



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

July 14, 2015

15-15

Stay of Proceedings Directed in Prosecution of Delta Police Officer

Victoria - The Criminal Justice Branch (CJB), Ministry of Justice, announced today that a stay of proceedings has been entered on a charge of Second Degree Murder previously approved against Cst. Jordan MacWilliams of the Delta Police Department. The charge related to an on duty incident on November 8, 2012, in which Mehrdad Bayrami was shot and killed during an armed standoff with police.

The charge was laid by way of a Direct Indictment filed in October 2014, following an investigation by the Independent Investigations Office (IIO). Since the initial charge assessment, Crown Counsel assigned to the prosecution have conducted extensive witness interviews and received further relevant disclosure from the IIO.

Based on a careful review of the case, CJB has determined that the available evidence no longer satisfies its charge approval standard for the continued prosecution of Cst. MacWilliams for any criminal offence. As a result, a stay of proceedings was directed in the case.

A Clear Statement explaining this decision in greater detail is attached to this Media Statement. Where CJB decides not to proceed with a prosecution in a case which the IIO has investigated, it is the practice of CJB to issue a Clear Statement of the reasons for not prosecuting, in order to maintain confidence in the integrity of the criminal justice system.

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Clear Statement

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Introduction

On October 9, 2014, the Criminal Justice Branch (CJB) approved a charge of second degree murder against Cst. Jordan MacWilliams of the Delta Police Department. CJB released a Media Statement announcing its decision on October 20, 2014.

The charge arose out of the shooting death of Mehrdad Bayrami on November 8, 2012 in New Westminster. The death was investigated by the Independent Investigations Office (IIO). A Report to Crown Counsel (RTCC) was first submitted to CJB by the IIO in July 2013. After an initial review, CJB sent the RTCC back to the IIO for further information on several issues. Some of this information was not immediately available to the IIO and further investigative steps were taken. In response to its requests, CJB received additional material from the IIO on July 18 and October 6, 2014, respectively.

After reviewing the evidence that was available in October 2014, senior Crown Counsel were satisfied that the standard for charge approval under CJB's Charge Assessment Guidelines (CHA 1) was met. A charge of second degree murder was approved. Taking into consideration its policy on the use of Direct Indictments (DIR 1), CJB also concluded it was appropriate to seek the consent of the Deputy Attorney General to proceed by way of Direct Indictment under s. 577 of the *Criminal Code*. His consent was provided and a Direct Indictment was filed. The matter was eventually scheduled to proceed to trial in October 2015.

Since then, Crown Counsel assigned to this prosecution have interviewed more than 35 witnesses, including many of the police officers who were present during the incident, as well as the officers in charge of the emergency response operation that culminated in Mr. Bayrami's death. In preparing the file for trial, Crown Counsel have also received further relevant disclosure from the IIO.

As a result of additional evidence obtained through the witness interviews, and further information and material received from the IIO and other sources, Crown Counsel undertook a comprehensive file review, informed by the legal principles governing the use of force by police and the Crown's legal and evidentiary burden of proof in criminal cases. In conducting this review, Crown Counsel have considered:

- all material evidence that would likely be admissible at trial;
- whether this evidence is reasonably capable of belief and the weight that would likely be assigned to it; and,
- the strength, on the facts of this case, of the justification defence under s. 25(3) of the *Criminal Code*, which is available to all police officers who use lethal force in the course of their duties.

Under CJB policy, Crown Counsel have an obligation, throughout the life of a prosecution file, to ensure that CJB's charge assessment standard continues to be met. Based on the file review that has now been conducted in this case, CJB has determined that the available evidence no longer satisfies the charge approval standard for a prosecution of Cst. MacWilliams for second degree murder, or for any other criminal offence.

Accordingly, CJB entered a stay of proceedings today on the charge of second degree murder. Consequently, Cst. MacWilliams is no longer facing criminal charges arising out of the shooting death of Mr. Bayrami.

