UNIVERSITY OF CALGARY

FACULTY OF LAW

2500 University Drive NW
Calgary, AB, Canada T2N 1N4
law.ucalgary.ca

June 14, 2017

The Honourable Kathleen Ganley
Minister of Justice and Solicitor General
Alberta Justice and Solicitor General
9th floor, John E. Brownlee Building
10365 - 97 Street
Edmonton, AB T5J 3W

Dear Minister Ganley,

Re: Investigation by Roberta Campbell of the Incarceration of the Blanchard complainant

I am a Professor of Law at the University of Calgary specializing in lawyers' ethics and professional regulation, and am President of both the Canadian Association for Legal Ethics and the International Association of Legal Ethics. I have had the opportunity to review documents related to the incarceration of the complainant during the preliminary inquiry into the matter of *R. v. Blanchard* 2016 ABQB 706.

Based on that review, I offer the following submissions and observations in relation to the conduct of Crown counsel, Ms. Patricia Innes, the duty counsel, Ms. Diana Goldie, and the judge, Judge Raymond Bodnarek, which may be of assistance to Ms. Campbell in her Investigation, depending on the nature of her mandate. I am also providing these submissions and observations to Chief Judge Terry Matchett of the Alberta Provincial Court, and to the Law Society of Alberta, as I believe them to be relevant to their assessment of whether the Judge or the lawyers in this case engaged in misconduct.

Basis for Submissions

I have neither been requested nor retained by any party to make these submissions.

The submissions are based on my review of the following materials:

1. The transcript of the Preliminary Inquiry;
2. The trial judgment of Mr. Justice Eric F. Macklin in *R. v. Blanchard* 2016 ABQB 706
3. Excerpts from the transcript of the trial and related proceedings, including the testimony of Detective Marci Koshowski, Detective Erich Reule and Ms. Rayann Fleming.
4. Submissions by counsel for Mr. Blanchard dated November 14, 2016 and related appendices summarizing evidence from the trial, including the evidence of Constable Robert Connors.
5. Submissions made to the Minister by the Association of Crown Counsel dated June 6, 2017

My qualifications for offering these submissions are that I am the author of *Understanding Lawyers' Ethics in Canada, 2d* (Markham: LexisNexis Canada, 2016), co-editor and co-author of *Lawyers' Ethics and Professional Regulation 3d Ed.* (Markham: LexisNexis Canada, 2016), co-editor and co-author of *In Search of the Ethical*

Lawyer (Vancouver: UBC Press, 2016), and the author of over 31 academic articles and book chapters related to lawyers' ethics, as well as significant public commentary. I have sat on the professional responsibility committees of both the Law Society of Alberta and the Canadian Bar Association. I am currently conducting research on the professional obligations of prosecutors, and in the course of doing so have reviewed over 160 cases addressing alleged misconduct by prosecutors, as well as numerous academic articles and commentary on that topic.

Crown Counsel

Legal obligations

The overarching obligation of a Crown counsel in a criminal trial is to present the matter fairly and dispassionately. As stated by Alberta's Code of Conduct for Crown Prosecutors' governing principles, "While Crown prosecutors are fully entitled to be strong advocates within the adversarial process, the words and actions of each Crown prosecutor must be guided by the values of accuracy, fairness and dispassion." (Alberta Code of Conduct for Crown Prosecutors ("Alberta Crown Code"), November 28, 2006. Online at: <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/code_of_conduct.aspx>. See also, *Boucher v. The Queen* [1955] SCR 16 at pp. 23-24; Law Society of Alberta Code of Conduct ("LSA Code") Rule 5.1-4 and Commentary).

Crown counsel must also comply with the specific obligations imposed on counsel by Law Society Codes of Conduct and relevant case law (*Krieger v. Law Society (Alberta)* 2002 SCC 65). Rule 5 of the Alberta Crown Code expressly directs Crown prosecutors to "Comply with the applicable rules of ethics established by the Law Society of Alberta."

