"Best Interests of the Child: A Promise Broken"

Why are women and girls Canada's fastest growing prison population; and, why should you care?

Defence for Children International – Canada
Grant Lowery Lecture – 26 April 2011

Thank you Radha, and all of you with DCI-Canada, for the privilege of being invited to deliver your twelfth annual Grant Lowery Lecture. It is both a profound honour and a tremendous responsibility. The work of Grant, as well as those who have spoken as your previous annual lectures have made many significant national and international contributions aimed at protecting the rights of children in Canada and internationally.

Before I begin my comments, I want to acknowledge and thank the traditional custodians of this land that we now know as Toronto. As a non-Indigenous woman who lives in Algonquin territory and has the privilege and responsibility of walking with many Indigenous women, men and young people, I consider it a duty to name the negative impact of colonization on all of us – for we see the consequences in very stark and profound ways when we enter our prisons and see firsthand the over-representation of Aboriginal men, boys, girls, and women. Indigenous women are more than one third (34%) of women serving federal sentences and more than 50%, 70%, 80%, even 100%, in some provincial and territorial jails and remand centres.

Our association has 25 members spread throughout Canada, providing services to marginalized, victimized, criminalized and institutionalized women, especially those who are imprisoned. We also undertake policy and law reform initiatives, most of which, these days, are aimed at trying to undo the outrageous injustices being perpetrated at breakneck pace in Ottawa. We also make every effort to address the interconnectedness of economic, social, legal and political decisions that contribute to women being the fastest growing prison population.

As we see the further erosion of the Canada's international reputation as human rights defenders of women, children, especially those most vulnerable because of multiple intersections of marginalization and discrimination, be it race, sexual orientation, ability – particularly disabling mental health issues -- or those escaping violence, we are witnessing the exponential growth of women in prison. Women and girls are the fastest growing prison population worldwide.

The fact that women are the fastest growing prison population is not accidental. In Canada, we recognize that our links to the United States have meant that we were amongst the first countries to be impacted by the regressive, so-called, law and order agenda, which are making prisons the default option for those most significantly impacted by the destruction of social safety nets, and the evisceration of medical, economic and education standards and services.

In too many communities and contexts, prisons are the only "service" that cannot turn people away because of waiting lists, a lack of beds or resources, change in mandate, et cetera. Imagine if, instead of continuing to cram more people into over-crowded prisons, we limited the number of bed days available for judges to impose as sentences, or if we turned women away and would not

allow them access to prisons when they really need housing, a shelter to escape violence, treatment to deal with past sexual abuse and other forms of trauma, drug and/or alcohol detoxification and treatment to address mental health and/or addiction issues.

In our organization, at the national level and amongst our members, we have recognized this reality very concretely by the change of our mission to articulate that we work with women who are criminalized versus the historic orientation of working with women who come into conflict with the law. With this reality, we recognize that it is the laws and policies that are increasingly coming into conflict with peoples' lives, resulting in the virtual inevitability of criminalization; rather than the notion that people are the full and consenting authors of their own circumstances.

In Canada, in 1996, despite having made international human rights commitments, such as the UN Convention on the Rights of the Child, we decided to follow the U.S. lead when the federal government eliminated the Canada Assistance Plan and therefore the essential nature of Canadian standards of social, medical and educational resourcing. We have now experienced the same sorts of cuts and knee-jerk band-aid responses – all of which norm crime and criminal justice and penal responses, thereby presuming criminality and perpetuating the problems of the past, be they crime prevention, homelessness, restorative justice or other responses.

Canada is rushing to follow the U.S. race to incarcerate the most dispossessed for longer and more brutalizing periods. Ironically, this is occurring at a time when many US jurisdictions are retreating from regressive 'law and order' agenda. Moreover, in 2008, a panel of federal judges ordered California to reduce its prison population by 40,000 over the next two years – which reflects a roughly 27% cut from the current population of 150,000. Until very recently, Canadian politicians were ignoring their social and fiduciary responsibilities to Canadians by passing laws, seemingly without concern as to the human and fiscal costs associated with them. The long list of new criminal justice reforms, will raise incarceration rates out and suck resources out of the community. Although, as I speak, today, the government's refusal to reveal the costs of the current crime agenda, means that Parliament is in the midst of deciding whether the government is in contempt of Parliament.

