 31 and 53; *Calnen*, at para. 8). It is the substance of the charge that matters, not adherence to a prescribed formula or particular sequence (*Daley*, at paras. 30 and 53; *Calnen*, at para. 8). The charge must be considered not in isolation but in the context of the trial as a whole (*Daley*, at para. 58; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32). The overriding question is whether the jury understood or was “properly equipped” with the law to apply to the evidence (*Calnen*, at para. 9; *Jacquard*, at para. 14). Each of the foregoing captures an aspect of a functional approach. How appellate courts have given effect to this guidance on occasion has lacked consistency.

[36] The appellate court’s task needs to be directed toward the ultimate “function” of jury instructions: to properly equip the jury to decide the case. In other words, when reviewing a charge to a jury for potential legal error, appellate courts need to read the charge as a whole and determine whether the overall effect of the charge properly equipped the jury in the circumstances of the trial to decide the case according to the law and the evidence.

[37] What does it mean for a jury to be “properly” equipped? Many terms have been used in the jurisprudence to describe errors in jury instructions that render a jury improperly equipped, notably “misdirection” and “non-direction”. In my view, the concept of “misdirection” is better understood in terms of whether the instructions would have equipped the jury with an *accurate* understanding of the law to decide the

case. Similarly, the concept of “non-direction” is better understood in terms of whether the instructions would have equipped the jury with a *sufficient* understanding of the law to decide the case. Thus, it is helpful to view a properly equipped jury as one that is both (a) accurately and (b) sufficiently instructed. This requires the appellate court to have regard both to what *was* said and what was *not* said in the judge’s instructions. To be clear, the distinction between allegations of inaccuracy and insufficiency are not two separate grounds of review of a jury instruction for legal error, nor do they replace or depart from other terms that have been used in the jurisprudence to describe errors in jury instructions. An alleged error, depending on how it is framed, might raise concerns of both inaccuracy and insufficiency. In the end, these concepts are useful tools through which an appellate court may answer the ultimate question of whether, on a functional reading, the instructions properly equipped the jury to fulfil its role.

(a) *Whether the Jury Was Accurately Instructed*

[38] In some cases, it is alleged that what the judge said in the charge would have equipped the jury with an inaccurate understanding of the law. This would be the case, for example, where a jury instruction suggests that the balance of probabilities is the requisite standard of proof to convict (*R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 243). This may also be so where the judge instructs the jury that they must be unanimous in their doubt, rather than in the verdict, before they can acquit (*R. v. Brydon*, [1995] 4 S.C.R. 253, at para. 24). A charge may also be so confusing as to

amount to an error of law (*R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 8; see also *Rodgerson*, at para. 42).

[39] These sorts of errors have typically been referred to as “misdirection” (see, e.g., *Rodgerson*, at para. 37; *Ménard*, at paras. 29-30; *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 9; *R. v. Morin*, [1988] 2 S.C.R. 345, at pp. 354-55; *Boucher v. The Queen*, [1955] S.C.R. 16). As I have explained, they are better understood in terms of whether the jury was equipped with an *accurate* understanding of the law to decide the case. This focuses the inquiry on the overall understanding of a given issue in the mind of the jury.

[40] An instruction is not inaccurate simply because it fails to use certain words or does not copy a strict formula; “it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters” (*Daley*, at para. 30; see also *Khela*, at para. 53; *R. v. Avetyan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 11; *Starr*, at para. 233). The question is whether the jury was accurately instructed to decide the case according to the law and the evidence (*Jacquard*, at para. 32).

[41] The charge must be read as a whole. As this Court has stated, “the right of an accused to a properly instructed jury does not equate with the right to a perfectly instructed jury” (*Jacquard*, at para. 32). A single ambiguous or problematic statement in one part of a charge will not necessarily be an error of law where the charge as a whole equipped the jury with an accurate understanding of the relevant legal issue (*R.*

v. Goforth, 2022 SCC 25, at paras. 35 and 40; *Jaw*, at para. 32; *Cooper*, at pp. 163-64). One misstatement might be compensated for by an accurate statement elsewhere in the charge, provided the jury would have accurately understood the law it must apply (*White 2011*, at paras. 82 and 84; *Ménard*, at para. 30; *Jacquard*, at para. 20).

[42] The organization of the charge and the placement of alleged inaccuracies within it will inform the overall accuracy of the charge (*Jaw*, at para. 33). For example, a problematic statement at one part of the charge may be less likely to undermine a proper statement of the law in a more material part of it (see, e.g., *Khela*, at para. 55; *R. v. Athwal*, 2017 ONCA 222, at paras. 2-3 (CanLII)). Conversely, it may be more likely for a jury to have been misled where the judge states the law correctly in a more generic part of the charge but then inaccurately states the same issue in a more material or significant part of the charge (see, e.g., *R. v. Subramaniam*, 2022 BCCA 141, 413 C.C.C. (3d) 56, at paras. 73-77; *R. v. Bryce* (2001), 140 O.A.C. 126, at paras. 13-15 and 20). There is a greater risk that the jury has an inaccurate understanding of the law where an inaccurate statement is made in a recharge in response to a question from the jury (*Brydon*, at para. 19; *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 139); this may well compound and thereby make more serious such an error.

[43] At all times, the focus is on whether the jury had an accurate understanding of the law from the charge.

(b) *Whether the Jury Was Sufficiently Instructed*

[44] In some cases, it is alleged that the judge did *not* say something that needed to have been said in order for the jury to be properly equipped to decide the case. It is thus alleged that the jury was not *sufficiently* instructed. In some instances, a failure to give an instruction, either with sufficient detail or at all, will be an error of law.

[45] These situations have typically been referred to as “non-direction” (see, e.g., *Khill*, at para. 145; *Lifchus*, at para. 9; *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 619). As I have explained, “non-direction” is better understood in terms of whether the instructions would have equipped the jury with a *sufficient* understanding of the law to decide the case. This directs the appellate court to the function of the instructions.

[46] The sufficiency of an instruction may be understood as involving two related questions: (i) whether an instruction was required and (ii) whether an instruction that was required was given with sufficient detail.

(i) Whether an Instruction Was Required

[47] Some instructions must be given in *every* jury trial. Other instructions are required in certain circumstances, but not in others. When faced with an allegation of insufficient instruction, an appellate court should consider whether the impugned instruction was *mandatory* or if its requirement was *contingent* on the circumstances of the case.

[48] Mandatory instructions that must be dealt with in every case include, for example, an explanation of the standard of proof beyond a reasonable doubt (*Lifchus*, at para. 22). The instructions must also include, *inter alia*, an explanation of the charges faced by the accused, including the required elements of each offence to be left with the jury; an explanation of the theories of each side; a review of the evidence relating to the law; the possible verdicts open to the jury; and the requirement of unanimity for reaching a verdict (*Daley*, at para. 29). The omission of a mandatory instruction will necessarily be an error of law.

[49] Contingent instructions are those that may be required in some cases but not others. They may include, for example, a *Vetrovec* warning where there is unsupported evidence by unsavoury witnesses (*Khela*, at para. 11), or a limiting instruction against general propensity reasoning (*Calnen*, at para. 5). Defences and included offences are put to the jury only where they bear an air of reality on the evidence (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 50; *R. v. Aalders*, [1993] 2 S.C.R. 482, at pp. 504-5). The fact that such instructions are not required in every case should not be understood to mean that they are optional. When the circumstances of the case are such that a particular instruction is required, it is an error of law to omit it.