Those specific obligations include the requirement that a lawyer must never provide evidence on a contested question of fact. A lawyer must not be effectively an unsworn witness. Lawyers who must provide testimony in a case may not continue to act as counsel in that case (see, e.g., *Rice v. Smith* 2013 ONSC 1200; *Understanding Lawyers' Ethics in Canada, 2d Ed.* §6.222-§6.226). As set out in the LSA Code:

> 5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the Rules of Court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.
>
> Commentary
>
> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

The Alberta Crown Code of Conduct also sets out as a governing principle that "Crown prosecutors … must not present as fact that which is unsupported by the evidence." Relatedly, Commentary 5 to Rule 5.1-1 of the LSA Code states that "A lawyer should refrain from expressing the lawyer's personal opinions on the facts in evidence of a client's case to a court or tribunal."

Lawyers have additional duties to ensure an accurate factual record in the event that a party is not present or represented in court. Commentary 8 to Rule 5.1-1 provides that:

> When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Crown prosecutors have further specific obligations in relation to ensuring the accuracy of the record at trial, although these obligations are set out in case law related to the Crown's duties to the accused. Case law directs prosecutors not to "curate" the evidence presented at trial (*R v Hillis* 2016 ONSC 451) and to advise the court of evidence before it "which is relevant to issues the court is to decide" (*R. v. MacInnis* [2007] OJ No. 2930 at para. 10; *R v Jackson* 2002 ABPC 100 at para. 66; *R v LA* 2005 ONCJ 546 at para. 35).

Lawyers must never knowingly make false statements to a court or tribunal. In addition, when a lawyer becomes aware that inaccurate information has been provided to the court or tribunal the lawyer must, subject to confidentiality, correct that inaccuracy. The Alberta Crown Code of Conduct sets out as a governing principle that "Crown prosecutors must be accurate when summarizing or referring to evidence or testimony". Rule 10 of the Alberta Crown Code of Conduct provides that a Crown prosecutor must:

> Never knowingly make a false or misleading statement of material fact or law to a court, or offer evidence that is known to be incorrect. If this somehow occurs, [a prosecutor must] take all necessary steps to correct it as soon as possible after the error has been discovered…

Similarly, Rules 5.1-2 and 5.1-5(b) of the LSA Code provide:

> Rule 5.1-2
> When acting as an advocate a lawyer must not…
>
> > (g) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
> > (i) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

> Rule 5.1-5(b):
> Upon becoming aware that a tribunal is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must, subject to Rule 3.3 (Confidentiality), immediately correct the misapprehension.
>
> Commentary 4: A lawyer has a duty to correct a misapprehension arising from an honest mistake on the part of counsel or from perjury by the lawyer's client or witness. It may be a sufficient discharge of this duty to merely advise the tribunal not to rely on the impugned information.

Lawyers also have obligations to witnesses in proceedings, including the obligation not to "needlessly inconvenience" a witness (Rule 5.1-2(u)) and the duty not to "abuse, hector or harass" a witness (although that duty is generally understood to apply to a lawyer's cross-examination of the witness).

Finally, lawyers have duties in relation to ensuring the accuracy and sufficiency of the law before the court. Specifically, lawyers must not deliberately fail to provide the court with "relevant adverse authority" that is directly on point to a matter at issue in a case (LSA Code Rule 5.1-2(n)). The Commentary to the LSA Code clarifies "With respect to the lawyer's obligation to discover the relevant law, the duty does not extend to searching out unreported cases. The lawyer does have an obligation to bring to the court's attention cases of which the lawyer has knowledge and, as well, the lawyer cannot discharge this duty by not bothering to determine whether there is a relevant authority." (See also, *General Motors Acceptance Corp v Isaac Estate* (1992) 7 Alta LR (3d) 230 (QB per Master Funduk)).