By creating criminally low social assistance – formerly known as welfare -- rates throughout Canada and even bans on receipt of state resources in some jurisdictions, many poor people are immediately relegated to the criminalized underclass. Rather than resulting in the criminalization of poor women for welfare fraud, prostitution, drug trafficking or whatever other survival strategies are employed, if we were truly interested in addressing fraudulent transactions that harm others, then criminally low welfare rates might result in the criminalization of those who craft, those who pass, and those who enforce, the laws and policies, **not** those subjected to them.

We are also seeing the increased feminization and criminalization of poverty. Welfare fraud is one example of how poor women are increasingly likely to be criminalized. Their attempts to survive poverty too often results in charges ranging from fraud (including welfare fraud), soliciting, pimping, living off the avails, or, importing and trafficking. As we learned via the Hamilton and Brown cases, African Canadian single mothers are literally recruited to traffic narcotics as they exit meetings with their assistance workers. Women who are trying to make the rent and/or feed their children/families are especially vulnerable. It used to be that we might see

women resorting to such means to address extraordinary expenses such as birthdays, Christmas and/or other holidays, child care, summer camp expenses, et cetera. It is increasingly the manner in which sole support moms are attempting to cover basic living costs.

In Ontario, we have the tragic reality of the life and death of Kim Rogers. Kim was criminalized in the first place because she attended school, while she was receiving 'Ontario works' funding. She was charged and convicted of "welfare fraud". This label and resulting punishment were applied because Kim attempted to return to school as an adult in order to obtain an education while still on social assistance. As part of the process, she also sought and received student loans. Although everyone knows that it is impossible to live on welfare without some supplemental income/support, to be "caught" doing so means the near certainty of criminal prosecution. We question why those responsible for the development of such harmful social policies and legislation are not held legally responsible for the human and social costs of criminalizing the most marginalized, vulnerable and oppressed.

In Kim Rogers' circumstances, her death was a result of criminal negligence and complicit political, economic, legal and social policy decisions, yet only **she** was held accountable. Moreover, after her death, we discovered that she could have been attending school and receiving additional benefits, had she or, more to the point, her worker known. She was eligible for disability benefits. Her usual work was waitressing and bar tending, but her knee surgery made it impossible for her to continue in that work, so she went back to school.

We should all examine the realities regarding who benefits from the discrepancy in monitoring, charging, prosecuting and sentencing of tax ***evasion***, unemployment fraud, OHIP/doctors' ***over-billing***, lawyers ***dipping in*** to their trust funds, GST fraud, versus the demonization of the poor exemplified by the criminalization and pursuit of welfare recipients. We should also question why some behaviour is characterized as almost benign omission versus purposeful, criminally intended, fraud?

During the mid-1990s, here in Canada, all of the provincial, territorial and federal heads of corrections met and agreed that we needed to reduce reliance on prisons. They opined that as many as 75% of those in prison, either serving sentences or awaiting trial, could be released to the community, without any corresponding increase in risk to public safety. The Correctional Investigator has repeatedly called on the government to address the needs of those with mental health issues in the community, rather than continuing to abandon them to prisons.

In the United Kingdom, noted policy leaders such as Pat Carlen and the Howard League are amongst those calling for the criminal justice system to refuse to proceed with criminalizing the young, those escaping violence, those with intellectual disabilities and mental health issues; they are also amongst those calling for more decarceration, community development, and social (re)investment. Indeed, many academics, professionals and practitioners on the front lines have also characterized the push to criminalize the most dispossessed as the present manifestation of race, ability, class and gender bias, and argue that this demands we examine our fundamental beliefs and notions of whose interests and biases are privileged, and at whose expense?

When we know the histories of abuse, poverty and extreme marginalization that is the reality of most of the young women and girls with whom we work, it seems quite ludicrous that we continue to pretend that telling women and girls not to take drugs to dull the pain of abuse, hunger or other devastation, or tell them that they must stop the behaviour that allowed them to survive poverty, abuse, disabling health -- especially mental health -- issues, et cetera, in the face of no current or future prospect of any income, housing, medical, educational or other supports. Surely none of us thinks it of benefit to anyone to continue to imprison women and girls, and then release them to the street with little more than psycho-social, cognitive skills or drug abstinence programming, along with the implicit judgment that they are in control of and therefore responsible for their situations, including their own criminalization. We all must rethink, resist and reject such notions.

