

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

**BETWEEN:**

**AHMED ABDULLAHI**

**Appellant  
(Appellant)**

**-and-**

**HIS MAJESTY THE KING**

**Respondent  
(Respondent)**

**-and-**

**CRIMINAL LAWYER'S ASSOCIATION OF ONTARIO**

**Intervener**

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**RESPONDENT'S FACTUM**

*Pursuant to Rule 42 of the Rules of the Supreme Court of Canada*

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**FACTUM OF THE RESPONDENT,  
HIS MAJESTY THE KING  
Section 691(1)(a) of the *Criminal Code***

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/ 2002-156, as amended)

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## **PART I: STATEMENT OF THE FACTS**

### **A. OVERVIEW OF THE RESPONDENT'S POSITION**

1. In 2013, as part of an investigation called “Project Traveller” police discovered that the Appellant, together with a group of people (some identified, some unknown,) was engaged in criminal conduct, including trafficking firearms between Windsor and Toronto. The Appellant, along with a co-accused, were tried before Justice Trafford, sitting with a jury, in 2015. The Appellant was convicted of participating in activities of a criminal organization, firearm possession and conspiracy to commit weapons trafficking. He was sentenced to 12 years imprisonment. A majority of the Court of Appeal for Ontario [“Court of Appeal”] dismissed the Appellant’s conviction appeal in its entirety and reduced his sentence. In dissent, Justice Paciocco would have allowed the conviction appeal regarding only the criminal organization count. The split in the Court below related not to the applicable principles of appellate review of jury instructions, or on the constitute elements of a criminal organization offence – but on the question of whether the instructions this trial judge delivered to this specific jury sufficiently equipped them to assess the issue of whether the Crown established the existence of a criminal organization.

2. The Appellant appeals as of right to this Court regarding only his criminal organization count conviction. He argues the majority erred in upholding the conviction. And that Justice Paciocco in dissent got it right. The trial judge’s instructions on the meaning of “criminal organization” were deficient, and a new trial is required on that count alone.

3. The appeal should be dismissed. The majority took the correct approach to assessing the sufficiency of the trial judge’s criminal organization instructions. Considering the instructions as a whole, in the context of the entirety of the record and the positions of the parties, the majority

was satisfied that the jury was sufficiently equipped to assess whether the Crown had established the existence of a criminal organization. Their analysis reveals no reversible legal error.

**B. SUMMARY OF THE FACTS**

4. The facts as summarized at paragraphs 7 – 20 of the Appellant’s factum are accepted as substantially correct. The Respondent also relies on the following summary of the relevant facts:

*(i) Overview of police investigation*

5. In March 2013, the Toronto Police Service obtained a wiretap authorization permitting the interception of the telephone conversations of various people, including the Appellant. The calls were monitored and interpreted, where necessary, from Somalian and Patois. These conversations led to further investigative actions, including surveillance and the execution of search warrants. The wiretaps continued after the search warrants were executed and further inculpatory interceptions were obtained. At the end of the Project, various people, including the Appellant were arrested and charged with numerous offences, including in relation to firearms and the participation in a criminal organization.<sup>1</sup>

*(ii) The events of March 30-31, 2013*

6. The wiretap authorization intercepted various calls regarding the trafficking of 5 firearms leading up to and on March 31, 2013. In particular, police intercepted the following conversations regarding the potential sale of firearms and about bringing multiple firearms back to Toronto:

- A March 28, 2013 conversation involving Ayanle Omar (another alleged member of the criminal organization) expressing his intention to bring at least 5 guns to Toronto for some people who wanted to seek revenge for the murder of one of Ayanle’s friends;

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<sup>1</sup> Charge to the jury, *Appellant’s SCC Record*, PDF p. 5-6; *R. v. Abdullahi*, 2021 ONCA 82, *Appellant’s SCC Record*, PDF p. 258-259, para. 1; p. 260-261, paras. 9-11