(ii) Whether the Instruction Was Given With Sufficient Detail

[50] When an instruction is required (whether it is mandatory or contingent), appellate courts need to determine whether the instruction was given with sufficient detail to equip the jury to decide the case.

[51] For example, an explanation of the standard of proof will require more than simply stating the phrase “beyond a reasonable doubt” (*Lifchus*, at para. 22). This is mandatory in every case. Or, the evidence may require a specific instruction. An example is *Rodgerson*, where the evidence of concealment and clean-up could be relevant to two issues: the accused’s self-defence claim and his intent to commit murder. The trial judge instructed the jury to consider this post-offence conduct evidence along with all the other evidence at trial. This Court concluded that a more specific instruction was required on the limited use of the evidence for the issue of intent, as the evidence could not be used in the same manner as for the claim of self-defence. The failure to give this more specific instruction constituted an error of law (paras. 27-29; see also *Khill*, at paras. 125-27 and 129-30). The need for this instruction was contingent on the circumstances of the case.

[52] Where a jury is asked to apply provisions that have been interpreted by the courts, it will often be insufficient for a judge to simply recite the relevant provisions to the jury without explaining the meaning given to them in the jurisprudence (C. Granger, *The Criminal Jury Trial in Canada* (2nd ed. 1996), at p. 246; see, e.g., *R. v. Maxwell* (1975), 26 C.C.C. (2d) 322 (Ont. C.A.)). It is not unusual for courts to read in requirements or qualifications to *Criminal Code* provisions that are not apparent

from the text of the provision. For example, in *R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157, this Court read the wording of the offence of having care or control of a motor vehicle while impaired under s. 253(1) of the *Criminal Code* (since repealed) as requiring a realistic risk of danger to persons or property. In such circumstances, merely reciting the text of the provision to the jury would be insufficient.

[53] Like accuracy, the sufficiency of an instruction must be assessed in the context of the charge as a whole. An instruction may be insufficiently detailed in one part of the charge, but can be supplemented by another part of the charge such that the jury was equipped with a sufficient understanding of the law to decide the case (*Calnen*, at para. 6; *Daley*, at para. 31; *Jacquard*, at paras. 14 and 20).

[54] There is no strict rule to determine the level of detail for an instruction to be sufficient. The level of detail that is required depends on the circumstances of each case (*Rodgerson*, at para. 30; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 50; *Daley*, at paras. 57 and 76). Moreover, judges are not required to adhere to specific wording; what counts is the substance of the instruction, not its adherence to or departure from a prescriptive formula (*Daley*, at paras. 30 and 53; *Mack*, at para. 48).

[55] Model jury instructions serve as important guides, but they are not decisive of the sufficiency of an instruction. On one hand, the judge is not required to give a formulaic instruction, and a less detailed instruction may be sufficient if the circumstances of the case do not require as much detail as the model instruction sets out. On the other hand, the circumstances of the case may require an instruction with

greater detail than a model instruction provides. This Court has cautioned against overreliance on model instructions; they are a valuable tool, not the final product (*R. v. R.V.*, 2021 SCC 10, at para. 64; *Rodgerson*, at paras. 51 and 54).

[56] Appellate courts should also be mindful that brevity is a virtue in jury instructions (*Daley*, at para. 56). The judge has a duty to “decant and simplify” the law (*Jacquard*, at para. 13). If the charge sufficiently equips the jury with what it needs to consider, the failure to say *all* that could have been said does not constitute an error of law (*Mack*, at para. 59).

(c) *Consideration of the Charge in Light of the Circumstances of the Trial*

[57] The central inquiry on appellate review is whether the instructions properly equipped the jury to decide the case. In answering this question, a functional approach requires that appellate courts consider the instructions not in isolation, but rather in the context of the trial. Every trial is different. An instruction that properly equips the jury in one trial will not do so in another trial. A jury needs to be equipped with only that which is necessary to decide the case before it.

[58] Although instructions need to be considered in the context of the trial, appellate courts should carefully consider how those circumstances are relevant to the central inquiry on appellate review: whether the judge’s instructions properly equipped the jury to decide the case. Again, a properly equipped jury can be understood as one that is both accurately and sufficiently instructed. The circumstances of the trial must

be directed to this inquiry and not be used to *replace* the instructions. To do so would subvert the trial judge's duty to instruct the jury accurately and sufficiently.

[59] With the foregoing in mind, I turn to the three considerations from the “trial as a whole” relied on by the majority in concluding that the instructions disclosed no legal error: (i) the evidence; (ii) the closing arguments of counsel; and (iii) the lack of objection by defence counsel. This is not an exhaustive list of the considerations that may be relevant in light of the jurisprudence of this Court; rather, these are the ones that have been placed in issue in this appeal.

(i) Evidence

[60] The evidence at trial informs *what* the jury needs to understand in order to be equipped properly to decide the case. Thus, the evidence at trial can inform the sufficiency of certain instructions. For example, whether a *Vetrovec* instruction is required will depend on the witnesses; if there are no unsavoury witnesses, then it is not an error of law to omit a *Vetrovec* instruction. In *Rodgerson*, a more specific instruction was required due to the nature of the evidence adduced at trial. For these types of instructions, whether the instruction is required and its level of detail depend on the evidence.

[61] The evidence does not inform the sufficiency of every instruction. For example, a sufficiently detailed instruction on the standard of proof must explain the phrase “beyond a reasonable doubt” in accordance with the jurisprudence, regardless

of the evidence. The jury needs to understand the law that it is called on to apply to the evidence. The existence of evidence relevant to a given issue cannot *replace* an accurate and sufficient instruction on the law. If a jury is equipped with an inaccurate understanding of the law, one can expect that the jury will apply that inaccurate legal framework to the evidence, whatever that evidence may be. If the instruction is insufficient, the appellate court cannot ascertain whether the jury undertook its task within the required framework.

[62] The *overall strength* of the Crown’s case is not a relevant consideration in the review of a jury instruction for legal error. The weight of the evidence is a factual matter for the jury. The strength of the Crown’s case may be a relevant consideration under the curative proviso, but that is a different question (*Araya*, at para. 53).

(ii) Closing Arguments of Counsel

[63] Like the evidence, the closing arguments of counsel form part of the overall circumstances of the trial; in some circumstances, these can inform the sufficiency of the judge’s instructions. Notably, the closing arguments of counsel can be relevant to whether a contingent instruction was required. For example, in *Khill*, defence counsel’s repeated emphasis on the final “split second” of the incident supported the need for the trial judge to provide a specific instruction on the accused’s “role in the incident” in his instruction on self-defence (paras. 134-35). Or, if counsel makes a problematic statement in closing argument, it can be incumbent on the judge to correct this and to

admonish the jury to disregard counsel's statements; a failure to do so may amount to an error (*R. v. Rose*, [1998] 3 S.C.R. 262, at paras. 63 and 126-27).