Indigenous women and girls continue to suffer the shameful and devastating impact of colonization. From residential school, to child welfare seizure, to juvenile and adult detention, Aboriginal women and girls are vastly over-represented in institutions under state control. Although Aboriginal women make up 1-2% of the Canadian population, they make up 34% of the federal prison population, and too often represent the majority of the women classified as maximum-security prisoners. Indeed, even as we work to deinstitutionalize and decarcerate, we are seeing that "treatment" is increasingly the colonial control mechanism of choice. Indeed, we are already seeing this, as we first saw exemplified in the case of G, the pregnant young Indigenous woman who was institutionalized for forced treatment.

The focus on fetal alcohol spectrum syndromes and disorders are gendered, classed and racist in approach and we must venture forth very carefully. Consider for a moment the reality that such alphabet soup diagnoses of FAS, FAE, FASD, ARND [alcohol-related neurological disorders] et cetera, are most prevalent in countries that have high rates of criminalized Indigenous populations. Even although the shopping lists of symptoms or characteristics of foetal alcohol labels overlap significantly with other conditions ranging from inadequate nutrition, oxygen deprivation, learning disabilities, attention deficit, et cetera, the labels are persistently utilized in places such as Canada, New Zealand, Australia and the United States. It is not coincidental that these are also countries with high rates of criminalization of racialized Indigenous peoples.

In the European Union, on the other hand, this approach is not seen as particularly helpful – they consider the symptoms and impact of other toxins, be they pollution, bad water, insufficient nutrients, lack of prenatal and postnatal supports, accidental brain injuries, lack of oxygen, et cetera, as equally important. After all, despite the rhetoric that it is 100% preventable, since many women do not know they are pregnant before the apparently crucial day 17 of gestation, the only way to make it so would be to prohibit the consumption of alcohol by all women of child-bearing age.

Moreover, since we don't really know what the impact of alcohol is on male sperm, then likely it should also be illegal for men to drink too. Obviously, we all want to limit the impact of alcohol and other toxins on foetal development, but we know that criminalizing behaviour is only likely to end up with a focus on those least able to defend themselves against it. Current access to justice issues being what they are, a focus on fetal alcohol exposure, in isolation, is likely to continue to

result in the disproportionate application of the law and societal judgment against poor and racialized women.

How many fewer diagnoses of FASD (fetal alcohol spectrum disorders), et cetera would there be if that label meant that the recipients thereof could not be relegated to the most isolating prison conditions? If such a label meant that someone could not be criminalized but must be found to be in need of community supports because their disability renders them incapable of forming criminal intent, we predict that the diagnoses might virtually evaporate. Courageous jurists, like Mary Ellen Turpel-Lafond (as she then was) have tried to take on this issue in individual cases. We applaud and encourage such efforts and continue to push for broader, systemic change.

It is no accident who is criminalized, nor who is imprisoned; and, nor is it an accident who is not! What if, instead of denying and defending abuse of power and force by police and prison personnel, as well as the neglect and abuse of institutionalized persons, we collectively condemned and stopped such practices.

Articles 37 and 40 of the UN Convention on the Rights of the Child promise that children should not experience the "cruel, inhuman or degrading" – not to mention tortuous – treatment endured by Ashley Smith during her months in isolation in youth and adult prisons. Rather, for youthful citizen law-breakers, the Convention calls for the alternatives to institutional care, "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." Being labeled as a maximum security prisoner, left stripped and shackled for months and years in isolation, transferred across the country 17 times in 11 months, and then left to die, seems unfathomable when one considers she was initially jailed for breaching a probation order to which she was sentenced for throwing crab apples at a postal worker.

I used to meet most women with significant mental health issues kneeling on a cement floor, or institutionally linoleum tiled floor, peering through a meal slot in a solid metal door. For almost three years following the publicity surrounding the death of Ashley Smith, I was denied access to the segregation unit where she died. In order to meet with the women in the circumstances Ashley faced before she died, they and I must "agree" to them being fully shackled, usually handcuffed to the back too, and isolated behind bullet-proof glass, monitored by 2-5 correctional officers.