CJB made its decision to enter a stay of proceedings independent of the IIO, the family of the deceased, Cst. MacWilliams, and the government. This decision was exclusively driven by

evidentiary and legal considerations arising out of the witness interviews, further information and material received from the IIO, the file review, and the analytical work conducted by Crown Counsel since the charge was first approved. The prosecutors working on this file have no connection to or working relationship with Cst. MacWilliams or the Delta Police Department.

The IIO, the family of Mr. Bayrami, and legal counsel for Cst. MacWilliams have all been advised of CJB's decision.

In her role as Chief Law Officer for the Crown, the Attorney General has been briefed on CJB's decision to enter a stay of proceedings, and has indicated to the Assistant Deputy Attorney General for CJB that she will not be providing a direction to continue with the prosecution under s. 5 of the *Crown Counsel Act*.

CJB recognizes that this case has attracted considerable public attention since the charge of second degree murder was approved in October 2014. CJB also appreciates the importance of transparency in maintaining public confidence in the administration of justice, especially in relation to the use of lethal force by police officers. As noted by the Supreme Court of Canada: "No one is above the law. When a member of the community is killed or seriously injured by a police officer, it is not only appropriate to ask whether the police were acting lawfully, it is essential".¹

The purpose of this Clear Statement is to summarize the reasons for the stay of proceedings, so that the public has an opportunity to understand the rationale underlying the CJB's decision.

Factual Background for the Charge Assessment

The evidence contained in the RTCC received from the IIO in 2014 established the following factual matrix for Crown Counsel's original charge assessment. ***This is a summary of the evidence only. Not every detail is included.***

At approximately 5:45 a.m. on November 8, 2012, Mehrdad Bayrami accosted his former domestic partner outside her place of work in New Westminster. He possessed a loaded handgun. He brandished the handgun and fired it several times in the course of assaulting and confining the victim. At the time of this incident, Mr. Bayrami was bound by a court order directing that he have no contact with the victim.

Mr. Bayrami's confinement of his former partner lasted for more than an hour, until police managed to escort her to safety at about 6:56 a.m. Mr. Bayrami did not go after the victim or attempt to interfere with the police escort. For much of the time that he was confining her, Mr. Bayrami held the handgun to his own head.

Once the victim was escorted to safety, Mr. Bayrami engaged in an armed standoff with police. For the next three and a half hours, until approximately 10:35 a.m., the members of the heavily armed and fully-equipped Municipal Integrated Emergency Response Team (MIERT), along with a number of other police officers, surrounded Mr. Bayrami. Cst. Jordan MacWilliams was a member of MIERT. Most of the standoff occurred in full daylight hours. Mr. Bayrami was clearly visible to the police throughout.

For most of this time, Mr. Bayrami sat or knelt in one place, with members of MIERT and the other police officers surrounding him. Police attempts to communicate with him, though initially somewhat successful, eventually broke down. Mr. Bayrami was withdrawn and relatively passive; talking to himself; variously pointing the gun at his head or chest; and occasionally mouthing words or making gestures to the police.

¹ *Wood v. Schaeffer*, [2013] 3 S.C.R 1053, para.3.

There were at least 27 police officers at the scene. The MIERT members were divided into four teams positioned around Mr. Bayrami. Many of them, including Cst. MacWilliams and his team, took cover behind armored vehicles. The MIERT members were ordered to maintain and enforce a perimeter of 20 metres around the spot where Mr. Bayrami was seated for most of the standoff. All of the officers were receiving ongoing radio transmissions and updates from commanders and fellow officers who had various vantage points of Mr. Bayrami and the scene. At about 10:00 a.m., Mr. Bayrami ejected the magazine from his handgun and communicated to police that there was just one round left in the chamber.

At approximately 10:36 a.m., Mr. Bayrami got up from his seated position and began moving around on foot. At first he was walking in circles, still holding the handgun and generally pointing it at his own head or chest. At times the movement of his arm, and the hand in which he held the gun, would have caused the barrel of the handgun to point in a direction away from himself and may have pointed in the direction of one or more of the police officers surrounding him.

