Citation: *R. v. Rauguth,* 2025 YKTC 29

Date: 20250625
Docket: 23-11018
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Phelps

REX

v.

ERICH EMMANUEL RAUGUTH

Appearances:
Brad Demone — Counsel for the Crown
Timothy E. Foster K.C. — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Erich Emmanuel Rauguth proceeded to trial on a single count alleging that on October 29, 2023, he committed an offence contrary to s. 320.15(3) of the *Criminal Code.* At the conclusion of trial, the Crown conceded that it had not proven one particularized element of the offence, being the name of the officer who made the s. 320.28(1)(a)(i) *Criminal Code* demand that was refused by Mr. Rauguth. The Crown made an application to amend the Count to conform to the evidence presented at the trial. Defence counsel opposes the application and invites an acquittal.

[2] At trial, Mr. Rauguth alleged that the RCMP breached his *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* ("*Charter*") rights. The trial proceeded in a blended *voir dire* to address the alleged *Charter* violations. The Ruling on *Voir Dire* is indexed as *R. v. Rauguth*, 2025 YKTC 15 and provides an extensive summary of the facts which will not be repeated in this decision.

[3] The circumstances are that during the evening of October 28, 2023, there was a social event at the ski hill in Dawson City, Yukon. In the early morning of October 29, 2023, a Ford Explorer driven by Mr. Rauguth was traveling away from the event at the ski hill towards downtown Dawson City when the vehicle struck the metal gate of a fence. The gate was long and became progressively narrow horizontally moving away from the base. On collision, the vehicle struck the narrow end of the gate with sufficient force for the gate to protrude into the cab of the vehicle, through the dashboard and into the passenger seated in the front passenger seat, with enough force to push the seat into the rear seat area of the vehicle. The passenger, Samanroop Bisla, was struck by the gate and did not survive her injuries, passing away at the scene. Mr. Rauguth was subsequently the subject of investigation during which he refused to provide samples of his breath on demand made pursuant to s. 320.28(1)(a)(i) of the *Criminal Code*.

[4] After the *voir dire* ruling was given, there was an adjournment to a date for the continuation of trial. At the trial continuation, the evidence on the *voir dire* was admitted in the trial and the Crown did not call any further evidence. Defence elected not to call evidence, and the matter proceeded to closing submissions. During submissions defence counsel argued that the Crown had failed to prove the particularized charge against Mr. Rauguth, specifically that the named officer in the charge made the

s. 320.28(1)(a)(i) *Criminal Code* demand to Mr. Rauguth that was refused. The charge that proceeded to trial reads:

> On or about the 29th day of October, 2023, at or near Dawson City, Yukon did, knowing at the time of the refusal, or being reckless as to whether, he was involved in an accident that resulted the death of another person, without reasonable excuse refused to comply with a demand made to him by Constable Phillippe Premerl, a peace officer, under s. 320.28(1)(a)(i) of the Criminal Code, contrary to section 320.15(3) of the Criminal Code.

[5] Defence argues that the Crown failed to prove that Cst. Premerl made a demand to Mr. Rauguth pursuant to s. 320.28(1)(a)(i) of the *Criminal Code*, and in failing to do so has not proven the charge against him. While the charge could have been worded to state that the demand was made by a peace officer, which would have been an acceptable charge, the Crown here proceeded with the allegation that it was the specific peace officer, Cst. Premerl, that made the demand.

[6] The Crown concedes that the evidence does not establish that Cst. Premerl made a s. 320.28(1)(a)(i) *Criminal Code* demand. They argue, however, that there would be no prejudice to Mr. Rauguth for the Court to amend the Count to conform with the evidence, and have applied to do so under the common law “surplusage rule” and s. 601(2) of the *Criminal Code*.

[7] The Supreme Court of Canada addressed the surplusage rule in *R. v. Vézina*, [1986] 1 S.C.R. 2, setting out the rule in para. 49:

> The "surplusage rule", which has been developed by the courts over a great many years, is succinctly stated as follows, in Ewaschuk, Criminal Pleadings and Practice in Canada (1983), at pp. 222-23:

> If the particular, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage, i.e., a non-necessary which need not be proved.

