Court File No. 40049

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N :

AHMED ABDULLAHI

Appellant

- and -

HIS MAJESTY THE KING

Respondent

- and -

THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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

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PART I – OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. The Criminal Lawyers' Association's ("CLA") intervention in this appeal is focused on two important issues: (1) whether the trial judge adequately instructed the jury on the definition of "criminal organization" (s. 467.1) notwithstanding he did not tell the jury that a criminal organization must have some form of structure and degree of continuity; and (2) what role counsel's closing addresses should play when an appeal court assesses whether the trial judge adequately instructed the jury on the essential elements of an offence.

2. At the Appellant's trial, the judge instructed the jury in line with the statutory definition of "criminal organization": a criminal organization is a group, "however organized", meeting certain other criteria. The trial judge did not tell the jury that the group needed "some form of structure and degree of continuity", as required by this Court's decision in *R. v. Venneri*.[1]

3. Brown J.A., writing for the majority in the Court of Appeal in the case at bar, emphasized that courts must take a flexible approach to determining whether a group is a criminal organization and that even a minimal amount of organization may suffice.[2] The majority found that the charge on this issue was adequate when viewed in the context of the trial as a whole, including the evidence the trial judge reviewed, the parties' closing addresses about "structure and continuity" (defence) and "cohesiveness" (Crown), and the lack of defence objection.[3]

4. Paciocco J.A. dissented, finding that the charge on "criminal organization" was not functionally adequate. As a matter of law, a criminal organization must have structure and continuity—and there was nothing in the trial judge's charge, examined as a whole and in the context of the entire case, that would "in all probability" have conveyed these elements to the jury.[4] While even a minimal level of organization suffices, an interpretation of *Venneri* that required such a minimal degree of organization as to eschew the elements of structure and continuity would be mistaken.[5] The contextual factors relied on by the majority could not ameliorate the trial judge's

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[1] *R. v. Abdullahi*, 2021 ONCA 82 at para. 67, Brown J.A. [*Abdullahi*]; *R. v. Venneri*, 2012 SCC 33 at para. 29 [*Venneri*].
[2] *Abdullahi*, *supra* at paras. 69-70, Brown J.A.
[3] *Ibid* at paras. 72-81, Brown J.A.
[4] *Ibid* at para. 121, Paciocco J.A., dissenting.
[5] *Ibid* at para. 127, Paciocco J.A., dissenting.

non-direction on these elements.[6] While closing addresses "may" be relevant to charge sufficiency, only in "rare circumstances, if ever" could counsel's words compensate for a trial judge's non-direction.[7]

5. The disagreement between the majority and dissenting judges at the Court of Appeal raises the following two issues on which the CLA sought and was granted leave: (1) whether juries must be explicitly instructed that a criminal organization needs *structure* and *continuity*, following this Court's decision in *Venneri*; and (2) how far "context"—counsel's closing addresses, in particular—can go to cure a trial judge's failure to instruct the jury on the elements of the offence.

6. The CLA respectfully submits, *first*, that structure and continuity remain essential characteristics distinguishing criminal organizations from other looser or shorter-term criminal activities undertaken by a group of three or more people. An unduly flexible approach to the definition of "criminal organization" risks capturing conduct outside Parliament's aim. This risk will be heightened where conscious and unconscious biases can bridge the gap that flexibility introduces. *Second*, while a jury charge must be assessed in context, a trial judge's erroneous or incomplete legal instructions cannot be cured by counsel's comments about the law in their closing addresses. Allowing counsel's addresses to substitute for a legally correct and complete charge confuses the separate roles played by judge and advocate at trial.

7. The CLA takes no position on the facts as advanced by the parties and defers to the parties on the factual record.

PART II – STATEMENT OF ARGUMENT

A. Trial judges must instruct juries that criminal organizations have structure and continuity

8. Structure and continuity are essential features of criminal organizations, separating those groups which merit this classification, and the stiffer penalties that follow, from those conspiracies and joint enterprises which do not. While this Court has urged trial judges to apply the statutory definition flexibly—eschewing adherence to a checklist of factors that define traditional criminal

[6] *Ibid* at paras. 138-157, Paciocco J.A., dissenting.
[7] *Ibid* at paras. 143-145, Paciocco J.A., dissenting.

organizations[8]—this direction cannot justify the omission of these essential features from a charge to the jury.