Background to Conduct of Concern

The complainant in the Blanchard case, "Angela Cardinal", began her testimony in the preliminary inquiry on June 5, 2015. Her testimony on that morning begins at page 357 of the transcript, and concludes at page 383, when she asks for a break. During that testimony Ms. Cardinal expressed her reluctance to testify (e.g., Transcript p. 360, ln 10 "I just want to go home), her anger at the accused (e.g., Transcript p. 358, ln. 13 "He deserves to fry in the chair") and also demonstrated her fatigue and incoherence. Her issues became particularly acute when testifying to the assault (Transcript p. 368) and when, at that point, the trial judge mistakenly referred to her as "Ms. Blanchard" – i.e., the name of the accused (See Transcript p. 369, ln. 19). She also expressed anger when defence counsel objected to questions (see e.g. Transcript p. 372, ln. 28, p. 373, ln. 33 and 40). Ms. Cardinal answered a range of substantive questions related to where she was born (Transcript pp. 358-359), the events prior to Blanchard's assault (Transcript pp. 360-364), her interactions with Blanchard prior to the assault (pp. 365-367), how she got into his building (Transcript p. 367), the assault (Transcript pp. 367-368, 373-378, 379-381, 382-383), and the nature of Blanchard's apartment (Transcript p. 379).

After the break, Ms. Innes advised the Court that "[Ms. Cardinal] is curled up on one of the benches outside, literally unwilling to interact" and asked for court to be adjourned until 2pm so that the Crown could consider whether "to introduce her statement made to the police by way of *KGB*" (Transcript p. 384).

When the Court returned at 2pm, Ms. Innes requested that the judge issue an order pursuant to s. 545(1)(b) of the *Criminal Code* which provides:

> 545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence…
>
> (b) having been sworn, refuses to answer the questions that are put to him….
>
> without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period. (For reference to this provision as the basis for the order, see Transcript p. 395)

Conduct of concern

The conduct by the Crown counsel that raises concerns in this case relates primarily to the application for the order pursuant to s. 545(1)(b).

Ms. Innes' main submissions in support of the order were as follows:

> Sir, since we adjourned and of course the Court was privy to the complainant making the attempt to testify that she did make. It was not helpful I don't think being in the state that she's in for her to attempt to testify. She was -- just to give you a little bit of background. A subpoena was issued for her, I'm not exactly sure of the date, but it was in April. It took until approximately a week ago when she wasn't served to have the Downtown police resources looking out for her. Luckily somebody located her in the downtown area on Wednesday morning and brought her into the police station in an attempt to have her sit down and watch her, in this case the videotape CD of her interview as is normal in preparation for witnesses. She was not willing to do that. She was very agitated and upset about the idea of doing that to the point where the attempt to have her do that did not continue.
>
> Arrangements were made for her to have a hotel room. Arrangements were also made to have a worker from the Bissell Centre who's been present here today who works with inner city persons who are required to be witnesses in court, to meet up with her and basically provide support. So she spent one night in a hotel and then she was put up a second night, however, she departed from the hotel without -- in the middle of the night or somewhere along that line. Police had to look frantically for her overnight to try and find her and located her at an address out in south Edmonton which is apparently her mother's address, however, mother indicated that she hadn't seen her for a year so that was just more or less lucky that they were able to locate her there and bought her breakfast at McDonalds. Brought her here and she essentially (INDISCERNIBLE) that's been around outside can attest to the fact that she curled up in a corner of the witness room

out there or the ante room and just laid on the floor and closed her eyes and is non-communicative."

Efforts were made to get her to understand the importance of standing up and becoming vocal and giving her evidence. And the best shot that we took at that was when she came in here this morning and was essentially unable to participate in the process in a way that we need for a witness to participate. In speaking with the person from the Bissell Rayann (phonetic), I don't know her last name I'm sorry, she's outside and certainly can be asked questions about this, but she indicated that in her experience the presentation of [Ms. Cardinal] is consistent with somebody who's coming down off of methamphetamine which is why potentially why she's so incredibly unable to be alert and wake up. It's a possibility and obviously she's not diagnosed and it could be other things. Additionally, she made reference here when she was on the witness stand about wanting to commit suicide. She also, according to the one detective who was one of the two detectives that was looking after her hotel and transportation to court this morning told them that some days back and I do not have a specific date that she hung herself in an alley and one of her friends saved her.