[8] The Court continued in *Vézina* to set out the test to be applied, noting at paras. 59 and 60:

> 59 Similarly, "the surplusage rule", which, as noted above, is the converse of s. 510(3), must also be seen as subject to the proviso that the accused not be prejudiced in his or her defence. In R. v. Elliott, [1976] 4 W.W.R. 285, McIntyre J.A. (as he then was) stated at p. 289:
>
> > It is clear in my view that where the Crown gives material particulars in an indictment it must prove them. A long list of authorities supports this proposition.
> >
> > ...
> >
> > It is of course true that immaterial or non-essential averments in indictments need not be strictly proved if no prejudice results to the accused.
> >
> > ...
>
> 60 Indeed, the notion that the accused not be prejudiced by the application of the "surplusage rule" may fairly be said to be a persistent theme throughout the case-law.

[9] The Crown also relies on s. 601(2) of the *Criminal Code* for the amendment application, which states:

> 601 (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
>
> > (a) a count in the indictment ...
> >
> > ...

[10] Similar to the surplusage rule, this section is qualified by the requirement to consider the prejudice to the accused in subsection 4 which states:

> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
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> (a) the matters disclosed by the evidence taken on the preliminary inquiry;
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> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;
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> (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
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> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[11] The test to be applied on a s. 601(2) *Criminal Code* application was addressed by the Supreme Court of Canada in *R. v. Cote*, [1996] 3 S.C.R. 139, wherein the Court addressed the impact of the proposed amendment on the accused at para. 91:

> In considering whether to amend a defective information or indictment, a court must concern itself with the impact of the proposed amendment upon the accused. The applicable standard under s. 601 of the Code is whether the accused would suffer "irreparable prejudice" as a result of the amended charge: R. v. P. (M.B.), [1994] 1 S.C.R. 555; R. v. Tremblay, [1993] 2 S.C.R. 932; Vézina and Côté v. The Queen, [1986] 1 S.C.R. 2; Morozuk v. The Queen, [1986] 1 S.C.R. 31. In those Criminal Code cases where there was no evidence that the accused was misled or irreparably prejudiced by the variance between the indictment and the evidence, the Court amended the indictment and dismissed the appeal.

[12] Both the surplusage rule and an application under s. 601(2) of the *Criminal Code* require an assessment of the prejudice to the accused in his defence if the proposed amendment is granted. That is, in this case, the prejudice caused to Mr. Rauguth by

amending “Constable Phillippe Premerl” to “a peace officer” in the single Count before the Court.

[13] The meaning of prejudice was addressed by the Ontario Court of Justice in *R. v. Bekri*, 2020 ONCJ 680, at para. 16:

> 16 *R. v. McIvor*, [2009] M.J. No. 146 is a more recent case, from Manitoba Court of Queen's Bench but applying the principles found in R. v. Melo, supra. ... More specifically, para. 22 addresses the issue of prejudice and clarifies that "more than the possibility of prejudice" is required to deny an amendment. Quoting from its Court of Appeal in *R. v. M. (E.A.D.)*, 2008 MBCA 78:
>
> > "Prejudice" must be real and substantial. It must be "irreparable." See *R. v. Morozuk*, [1986] 1 S.C.R. 31 (S.C.C.), at 38, and *R. v. McConnell* (2005), 196 C.C.C. (3d) 28 (Ont. C.A.) at para. 10. As the court said in *McConnell* (at para. 11):
> >
> > > ... prejudice "speaks to the effect of the amendment on an accused's ability and opportunity to meet the charge" [*R. v. Irwin* (1998), 123 C.C.C. (3d) 316 (Ont. C.A.)]. Thus, in deciding whether an amendment should be allowed, the court will consider whether the accused will have a full opportunity to meet all issues raised by the charge and whether the defence would have been conducted differently. ...

[14] For observers, the Crown application may seem like a minor technicality, but it is set against the standard the Crown is held to in *Criminal Code* prosecutions of proof beyond a reasonable doubt. This legal principle has been set out at some length in *R.* v. *Nyznik*, 2017 ONSC 4392, at paras. 4 to 7:

> 4 ...The presumption of innocence is a cornerstone of our criminal justice system, originally embedded in our common law tradition and now guaranteed as a fundamental legal right under our constitution.