[64] This Court has stated that counsel's closing arguments may "fill gaps" in the judge's charge (*Daley*, at para. 58). However, this statement must be understood in light of the nature of the alleged error. Appellate courts have viewed counsel's closing arguments as capable of filling gaps in the judge's *review of the evidence* (see, e.g., *R. v. Connors*, 2007 NLCA 55, 269 Nfld. & P.E.I.R. 179, at para. 15; *R. v. Smith*, 2010 BCCA 35, 282 B.C.A.C. 145, at paras. 41 and 46; *R. v. Krasniqi*, 2012 ONCA 561, 291 C.C.C. (3d) 236, at para. 81). This is because judges are not required to review in detail the whole of the evidence; they are required only to review critical parts of the evidence and to ensure that the jury understands the significance of the evidence having regard to the issues in the case (*Daley*, at paras. 56-57; *R. v. P.J.B.*, 2012 ONCA 730, 298 O.A.C. 267, at para. 47).

[65] I agree with the intervener, the Criminal Lawyers' Association of Ontario, that counsel's closing arguments cannot *replace* an accurate and sufficient instruction on the *law*. The fact that counsel might have explained a legal principle properly will not correct the trial judge's failure to do so (*Avetysan*, at paras. 23-24; *R. v. Gray*, 2012 ABCA 51, 522 A.R. 374, at para. 19). Juries are invariably told to take the law from the judge and not from counsel or other sources. Such an instruction reflects the trial judge's duty to instruct the jury on the law. It also prevents the jury from cobbling together disparate and potentially inconsistent explanations of the law. Reliance on

multiple sources might well not only confuse juries but also frustrate appellate review of a jury instruction for legal error, as appellate courts would not know which legal principles the jury applied.

(iii) Silence of Counsel

[66] Trial judges often convene a pre-charge conference, as provided for under s. 650.1 of the *Criminal Code*. In this proceeding, the judge will usually provide counsel with a draft of the jury charge and invite comments on it. This is intended to be a meaningful exchange. Counsel should lay their cards on the table, and the judge should be mindful of what counsel says, bearing in mind that it is an adversarial process. After the judge has instructed the jury, counsel have an opportunity to raise objections to the charge or to request clarifications or additional instructions before the jury commences its deliberations. As with the pre-charge conference, this is meant to be a meaningful exchange where counsel lay their cards on the table. Finally, when juries raise questions during their deliberations, counsel have the opportunity to provide submissions to the judge as to how to answer the questions. Where counsel fails at these various opportunities to request the inclusion of an instruction or fails to raise an objection to the charge as delivered, appellate courts have often turned to counsel's silence as an important consideration.

[67] Although the silence of counsel can be a relevant consideration, it should be recalled that the responsibility for the jury charge lies with the trial judge, not counsel. This Court has on several occasions stated that the silence of counsel, while

relevant, is not determinative (see, e.g., *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44; *Daley*, at para. 58; *Mack*, at para. 60). To hold otherwise would “unequivocally prejudice an accused’s right of appeal in cases where counsel is inexperienced with jury trials” (*Jacquard*, at para. 37). The silence of counsel is simply one of many considerations under a functional approach.

[68] Counsel’s silence may be particularly relevant as to whether a contingent instruction was required. For example, the lack of a request by defence counsel for the inclusion of a limiting instruction against general propensity reasoning may reinforce the conclusion that such an instruction was not required in the circumstances of the case (*Calnen*, at para. 41). Counsel’s silence may also suggest that an instruction that *was* given was sufficiently detailed. For example, the lack of objection may indicate the sufficiency of a judge’s *Vetrovec* instruction (*Khela*) or instructions on advanced intoxication (*Daley*). Counsel’s silence could also support a conclusion that the charge read as a whole accurately set out the law relevant to a given issue. For example, in *Goforth*, the lack of objection by defence counsel did not *make* the jury charge accurate, but it supported the conclusion that the overall effect of the charge accurately instructed the jury with the foreseeability standard for the offence (para. 39). One can take the view that an instruction good enough for counsel was likely good enough for the jury (see, e.g., *Jaw*, at para. 36). But, the impressions of the moment can be mistaken, especially in complex cases with multiple legal issues.

[69] Counsel's silence may be particularly significant where there are indications that it was a tactical decision. If the absence of an instruction at trial could have benefited the party who argues on appeal that it was required, then the appellate court might ask whether counsel made the tactical decision not to seek the instruction at trial (*Calnen*, at para. 41; see also *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423, at para. 3). This can be a significant consideration. Counsel cannot withhold an objection at trial and save it for an appeal. Appellate courts are also rightly hesitant to second-guess the tactical decisions of counsel, save to prevent a miscarriage of justice (*Calnen*, at para. 67; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 34). Conversely, if the omission of an instruction would have had no apparent benefit for the appealing party, this may suggest that the error was an oversight rather than a tactical decision (*Khill*, at para. 144; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 48).

[70] Appellate courts may also be called on to consider whether counsel's silence is relevant to the curative proviso. Counsel's silence may suggest, for example, that while an omission in the judge's instructions was an error of law, the error was harmless in the circumstances (*R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 143; *Jaw*, at para. 44). As noted before, this is a distinct inquiry.

(iv) Sentencing Submissions and Reasons

[71] Counsel's sentencing submissions and the judge's reasons for sentence are necessarily given *after* the jury has rendered a verdict of guilt. Thus, matters to be

considered for the first time at sentencing cannot be relevant to whether the jury was properly equipped to decide whether the accused should be found guilty or not guilty.

(3) Summary

[72] In sum, when reviewing a jury charge for potential legal error, appellate courts should adopt a functional approach by reading the charge as a whole and determining whether the overall effect of the charge achieved its function: to properly equip the jury in the circumstances of the trial to decide the case according to the law and the evidence. The appellate court's task needs at all times to be directed to this function. It is helpful to view a properly equipped jury as one that is both accurately and sufficiently instructed. The appellate court should consider if the jury had an accurate understanding of the law from what the judge said in the charge, bearing in mind that an instruction does not need to meet an idealized model, nor must it use prescribed wording. The appellate court should also consider if the judge erred by failing to give an instruction, either with sufficient detail or at all. While some instructions are mandatory and their omission will constitute an error of law, whether other instructions are needed will be contingent on the circumstances of the case. Whenever an instruction is required, the judge needs to provide that instruction with sufficient detail for the jury to undertake its task. The circumstances of the trial cannot *replace* the judge's duty to ensure the jury is properly equipped, but they do inform what the jury needed to understand to decide the case.

B. *Definition of a Criminal Organization*

[73] I turn now to the instruction to the jury at issue in this appeal and to the definition of a criminal organization.

[74] In order to obtain a conviction for a criminal organization offence, the Crown must first prove the existence of a criminal organization (see *Venneri*, at para. 25). This is common to all criminal organization offences. Sections 467.11 to 467.13 of the *Criminal Code* set out four substantive offences targeting escalating degrees of involvement with a criminal organization. In addition to these offences, pursuant to s. 2, any other serious offence committed for the benefit of, at the direction of, or in association with a criminal organization is also considered a “criminal organization offence”. Other provisions of the *Criminal Code* distinguish the (ordinary) commission of certain offences from their commission in relation to a criminal organization, e.g., possession of an explosive (s. 82(2)) and various offences involving a firearm (ss. 239(1)(a), 244(2)(a), 244.2(3)(a), 279(1.1)(a), 279.1(2)(a), 344(1)(a) and 346(1.1)(a)).