I think -- and oh, and the other thing we've done is we contacted through Rayann it occurred to me that perhaps somebody from the Native community like a medicine person or something could assist. So we asked Rayann if she knew someone. She got a hold of a lady named Lorette Goulay (phonetic) who is an Elder at the Ambrose House which is the downtown area. She has come over she's been here since we broke or shortly after that and she has attempted to communicate with the complainant and is not able to do so at this point meaningfully because again the complainant simply wishes to go to sleep. I don't like having to ask this, but I feel I have no option and that is I ask, Sir, that as this witness has presented in a fashion that is not consistent with being able to give her evidence and given the difficulty in getting her here in the first place and maintaining enough idea of where she's located to ensure she attends for court I'm asking that she be detained in custody and brought back to court the next day that we sit in an attempt to have her give her evidence. Now, my friend brought up the idea that she might want to speak with duty counsel. I have no problem with that of course. I'm not sure that anyone is going to be in a position to speak with her as she is not communicated with really anyone outside other than I think she took a couple of Tylenol a little bit ago. I can certainly have the worker come in Rayann. The lady from the Ambrose House the Elder who's here Ms. Goulay to speak to whether or not they think someone could communicate with her, but I haven't [sic] really run out of options, Sir, other than to suggest that.

I know witnesses [are] required to present themselves in a manner that they are fit to testify she has not done that. I don't know whether this is her own doing or some other thing is at play or it's a combination of factors, but if we turn her back after today to her own devices I can probably guarantee, short of having an officer essentially handcuff

> himself to her she won't be here unless the officers are lucky enough to find her again. It's in the public interest that she be here to testify. So these are the things that I'm putting before you, Sir, and certainly my friend may have some -- some additional comments. I'm also happy to get some of these people in to give you any further detail. Constable --or sorry, Detective Reule (phonetic) will also be here he's the officer who communicate[d] what she indicated about trying to hang herself or hanging herself….
>
> And we also have the overriding concern that she be here in a state to testify at some reasonable date in the future if that is ever going to occur. I think if this were just a -- like if we were just dealing with a person who was presenting with statements of intent -- intention to kill themselves and some of these other physical presentations that a form 10 might be the appropriate way to go, but I think with the additional factor that we are in a court of law, she's under subpoena. We had this history trying to locate her although I don't have the details of what efforts were made to locate her in the first place. I do know that as of Friday of last week two sergeants from Downtown Division had spread out a bulletin to all members to keep their eye out for this young lady and to try to bring her in to -- for the -- to serve her with the subpoena which was in their -- in their custody. (Transcript pp. 387-390)

Ms. Innes summarizes the Crown position that "It's a flight risk and also the fact that she has presented in a condition unsuitable for testifying and we don't know what the reason is. It may be totally out of her control or it may be something that she has some control over (INDISCERNIBLE) we don't know." (Transcript p. 391).

To this point in time, duty counsel for the complainant was not present, and neither was the complainant. Ms. Goldie joined the proceedings after an adjournment, commencing at page 392 of the Transcript. At that point in time Ms. Innes added to her submissions the position that "She [Ms. Cardinal] is not answering the questions that are put to her" (p. 394). Ms. Innes did not reiterate her earlier factual submissions, and nor were any witnesses provided to attest to those facts. Ms. Innes did not provide any case law or legal argument in relation to s. 545(1)(b). Notably, neither Judge Bodnarek nor Ms. Goldie requested that Ms. Innes provide any evidence or legal argument.

This approach to requesting the order raises several concerns in light of the legal obligations of the Crown counsel:

- Ms. Innes provided unsworn testimony as to the facts at issue. She offered to have a police officer testify, and the judge did not take her up on that offer; nonetheless, the "evidentiary" basis for the order was exclusively unsworn statements made by counsel. It is noted in this respect that this was not simply a question of advising the court about a witness's whereabouts, or a request for a brief adjournment, but was rather an attempt to establish the factual basis for an order to incarcerate the complainant: that is, an order implicating the complainant's liberty and right to fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*.