> 5 The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions -- an outcome that cannot be accepted in a free and democratic society.
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> 6 The concept of proof beyond a reasonable doubt is not an easy one to define. It is clearly more rigorous than the balance of probabilities standard applied in civil cases. The balance of probabilities requires the party bearing the onus to establish that the proposition they advance is "more likely than not" -- *i.e.* better than 50/50. In its landmark 1997 decision in *R. v. Lifchu*s, the Supreme Court of Canada held that the following definition would be an appropriate instruction for a criminal jury:
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> > [...]
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
> >
> > On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
> >
> > In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
>
> 7 This instruction, with very little modification, is now the standard instruction on reasonable doubt given to criminal juries throughout Canada. The same standard is applied by judges sitting without a jury on criminal trials. The bottom line is that probable or likely guilt is insufficient ... I must be <u>sure</u> that they committed the offence charged.

[15] This high standard of proof beyond a reasonable doubt is applied in *Criminal Code* trials along with the right to make full answer and defence. This latter principle

was articulated by the Supreme Court of Canada in *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 98:

> The right to make full answer and defence is protected under s. 7 of the Charter. It is one of the principles of fundamental justice. In R. v. Stinchcombe, [1991] 3 S.C.R. 326, at p. 336, Sopinka J., writing for the Court, described this right as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted". The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be met before opening one's defence, the principles governing the re-opening of the Crown's case, as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.

[16] The Court in *Rose* continued at para. 102:

> In our view, it is useful to distinguish here between two discrete aspects of the right to make full answer and defence. One aspect is the right of the accused to have before him or her the full "case to meet" before answering the Crown's case by adducing defence evidence. The right to know the case to meet is long settled, and it is satisfied once the Crown has called all of its evidence, because at that point all of the facts that are relied upon as probative of guilt are available to the accused in order that he or she may make a case in reply: see R. v. Krause, [1986] 2 S.C.R. 466, at p. 473, per McIntyre J.; John Sopinka, Sidney Lederman and Alan Bryant, The Law of Evidence in Canada (1992), at p. 880. This aspect of the right to make full answer and defence has links with the right to full disclosure and the right to engage in a full cross-examination of Crown witnesses, and is concerned with the right to respond, in a very direct and particularized form, to the Crown's evidence. Inherent in this aspect of the right to make full answer and defence is the requirement that the Crown act prior to the defence's response.

[17] The common law test and the s. 601(2) *Criminal Code* application for an amendment to the Count require an assessment of the prejudice to the accused if the amendment is made by the Court. Key considerations are the nature of the offence

before the court, the nature of the amendment, the timing of the application in the proceeding, and the prejudice to the accused if the amendment is granted.

[18] Crown has argued that there is little to no prejudice to Mr. Rauguth, arguing that the disclosure material was complete and it should have been clear to Mr. Rauguth that they were relying on the s. 320.28(1)(a)(i) *Criminal Code* demand made by Cpl. Gilmar for the basis of the refusal. They further argue that it was clear to Mr. Rauguth as his *Charter* application was focused on the formulation of reasonable grounds by Cpl. Gilmar and the s. 320.28(1)(a)(i) *Criminal Code* demand she made to him. The Crown submits that the attack on the demand made by Cpl. Gilmar shows that the defence knew that her demand was the one that was refused, not a demand by Cst. Premerl. Based on this, they argue that there would be no prejudice to Mr. Rauguth if the amendment was granted.

[19] Defence counsel disagrees with the Crown assessment and argues that the defence was focused on the particulars of the charge and the allegation that the s. 320.28(1)(a)(i) *Criminal Code* demand was made by Cst. Premerl. He relied on case law that stands for the proposition that the precise words of a breath demand do not have to be proved as long as the person receiving the demand understands what is being requested. This principle is set out in the decision of this Court of *R. v. Tom*, 2024 YKTC 23, and summarized at para 41:

> I agree with these authorities for the proposition that the wording used by a peace officer when making a breath demand does not have to follow a script. While the Court in *Gaven* was dealing with a s. 320.27 *Criminal Code* demand, I find that the principle applies equally to a s. 320.28 *Criminal Code* demand. It was made clear to Mr. Tom that he was required to provide two samples of his breath for the purpose of analysis

> at the detachment, which he ultimately did. Mr. Tom acknowledged his understanding of what he was being told by Cpl. MacNeil.