[75] Understanding the definition of a criminal organization is necessary in order to determine whether the judge’s instruction properly equipped the jury to decide whether the appellant participated in the activities of a criminal organization.

(1) Distinguishing Qualities of a Criminal Organization

[76] Not every group of three or more persons that facilitates or commits a serious offence for a material benefit is a criminal organization. This Court in *Venneri*

interpreted Parliament's direction in s. 467.1(1) of the *Criminal Code* that a criminal organization be "organized" in some fashion as requiring the group to have "some form of structure and degree of continuity" before the "exceptional regime" of the organized crime provisions of the *Criminal Code* is engaged (para. 29).

[77] The appellant says that the trial judge erred by failing to instruct the jury on the requirement for a "criminal organization" to have structure and continuity. In *Venneri*, this Court took a purposive approach and set out the underlying rationale for the requirement of structure and continuity. It is helpful to review that rationale, which informs what a jury needs to understand in order to be properly equipped to decide whether a criminal organization exists.

[78] The purpose of the *Criminal Code*'s criminal organization regime is to identify and undermine groups that pose an enhanced threat to society due to the institutional advantages of structure and continuity (*Venneri*, at para. 40). Structured and continuous criminal entities offer advantages to their members by consolidating and retaining knowledge; sharing customers and resources; developing specializations; dividing labour; fostering trust and loyalty; and developing reputations in the community, including for violence (para. 36). These same advantages enable criminal organizations to elude law enforcement more effectively.

[79] To counteract these advantages, Parliament has enacted not only substantive criminal organization offences but also heightened investigative, procedural and penal consequences where a criminal organization is involved or

alleged to be involved in an offence. These include greater police powers for certain authorizations and warrants (ss. 185(1.1), 186(1.1), 186.1, 492.1(6)(a) and (b) and 492.2(5)(a) and (b)) and a reverse onus for bail (s. 515(6)(a)(ii)). At sentencing, involvement in a criminal organization is an aggravating factor (s. 718.2(a)(iv)), conditional sentences are unavailable (s. 742.1(d)), and parole ineligibility can be delayed (s. 743.6(1.1)). Sentences for certain criminal organization offences must be served consecutively to other sentences arising from the same event (s. 467.14). Murder is elevated to first degree murder where the death is caused for the benefit of, at the direction of, or in association with a criminal organization (s. 231(6.1)).

[80] The enhanced threat to society posed by criminal organizations by virtue of their structure and continuity explains why the criminal organization regime is considered exceptional. Groups of individuals acting in concert, where they lack structure and continuity, do not pose the same enhanced threat to society constituted by criminal organizations (*Venneri*, at paras. 27, 29 and 40). As Fish J. explained in *Venneri*:

Stripped of the features of continuity and structure, “organized crime” simply becomes all serious crime committed by a group of three or more persons for a material benefit. Parliament has already criminalized that activity through the offences of conspiracy, aiding and abetting, and the “common intention” provisions of the *Code* (see, e.g., ss. 21 and 465(1)). [para. 35]

Identifying a group as a criminal organization when it lacks the requisite qualities of structure and continuity “would cast a net broader than that intended by Parliament”

and subject the group to the exceptional procedural and substantive consequences of the criminal organization regime (paras. 31 and 35).

[81] The Crown and the majority of the Court of Appeal do not dispute that a criminal organization must have structure and continuity. However, they stress that the definition of a criminal organization must be applied “flexibly” and must not be limited to stereotypical models of organized crime. With respect, the Crown and the majority of the Court of Appeal conflate the legal requirement for a criminal organization to be structured and continuous with the flexibility needed to conduct the factual assessment of the circumstances in each case.

[82] Criminal organizations are opportunistic and adaptive. They vary based on which “business model” proves successful. They can take forms that do not fit stereotypical models of organized crime but nonetheless can pose the type of enhanced threat to society contemplated by Parliament. Thus, the definition of a criminal organization must be applied flexibly (see *Veneri*, at paras. 28 and 36-41; *R. v. Terezakis*, 2007 BCCA 384, 223 C.C.C. (3d) 344, at para. 34; *Beauchamp*, at paras. 145-48).

[83] However, flexibility in the acceptable *forms* of structure and *degree* of continuity does not mean that structure and continuity are optional (*Veneri*, at paras. 27-31). Rather, the group must have structure and continuity to give rise to the sort of enhanced threat to society that Parliament has sought to combat, bearing in mind the differences from other groups of offenders such as conspirators.

(2) Improper Reasoning

[84] I agree with the appellant and the intervener, the Criminal Lawyers' Association of Ontario, that careful consideration of a group's structure and continuity is needed to guard against improper reasoning in identifying a criminal organization. This is needed to avoid the risk that police, lawyers, juries, and judges could identify a group as a criminal organization based on shared characteristics such as ethnicity, cultural background, neighbourhood, religion, language, or dialect. While such characteristics may indicate a common social or cultural identity among persons who commit offences, they are irrelevant in identifying the existence of a criminal organization. To view such characteristics as indicative of organized crime is to depart from Parliament's intention and to do so in a way that undercuts a key goal of Canadian society, cultural diversity.

[85] The flexibility with which the definition of a criminal organization is applied must not become an invitation for irrelevant considerations or improper reasoning. The risk of improper reasoning is especially acute where an accused is a member of a marginalized community, underrepresented among police, lawyers, jurors, or the judiciary, and whose characteristics and practices may well be less familiar and possibly the subject of biases, prejudices, or stereotypes among those tasked with enforcing the law and passing judgment. The courts have recognized the risks of racial bias or stereotypical reasoning, including subconscious biases, in the criminal justice system (see, e.g., *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 21-22;

Barton, at paras. 195-97). Just as the definition of a criminal organization must not be *limited* to stereotypical models of organized crime, care must also be taken not to identify a criminal organization merely *because* the group appears to satisfy some stereotypical model. The trier of fact's focus when tasked with identifying a criminal organization needs at all times to remain fixed on whether the *particular* group in question possesses the distinguishing qualities of a criminal organization, i.e., structure and continuity.

[86] Trial judges play an important role in combatting biases, prejudices, and stereotypes in the courtroom (*Barton*, at para. 197). A suitable instruction on the requirements for a criminal organization is part of this. Under the general rules of evidence, courts can exclude evidence that is not relevant to this inquiry or where the prejudicial effect of the evidence would outweigh its probative value. Trial judges should provide a warning to juries of the risks of subconscious bias or improper reasoning where the circumstances warrant such a caution (para. 200).

C. *Application to the Circumstances of This Case*

[87] The appellant alleges that the jury was not properly equipped to decide the case because the judge did not say something that he was required to say. This is an allegation of insufficient instruction.

[88] The existence of a criminal organization is a required element of the offence of participation in the activities of a criminal organization. An instruction on

this element is therefore mandatory. The alleged criminal organization must have structure and continuity to give rise to the sort of enhanced threat to society that Parliament has sought to combat. Therefore, in order for the jury to be sufficiently equipped to decide whether a criminal organization existed, the instruction must include an explanation of structure and continuity.