- Ms. Innes's statements in support of the order were made without counsel for the complainant or the complainant herself being present, despite the application of s. 7 of the *Charter*. The application of s. 7 was also not noted.
- Ms. Innes made a statement of fact or opinion when asserting that the complainant "is not answering the questions that are put to her". This may have related either to Ms. Cardinal's behaviour outside of court or to Ms. Cardinal's earlier testimony. If related to the testimony, the comment did not acknowledge the many substantive questions Ms. Cardinal had answered. This is significant given that Ms. Goldie had not been present during the morning's proceedings, such that she had no capacity to assess or challenge the accuracy of that characterization. It is acknowledged that Judge Bodnarek was able to assess the accuracy of that characterization. If related to Ms. Cardinal's behaviour outside of court, it was a personal opinion on evidence not presented to court and that Judge Bodnarek could not assess. Depending on how it is interpreted, this statement may be characterized as inaccurate, and in either case appears to be a statement of opinion.
- Ms. Innes did not provide any case law or legal argument in relation to s. 545(1)(b) and, in particular, as to whether Ms. Cardinal's conduct could properly be characterized as a refusal and as to whether Ms. Cardinal had a "reasonable excuse" for her difficulties in testifying (as required under subsection 2 of the provision).

More significant concerns arise from the fact that Ms. Innes's representations to the court were incorrect in material respects. Ms. Innes stated:

> So she spent one night in a hotel and then she was put up a second night, however, she departed from the hotel without -- in the middle of the night or somewhere along that line. **Police had to look frantically for her overnight to try and find her and located her at an address out in south Edmonton which is apparently her mother's address, however, mother indicated that she hadn't seen her for a year so that was just more or less lucky that they were able to locate her there** and bought her breakfast at McDonalds [emphasis added].

As attested to at trial by Constable Robert Connors, Detective Marcia Koshowski and Detective Erich Reule, Ms. Cardinal in fact returned to the hotel of her own volition on the second night, and the police officers took her to her mother's house and picked her up there the next morning. As summarized by the trial judge:

> The Complainant was taken to police headquarters on June 3, 2015. The police found a hotel room for her for the night of June 3, 2015. She was there when they attended the next morning. They found a hotel room for her for the night of June 4, 2015. Late that evening, the Complainant left the hotel and went to her mother's home. **She returned by bus to the hotel and the police were waiting for her.** She was not welcome to stay in the hotel as she wanted to have guests**. The police took her to her mother's home to sleep. They picked her up the next morning** [emphasis added] (*R v Blanchard* at para. 229)

Had the evidence to support the order been provided through witnesses it is likely, given the later testimony of the police officers at the trial, these inaccuracies would have been avoided.

The inaccuracies in the Crown's statements in support of the order became even more problematic when, on Monday June 8, 2015, Ms. Cardinal advised the Court that this information was incorrect:

> CARDINAL: Do I really have to be remanded? Can I just go to my mother's?
> COURT: The Crown has very serious concerns that we will not get you back in court if you go to your mother's.
> CARDINAL: I promise...And I've been obliging the whole way. Since this point of being incarcerated
> COURT: Well, except for the fact, and this is why the Crown's concerned, they put you up in a hotel for two nights and on the second night you left.
> CARDINAL: I didn't leave, I came right back
> COURT: Well, they found you somewhere else. That's the information I have.
> CARDINAL: Found me somewhere else? Where?
> COURT: I'm told your mother's house
> CARDINAL: No. I was back at the hotel.
> COURT: That's the information I have
> INNES: That's not what I understood But I – and I'm going by second hand information. So, I don't have the detective here right now. (Transcript pp. 572-573 *The name of the complainant has been changed*)

Ms. Cardinal was incarcerated for two more nights following this exchange. No further information was provided to the Court to correct the inaccurate information that had earlier been provided, even though its accuracy had now been called into question.