(i) Requiring some form of structure and degree of continuity fulfills Parliament's aims in creating this regime

9. In *Venneri*, this Court interpreted the statutory requirement that a criminal organization be a "group, however organized" as requiring both structure and continuity. Before *Venneri*, some trial courts concluded that "very little or no organization" was needed to satisfy the statutory definition.[9] However, this Court ruled that some form of structure and degree of continuity were required to distinguish criminal organizations from other groups of offenders sometimes acting in concert.[10] Parliament targeted *organized* crime for higher penalties because a group that operates with even a minimal degree of organization over a period of time will be better positioned to capitalize on the advantages that come with ongoing coordination and thus will pose an enhanced threat to the community.[11] Individuals that come together on an *ad hoc* basis with little or no organization do not pose the type of increased risk Parliament sought to capture with this regime.[12] Structure and continuity have been treated as essential features of criminal organizations in appellate decisions across the country.[13]

10. The Court of Appeal majority's approach in the case at bar emphasized flexibility: determining whether a targeted group is a criminal organization must be done "on a flexible basis, not on the basis of pre-conceived notions about what organized crime may look like".[14] The flexible approach originates from *Venneri*: it reflected Parliament's intention to capture groups

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[8] *Venneri*, *supra* at paras. 29, 38.
[9] *Ibid* at para. 27.
[10] *Ibid* at paras. 25-27, 29-31, 35.
[11] *Ibid* at paras. 36, 40.
[12] *Ibid* at para. 40; see also *R. v. Savari Carbonnel*, 2014 QCCA 95 at para. 14 [*Savari Carbonnel*]; *R. v. O'Reilly*, 2017 QCCA 1283 at para. 171 [*O'Reilly*].
[13] See, e.g., *R. v. Kwok*, 2015 BCCA 34 at para. 94; *R. v. Saikaley*, 2017 ONCA 374 at para. 119 ("ongoing and organized association") [*Saikaley*]; *O'Reilly*, *supra* at paras. 169-171; *R. v. Beauchamp*, 2015 ONCA 260 at paras. 153-156 [*Beauchamp*]; *Savari Carbonnel*, *supra* at paras. 10-12.
[14] *Abdullahi*, *supra* at paras. 69-71, citing *Beauchamp*, *supra* and *Saikaley*, *supra*.

beyond those stereotypically associated with the label "criminal organization".[15] In the Court of Appeal majority's view, definitional flexibility was important to assessing whether the trial judge erred in failing to instruct the jury on structure and continuity.[16] Even a minimal amount of structure and continuity may suffice.[17]

11. However, this Court in *Venneri* was clear that the definition is not so flexible as to include groups without some form of structure and degree of continuity.[18] Overemphasizing definitional flexibility at the expense of requiring structure and continuity risks upsetting the balance this Court struck in *Venneri* and capturing groups who do not, in fact, meet Parliament's definition.

(ii) Courts have relied on structure and continuity to distinguish between criminal organizations and other groups

12. The presence (or absence) of structure and continuity has rightly been used to distinguish between *ad hoc* groups or one-time conspiracies and "criminal organizations" in the case law. Whether a group of three of more people make up a criminal organization is a "highly factual" determination.[19] In *R. v. Saikaley*, the Court of Appeal for Ontario concluded that a group of three people trafficking cocaine and marijuana comprised a criminal organization: the group was hierarchical, with distinct roles for its members, and operated for a considerable period of time.[20] By contrast, where a group developed a cocaine importation scheme over several months and divided tasks among group members, the Court of Appeal of Quebec concluded that this group was a conspiracy focused on one particular event.[21] The Court noted that if speaking over the phone several times over a few months was enough to turn a conspiracy into a criminal organization, the distinction would evaporate for any conspiracy lasting more than a few hours.[22]