- A March 30, 2013 conversation in which an individual named Bihi and the Appellant negotiated the sale of a gun to Bihi, with the Appellant indicating he intended to bring 5 guns to the neighborhood; and,
- A conversation later on March 30, 2013 wherein Ayanle Omar directed the Appellant to bring the money to the bus stop (even though the Appellant told him that the police were following him.<sup>2</sup>)<sup>3</sup>

7. On March 31, 2013, based on information intercepted on the wires, police believed the Appellant was driving illegal firearms from Windsor to Toronto. Officers traveled from Windsor eastbound on the 401 in pursuit of an unknown-make rental vehicle in which they believed the Appellant was travelling. Near Campbellville, the officers observed a white Chrysler with a Quebec licence plate. They observed two men inside: the Appellant (the driver) and Mr. Daud Hussein, in the front passenger seat. Officers did not see Ms Khadra Omer [“Omer”] who was in the backseat. The officers followed the white car in separate unmarked police vehicles.<sup>4</sup>

8. Around the Milton area, the white car began driving erratically. The two visible occupants of the vehicle were seen looking around at other vehicles (due to a concern that they were under police surveillance.) The Appellant began to change lanes and accelerated beyond the pace of traffic to 130 km/h and exited the highway onto Dixon Road. The officers and a marked OPP cruiser followed. When the Appellant’s car and the cruiser were stopped at a red light, the officer in the marked cruiser activated his lights and siren. Despite the fact that the white car was stopped

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<sup>2</sup> The Appellant took further steps to avoid police attention. For instance, on March 30, he returned to Toronto from Windsor and returned his rental car, only to rent a second vehicle from a different rental company late that same evening that he used to drive back to Windsor. See Charge to the jury, *Appellant’s SCC Record*, PDF p. 122, 176

<sup>3</sup> Charge to the jury, *Appellant’s SCC Record*, PDF p. 176

<sup>4</sup> Charge to the jury, *Appellant’s SCC Record*, PDF p. 5, 125

in the passing lane (not the left turn lane), the Appellant suddenly turned the vehicle to the left, through a red light onto Chetta Place. Shortly thereafter, the Appellant turned into the 330/340 Dixon Road apartment complex located on the West side of Chetta Place. The officers pursued the white car but lost sight of it near the entrance to the building's underground parking. When the officers stopped at the top of the ramp into the parking area, they observed that the door was damaged, as if someone had driven right through the door and into the underground garage.<sup>5</sup>

9. The officers proceeded into the garage on foot. They observed the white car abandoned, not in a parking spot but instead near a stairwell door. The passenger side, hood, and windshield were damaged. The officers saw a black bag on the front passenger seat. Three firearms, each in a black sock, were found inside the bag. Two of the guns were Ruger P95 semi-automatic pistols. The third gun was a .40 calibre Smith & Wesson Military & Police gun. One gun had a clip and all three had magazines. None were loaded. All three weapons were illegal firearms under the *Code*.<sup>67</sup>

10. Officers unsuccessfully searched for the occupants of the white car. Further examination of the vehicle uncovered evidence linking it to the Appellant, including:

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<sup>5</sup> Charge to the jury, *Appellant's SCC Record*, PDF p. 7-8; Exhibit 3: Colour copy – Garage door entrance, *Appellant's COA Appeal Book*, Volume AB6, PDF p. 50; Exhibit 4: Colour copy – Garage door entrance (wide shot), *Appeal Book*, Volume AB6, PDF p. 52

<sup>6</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 262-263, paras. 16, 19; Charge to the jury, *Appellant's SCC Record*, PDF p. 8-11, 149

<sup>7</sup> The trial judge ultimately concluded that five firearms were in the white vehicle on this date: the three recovered firearms, as well as two additional firearms taken by Omer when she fled the vehicle. The trial judge further concluded that these firearms were ultimately sold by Hussein to someone in the neighbourhood. The two additional guns were never recovered by police. See *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 262-263, paras. 16, 19; Charge to the jury, *Appellant's SCC Record*, PDF p., PDF p. 8 – 11, 149