[89] The trial judge's instructions in this case did not sufficiently equip the jury to determine whether a criminal organization existed. Rather, the judge merely recited the definition in s. 467.1(1) of the *Criminal Code*. This would not have equipped the jury with an understanding that a criminal organization must pose an enhanced threat to society by virtue of its structure and continuity. This requirement is not apparent from the bare text of the definition. To the contrary, in *Venneri*, Fish J. surveyed the jurisprudence where some trial courts had incorrectly found that very little or no organization was required (para. 27). Jurors cannot be expected to divine an interpretation of the statutory text that even judges could not ascertain before this Court's guidance. In so saying, I stress that there is no magic to the words "structure" and "continuity"; Fish J. in *Venneri* referred to other terms such as "cohesiveness" and "endurance" (para. 41). While it is better to use a consistent formulation (structure and continuity), whatever words are used, the judge needs to make clear to the jury the distinguishing qualities of a criminal organization.

[90] The majority relied on portions of the evidence at trial, closing arguments of counsel, and the lack of objection from defence counsel as indicating that the

instructions were sufficient. With respect, the majority's reliance on these considerations was misplaced. The majority's focus strayed from the ultimate function of jury instructions and the central inquiry on appellate review — whether the jury was properly equipped to decide the case.

[91] First, the existence of evidence that might have concerned structure and continuity could not have equipped the jury with an understanding that it needed to be satisfied that the group had structure and continuity in order to convict. Absent guidance from the judge, the jury might have convicted the accused without finding that the group in which he was involved possessed the distinguishing qualities of structure and continuity required by law.

[92] The two aspects of the evidence at trial relied on by the majority warrant further comment. The evidence of Detective Kerr was, in my respectful view, the sort of evidence that risked inviting improper reasoning by the jury. His evidence did not relate to the structure or continuity of any particular criminal organization but referred generically to “the nature, customs, culture, characteristics, identifiers, terminology, behaviour, and activities of urban street gangs” (C.A. reasons, at para. 73). He agreed in cross-examination that many of these alleged “indicia” of organized criminality could just as easily indicate social bonding or participation in “urban culture”. The generic nature of this evidence posed a risk that the jury would find the existence of a criminal organization based on a stereotypical model of an “urban street gang” whose characteristics and practices may in some ways mirror the cultural norms of racialized

communities in Toronto, or worse, may be the subject of biases, prejudices, and stereotypes. This aspect of the evidence, rather than indicating the sufficiency of the judge's instructions, reinforces the importance of a clear instruction on structure and continuity as a guard against improper reasoning.

[93] The other aspect of the evidence relied on by the majority of the Court of Appeal was also problematic. The Crown referred to the designation "HNIC" only for the purpose of identifying the appellant as one of the speakers overheard in the wiretaps. It was during sentencing that the Crown advanced the theory that the appellant was the leader of the alleged criminal organization, as demonstrated by its proposed decoding of the designation. Given the timing of these submissions, they could not be relevant to the sufficiency of the instructions to the jury.

[94] Second, counsel's closing arguments could not have filled the gap left by the judge's omission of an instruction on the distinguishing qualities of a criminal organization. I note that, in accordance with accepted practice, counsel for both the defence and the Crown told the jury in closing arguments that the judge would explain the definition of a criminal organization; as well, the judge directed the jury to take their understanding of the law from him rather than from counsel.

[95] Finally, the lack of objection from defence counsel cannot make up for the insufficiency of the judge's instructions in this case. As noted by Justice Paciocco, there is no suggestion that the lack of objection was tactical. The lack of structure and continuity was central to the defence on this count; defence counsel had nothing to gain

by failing to object and it seems to have been an oversight on their part. At the end of the day, the judge's omission of this mandatory instruction left the jury insufficiently equipped to decide a required element of the offence.

[96] In light of the foregoing, the trial judge erred in law in his instruction to the jury on the count of participation in the activities of a criminal organization. In this case, the circumstances of the trial relied on by the majority of the Court of Appeal could only have been relevant, if at all, to the curative proviso. However, the Crown has not sought to rely on the curative proviso in this case, and I therefore make no further comment on its potential application.

V. Conclusion

[97] I would allow the appeal, set aside the appellant's conviction for participation in the activities of a criminal organization, and order a new trial on that count.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[98] This appeal provides an opportunity to apply the functional approach to appellate review of jury charges (see, e.g., *R. v. Goforth*, 2022 SCC 25, at paras. 20-22;

R. v. Calnen, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 8-9; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 32). While my colleague purports to affirm this approach, with respect, he elevates form over substance and renders the contextual assessment more rigid in several ways.

[99] The sole issue in this case is whether the jury understood the legal elements of the definition of “criminal organization” in s. 467.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. There is no dispute that “some form of structure and degree of continuity” are required (*R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211, at para. 29). While the trial judge’s charge was not perfect, it would not have made any difference if he had used the precise words “structure” and “continuity” in explaining the definition. The jury knew it had to decide whether the appellant was a member of a group that (1) was organized; (2) existed for some period of time; and (3) went beyond one formed randomly for the immediate commission of a single offence (A.R., vol. I, at pp. 203-13) — and which therefore, in substance, had *some form* of structure and degree of continuity.

[100] I am satisfied that, examined as a whole and in context, the judge’s charge properly equipped the jury to decide the case according to the law and the evidence. I would dismiss the appeal and uphold the appellant’s conviction on the count of participation in the activities of a criminal organization.

II. Legal Principles

[101] Like my colleague, I will first review the legal principles applicable to appellate review of jury instructions. I will then discuss the legal elements of a criminal organization. Finally, I will apply these principles to determine whether the judge’s charge properly equipped the jury to decide the count of participation in the activities of a criminal organization.

A. *Functional Approach to Appellate Review of Jury Instructions*

[102] This Court has long held that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed (*Goforth*, at para. 20, citing *Daley*, at para. 31; *Jacquard*, at paras. 2 and 32). This “functional approach” to appellate review of jury instructions was reaffirmed last year by this Court in *Goforth*, summarized by the majority as follows:

Trial judges are not held to a standard of perfection in crafting jury instructions (*Daley*, at para. 31). Rather, an appellate court must take a functional approach when reviewing a jury charge by examining the alleged errors in the context of the evidence, the entire charge, and the trial as a whole (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 10; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32). It is the substance of the charge — and not adherence to or departure from a prescriptive formula — that is determinative (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 54; *R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273, at para. 69). As Bastarache J. instructed in *Daley*, at para. 30:

. . . it is important for appellate courts to keep in mind the following. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case. [Emphasis in original; para. 21.]

[103] In *Calnen*, Moldaver J. described the approach in similar terms:

An appellate court undertakes a functional approach in reviewing a jury charge, asking whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence

In short, the test is whether the jury was properly, not perfectly, instructed: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62. At the end of the day, the overriding question is whether the jury was properly equipped to decide the case absent a limiting instruction against general propensity reasoning. [paras. 8-9]

[104] These principles are not disputed by the appellant. They were also not the subject of disagreement at the Court of Appeal for Ontario. While the Court of Appeal did not have the benefit of this Court's reasons in *Goforth*, both the majority and the dissent undertook a contextual review of the trial judge's charge in accordance with this Court's prior jurisprudence. Brown J.A., writing for the majority, did exactly what this Court has instructed: he considered the impugned portion of the charge in context and in the circumstances of the trial as a whole.