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[15] *Venneri*, *supra* at paras. 27-29.
[16] *Abdullahi*, *supra* at para. 69.
[17] *Ibid* at para. 69, citing *Beauchamp*, *supra* at para. 155.
[18] *Venneri*, *supra* at para. 29.
[19] *Saikaley*, *supra* at para. 125.
[20] *Ibid*.
[21] *Savari Carbonnel*, *supra* at paras. 14, 16.
[22] *Ibid* at para. 14.

13. The requirement for structure and continuity distinguishes those small drug operations which have been found to be criminal organizations and those which have not.[23] Some groups alleged to be "street gangs" engaged in firearm or drug trafficking will have the requisite structure and continuity: for example, a "loose" group with a name, leader, and members with distinct roles and which operated in the drug trade over several months.[24] Others will not.

14. For example, in *R. v. Allegro*, the trial judge was not satisfied the three defendants were part of a group with the necessary structure and continuity to ground a criminal organization finding.[25] The three defendants were engaged together in criminal behaviour (particularly drug trafficking).[26] The Crown relied on music videos to show that this group had a name ("Shots Up Mafia"), shared geographic ties, and associated with each other.[27] However, one defendant testified that the Shots Up Mafia was a gangster rap group and not a criminal organization (though some members did engage in criminal activity).[28] The trial judge found that there was no division of labour, rules, communications or hierarchy within the group. The group lacked cohesion. Only two members shared profits. There was no evidence the group could or would continue.[29] Thus, there was no criminal organization. Instead, the alleged members were close friends who would help each other out occasionally. Their criminal activity was focused in a particular neighbourhood because that is where they grew up.[30]

15. Similarly, in *R. v. Donison* the trial judge was not satisfied that several people involved in (and sometimes assisting each other with) street-level drug dealing in a particular neighbourhood had the requisite structure to be a criminal organization.[31] Each alleged member engaged in street-level trafficking and there was little, if any, evidence of division of labour.[32] The alleged members'

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[23] *Saikaley*, *supra* at paras. 121-124.
[24] *R. v. Gardner*, 2014 ONSC 3292 at paras. 119-134; see also *R. v. C.(D.J.)*, 2016 MBQB 143 at para. 85; *R. v. Harris*, 2019 ABQB 456 at paras. 249-258; *R. v. Evans*, 2013 ONSC 7003 at paras. 4-9.
[25] *R. v. Allegro et al.*, 2021 ONSC 6138 at para. 227 [*Allegro*].
[26] *Ibid* at para. 241.
[27] *Ibid* at paras. 207-216.
[28] *Ibid* at para. 210.
[29] *Ibid* at para. 241.
[30] *Ibid* at paras. 231, 237.
[31] *R. v. Donison*, 2021 ONSC 2297 at paras. 340-343 [*Donison*].
[32] *Ibid* at para. 347.

attempts to discourage competition and avoid detection would likely be made by any professional drug trafficker and were not coordinated.[33] That they helped each other from time to time and operated in the same neighbourhood was not surprising as it was apparent they were close friends who lived in the area.[34]

(iii) The structure and continuity requirements guard against reliance on improper reasoning

16. Diluting the need for structure and continuity leaves room for other, improper, considerations—like racial stereotypes—to infect the analysis in cases like *Allegro* and *Donison*. Stereotypes are cognitive mechanisms that all people use to simplify the task of perceiving, processing, and retaining information.[35] In other contexts, increased discretion and flexibility have left room for improper reasoning. For example, courts have recognized that racial profiling is a reasoning process in which conscious or unconscious bias diverts a decision-maker from proper, individualized, assessment.[36] American research suggests that racial disparity in police arrest and charging practices "may be most evident with respect to drug possession and other discretionary offences".[37]