- A Hertz lease package and wallet containing many identification cards in the Appellant's name (found in the glove compartment);
- Two phones associated to the Appellant were recovered from the vehicle;
- A Provincial Offences ticket in the Appellant's name as well as a bag containing various mail and car leases in the Appellant's name was found in the trunk; and,
- When the white car was forensically examined, the Appellant's fingerprints were found on the driver's door.<sup>8</sup>

*(iii) The continued investigation*

11. The police investigation continued after March 31, 2013. The phone conversations of the Appellant and others continued to be intercepted through April 2013. The Appellant was intercepted talking with Hussein regarding what had happened to the bags that were left when they ran from the white car. For instance, about an hour after the vehicle was abandoned, the police intercepted a conversation between the Appellant, Hussein and another co-conspirator, Abdi. The conversation included the following exchange:

Abdi:	Yo
Appellant:	Is the girl with you?
Abdi:	Yes
Appellant:	Did she put the stuff in a good place?
Abdi:	I don't know. She said it was a big bag. She put it somewhere 23
Appellant:	Okay. It's my people at least. Tell her to prepare herself for a wedding
Abdi:	She said it was a big bag. She wasn't able to push it. Someone needs to go check it out.
Appellant:	<b>They have my car. They have my ID, everything.</b>
Abdi:	She said it was only one bag. <b>The other bag is still in our car.</b>
Appellant:	No, she's talking shit.
Abdi:	Here, talk to Lionel

<sup>8</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 262-263, paras. 16-18; Charge to the jury, *Appellant's SCC Record*, PDF p. 8 – 11, 149

Daud Hussein:	Yo
Appellant:	<b>She only brought one bag?</b>
Daud Hussein:	One bag, the blue one. <b>The black one you had</b>
Appellant:	I thought you took both of them. What the fuck
Daud Hussein:	She threw the blue one and I grabbed the blue one and ran
Appellant	And the black one?
Daud Hussein	<b>I think the black one is in the car</b>
Appellant	<b>Wow wow that's fucked up wow that's fucked up. We fucked up. My phone is tapped. That's what it is.<sup>9</sup></b>

12. Intercept evidence also revealed that the Appellant's co-accused Naimo Warsame ["Warsame"] transported a firearm from Windsor to Toronto on April 9, 2013 for Siad and Abdi. The trial judge concluded that a transfer of firearms took place on that date, when Abdi and Siad purchased a handgun at the Rack N'Roll Bar in Windsor from Lamar Porter. Siad gave the firearm to Warsame, who then brought the gun to Toronto. Police ultimately obtained a search warrant for Warsame's apartment at 370 Dixon Road. When the warrant was executed on April 25, 2013, a revolver was found under Warsame's mattress. The trial judge ultimately concluded this was the gun Warsame had brought from Windsor on April 9, 2013.<sup>10</sup>

*(iv) The criminal organization*

13. The Crown argued that the Appellant and others engaged in their criminal activities for the betterment of a criminal organization. The Crown's argument rested on various intercepted communications, Det. Kerr's evidence regarding the behavior and characteristics of street gangs, and photographic evidence, for instance, depicting the Appellant in Bloods red making a Bloods hand sign. The Crown argued, and Justice Trafford ultimately found that a "criminal organization"

<sup>9</sup> Charge to the jury, *Appellant's SCC Record*, PDF p. 13, 126-130

<sup>10</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 264, paras. 21-23

existed from March – June 2013. The core members of this organization included the Appellant, Daud Hussein, and Ayanle Omar. The group was not simply randomly founded to commit a single crime. It was an ongoing, continuing group involved in firearm trafficking. The group's objective was to traffic firearms from Windsor to Toronto to be used for the benefit of the group, or one of them, in the Dixon Road/Chetta Place area to commit crimes or otherwise make money. The group trafficked in lots of firearms in addition to those recovered on March 31, 2013. The group organized strategies to conceal their criminal activity. For instance, the group had lookouts near the apartment buildings, had escape routes from the area to avoid arrest, and had places to conceal their contraband, such as the two never-recovered firearms transported from Windsor on March 31, 2013.<sup>11</sup>

14. In his reasons for sentence, Justice Trafford concluded that the Appellant was a leader of the organization. He was trusted and respected by the others. He was involved in the planning of the group's gun trafficking activities. He also took steps to adapt their plans to try to avoid police detection.<sup>12</sup>