[See also *R. v. O'Flynn*, 2006 BCPC 00560]

[20] The requirement to provide particulars in a charge regarding a refusal to provide a breath sample was addressed in *Regina v. Gray*, (1986) 30 C.C.C. (3d) 234 (BC County Court of Westminster), at para. 9:

> My perusal of relevant case-law indicates that the Crown need not specify in an information which police officer made the demand: see *R. v. Cale* (1974), 17 C.C.C. (2d) 177 (Ont. H.C.J.). In that case the relevant wording on the information was that the accused refused to comply with "a" demand made to him by "a" peace officer. A police officer, with reasonable and probable grounds, made the demand and subsequently turned the accused over to the technician who made a father demand which was refused. The court found that an accused may be convicted of refusing to provide a breath sample notwithstanding the fact there was no evidence that the breathalyzer technician had reasonable and probable grounds to believe the accused had committed an offence under s. 234 of the *Criminal Code*. Van Camp J. was of the view, at p. 180, that:
>
> > ... even if the appellant had a defence to his refusal to comply with the demand of the technician, he had not complied with the demand of the police officer. The repetition of the demand in essentially the same words by the technician does not nullify the demand made by the police officer. The gist of the offence is his failure or refusal to comply with the demand made to him by a peace officer.

[21] The Court in *Gray* continues to address the particularized Count at paras. 11 and 12:

> 11 However, if the information particularizes the name of the technician whose demand has been refused, and if the technician did not have reasonable and probable grounds for the demand, the Crown cannot rely on the demand of the arresting officer who had reasonable and probable grounds. In *R. v. Torikka* (1981), 11 M.V.R. 23 (B.C. Co. Ct.), Hutchinson Co. Ct. J. stated at pp. 25-6:

> There were two demands made of the appellant. The Crown could have relied on the first demand made by ... [the arresting officer] in which case the appellant may well have conducted his defence in a different manner. Alternatively, the Crown need not have specified which police officer made the demand, as occurred in *R. v. Cale* (1974), 17 C.C.C. (2d) 177 (Ont.).
>
> However, the Crown did particularize the demand ...
>
> ...
>
> The appellant may have a reasonable excuse for failure to comply with a demand made by ... [the arresting officer], but no such reasonable excuse for failing to comply with a demand made by ... [the breathalyzer technician]
>
> 12 The Crown in the case at bar, although not referring to *Cale*, *supra*, appears to be adopting a similar approach when it submits that the technician's demand was merely a repetition of the arresting officer's earlier demand, and therefore of no consequence. As with the facts of *Cale*, but unlike those in *Torikka*, neither police officers' name is specified in the case at bar. In my view, *Cale*, and the cases discussed therein apply to the present facts, and it is therefore not necessary that the Crown specify in the information which police officer made the demand.

[22] There is no requirement to particularize the name of the peace officer who made the demand that was ultimately refused. However, as stated in *Gray*, where the Crown chooses to do so they are required to prove that the particularized officer made the demand.

[23] In this case the Crown did particularize the specific officer who made the demand, and the defence strategy at trial included addressing whether or not Cst. Premerl formed the requisite reasonable grounds to make the demand. If he did, then the words of Cst. Premerl relied on by the Crown to form the demand would become the subject of argument.

[24] Defence counsel argues that he relied on the legal principle that one officer can transfer grounds formed for the demand to another officer. That is, other involved officers could have relayed observations of Mr. Rauguth to Cst. Premerl for him to have formed his own reasonable grounds to make the demand, in which case his engagement with Mr. Rauguth regarding the taking of breath samples at the detachment would have become a focus of the defence. The defence focused on what grounds the different officers formed and what was relayed to Cst. Premerl regarding those grounds.