Over the course of the standoff, police repeatedly instructed Mr. Bayrami to put down his weapon and surrender. They repeatedly told him that his actions were concerning them and they tried to encourage him to end the standoff peacefully. He either ignored or did not acknowledge their commands.

Cst. MacWilliams was assigned to one of the four MIERT teams and was designated to act in the role of "lethal overwatch". This meant he was to discharge his firearm at Mr. Bayrami if he believed on reasonable grounds that it was necessary to do so in order to preserve himself, or another team member, from death or grievous bodily harm.

The shooting of Mr. Bayrami was captured on video. At 10:40 a.m., he can be seen standing in one spot, with the handgun pointed skyward or, at times, approaching his own head. He is looking at and mouthing words generally in the direction of Cst. MacWilliams' team. Mr. Bayrami takes several steps forward, roughly in the direction of Cst. MacWilliams' team. The handgun is pointing skyward. Mr. Bayrami stops. ARWEN rounds (non-lethal bullets) are fired at Mr. Bayrami. He jerks his right shoulder back and takes two or three small steps backward. He then begins taking larger steps backward when a "flash bang" explosive device is detonated. This explosion is meant to distract. It apparently catches Mr. Bayrami's attention and he continues to take further steps backward. His right forearm and hand (which holds the gun) drops to an approximate 45 degree upward angle, then to a roughly horizontal position approximately parallel to the ground, and then directly downward so that the gun is pointing to the ground. Just as the arc of his arm reaches a full downward position and his gun is pointing directly to the ground, two "pops" can be heard in quick succession. When he is shot, Mr. Bayrami is still moving backward and his right hand is down at his side. He is seen to jerk suddenly to his right; he grasps the right side of his abdomen with his left hand, spins around and drops his gun as he falls to the ground.

While he is lying on the ground, Mr. Bayrami picks up the handgun and points it at his own head. He drops it again and in the next few minutes, a police service dog appears. It grabs Mr. Bayrami by the right calf and spins him around. Eventually, several MIERT members come into view. They handcuff Mr. Bayrami and provide emergency medical assistance.

The evidence revealed that Cst. MacWilliams fired two rifle rounds at Mr. Bayrami, one of which apparently missed. The other struck him in the abdomen. Mr. Bayrami was transported directly to hospital from the scene. He ultimately died as a result of the gunshot wound.

Cst. MacWilliams provided a statement to CJB through his legal counsel, confirming that he shot Mr. Bayrami. In his statement, he said he believed he was entitled to use lethal force

against Mr. Bayrami because “if he did not stop [Mr. Bayrami] immediately, the suspect would shoot Cst. MacWilliams or one of his team members”.

Legal Context for the Charge Assessment

Under s. 229 of the *Criminal Code*, a person is subject to prosecution for murder if he causes the death of a human being and either intends to cause death, or intends to cause bodily harm that he knows is likely to cause death, and is reckless as to whether death ensues.

A police officer who intentionally uses lethal force in the course of his duties cannot be convicted of murder, or any other offence arising out of the death, if he believes on reasonable grounds that lethal force was necessary to preserve himself or someone under his protection from death or grievous bodily harm (s. 25(3) of the *Criminal Code*).

Based on the evidence available at the time of the original charge assessment, Crown Counsel was satisfied the evidence would establish that Cst. MacWilliams fired the shot that caused Mr. Bayrami’s death and that he intended to cause Mr. Bayrami’s death or, at least, that Cst. MacWilliams intended to cause Mr. Bayrami bodily harm that he knew was likely to cause death. However, standing alone, this would not be enough to sustain a conviction for second degree murder.

Cst. MacWilliams asserted a belief that shooting Mr. Bayrami was necessary for his self-preservation, or for the preservation of his fellow officers. It is reasonable to assume he would make this same assertion at a trial. The law is clear that even a mistaken belief in the need to use lethal force offers a complete defence to a charge of murder if it was objectively reasonable in the circumstances of the case. As such, to sustain a conviction for second degree murder, the Crown would have to prove that Cst. MacWilliams’ stated belief was not reasonable.