**(v) *The Appellant's appeal at the Court of Appeal***

15. The Appellant appealed his convictions and the sentence imposed to the Court of Appeal. Regarding his conviction, he challenged the admission of the translation evidence regarding the Somali intercepts, and the criminal organization and post-offence conduct jury instructions. He also sought a reduction in his sentence. Brown J.A. for the majority dismissed the entirety of the conviction appeal and reduced the Appellant's sentence to 10 years. Paciocco J.A. parted company

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<sup>11</sup> Charge to the jury, *Appellant's SCC Record*, PDF p. 100-102, 120-124, 139, 153

<sup>12</sup> Reasons for sentence, *Appellant's SCC Record*, PDF p. 239

with the majority only on the criminal organization count. He would have ordered a new trial on the criminal organization count alone (due to an error he found in the instructions on that count), and otherwise dismissed the conviction appeal.<sup>13</sup>

## **PART II: RESPONDENT’S POSITION ON THE APPELLANT’S QUESTION**

16. The Respondent’s position on the issue raised by the Appellant is as follows:

**ISSUE:** Did the trial judge’s instructions adequately equip the jury to determine whether the Crown had established the existence of a criminal organization?

Yes: Considered in the context of the charge as a whole, the entirety of the record and the positions of the parties, the instructions were not deficient. The jury would have understood the difference between a conspiring group and a criminal organization and the need to evaluate whether the group was *ad hoc* and randomly formed, or a gang organized in some fashion.

## **PART III: STATEMENT OF ARGUMENT**

### **A. APPELLATE REVIEW OF JURY INSTRUCTIONS**

17. The approach to appellate review of jury instructions is well settled. An accused is entitled to a jury that is “properly, not perfectly, instructed.” Trial judges who craft jury charges are “not held to a standard of perfection.” Appellate courts must take a functional approach in reviewing jury instructions. This approach requires examining any alleged errors “in the context of the evidence, the entire charge, and the trial as a whole.” The key question

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<sup>13</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant’s SCC Record*, PDF p. 259-260, paras. 4-7; p. 303, paras. 119-121

is whether the charge as a whole enabled the jury to decide the case according to the law and the evidence.<sup>14</sup>

18. When reviewing the adequacy of a charge, appellate courts afford trial judges some flexibility in crafting the language of jury instructions. As Bastarache J. stated in *R. v. Daley*, “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.”<sup>15</sup>

19. The Appellant alleges a non-direction error – namely that the trial judge left out elements from the charge relating to the criminal organization count which he now says were required. Rarely will a charge include all that could be said about a particular subject. The failure to say all that could be said is not a reversible error. As Watt J.A. stated in *R. v. Wood*, “on review, the issue is not whether something more or something different *could* have been said. [...] The issue is whether, in the context of the trial as a whole, what *was* said was sufficient.”<sup>16</sup>

20. Ultimately, an appellate court must focus on the overall effect of the instructions provided, in the specific context of the case at bar. Were the instructions provided sufficient? Did they provide the jury with the tools they needed to evaluate the live issues in the case? If this question is answered in the affirmative, then the fact that a jury could have been charged differently, or that additional instructions *could* have been provided is immaterial.

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<sup>14</sup> *R. v. Goforth*, 2022 SCC 25 at paras. 20-21; *R. v. Calnen*, 2019 SCC 6 at paras. 8-9; *R. v. Daley*, 2007 SCC 53 at para. 31; *R. v. Araya*, 2015 SCC 11 at para. 39

<sup>15</sup> *R. v. Goforth*, 2022 SCC 25 at para. 22; *R. v. Daley*, 2007 SCC 53 at para. 30

<sup>16</sup> *R. v. Wood*, 2022 ONCA 87 at paras. 130-132

**B. THE CRIMINAL ORGANIZATION INSTRUCTIONS WERE SUFFICIENT AND DISCLOSE NO LEGAL ERROR**

***(i) The elements of “criminal organization”***

21. The interrelated provisions of s. 467.1 – 467.13 of the *Criminal Code* provide a legislative scheme aimed at addressing the problem of coordinated criminal activity. The provisions rely on a common definition of “criminal organization”, set out in s. 467.1 as:

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.<sup>17</sup>

22. The key question to consider in determining whether any specific group meets this definition is whether the group “pose[s] an elevated threat to society due to the ongoing and organized associated of their members.” This question flows from the fundamental rationale for specifically criminalizing the activities of criminal organizations. Criminal organizations pose an elevated threat. As Justice Fish explained in *R. v. Venneri*:

Working collectively rather than alone carries with it advantages to criminals who form or join organized groups of like-minded felons. Organized criminal entities thrive and expand their reach by developing specializations and dividing labour accordingly; fostering trust and loyalty within the organization; sharing customers, financial resources, and insider knowledge; and, in some circumstances, developing a reputation for violence. A group that operates with even a minimal degree of organization over a period of time is bound to

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<sup>17</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 467.1(1) – 467.13; *R. v. Kang*, 2019 BCSC 2109 at para. 107

capitalize on these advantages and acquire a level of sophistication and expertise that poses an enhanced threat to the surrounding community.<sup>18</sup>

23. The goal of the legislation is only accomplished through the use of a purposive approach to the identification of criminal organizations that “eschews undue rigidity and is not fixated upon stereotypes that ‘fit the conventional paradigm of organized crime’”. Flexibility is key. As the Court of Appeal for Ontario noted in *R. v. Saikaley*, criminal organizations have no incentive to conform to any formal structures. The criminal organization provisions were amended into its present form to avoid prior issues with criminal organizations re-structuring to avoid liability. The breadth of the present language signals the Parliamentary intention to extend the reach of the criminal organization provision to a wide variety of groups who work collectively to commit serious crimes.<sup>19</sup>

24. The broad reach of the criminal organization provision and the flexibility required to define such groups is counterbalanced by the need to take care not to overextend the reach of the provisions and turn any conspiracy of three or more people to commit serious offences into criminal organization offences. This Court struck the balance between the need for flexibility and this concern for overreach in *R. v. Venneri*. There, Justice Fish for the Court sketched out the contours of the meaning of “a group, however organized.” He highlighted the need for “some

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<sup>18</sup> *R. v. Venneri*, 2012 SCC 33 at paras. 36, 40; *R. v. Saikaley*, 2017 ONCA 374 at paras. 119, 121

<sup>19</sup> *R. v. Venneri*, 2012 SCC 33 at paras. 29, 40-41; *R. v. Beauchamp*, 2015 ONCA 260 at paras. 145-148, 152, 174; *R. v. Saikaley*, 2017 ONCA 374 at paras. 119 – 120; *R. v. Kang*, 2019 BCSC 2109 at para. 103; *R. v. Terezakis*, 2007 BCCA 384 at para. 11 (MacKenzie JA in concurrence)

form of structure and degree of continuity” and coordination in the group to distinguish a criminal organization from other forms of group illegal activities (e.g., conspiracies).<sup>20</sup>

25. However, he was careful not to overstate this requirement to demand a checklist of stereotypical characteristics. Even a minimal amount of some form of organization, structure or degree of continuity would suffice. The definition was not restricted to biker gangs or large drug cartels. A small operation with a “loose structure” could meet the definition, depending on circumstances and specific evidence called.<sup>21</sup>

**(ii) *The majority of the Court of Appeal got it right: the instructions were sufficient***

26. The dispute that divided the Court below is a narrow one. There was no issue regarding the constituent elements of the criminal organization offence, or with respect to the availability on the evidence of the conclusion that the Crown had established a criminal organization. Both the majority and dissent in the Court of Appeal accepted the need for there to be some organization or structure to a group for it to constitute a criminal organization. Where the justices parted company was on the question of whether the specific instructions provided in this case were sufficient on this point.<sup>22</sup>

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<sup>20</sup> *R. v. Venneri*, 2012 SCC 33 at paras. 27-31, 35; *R. v. Beauchamp*, 2015 ONCA 260 at paras. 152 – 153; *R. v. Kang*, 2019 BCSC 2109 at paras. 101-102