The final section of these submissions addresses the general issue of the obligations of lawyers and judges in a case like this, where the legal system seeks to deprive the victim of a crime of her liberty and dignity in order to pursue the public interest in a criminal conviction. It should be noted here, however, that Ms. Cardinal expressly stated her desire to have her shackles removed, and Ms. Innes does not appear to acknowledge Ms. Cardinal's statement or respond to it:

> CARDINAL: Just want to get the heck out of these shackles. That's it.
> INNES: Okay. All right. Now, remember I can see you; okay? You can't see me but I can see you. That's your finger, right?
> COURT: All right. Let's go.
> INNES: Okay. So we need to get back to business here.
> CARDINAL: All right. (Transcript p. 588, *names of speakers added*)

Duty Counsel

Legal obligations

Any comments about the conduct of the duty counsel must be made in the context of the extraordinarily difficult position in which she was placed. She was not present during Ms. Cardinal's testimony on the first morning of the hearing, and nor was she present during the Crown's main submissions in support of the

order. At the time she first met Ms. Cardinal, Ms. Cardinal was, based on the Crown's statement, in considerable distress. Ms. Goldie's conduct has to be assessed in light of the fact that the circumstances were not conducive to effective representation.

Having said that, when lawyers agree to represent a client, even on a limited basis, they owe that client a duty of competence (LSA Code Rule 3.1-2, Commentary 8). They have an obligation to communicate effectively with their client, taking into account the circumstances, and to obtain instructions from the client (LSA Code Rule 3.2-1, Commentary 3; Rule 3.2-4). When a client's ability to make decisions is impaired, the lawyer has an obligation to maintain as normal a relationship with the client as possible (LSA Code Rule 3.2-15). When acting as an advocate, a lawyer must represent the client "resolutely" and

> has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done (LSA Code Rule 5.2-1, Commentary 1. See also: *R. v. Neil* 2002 SCC 70 at para. 19; *Canadian National Railway Co. v. McKercher LLP* 2013 SCC 39 at para. 43; *Understanding Lawyers' Ethics in Canada, 2d Ed.* §4.1-§4.20)

Representation provided

In representing Ms. Cardinal, Ms. Goldie made the following submissions at the time the order was sought and granted:

> What I can say, Sir, I want to make sure that [Ms. Cardinal] understands the nature of the Crown's application. And the Crown's application, as I understand it, is that she be remanded into custody until Monday I believe… so that she would have an opportunity to rest up and perhaps if it applies, sober up, and I say, if it applies… such that she would be better able to give her evidence… What I can tell you is [Ms. Cardinal] has been able to tell me that she recalls giving her statement to the police. She recalls being very careful to be accurate in that, and that she also has indicated that she's not quite feeling -- well, she's exhausted, I can say that. And she personally is worried that she is not able right this minute to remembering things accurately although she was able to tell me she certainly knows the overall nature of the charges. She is very clear about -- she's not recanting let me put it that way, Sir (Transcript pp. 392-393)…
>
> If I could ask that (INDISCERNIBLE) one step further that the Court's firmly suggest that she be placed a (INDISCERNIBLE) a medical unit (Transcript pp. 395-396)

On Monday June 8, 2015 Ms. Goldie made the following additional representations in response to the Crown taking the position "that [Ms. Cardinal] should remain in custody until she has finished testifying before the Court" (Transcript p. 428):