[105] In dissent, Paciocco J.A. likewise considered whether the charge, "when examined as a whole and in the context of the entire case, . . . would 'in all probability' have conveyed these elements of the offence [(structure and continuity)] to the jury" (2021 ONCA 82, 399 C.C.C. (3d) 397, at para. 121, quoting *Daley*, at para. 30). He disagreed with the majority not on the legal framework, i.e. the functional approach, but on its application to the judge's charge in this case.

[106] Nonetheless, my colleague seeks to provide further “guidance” on the established framework (paras. 1 and 30-72). This is unnecessary, and complicates or narrows the contextual assessment in several respects.

[107] First, my colleague categorizes errors in jury instructions as those related to “accuracy” or “sufficiency”, and within the latter category, instructions which are “mandatory” or “contingent”. This rigid characterization is unhelpful. I agree that a jury instruction that is not accurate may result in what has traditionally been called misdirection; one that is not sufficient may result in a case of non-direction. But in all cases, as my colleague recognizes, the relevant question is simply whether the charge properly equipped the jury to decide the case according to the law and the evidence (paras. 4, 29, 35-37, 57 and 72; see also *Calnen*, at para. 8; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 54; *Goforth*, at para. 58). Similarly, a “contingent” instruction may be required in a particular case and thus become “mandatory” in the circumstances. In my view, bright-line categorization of this nature is unnecessary, and may create confusion.

[108] Second, my colleague appears to narrow the contextual assessment as it relates to the submissions of counsel. While he accepts that “in some circumstances, these can inform the sufficiency of the judge’s instructions”, he confines this to “filling gaps in the judge’s *review of the evidence*” (paras. 63-64 (emphasis in original)).

[109] I am not convinced that the submissions of counsel should be so limited. In *Daley*, this Court held as follows:

Finally, it should be recalled that the charge to the jury takes place not in isolation, but in the context of the trial as a whole. Appellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge [Emphasis added; para. 58.]

[110] Subsequently, in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, our Court considered whether the Crown's closing address was sufficient to remedy a legal deficiency in the jury charge (para. 35). In that case, because the submissions were "scattered throughout a lengthy closing argument", "many of them were vague and oblique", and the "Crown never hit the nail on the head" on the legal relevance of the evidence in question, they did not "suffice to fill the gap and correct the legal error in the jury charge" (para. 36 (emphasis added)). Moldaver J. elaborated on the distinction between cases of alleged *misdirection* and those of *non-direction*:

I should also note, in regard to the instructions on Mr. Rodgerson's flight from and lies to the police, that the legal error amounted to *misdirection*, not *non-direction*. The trial judge instructed the jury that it could use the evidence to infer that Mr. Rodgerson had the requisite intent for murder, when no such inference was available. The error was unrelated to a gap in the charge, and as such, the gap-filling principle contemplated by Daley could have no application. [Emphasis added; para. 37.]

[111] I agree that counsel's submissions cannot serve to *correct* a misstatement or legal error made by a trial judge. But it may be possible, as this Court accepted in *Rodgerson*, for the submissions of counsel to help fill an alleged gap in the judge's charge. As always, this must be assessed in the context of the trial as a whole.

[112] In dissent in the court below, Paciocco J.A. also accepted that closing submissions may be relevant to the sufficiency of the charge (para. 143, referring to *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344), though only in rare circumstances. In *Niemi*, this related to the need for a temporal and causal connection between sexual assault and murder, a legal requirement of the offence (paras. 92-109). I would also note the subtle but important difference between counsel’s submissions and a trial judge’s summary or explanation of them, in the judge’s own words, for the jury. As I explain below, the trial judge in this case provided an overview of the defence’s position that referred directly to the “organizational structure” (or lack thereof) of the alleged criminal organization.

[113] While I am in substantial agreement with the remainder of my colleague’s discussion of the legal framework, I would again emphasize that the functional approach has always been — and should remain — flexible and contextual. The impugned portion of a jury charge must be read in the context of the entire charge and the trial as a whole.

B. *Definition of a Criminal Organization*

[114] At issue in this appeal is whether the trial judge properly charged the jury on the legal elements of a criminal organization, defined in s. 467.1(1) of the *Criminal Code* as follows:

criminal organization means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[115] In *Venneri*, Fish J., writing for the Court, examined the objectives of this legislative regime at some length. By insisting that criminal groups be “organized”, he said, Parliament has *made plain* that “some form” of structure and degree of continuity are required:

I agree with Mackenzie J.A. that a flexible approach favours the objectives of the legislative regime. In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be “organized”, Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*. [Emphasis added; para. 29.]

[116] Fish J. then held that the word “organized” *necessarily connotes* some form of structure and co-ordination:

Qualifying “organized” in s. 467.1 by “however” cannot, as a matter of language or logic, be taken to signify that no element of organization is required at all. “Organized” necessarily connotes *some form* of structure and co-ordination, as appears from the definition of “organized” in the *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2:

Formed into a whole with interdependent parts; coordinated so as to form an orderly structure; systematically arranged. [Emphasis added; p. 2023.]

In French, the definitions in *Le Grand Robert de la langue française* (electronic version) are consistent with this: it defines the noun “*organisation*” as the [TRANSLATION] “[a]ction of organizing (something); the result of such an action” and the verb “*organiser*” as “[t]o give a specific structure or composition, order, or method of functioning or administration to” [Emphasis in original; para. 30.]

[117] Fish J. further noted that the words “however” and “organized” in the statutory definition are intended to be complementary, not contradictory:

Thus, the phrase “*however* organized” is meant to capture differently structured criminal organizations. But the group must nonetheless, at least to some degree, be organized. Disregarding the requirement of organization would cast a net broader than that intended by Parliament. [Underlining added; para. 31.]

[118] Therefore, the overriding question in this appeal is whether the jury was properly equipped to decide the case absent the trial judge’s use of the precise words “structure” and “continuity” in explaining the definition of a criminal organization (see *Calnen*, at para. 9). In his reasons, my colleague accepts that there is no magic to those precise words: “While it is better to use a consistent formulation . . . whatever words are used, the judge needs to make clear to the jury the distinguishing qualities of a criminal organization” (para. 89). However, my colleague relies on his own formulation of those qualities: that a criminal organization “must pose an enhanced threat to society by virtue of its structure and continuity” (*ibid.* (emphasis added); see also para. 5).

[119] With respect, that differs from what this Court said in *Venneri*, which is that Parliament sought to identify groups that pose an elevated threat to society *due to the ongoing and organized association of their members*:

It is preferable by far to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members. All evidence relevant to this determination must be considered in applying the definition of “criminal organization” adopted by Parliament. Groups of individuals that operate on an *ad hoc* basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.

Courts must not limit the scope of the provision to the stereotypical model of organized crime — that is, to the highly sophisticated, hierarchical and monopolistic model. Some criminal entities that do not fit the conventional paradigm of organized crime may nonetheless, on account of their cohesiveness and endurance, pose the type of heightened threat contemplated by the legislative scheme. [Emphasis added; paras. 40-41.]