<sup>21</sup> *R. v. Venneri*, 2012 SCC 33 at paras. 36, 38-40, 41; *R. v. Beauchamp*, 2015 ONCA 260 at paras. 153, 155; *R. v. Saikaley*, 2017 ONCA 374 at paras. 120, 125-126; *R. v. Evans*, 2019 ONCA 715 at para. 189; *R. v. Petrin*, 2018 SKCA 100 at para. 110; *R. v. Pasquin*, 2014 QCCA 786; *R. v. Beaven*, 2013 SKQB 7

<sup>22</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant’s SCC Record*, PDF p. 283-284, paras. 69-71; p. 305, para. 127



27. The majority correctly found that the trial judge's instructions, assessed in context, were sufficient. The trial judge provided the jury with 19 transcript pages of instructions on the criminal organization count. He began these instructions by telling the jury that in addition to the question of whether the Crown had established identity, the criminal organization count had three elements:

- (a) The existence of a criminal organization;
- (b) The knowing participation in or contribution to any activity of the criminal organization by the accused; and,
- (c) That that participation/contribution was for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence.<sup>23</sup>

28. The trial judge then addressed each element in turn. Regarding the first element (the existence of a criminal organization), the trial judge said in part:

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. The Crown is not required to prove that a Defendant knew the identity of the persons who are in the group. The Crown is, however, required to prove the Defendant knew of the existence of the group and its essential character or purpose.

The requirement of the purpose of the group relates to its essential objective, that is, to facilitate or to commit at least one serious offence such as transferring illegal guns. The only other qualification to the purpose is that the serious offence will likely lead to a material benefit, such as a financial benefit, for at least one of the group. This is a requirement of purpose. It is not a requirement of facilitation or commission. The Crown need not prove the group, as defined, actually facilitated or committed such an offence or received benefit. [Emphasis added.]<sup>24</sup>

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<sup>23</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 280-281, para. 65; Charge to the jury, *Appellant's SCC Record*, PDF p. 204-205

<sup>24</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 281, para. 66; Charge to the jury, *Appellant's SCC Record*, PDF p. 206

29. There is no dispute that the above-noted passage was accurate.<sup>25</sup> The question is whether the trial judge was required to say more. And in particular, whether the jury was equipped to decide this issue in this case when the trial judge did not elaborate on the need for some form of structure, degree of continuity and coordination for any group to constitute a criminal organization.<sup>26</sup>

30. After considering the applicable principles regarding the definition of criminal organizations from cases like *Venneri*, the majority concluded that the instructions provided were not deficient. The majority based its reasoning on the required assessment of the totality of the charge in the context of the entire record. The majority noted several aspects of the record that were especially relevant to assessing the sufficiency of the impugned instruction. First, the majority noted the evidence the jury heard addressed issues including the structure, continuity and coordination of the alleged criminal conspiracy. In particular, Det. Kerr, an expert on the existence of urban street gangs in Toronto, provided evidence on the nature customs, culture, characteristics, identifiers, terminology, behaviour and activities of urban street gangs. The trial judge reviewed this evidence in his charge, and related it to other evidence presented by the crown (e.g. photographs of the Appellant showing indicia of gang membership like wearing clothing of a particular colour and flashing certain hand signs, as well as the specific language used on the intercepted calls, and the repeated references to the appellant as “H”, “HNI” or “HNIC”.) The trial judge explained the relevance of this evidence in particular to the issue of whether a criminal organization existed. He said:

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<sup>25</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 467.1(1); *R. v. Abdullahi*, 2021 ONCA 82, *Appellant’s SCC Record*, PDF p. 281-282, paras. 66-67; p. 307, para. 134

<sup>26</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant’s SCC Record*, PDF p. 282, paras. 67-68; p. 284, para. 72