17. The Court of Appeal for Ontario in *R. v. King* recently recognized that "racist stereotypes" increase the risk the jury will engage in propensity-based reasoning after learning the details of an Indigenous defendant's criminal record.[38] The Court stated that stereotypical beliefs are

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[33] *Ibid* at para. 346.
[34] *Ibid* at paras. 343, 345.
[35] Chris Rudnicki, "Implicit Bias and Racial Profiling: Why R. v. Dudhi's Novel 'Attitudinal Component" Imposes an Unjustifiable Burden on Claimants, (2020) 68 Crim. L. Q. 410 at 423, citing Linda Hamilton Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity" (1995), 47:6 Stan. L. Rev. 1161 at 1187.
[36] See *R. v. Le*, 2019 SCC 34 at paras. 76-78 [*Le*]; *R. v. Sitladeen*, 2021 ONCA 303 at paras. 77-78; *R. v. Brown* (2003), 64 O.R. (3d) 161, 2003 CanLII 52142 at paras. 7-8, 42-49, 86 (C.A.); David M. Tanovich, "Applying the Racial Profile Correspondence Test" (2017) 64 Crim. L. Q. 359 at 359.
[37] Ontario Human Rights Commission, "Racial Disparity in Arrests and Charges" (2020) at 3-4, 7, online: <https://www.ohrc.on.ca/sites/default/files/Racial%20Disparity%20in%20Arrests%20and%20Charges%20TPS.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> (emphasis added); see *Le*, *supra* at paras. 91-93, 96.
[38] *R. v. King*, 2022 ONCA 665 at para. 194 [*King*].

"pervasive" within Canadian society and "cause analytical problems in applying the law".[39] Safeguards built into the justice system to weed out juror bias will not always be sufficient—juror oaths and instructions designed to eliminate biases in the courtroom "are not a panacea".[40]

18. Here, jurors denied an instruction on structure and continuity may substitute their own views on which groups pose the heightened danger associate with a criminal organization—views which may be influenced by conscious or unconscious bias. Jurors may infer that, because the defendants are racialized, speak the same language, or are from the same marginalized community, they are part of a "gang" and thus a "group, however organized". An approach to defining criminal organizations that tips the balance too far towards flexibility risks inviting these and similar chains of improper reasoning.

19. The CLA respectfully asks this Court to reinforce that structure and continuity are essential elements distinguishing criminal organizations and that trial judges must tell juries so.

B. Counsel's closing addresses cannot substitute for legally accurate jury instructions on the essential elements of the offence

20. Legal instructions on the elements of the offence must come from the trial judge, not the advocates. This Court has explained each actor's role in a jury trial: the jury is the master of the facts. The trial judge is the master of the law. And Crown and defence counsel are responsible for putting all evidence relevant to their positions before the jury and effectively defending the interests of the state and the defendant, respectively.[41] While the functional approach to reviewing charge sufficiency invites appellate courts to consider the context in which the charge was given,[42] including counsel's closing addresses, this approach must not detract from the principle that "the ultimate responsibility for the correctness of the instructions remains with the judge and the judge alone".[43]

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[39] *Ibid*.
[40] *Ibid* at para. 195, citing *R. v. Barton*, 2019 SCC 33 at para. 176, Moldaver J.
[41] *R. v. Daley*, 2007 SCC 53 at para. 28 [*Daley*].
[42] *R. v. Goforth*, 2022 SCC 25 at para. 21 [*Goforth*]; *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 32-33 [*Jacquard*].
[43] *R. v. Khill*, 2021 SCC 37 at para. 144 [*Khill*]; see also *Jacquard*, *supra* at para. 37; *R. v. Jaw*, 2009 SCC 42 at para. 44.

(i) Closing addresses offer useful context in particular circumstances

21. Appellate courts have relied on closing addresses as part of the relevant "context" in assessing charge sufficiency in at least the following ways: (1) to determine whether an issue is live and requires an instruction; (2) to evaluate whether the charge would have led the jury down an impermissible reasoning path; (3) to fill evidentiary gaps left by the charge.