In deciding whether the Crown met this burden, a judge or jury would be legally obliged to permit Cst. MacWilliams a certain amount of latitude in forming the belief that he did. Although a decision to use lethal force is assessed against a reasonable person standard under s. 25(3) of the *Criminal Code*, it is a standard that takes into account the particular circumstances faced by the officer, human frailty, and the fact that police officers must often react in difficult and exigent circumstances.² As affirmed by the Supreme Court of Canada, police officers cannot be expected to “measure the force used with exactitude”.³ Any reasonable doubt on this point would be factually and legally resolved in favour of the accused and require an acquittal.

Analysis by Crown Counsel

Based on the evidence available at the time of charge assessment, Crown Counsel was satisfied the Crown could prove that Cst. MacWilliams’ stated belief in the necessity of lethal force was not based on reasonable grounds. Relevant factors that Crown Counsel considered in the analysis included (but were not limited to), the following:

- after the victim of Mr. Bayrami’s initial violence was escorted to safety, there followed a prolonged period of more than three and a half hours, during which time Mr. Bayrami was almost completely passive;
- he made no threatening statements or gestures to police or anyone else during this period and appeared to be de-escalating in his intended use of violence;
- it appeared that if he intended to harm anyone, it was only himself;

² *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Assante-Mensah*, 2003 SCC 38.

³ *R. v. Nasogaluak*, 2010 SCC 6; *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (BCCA).

- Mr. Bayrami ejected the magazine from his gun, apparently leaving only one round of ammunition in it, which he indicated he would use on himself;
- the video evidence clearly showed that:
 - after getting up at about 10:36 a.m., Mr. Bayrami did start to move toward Cst. MacWilliams' team; however, he stopped moving forward before the police used any force against him;
 - as he approached Cst. MacWilliams' team, his handgun was pointing upwards into the sky;
 - when officers fired the ARWEN and set off the "flash bang" device, Mr. Bayrami started moving backwards, away from Cst. MacWilliams' team;
 - as he moved backwards, his right arm moved from an upward to a downward position, apparently unconsciously;
 - he was still moving backwards when Cst. MacWilliams shot him; and,
 - his gun was pointing down at the ground at the moment the lethal shot apparently struck him;
- in their statements to the IIO, some officers described the incident in a way that seemed inconsistent with what appeared on the video. For example:
 - some said that Mr. Bayrami "**raised**" the gun immediately prior to being shot and intentionally pointed it at the police; and,
 - others said he was still moving forward and toward Cst. MacWilliams' team when he was shot;
- in his own statement, provided to Crown Counsel by his lawyer, Cst. MacWilliams also provided a version that appeared inconsistent with the video evidence. For example:
 - he said Mr. Bayrami "was **holding the gun down at his side** and suddenly began walking towards Cst. MacWilliams' team";
 - he said the ARWEN and the flash bang had been "**ineffective** in stopping the suspect"; and,
 - he said he "observed the suspect **raise** his firearm to his hip", and then point it at the police.

Based on the evidence originally available to the CJB, considered in its entirety, Crown Counsel were not satisfied that Cst. MacWilliams' stated belief in the need for lethal force was based on reasonable grounds.

This was a protracted standoff within the context of a controlled perimeter; it unfolded in broad daylight; and there were more than 27 officers on scene. They had protective equipment and non-lethal force options available to them. In fact, non-lethal measures were taken immediately prior to the use of lethal force by Cst. MacWilliams and, based on the video evidence, these measures appeared to cause Mr. Bayrami to retreat back into the established perimeter. Based on the video evidence, Mr. Bayrami was moving backwards with the handgun pointing to the ground when he was shot.

It was within this evidentiary context that the charge of second degree murder was originally approved.