Now, members of the jury, the defence did not contest the expertise of Detective Constable Kerr nor did it challenge much of the substance of his opinion. Rather, the contest in this trial relates to the application of the opinion to the circumstances of the case. Has the Crown proven the existence of an urban street gang in the area of the apartment buildings on Dixon Road in the spring of 2013 and implicated Abdullahi and Warsame in its affairs? More will be said about this factual issue in connection with the definition of a criminal organization later in the Charge. This opinion, if accepted, may be helpful in your determination of this issue. [Emphasis added]<sup>27</sup>

31. Second, the majority pointed to the fact that the charge had to be read in light of the parties' positions. There was no dispute amongst the parties that *some* cohesiveness or structure and continuity of enterprise was required to establish a criminal organization. The parties provided opposite submissions on whether such an element was established on the evidence in this trial. In her closing argument, the Crown took the position that a criminal organization was in place, the Appellant was one of the seven core members of the group, and that their criminal objective was to traffic arms from Windsor to Toronto. The Crown argued that there was evidence demonstrating "the cohesiveness" of the gang and that it was a "continuous enterprise." The Crown noted that different members of the group played different roles: Warsame and Abdi were couriers/runners who transported guns between Windsor and Toronto. Siad was responsible for arranging transportation for the couriers. The Crown argued that the jury could rely on the intercepts as evidence of an urban street gang that constituted a criminal organization:

The intercepts evidence the membership, the hierarchy, the territory, the activities, and even the language of the gang. This gang's activities included the possession of and trafficking in firearms. The most important thing about this gang is not their name. It's

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<sup>27</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 283-284, paras. 69-71; p. 284-285, para. 73; p. 285, para. 74; Exhibit 141-143, *Appellant's COA Appeal Book*, Volume AB6, PDF p. 329-333; Charge to the jury, *Appellant's SCC Record*, PDF p. 12, 18, 56-61

their neighbourhood. Their turf. Their territory. Their hood. That turf is the buildings in the 300 block of Dixon Road.<sup>28</sup>

32. In his closing address, the Appellant's trial counsel made the opposite argument. He argued

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.

...

You have one event, Easter weekend 2013. You have the following allegations. My client and another male are allegedly in a car on the highway travelling from Windsor to Toronto. The police follow them. The car crashes. Three guns are left behind. Efforts are made to locate the people. The police are investigating. I submit to you these allegations do not meet the threshold of a criminal organization. [Emphasis added.]<sup>29</sup>

33. Finally, the majority took from the lack of objection on this point by the defence to the draft charge the trial judge vetted with counsel as indicative of the overall sufficiency of the instructions in the specific circumstances of this case.<sup>30</sup>

34. The majority's approach was sound. Justice Paciocco's comments to the contrary in his dissent should be rejected. First, Justice Paciocco concluded that without an express direction to

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<sup>28</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 285-286, paras. 75-76, 77; p. 287, para. 79; Crown closing submissions, *Transcript Vol. 24 (May 25, 2015)*, PDF p. 62-63, 90, 94, 96-97

<sup>29</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 286-287, paras. 78; Appellant's closing submissions, *Transcript Vol. 25 (May 26, 2015)*, PDF p. 24-28

<sup>30</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 287-288, paras. 80-81

the jury that a criminal organization required structure and continuity, the instructions were fatally deficient. This approach places form over substance. The majority's approach, consistent with the repeated authorities of this Court, focused on the key question of whether in the specific context of this case the instructions provided would have sufficiently armed the jury to perform its task. Not on whether the manner in which the trial judge's instructions accomplished that task were ideal or pristine.

35. Second, looking at the broader context, Justice Paciocco disagreed that the record supported the sufficiency of the instructions provided. He noted that it was the trial judge's obligation to charge the jury on the applicable legal principles. There is no dispute on that point. However, the assessment of what the jury would have taken from the trial judge's specific instructions is necessarily informed by the context in which they heard the instructions. Within the context of evidence regarding the factors to consider in deciding what kinds of groups constitute urban street gangs, and diametrically opposed arguments from the parties regarding whether the group outlined the evidence was sufficiently cohesive, structured or continuous, the jury would have understood to consider these aspects in deciding whether a criminal organization existed.