[25] Defence counsel outlined how this file unfolded to ground the basis for the reliance on the Count as written and the prejudice caused if the Count was to be amended:

1. Cpl. Gilmar, an experienced officer who has been promoted to the rank of corporal, drafted the charges on the Information herself. She was the lead investigator in relation to the alleged refusal to provide a breath sample and she proceeded to draft the Counts on the Information, including the charge against Mr. Rauguth for refusing a demand made by Cst. Premerl. She did so with full knowledge that she herself had made a demand, leaving Mr. Rauguth to defend himself against a demand she believed on reasonable grounds was made by Cst. Premerl.

2. While the Counts on the Information were drafted by the RCMP, within weeks of the charge being laid the file was assigned to a senior

Public Prosecution Service of Canada counsel. Defence counsel argues that it would be expected that senior Crown counsel would review the file thoroughly and that the review would include the specific wording of the charges.

3. Based on the charges on the Information, defence counsel argues that they made the strategic decision to proceed before a territorial court judge and not to pursue a preliminary inquiry, forgoing the discovery benefit of doing so.

4. There was considerable delay for an accident reconstruction report to be completed and for two pre-trial conferences to take place on the file. At the second pre-trial conference, Crown advised that Count 2 on the Information, alleging an offence contrary to s. 320.14(3) of the *Criminal Code*, would be stayed by the Crown. Defence counsel argues this was further evidence that the senior crown prosecutor closely reviewed the charges, which would have been necessary to make the decision to enter a stay of proceedings on one Count and to continue with the remaining Count that is before the Court.

5. There was an application by the Crown on the opening day of trial, prior to the calling of evidence, to amend the current Count before the Court. The Count originally read:

> On or about the 29th day of October, 2023, at or near Dawson City, Yukon did, knowing at the time of the refusal, or being reckless as to whether, he was involved in an

> accident that resulted the death of another person, without reasonable excuse refused to comply with a demand made to him by Constable Phillippe Premerl, a peace officer, under s. 320.28 of the Criminal Code, to provide then or as soon thereafter as was practicable samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to section 320.15(3) of the Criminal Code.

The Count was significantly amended to read:

> On or about the 29th day of October, 2023, at or near Dawson City, Yukon did, knowing at the time of the refusal, or being reckless as to whether, he was involved in an accident that resulted the death of another person, without reasonable excuse refused to comply with a demand made to him by Constable Phillippe Premerl, a peace officer, under s. 320.28(1)(a)(i) of the Criminal Code, contrary to section 320.15(3) of the Criminal Code.

Defence argues that there was considerable attention given by the Crown to the specific wording of the Count, including the clarification of the specific subsection of the *Criminal Code*, being s. 320.28(1)(a)(i). Defence counsel did not object to the late amendment, in part because the Crown did not seek to amend the name of the peace officer who made the demand. Defence argues that this was a further indication of the Crown's intention to prove that Cst. Premerl made the demand.

6. Defence counsel did cross-examine Cpl. Neilsen on the observations he made and the grounds of impairment that he formed. Cpl. Neilsen confirmed on cross-examination that he did not form reasonable

grounds to believe that Mr. Rauguth was impaired by alcohol, only that he had a reasonable suspicion. Defence counsel, noting that the Crown did not elicit evidence of information shared by Cpl. Nielsen with Cst. Premerl regarding his observations at the scene, did not pursue this avenue of questioning himself. Defence counsel argues that the Crown would have assessed the evidence in the same manner and chose not to make the application to amend at that time, which may have been early enough in the trial to minimize the prejudice caused. In choosing not to apply for the amendment, defence counsel took this as an indication of the Crown's intention to continue to prove that the s. 320.28(1)(a)(i) *Criminal Code* demand was made by Cst. Premerl.