> Thank you Sir. I can advise that first of all I have not spoken to the young lady yet today. But, I have spoken with the security staff and my understanding is that inadvertently perhaps there was contact between the individuals and Ms. [Cardinal] is somewhat agitated. Which, probably reinforces my friend's suggestion that she remain in custody until the Court has concluded her involvement shall we say.
>
> The suggestion is that first my friend had set up a computer and things in the ante room. That is complicated and probably impossible for security reasons as she is in custody and it would require the presence of a sheriff. Which would tie up a sheriff for a while. My understanding is the video is about 3 hours long. The suggestion is that the representative from, I think it's the Bissell….From the Bissell with victim services, attend down in cells in the lawyer's interview room. And I understand the sergeant is approved that that lay person so to speak could be present. And that the video be looked at. Now, obviously I can tell you that it's 3 hours long. I have no idea whether she will in fact consent to watch it or all of it but, that's your outside parameter.
>
> If all goes well from a Crown's perspective then my friend would seek to call her and prior to that wishes that she be in civilian garb, as she's presently in remand clothes. That has been - that can be facilitated if we get to that point. And then, my understanding is of course that there will be direct and cross and redirect and so on and perhaps even the necessity of playing the video I'm not sure how things will transpire. But, that is the possible way things will unfold. And, for that purpose, I believe, the Crown would have an application for an adjournment to allow that to happen…. (Transcript pp. 428-429)

At the end of that day, Ms. Goldie made the following further submissions following the Crown's statement that Ms. Cardinal is "not objecting to remaining in custody until she's finished giving her evidence. Is that fair or is that overstated?":

> That is overstating it -- … -- unfortunately. She wishes to have the entire proceeding concluded. She is in a far different -- she presents much, much differently. She -- last time she certainly was not recanting, but she's -- she wasn't very articulate and she is very articulate. She's clear and, no, she did not finish watching the video. My friend has referred to the first and the second. She went through the first (INDISCERNIBLE). She went a good way into the second and is becoming more emotional and I questioned her, she had absolutely no qualms about recalling everything. That was obviously (INDISCERNIBLE) work through things. So, at that point it seemed prudent to stop at that point. But we probably would not yet have finished watching the video (INDISCERNIBLE) the file (INDISCERNIBLE). (Transcript p. 502)

Ms. Goldie also urged the court not to delay Ms. Cardinal's testimony (Transcript p. 503; p. 516), and noted that the Crown did not have a "516.2 in the order" (Transcript p. 510).

Ms. Goldie made further submissions just prior to Ms. Cardinal's testimony:

> She wishes to understand, Sir. And I'd also mentioned that there'd be a 2:00 start and I explained the reason. And should you continue to determine that she should stay in custody perhaps some thought could be given to rescheduling that appointment in terms of -- and I have not discussed this with my friend, but we're talking about a -- a young lady who is in custody, has been in custody since Friday and she's having a great deal of difficulty understanding why. And I'm having a great deal of difficulty -- I'm -- she's asked me not to keep her in and I don't have that power, Sir.

She also made submissions in support of the Crown's application for Ms. Cardinal to testify behind a screen (Transcript p. 521-22). On the morning of June 9, 2015 Ms. Goldie asked to be relieved of attending at Court and was granted that relief.

Issues of concern

The primary question in relation to Ms. Goldie's representation of Ms. Cardinal is her decision not to object to Ms. Cardinal's incarceration either at the outset or later. She made submissions in relation to the conditions of the incarceration, but she did not object to either its evidentiary or legal foundations. Given the presumption that any reasonable person will not want to be incarcerated, and in light of Ms. Cardinal's later and clear objection to her incarceration, this approach does not seem to reflect the ordinary duties of counsel in an adversarial proceeding. While a judge may determine that the order was factually warranted and legally justified, it is the role of counsel for Ms. Cardinal to raise whatever evidentiary and legal grounds are available to resist that order being granted. Or, at the very least, to ensure that the Crown discharges its onus to establish those evidentiary and legal foundations.

For contrast and context, it is worth repeating the arguments made by the complainant herself in response to her incarceration. Shortly after the exchange with the Court in which she identified the factual issues with the order, the following exchange took place:

> CARDINAL: Can we make this testimony faster? Like somehow get me out of these shackles and get me free?
> COURT: We're
> INNES: We're going to do everything we can to accommodate you
> COURT: -- we're making --
> CARDINAL: Like today I was downstairs.
> COURT: Yes, I understand
> CARDINAL: All that time. I could have been like done by now
> COURT: Well, we're making much better progress.
> CARDINAL: I'm the victim and look at me. I'm in shackles. This is fantastic. This is great fricking – this is a great system.
> COURT: We're – we're making really good progress.
> CARDINAL: Not great progress. Look at me, I'm in shackles
> COURT: No, I understand.
> CARDINAL: Judge, you wear these. I'd like to see that
> COURT: Okay. All right. So, we're back tomorrow at 2 PM