36. Third, Justice Paciocco's interpretation of the assistance provided in counsel's submissions must be rejected. Justice Paciocco interpreted the Crown's reference to the "cohesion" of the group as *inconsistent* with the need for a criminal organization to have some degree of structure and continuity. However, "cohesion" is not inconsistent with the need for some kind of structure or continuity in a criminal organization. As Justice Fish noted in *Venneri*,

**41** 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.<sup>31</sup>

37. Finally, while the majority acknowledged the settled law that a lack of objection is not determinative, Justice Paciocco used his conclusion that an objection should have been made to eschew any significance of the position the parties took on the draft charge on this point. The question for this analysis is not whether or not an objection should have been made at first instance. The question is what, if any, significance can be placed on the lack of objection in the specific circumstances of this case. The majority's conclusion that the lack of objection was *consistent* with their interpretation that it was clear the jury had to consider whether there was any structure/cohesiveness or continuity to the group to determine whether a criminal organization existed. If the jury thought this was a random group slapped together to accomplish a specific criminal act, they would have known it was not a criminal organization.<sup>32</sup> If, however, the jury was satisfied based on the indicia that the Crown pointed to that this was no random group, but instead a coordinated and cohesive organization trafficking arms from Windsor to Toronto, they would have understood the criminal organization requirement was met, and then moved on to consider the accused's alleged participation in the group's activities.

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<sup>31</sup> *R. v. Abdullahi*, 2021 ONCA 82, *Appellant's SCC Record*, PDF p. 310-311 at paras. 144-146; *R. v. Venneri*, 2012 SCC 33 at para. 41

<sup>32</sup> Charge to the jury, *Appellant's SCC Record*, PDF p. 173-189

**PART IV: SUBMISSIONS ON COSTS**

38. The respondent does not seek any order for costs.

**PART V: ORDER REQUESTED**

39. The respondent respectfully requests that this appeal be dismissed.

**PART VI: RESTRICTIONS TO ACCESS OR PUBLICATION OF INFORMATION**

40. There are no restrictions to access or publication in this matter that could impact this Court's reasons.

**ALL OF WHICH** is respectfully submitted by



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Katie Doherty  
Counsel for the respondent

**DATED AT TORONTO** this 22<sup>nd</sup> day of September, 2022

## PART VII: AUTHORITIES CITED

<b>Cases:</b>	<b>Paragraph No.:</b>
<u><i>R. v. Abdullahi</i>, 2021 ONCA 82</u>	5, 9, 10, 12, 15, 26, 27, 28, 29, 30, 31, 32, 33, 36
<u><i>R. v. Araya</i>, 2015 SCC 11</u>	17
<u><i>R. v. Beauchamp</i>, 2015 ONCA 260</u>	23, 24, 25
<u><i>R. v. Beaven</i>, 2013 SKQB 7</u>	25
<u><i>R. v. Calnen</i>, 2019 SCC 6</u>	17
<u><i>R. v. Daley</i>, 2007 SCC 53</u>	17, 18
<u><i>R. v. Evans</i>, 2019 ONCA 715</u>	25
<u><i>R. v. Goforth</i>, 2022 SCC 25</u>	17, 18
<u><i>R. v. Kang</i>, 2019 BCSC 2109</u>	21, 23, 24
<u><i>R. v. Pasquin</i>, 2014 QCCA 786</u>	25
<u><i>R. v. Petrin</i>, 2018 SKCA 100</u>	25
<u><i>R. v. Saikaley</i>, 2017 ONCA 374</u>	22, 23, 25
<u><i>R. v. Terezakis</i>, 2007 BCCA 384</u>	23
<u><i>R. v. Venneri</i>, 2012 SCC 33</u>	22, 23, 24, 25, 30, 36
<u><i>R. v. Wood</i>, 2022 ONCA 87</u>	19

<b>Statutory Provisions or Regulations:</b>	<b>Paragraph No.:</b>
<i>Criminal Code</i> , R.S.C., 1985, c. C-46, s., <u>467.1</u> – <u>467.13</u>	21, 29
<i>Code criminel</i> , L.R.C. (1985), ch. C-46, art. <u>467.1</u> – <u>467.13</u>	