7. Defence counsel did pursue a *Charter* challenge relating to Cpl. Gilmar and the grounds she formed by administering an Approved Screening Device test at the roadside. While unsuccessful, defence counsel argues that the challenge was related to attacking the information possibly relayed by Cpl. Gilmar to Cst. Premerl regarding reasonable grounds to believe that Mr. Rauguth was impaired by alcohol. Crown did not elicit sufficient evidence on the transfer of information from Cpl. Gilmar to Cst. Premerl in direct examination and defence counsel chose not to pursue this line of questioning in cross-examination, noting that while much of the exchange was audio recorded, they could not know if all the

exchanges were captured in the recording. Defence argues again that the Crown would have assessed the evidence in the same manner and again chose not to make the application to amend at that time, escalating the prejudice against Mr. Rauguth.

8. Cst. Premerl was presented by the Crown and did not provide evidence of forming his own reasonable grounds of impairment, instead testifying that he relied on the confirmation from Cpl. Gilmar that she had made the s. 320.28(1)(a)(i) *Criminal Code* demand. Defence counsel strategically chose to limit cross-examination to the exchange constituting the refusal, and not about forming his own reasonable grounds to make the demand. Defence counsel highlighted in argument that again, after this witness testified, the Crown chose to proceed with the Count as drafted.

9. Cpl. Penk provided limited information to the Court given his peripheral involvement in this investigation. He had been contacted by Cpl. Nielsen and was responsible for contacting Cst. Premerl to attend the detachment as the qualified technician. Crown did not elicit from Cpl. Penk any exchange of information that would go to Cst. Premerl forming his own reasonable grounds. Again, defence counsel's cross-examination was limited based on the Crown's approach.

10. Based on the evidence presented by the Crown in the *voir dire*, defence chose not to proceed with Mr. Rauguth's s. 10(b) *Charter*

argument. This was a strategic decision based on how the evidence had come out to that point in the proceedings. Defence counsel argues that some of the evidence to be elicited in the *Charter* challenge included evidence from counsel he spoke with that evening that would go to whether or not, based on his state of mind that evening, Mr. Rauguth knew at the time of the refusal that he was involved in an accident that resulted in the death of another person. Defence argues that this strategic decision was based on the evidence as it was presented at trial to that point, and the fact that the Crown was continuing with the Count as worded.

11. The matter was adjourned after the *voir dire* to a date for the decision on the *Charter* application. Defence counsel notes again that there was no application by the Crown, after having the opportunity to carefully assess the evidence that was presented at trial, to amend the Count before the Court.

12. At the trial continuation, Crown closed its case without making the amendment application. Defence counsel chose not to call evidence, which he argues was an important strategic decision based on how the evidence came out at trial in relation to the specific Count before the Court. Counsel proceeded to submissions with the Crown proceeding first, followed by the defence. Defence counsel argued that the Crown had failed to prove an essential element of the case by failing to prove that Cst. Premerl made the demand. It was only after

> this submission that the Crown sought an adjournment and subsequently made the application to amend the Count.

[26] I accept the submission of defence counsel that there was a strategy formed to defend this case based on the particulars of the charge. That strategy continued and evolved through each stage of the proceeding, as the Crown continued to rely on the Count as set out, particularizing Cst. Premerl as the officer who made the demand. The strength of the Crown's case on this point diminished through the presentation of each officer, and the defence approach was adjusted accordingly.

[27] Keeping in mind the standard of proof that the Crown is required to meet, and the right to make full answer and defence, I cannot conclude in this case that there would be no prejudice to Mr. Rauguth if I allowed the amendment. I find that there would be significant prejudice to Mr. Rauguth given how the evidence unfolded and how defence counsel explained the strategic decisions made throughout the proceeding.

[28] The Crown argued that prejudice could be repaired by re-opening the case and presenting the witnesses again for examination. While I appreciate that as an option, I cannot see how that would remedy Mr. Rauguth's right to full answer and defence. The defence counsel's strategic approach to the file cannot be corrected at this late stage, and I conclude that the proposed amendment would cause irreparable prejudice to Mr. Rauguth. The proposed amendment cannot be made at this late stage without injustice being done.

[29] The Crown application to amend the Count before the Court is denied.

[30] I find that the Crown has not proven the offence as particularised beyond a reasonable doubt and I find Mr. Rauguth not guilty of the charge contrary to s. 320.15(3) of the *Criminal Code*.

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PHELPS C.J.T.C.