INNES: Thank you, Sir.
COURT: Thank you.
CARDINAL: At two?
COURT: Two, yes.
CARDINAL: So, I am in the gaol cells incarcerated while you sit missy pritzy on your fricking stairs – on your chair, and I get to sit in the gaol cell cool?
INNES: Ms. [Cardinal]
COURT: We're – we're doing 2:00 because Mr. Blanchard needs some emergency dental work done and –
CARDINAL: Emergency?
COURT: -- and they can only do it on Tuesdays and he's – he's waited some time for this. So, he's going to be.
CARDINAL: Emergency?
COURT: -- he's going to be seen by a dentist tomorrow. So, that – that's why he --
CARDINAL: I need to be seen by a dentist. You don't see me crying, My Lord.
(Transcript pp. 573-575 *The name of the complainant has been changed*)

Judge Bodnarek

During the course of Ms. Cardinal's testimony, Judge Bodnarek issued the order approving her incarceration despite the absence of an evidentiary foundation for that order, or legal argument in relation to the application of s. 545(1)(b) of the *Criminal Code*. This was the case despite some of the evident legal issues in relation to the application of that provision in these circumstances, and the Crown's admission that she was relying on potentially faulty factual information about the actual risk of flight. He did not ensure that counsel for the complainant was present during the bulk of the representations made by Crown counsel in support of that order. He did not flag the issue with the factual basis for the order raised by Ms. Cardinal's statement that she had returned to the hotel, and did not ask for the Crown to provide additional information on that point. He knew that Ms. Cardinal was in shackles (Transcript p. 535, p. 587, p. 602, p. 775, p. 811) and he made no efforts to have those shackles removed, even though Ms. Cardinal was 5'0", 109 lbs, at no point had physically challenged or assaulted anyone, and was the victim in the proceeding not the accused. Judge Bodnarek also did not address the substance of Ms. Cardinal's arguments: that there was no basis for the order, that it was inappropriate in the circumstances, and that the Court was failing to take all reasonable steps to accommodate her.

All of these actions (or inactions) give rise to serious questions about the propriety of Judge Bodnarek's conduct in this matter. He was relying on the submissions of counsel, but that reliance does not explain his failure to ensure an evidentiary and legal basis for the order, to respond to Ms. Cardinal's submissions or to have her shackles removed.

Systemic Issues

These submissions have not addressed the underlying question of policy raised by this case: when, if ever, is it appropriate to incarcerate the victim of a crime in order to ensure her participation in the criminal justice system? I have no expertise to assess or remark on that point.

The nature of the order sought here is, however, relevant to the assessment of the conduct of the lawyers and judge in this case. This order subjugated Ms. Cardinal. It locked her up, shackled her and forced her into proximity with her assailant. It treated her understandable difficulties in testifying on the first day she had seen the man who brutally assaulted her as deficiencies, and even as deviance.

It may be that our legal system must do such things. But it must do them carefully, and with meticulous attention to and observation of the law's process and substance. It is one thing for lawyers fighting about which company owes money under a contract to be relaxed about the norms of adversarial advocacy, or to push the law's application. It is another thing entirely for lawyers to do so when a young woman's dignity, autonomy and liberty are at stake: "Lawyers should approach laws defending basic human dignity with fear and trembling." (David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) p. 241)

Regards,

Alice Woolley
Professor of Law
Faculty of Law, University of Calgary
(403) 220-4013; awoolley@ucalgary.ca

cc:
Philip Bryden, Deputy Minister of Justice and Deputy Solicitor General, Justice and Solicitor General Alberta
Chief Judge Terry Matchett, Provincial Court of Alberta
Don Thompson, Executive Director, Law Society of Alberta
Anthony Young, President, Law Society of Alberta