22. First, counsel's closing addresses offer the appeal court insight into whether an issue was significant enough to warrant an instruction. In *R. v. Jacquard*, the trial judge's shorter and less elaborate charge on "planning and deliberation" could be explained by the defence's failure to raise this as a live issue through cross-examination or in its closing address.[44]

23. Second, reviewing counsel's addresses can allay—or heighten—concerns that the jury could have gone down an impermissible reasoning path. For example, in *R. v. Srun*, the Court of Appeal for Ontario dismissed concerns that the jury might have convicted the appellant of second degree murder as a party under s. 21(2) after the trial judge wrongly said that section applied to "all counts", in part because none of the six separate jury addresses suggested the appellant was anything other than the one and only principal in the stabbing.[45] By contrast, in *R. v. Khill*, defence counsel's emphasis on the moment before the defendant killed the deceased heightened the possibility the trial judge's charge left the misleading impression that the jury should focus its reasonableness inquiry on that moment and disregard all of the defendant's actions, omissions, and judgment calls throughout the incident.[46]

24. Third, appeal courts have repeatedly looked to counsel's jury addresses to fill evidentiary gaps in the trial judge's charge.[47] For example, in *Stojanovski*, the Court of Appeal for Ontario concluded that the jury would have been aware of the possibility of collusion as a result of the trial judge's references to this possibility in her summary of the parties' positions, coupled with the

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[44] *Abdullahi*, *supra* at para. 144, Paciocco J.A., dissenting.
[45] *R. v. Srun*, 2019 ONCA 453 at paras. 65-66; see also *R. v. Araya*, 2015 SCC 11 at para. 50.
[46] *Khill*, *supra* at para. 134.
[47] *Daley*, *supra* at paras. 57-58; see also *R. v. Stojanovski*, 2022 ONCA 172 at paras. 91-96 [*Stojanovski*]; *R. v. P.J.B.*, 2012 ONCA 730 at paras. 47-48; *R. v. Kraniqi*, 2012 ONCA 561 at paras. 80-81.

attention paid to this evidence in the Crown's and both appellants' jury addresses.[48] However, counsel's review of the evidence in their closing addresses does not relieve the trial judge of the duty to perform an *independent* review in their charge.[49]

(ii) Closing addresses cannot substitute for legally correct and complete jury instructions

25. By contrast, appeal courts have rightly been concerned about relying on counsel's closing addresses to fill gaps in the trial judge's *legal* instructions.[50] This Court in *R. v. Avetysan* concluded that the trial judge's charge risked inviting a conviction on a standard of proof other than "beyond a reasonable doubt". The respondent Crown had argued that the trial Crown's submission on the standard of proof might have remedied the otherwise defective charge, but this Court disagreed:

> The fact that Crown counsel might have described the reasonable doubt standard properly will not correct the trial judge's failure to do so. The long-established rule is that the trial judge instructs the jury on questions of law. The trial judge bears that responsibility, and while counsel's errors can be corrected by the trial judge in his charge, the opposite is not true.[51]

26. The Court of Appeal of Alberta in *R. v. Gray* also concluded that not every mistake or omission in a trial judge's charge can be rectified by reference to closing addresses: a trial judge's failure to instruct a jury correctly on the law cannot be cured in this way. The Court of Appeal relied on the judge and jury's separate roles: the "inevitable instruction" that the jury must accept the law as presented by the trial judge[52] precludes the jury's relying on counsel addresses for the