[120] It is noteworthy that in *Venneri*, this Court used “ongoing and organized” and “cohesiveness and endurance” interchangeably, and without direct reference to “structure and continuity”. In *R. v. Saikaley*, 2017 ONCA 374, 135 O.R. (3d) 641, the Court of Appeal for Ontario unanimously affirmed that the “guiding question in assessing whether a group of individuals forms a criminal organization is whether the group ‘pose[s] an elevated threat to society due to the ongoing and organized association of their members’” (para. 119, quoting *Venneri*, at para. 40). What is relevant is the substance of this requirement, not the precise form or exact words used.

[121] In *Saikaley*, the Court of Appeal also emphasized that “courts must take a flexible approach, appreciating that ‘criminal organizations have no incentive to conform to any formal structure’” (para. 120, citing *Venneri*, at para. 28). In that case, the court found a criminal organization in a “small operation with a loose structure” (para. 126). In other cases, courts have affirmed that while a group must have *some form* of structure and degree of continuity, even a minimal amount may suffice (see, e.g., *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280, at para. 155).

[122] With these principles in mind, I turn to the application of the functional approach in this case.

III. Application

[123] There is no dispute that the trial judge accurately set out the statutory definition of a criminal organization in s. 467.1(1) of the *Criminal Code*. Indeed, he began his charge to the jury on the count of participation in the activities of a criminal organization as follows:

The first element is the existence of a criminal organization. A criminal organization is

(a) a group, however organized, that is composed of three or more persons in or outside Canada; and that

(b) has, as one of its main purposes or activities, the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit including a financial benefit by the group or any one of the persons who constitute the group.

It is necessary to elaborate upon each of the components of that definition. A requirement of a group of three or more persons is not met if the group of three or more persons was formed randomly for the immediate commission of a single offence. [Emphasis added.]

(A.R., vol. I, at pp. 203-4)

[124] My colleague says that the trial judge was required to go beyond the statutory text given our Court’s interpretation of “criminal organization” in *Venneri*. In my view, by instructing the jury that the group had to be “organized”, the judge *made plain* that some form of structure and degree of continuity were required. What matters is the “general sense which the words used must have conveyed, in all probability, to the mind of the jury”, not whether the judge recited a particular formula (*Daley*, at para. 30; *Goforth*, at para. 21). Jurors do not check their common sense at the door of the deliberation room (*Goforth*, at para. 58). In this case, the jury would have understood “organized” to *necessarily connote* some form of structure and co-ordination (*Venneri*, at para. 30). This is further evident or obvious when reviewing the context in which the judge’s instructions were given.

[125] First, having read the statutory text, the judge elaborated on the legal elements of a criminal organization:

The formation must not be random. The formation must not be for the purpose of committing an offence. [Emphasis added.]

(A.R., vol. I, at p. 204)

[126] Both of these requirements speak directly to structure and continuity, if not in those exact words.

[127] Second, the judge instructed the jury to recall the overview of the case for the Crown and defence. He summarized defence counsel's position that a group randomly formed for the commission of *one* crime would not meet the legal requirements of the offence:

On the evidence, the most the Crown has proven against Abdullahi is that he was part of a group randomly formed for the commission of one crime on March 31, 2013. Such a group is not a criminal organization. [Emphasis added; pp. 210-11.]

[128] This supplemented what the judge had stated earlier in his charge, in summarizing the defence's position on the lack of an "organizational structure":

Count number one alleges that Abdullahi participated in the activities of a criminal organization. This offence does not include a group randomly formed for the commission of one offence. The organizational structure of the alleged group was not discussed in any of the conversations. The events of March 31, 2013 are, if proven beyond a reasonable doubt, one crime committed by two people. This does not meet the definition of criminal organization. You should reject the position of the Crown on the issue of criminal organization in the submission of the defence. Return a verdict of not guilty on count one. [Emphasis added; p. 151.]

[129] Third, the judge emphasized that the appellant was required to be a member of the alleged organization *for some period of time*, again reinforcing the continuous nature of a criminal organization:

A Defendant or some other person may become . . . a member and leave at any time thereafter for any reason. What is essential is probable membership for some period of time and not the length of the probable membership or the reason for leaving it. [Emphasis added; p. 213.]

[130] In *Venneri*, Fish J. held that a “group that operates with even a minimal degree of organization over a period of time is bound to capitalize on these advantages” — i.e. those that flow from working collectively — and “acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community” (para. 36 (emphasis added)). While the judge in this case may not have described structure and continuity in those precise words, he did make expressly clear that the appellant had to be a member of a group that was “organized” and that his membership must have been for “some period of time”.

[131] Fourth, as the majority at the Court of Appeal noted (see para. 79, per Brown J.A.), there was no dispute between the parties that a criminal organization had to have “cohesiveness and continuity” (as put by the Crown) or “structure and continuity” (as put by the defence). At trial, defence counsel stated as follows with respect to the definition of a criminal organization:

. . . I want to read that to you again. Criminal organization “does not include a group of persons that forms randomly for the immediate commission of a single offence.” The law tells us that to substantiate a criminal org charge you need some form of structure and a degree of continuity to the group, structure and continuity. So I put this to you, members of the jury; where is the structure and continuity to this group that’s alleged to be a criminal organization? You have a number of people on the wires talking about bringing *shekos*, stories, which the Crown alleges to be guns, to Toronto, from Windsor, on Easter weekend, which is March 30 to 31st, 2013. There is no organizational structure ever discussed

on the wires. In fact, I submit to you that this totally seems like a group of people forming randomly for the immediate commission of a single offence. [Emphasis added.]

(A.R., vol. XXXII, at pp. 18-19)

[132] To repeat, counsel's explanation of the law cannot, on its own, replace the judge's explanation. But the submissions of counsel are one of many factors to be assessed on appellate review — including, most importantly, what the judge did tell the jury, considered in the context of the trial as a whole.

[133] Fifth, counsel for the appellant did not object to the judge's draft charge. I further agree with the majority at the Court of Appeal that the common ground between the parties underlay defence counsel's lack of objection to the charge (para. 80, per Brown J.A.). In *Daley*, this Court held as follows:

Appellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge: see *Der*, at p. 14-26. Furthermore, it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection." [para. 58]

[134] In this case, the judge provided counsel with a draft of the charge and sought comments in a two-day conference. This resulted in multiple submissions on other issues but not on the criminal organization portion of the charge. Though by no

means decisive, trial counsel's lack of objection supports the conclusion that the charge was adequate in the circumstances (see *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 60).

[135] Sixth, and finally, following the charge, the jury asked the judge three supplemental questions (see A.R., vol. XXXV, at pp. 3-13). Two related to the evidence and one sought to clarify the elements of the offence on a separate count, possession of property obtained by crime. The jury did not ask for clarification on the count of participation in the activities of a criminal organization. This also suggests that there was no confusion about the legal requirements of the offence.

[136] In my view, when reviewed in its entirety and in context, the judge's charge properly communicated to the jury the need to determine whether the appellant was a member of a group that posed an elevated threat to society due to the ongoing and organized association of its members (*Venneri*, at para. 40). *These* are the distinguishing qualities of a criminal organization, which may in turn be described by the words "structure" and "continuity".