Since then, the prosecutors assigned to this case have conducted more than 35 witness interviews, including extensive interviews with many of the police officers on scene at the time of the shooting. CJB has also received further disclosure from the IIO that is directly relevant to the prosecution. Crown Counsel conducted the interviews in preparation for trial, and to ensure they had a fully informed and complete understanding of the dynamics of the situation as it

unfolded. Of particular significance to the analysis was the nature and degree of danger that Mr. Bayrami actually posed to the officers on scene, and their reasonable perceptions of that danger. Under Canadian criminal law, the benefit of any doubt about whether Cst. MacWilliams reasonably believed lethal force was necessary to preserve himself, or someone else from death or grievous bodily harm, would necessarily weigh in his favour at trial and require an acquittal.

CJB now has additional evidence and information available in relation to:

- the specifics of how the emergency response operation involving Mr. Bayrami was organized and directed, and how it unfolded;
- the observations, thought processes, and responses of most of the officers directly involved in the operation;
- the officers' perceptions of the level of danger presented by Mr. Bayrami immediately before he was shot, and their ability to react to that danger;
- the training and experience that Cst. MacWilliams and his fellow officers brought to the incident;
- some of the dynamics that may reasonably affect and inform a police officer's assessment of the need to use lethal force in a crisis situation; and,
- the real-life limitations on a police officer's ability to perceive, assess, and react to violent or potentially violent actions from a suspect who is armed with a loaded handgun.

This fuller factual context, and the weight that the related evidence would likely be assigned at trial, led Crown Counsel to re-evaluate the totality of the evidence, as well as the legal and factual significance of some of the premises underlying the original charge assessment. The following considerations, among others, came into play:

- From the police perspective, after more than three hours of relative passivity, Mr. Bayrami's actions of standing up and moving toward Cst. MacWilliams' team with the loaded gun in his hand, indicated a very significant change in his demeanor. It was the opposite of de-escalation and it significantly elevated the risk to all, precipitating the police use of non-lethal force against him.
- Their resort to the non-lethal ARWEN and "flash bang" was a very significant escalation of the situation that increased the unpredictability and danger of the standoff.
- Several officers strongly believed that the use of non-lethal force had been ineffective to eliminate the risk Mr. Bayrami posed. The officers expected Mr. Bayrami to surrender, or, at least to demonstrate a very significant reaction of pain or surprise. As is apparent from the video, however, Mr. Bayrami's only reaction was to flinch slightly and start moving backwards. In the significant stress of the moment, several officers did not even realize he had started moving backwards and away from Cst. MacWilliams' team. In fact, a number of them believed he was still moving forward when he was shot.
- Although he was moving backwards, Mr. Bayrami did not surrender and he was still holding a loaded handgun. Even a retreating suspect armed with a loaded firearm could fire it, intentionally or accidentally, at the police while retreating. There is no difference in risk, from the perspective of police, from a gun that is fired intentionally and one that is fired accidentally.
- A retreating suspect who wanted to avoid apprehension or provoke the police to shoot him could reasonably be expected to point his gun or shoot at police while retreating.
- Despite having protective equipment and an armored vehicle for cover, the officers who fired the ARWEN and set off the "flash bang" had to step out from behind cover to do so.

Although their standard emergency response equipment included some body armor, an anti-ballistic breast plate and a helmet, their faces, arms, and possibly their legs and necks would still be exposed to possible gun fire from Mr. Bayrami. As “lethal overwatch” for the other officers, in order to aim his rifle at Mr. Bayrami, Cst. MacWilliams would have had to expose his own face and possibly his neck to possible gunfire from Mr Bayrami.