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[48] *Stojanovski*, *supra* at paras. 91-96.
[49] *R. v. Minor*, 2013 ONCA 557 at paras. 84-88, 111.
[50] *R. v. Avetysan*, 2000 SCC 56 at paras. 23-24 [*Avetysan*]; see also *R. v. Gray*, 2012 ABCA 51 at paras. 15-21, leave to appeal to SCC refused, 34772 (August 30, 2012) [*Gray*]; *R. v. Brown*, 2015 ABCA 228 at para. 27; *R. v. Marshall*, 2017 ONCA 1013 at para. 28; *R. v. LaBrecque* (2001), 56 O.R. (3d) 97, 2001 CanLII 7144 at paras. 7-11 (C.A.); *R. v. Learn*, 2013 BCCA 254 at paras. 25-26; *R. v. Prokofiew*, 2012 SCC 49 at paras. 85-93, Fish J., dissenting; *contra R. v. Pomeroy*, 2008 ONCA 521 at para. 117; *R. v. Wang* (2001), 153 C.C.C. (3d) 321, 2001 CanLII 20933 at para. 46 (Ont. C.A.).
[51] *Avetysan*, *supra* at paras. 23-24.
[52] See National Judicial Institute, Model Jury Instructions, "8.2 Respective Duties of Judge and Jury", online: <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/final-instructions/duties-of-jurors/respective-duties-of-judge-and-jury/?langSwitch=en> ("I am the sole judge of the law"); Hon. Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto, ON: Carswell, 2015) at 42, 321 (Preliminary 15, "Duties of Jurors", ("Our law

legal principles.[53] This Court's decision in *R. v. Rogerson* includes two examples where legal errors are not cured: first, where the "gap" stems from the trial judge's failure to explain how post-offence conduct evidence could assist the jury on the question of intent, the Crown's disparate and imperfect explanations will not remedy the defect; and second, a *misdirection* cannot be considered a "gap" in the charge.[54]

27. The CLA respectfully submits that relying on jury addresses to cure legal deficiencies in jury charges exceeds the bounds of the "contextual" approach. First, it undermines the trial judge's role as the "master of the law". Second, it risks encouraging counsel to expand their closing addresses by including legal instructions in the event the trial judge misses them. This in turn risks the jury receiving legal instructions from multiple sources. Third and most importantly, it denies defendants not only a perfect instruction but a *proper* one.[55] Juries should not be left to piece together the law from the various actors at trial—the legal instructions on the elements of the offence in the trial judge's charge should be accurate and complete.

PART III – SUBMISSIONS ON COSTS

28. The CLA makes no submissions as to costs.

PART IV – ORDER SOUGHT

29. The CLA respectfully requests an opportunity to present five minutes of oral argument or such time as the Court sees fit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF NOVEMBER, 2022.

Colleen Baumon

for

Emily Lam and Colleen McKeown
Counsel to the Intervener CLA

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does *not* let you use your own or anybody else's ideas about what the law is or should be, or let you get information about it from any other source"); Final 2-A, "Duties of Judge and Jury", ("[I]t is very important that you accept the law from me and follow it without question")).

[53] *Gray*, *supra* at para. 19.
[54] *R. v. Rodgerson*, 2015 SCC 38 at paras. 34-37, citing *Daley*, *supra* at para. 58.
[55] See *Goforth*, *supra* at para. 20.

PART V – AUTHORITIES RELIED ON

Jurisprudence	Paragraph(s)
R. v. Abdullahi, 2021 ONCA 82	2, 3, 4, 10, 22
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Secondary Sources **Paragraph(s)**

Linda Hamilton Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity" (1995), 47:6 Stan. L. Rev. 1161	16
David M. Tanovich, "Applying the Racial Profile Correspondence Test" (2017) 64 Crim. L. Q. 359	16
Ontario Human Rights Commission, "Racial Disparity in Arrests and Charges" (2020) online: <https://www.ohrc.on.ca/sites/default/files/Racial Disparity in Arrests and Charges TPS.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>	16
National Judicial Institute, "8.2 Respective Duties of Judge and Jury", *Model Jury Instructions*, online: <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/final-instructions/duties-of-jurors/respective-duties-of-judge-and-jury/?langSwitch=en>	26
Hon. Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto, ON: Carswell, 2015)	26

Legislative Authorities **Paragraph(s)**

Criminal Code, R.S.C. 1985 c. C-46, s. 467.1 *Code criminel,* L.R.C. (1985), ch. C-46, art. 467.1	1