[137] My colleague relies on *R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157, for the proposition that it is not unusual for courts to read in requirements to *Criminal Code* provisions that are not apparent from the text itself (para. 52). In *Boudreault*, at para. 33 (emphasis deleted), this Court read in a "realistic risk of danger to persons or property" requirement that was not plain or obvious from the text of the former s. 253(1) of the *Criminal Code*, which read as follows:

253 (1) Every one commits an offence who operates a motor vehicle or vessel . . . or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[138] This is distinguishable from the requirements of structure and continuity, which Parliament has *made plain* through the statutory language. The use of the word "organized" *necessarily connotes* some form of structure and co-ordination (*Veneri*, at para. 30); by contrast, in *Boudreault*, the majority of this Court "read in [a] new essential element to narrow the ordinary meaning of the words 'care or control'" (para. 86, per Cromwell J., dissenting).

[139] My colleague also refers to a lone example of a case in which it was "insufficient for a judge to simply recite the relevant provisions to the jury without explaining the meaning given to them in the jurisprudence" (para. 52, citing *R. v. Maxwell* (1975), 26 C.C.C. (2d) 322 (Ont. C.A.)). As discussed above, I disagree that the judge in this case simply recited s. 467.1(1) of the *Criminal Code*. In my view, he elaborated beyond the statutory text, including on the need to establish membership "for some period of time". In any event, I find that *Maxwell* is also distinguishable. At issue in *Maxwell* was whether the accused was involved in a store robbery. In his charge to the jury, the judge stated as follows:

Another section of the Criminal Code which you should also bear in mind and, depending upon what you find the facts to be, may or may not be relevant and, as I have no way of knowing what findings of fact you will make, I must direct your attention to this section of the Criminal Code. [Emphasis added; p. 323.]

[140] The judge then read the two subsections of s. 21, which relate to party liability and common intention. He did not give any explanation as to which subsection might apply, how they might be applicable, or the possible status of the accused as a party to the robbery (see pp. 323-24). In this case, there is no suggestion that the judge failed to explain *how* the definition of a criminal organization related to the offence of participation in the activities of such an organization.

[141] In cases of alleged non-direction, as was discussed at the hearing, the question may come down to the degree of “obviousness” of the point of law at issue. While I accept that certain legal requirements are not “obvious” or plain from the statutory text — for example, *mens rea* requirements for various offences — the point of law at issue in the instant case was obvious or plain to the jury, in the context of the entire charge and the trial as a whole.

[142] With respect, my colleague’s discussion of stereotypical or improper reasoning (at paras. 84-86 and 92) is also misplaced. First, the issue in this case is not whether structure and continuity serve as safeguards against stereotypical or improper reasoning. It is whether the jury understood structure and continuity to be legal requirements of the offence, based on what the judge did tell the jury.

[143] Second, this issue was not discussed in the court below, including by Paciocco J.A. in dissent. The appellant himself states that it “may have been possible for the jury to infer a continuous group based on a shared neighbourhood, loyalty to one’s friends, and the commission of similar crimes — or perhaps even in combination with the shared cultural indicia — but the trial judge was required to adequately equip them to assess this evidence”, which in turn required an instruction on the elements of structure and continuity (A.F., at para. 35). This reinforces that the issue in this case is simply whether the jury understood the legal elements of the definition of a criminal organization, absent the judge’s use of the precise words “structure” and “continuity”.

[144] Third, Detective Kerr’s evidence was not contested by the defence at trial (see A.R., vol. I, at p. 59; A.R., vol. XXXII, at pp. 15 and 20). The trial judge related his evidence to photographs of the appellant showing certain indicia of gang membership, as well as to certain behaviours consistent with street gangs (see A.R., vol. I, at pp. 99, 113, 151, 211 and 214). I agree that evidence of a common social or cultural identity does not identify the existence of a criminal organization. But there is a significant difference between this, in a generic sense, and indicia of the appellant’s gang membership more specifically, such as displays of the Bloods’ hand sign. While the nature of a jury trial necessarily means that the jury’s reasons for a guilty verdict are unclear, Detective Kerr’s evidence was only part of the evidence put forward by the Crown to prove the existence of a criminal organization. The Crown also relied, crucially, on intercepted wiretap conversations in which the appellant discussed plans to transport firearms on an ongoing basis.

[145] Finally, I reiterate and emphasize that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed (*Goforth*, at para. 20; *Daley*, at para. 31; *Jacquard*, at paras. 2 and 32). In *Jacquard*, Lamer C.J. held that appellate courts must “ensure that the yardstick by which we measure the fitness of a trial judge’s directions to the jury does not become overly onerous” (para. 1). He elaborated as follows:

We must strive to avoid the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal. Neither the Crown nor the accused benefits from a confused jury. Indeed justice suffers.

These comments are not meant to suggest that we sanction misdirected verdicts. This Court has stated on repeated occasions that accused individuals are entitled to properly instructed juries. There is, however, no requirement for perfectly instructed juries. As I specifically indicated at the hearing of this case, a standard of perfection would render very few judges in Canada, including myself, capable of charging juries to the satisfaction of such a standard. [Emphasis in original; paras. 1-2.]

[146] In *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, this Court reiterated that jury charges are not to be endlessly dissected and subjected to minute scrutiny and criticism (para. 39, quoting *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163). In *Goforth*, the majority of this Court upheld a jury charge as functionally adequate despite what the minority characterized as five separate instances in which the judge *misstated* an essential element of the offence (see para. 62, per Brown J.).

[147] In this case, there is no suggestion that the judge misstated the law or misdirected the jury. At issue is whether the judge said *enough* in explaining the legal

elements of a criminal organization, one of multiple counts against multiple defendants and as part of a lengthy charge that spanned over 200 transcript pages.

[148] Undoubtedly, the judge could have said more. But a “failure to say all that could have been said does not amount to a legal error” (*Mack*, at para. 59). In the context of the entire charge and the trial as a whole, the need for “some form” of structure and degree of continuity was made plain to the jury. The jury understood that the group had to be organized, that membership had to be for some period of time, and that the legal requirements of the offence were not met if the group was formed randomly for the immediate commission of a single offence (A.R., vol. I, at pp. 203-13). I fail to see how a group could meet these requirements — as the jury must have found in order to convict — but nonetheless lack some form of structure or degree of continuity. While the judge’s charge was not perfect, the jury was properly equipped to decide the case according to the law and the evidence.

[149] As a result, it is unnecessary to deal with the application of the curative proviso. I agree with my colleague that certain evidence relied on by the majority of the Court of Appeal could have been relevant to the proviso, including that which led the sentencing judge to conclude that the appellant was a principal member and leader of the criminal organization (2015 ONSC 4163, at p. 9 (CanLII); see C.A. reasons, at paras. 73-74 and 103, per Brown J.A.). However, given my disposition of the case and because the Crown did not invoke the curative proviso, I would make no further comment on its potential or alternative application in this case.

IV. Disposition

[150] For the reasons above, I would dismiss the appeal and uphold the appellant's conviction on count 1 for participation in the activities of a criminal organization. I would add that, as a practical matter, it would be a waste of judicial resources to order a new trial, as the accused has been released for time served.

Appeal allowed, CÔTÉ J. dissenting.

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