- Irrespective of whether Mr. Bayrami actually intended to point his handgun at the police, several officers said they saw the muzzle of his gun pointing in their direction and a few of them perceived that he was intentionally pointing the gun at them. Still images rendered from the video evidence and obtained by Crown Counsel after the original charge assessment provide support for this impression, which is also consistent with the version of events recounted by Cst. MacWilliams.
- Until they intend to shoot, police officers are trained to keep their finger on the trigger guard or the frame of their firearm; not the trigger. Although only Cst. MacWilliams chose to use lethal force, other officers on scene advised Crown Counsel in their interviews that, in the minutes before Cst. MacWilliams fired, they moved their own fingers on to the triggers of their own firearms. Based on Mr. Bayrami’s movements, the fact that he had his finger on the trigger of his gun, and the movements of the handgun in his hand, these officers told Crown Counsel it was a matter of mere happenstance that Cst. MacWilliams shot Mr. Bayrami, rather than one of them.
- It takes time for a human being to perceive, process, and react to a violent threat. This inherent time delay could explain why Cst. MacWilliams apparently fired only after Mr. Bayrami’s gun hand had moved downwards from a horizontal to a vertical position.

The evidence considered by Crown Counsel at charge assessment in October 2014, and the further information and evidence obtained since then, shows that a number of the police officers who were in attendance have recollections and perceptions of what occurred in the time leading up to the shooting of Mr. Bayrami that are different from each other. It is also true that, for some of them, their recollections and perceptions appear to be contrary to the unfolding of events as revealed in the video evidence. Moreover, when conducting their interviews, Crown Counsel experienced a wide range of reactions to the fact of the prosecution, including an undercurrent or an outright assertion of bias in favour of Cst. MacWilliams by a few of the officers.

However, despite the existence of factual inconsistencies, and the indication of bias from a few of the police witnesses, Crown Counsel are satisfied that, on the whole, the evidence of the officers on scene is reasonably capable of belief.

CJB appreciates that the perceptions and/or assessments of other officers at the scene are not determinative of whether the belief held by Cst. MacWilliams, at law, was objectively reasonable.⁴ However, this evidence would be admissible at trial and, from Crown Counsel’s experience and understanding of the criminal trial process, in conjunction with all of the other available evidence, it would likely provide the basis for reasonable doubt in relation to the defence available to Cst. MacWilliams under s. 25(3) of the *Criminal Code*.

As noted, although a decision to use lethal force is assessed against a standard of reasonableness, it is a standard that takes into account the particular circumstances faced by an officer, human frailty, and the fact that police officers must often react in difficult and exigent circumstances.⁵ As affirmed by the Supreme Court of Canada, police officers cannot be expected to “measure the force used with exactitude”.⁶ Canadian law on the use of

⁴ *R. v. Pompeo*, 2014 BCCA 317.

⁵ *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Assante-Mensah*, 2003 SCC 38.

⁶ *R. v. Nasogaluak*, 2010 SCC 6; *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (BCCA).

disproportionate, or excessive, force by police is clear: “Just as it is wrong to engage in *ex-post facto* justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions”.⁷

Conclusion

In light of the additional evidence and information that has been received and reviewed by Crown Counsel since this charge was originally approved in October 2014, CJB has determined that the available evidence, considered in its entirety, no longer supports a viable prosecution of Cst. MacWilliams for second degree murder, or any other offence.

The Crown is satisfied that it could prove Cst. MacWilliams used lethal force against Mr. Bayrami in the course of his duties, and that this force caused Mr. Bayrami’s death. However, Cst. MacWilliams has stated that he chose to use lethal force because “if he did not stop [Mr. Bayrami] immediately, the suspect would shoot Cst. MacWilliams or one of his team members”. This stated belief puts s. 25(3) of the *Criminal Code* front and centre in the prosecution, from both an evidentiary and legal standpoint. To sustain a conviction for second degree murder, the Crown would have to prove, beyond a reasonable doubt, that Cst. MacWilliams’ belief, even if mistakenly held, was not objectively reasonable in all of the circumstances.

After a comprehensive file review, taking into account the original evidence contained in the RTCC; the additional or refined evidence obtained through the witness interviews; further information and material received from the IIO and other sources; and the analytical work that has been conducted by Crown Counsel since charge assessment, CJB has concluded that its charge assessment standard for a criminal prosecution is no longer met.

Accordingly, a stay of proceedings has been entered on the charge of second degree murder.

⁷ *R. v. Golub*, [1997] O.J. No. 3097 (CA).