In our attempts to address these issues, we have met with judges, prosecutors, the defence bar, correctional authorities and mental health professionals. Mental health and youth workers, in particular, have lamented the reality that the evisceration of their resources, combined with the advent of zero tolerance to violence policies, have resulted in policy directives that instruct them to call the police and urge the pursuit of criminal prosecution in cases where those with mental health and/or intellectual disabilities are assaultive or abusive. Behaviour that might previously have been considered to be symptomatic of the psychiatric or mental health label attached to the individual is treated as criminal or "bad" behaviour in the criminal justice context. Reduced resources and priorities mean that they are usually without the requisite supports to handle the most challenging folk. There is a long line-up of others in the community who are not criminalized awaiting treatment options, so they are seen as legally and ethically justified in making such decisions.

The reflex of corrections to develop mental health service in prisons sounds positive to many, yet, in reality, it is only serving to exacerbate the trend to increasingly criminalize women with mental health issues and intellectual disabilities. Developing such services in prisons at a time when they are increasingly non-existent in the community is resulting in more women receiving federal sentences because of a presumption that there is an ability to access services in prison that are not available in community settings. It is vital that we recognize, however, that prisons are not, and cannot be, treatment or healing centres.

In fact, those subject to federal terms of imprisonment are too often relegated to the most isolating conditions, almost inevitably accumulating additional charges and usually ending up serving many more years in prison, as a result of behaviour and charges arising in prison, largely in response to the conditions of confinement to which they are subjected. For further insight into this phenomenon, I encourage you to read an article by Marian Botsford, entitled, "Life on the Instalment Plan", in the March 2009 volume of ***The Walrus***.

Unlike the sentiment expressed by mental health workers, corrections staff necessarily categorize the mental health considerations as secondary. Because they are dealing with people who have been criminalized, the behaviour is generally labelled as bad – manipulative, attention-getting, capable of control, [indeed, within the control of the individual] -- and mental health issues almost always take a back seat to security and punitive responses.

We need to continually question who benefits from such approaches. The off-loading of responsibility without requisite resources, the lack of appreciation by many of the impact of resource cuts, and the apparent belief that someone else will address issues, is resulting in the reality that increasingly, we are witnessing the abandonment of social issues to the criminal courts and penal systems to rectify.

The pre-existing lack of trust, connection and communication (too often further exacerbated by literacy and English as a second language issues) between 'client' and 'counsel' will only serve to further isolate the most marginalized. Similarly, limited access to justice, especially as a result of cuts to legal aid, and the concurrent vilification of those left standing and/or advocating with and on behalf of the most marginalized, means that the last ones left standing with the women and girls we know, are generally without adequate supports or resources, so they also continue to be vilified for their inadequacy to make things work.

So, to sum up, according to Statistics Canada, there has been a steady increase in the numbers of people remanded in custody, and with the exception of a slight increase two years ago, the imprisonment rate for men has been falling for much of the last two decades. It is appropriate that sentences reflect the credited time for pre-trial custody; pre-trial custody is generally warehousing in a maximum security – often very isolated – setting. The lack of community-based resources and resulting increase in homeless people, those with mental health and addiction issues, as well as those escaping violence, is directly contributing to the increased numbers remanded in custody.

Women account for 10-15% of those charged with violent offences, and 45.5% of all property related charges against women, are for "shoplifting". 85% of women in federal custody are

serving their first federal term of imprisonment, 47.9% are between 21 and 34 years of age; 17% are serving life sentences.

It currently costs between $185,000 and upwards of $350,000-500,000 per annum to jail a woman in the federal system, compared to approximately $35,000 for residency in a funded, supervised community-based setting. Even a few weeks remanded in custody can interfere with housing, employment, social assistance, child custody, et cetera. As such, it is not surprising that relative few women receive conditional sentences. As the Parliamentary Budget Officer reported in June of last year, one new law alone – of the many already passed or in the works – will cost tax payers between 7 and 10 billion dollars. Rather than addressing the egregious conditions in local lock-ups and remand centres, the government passed a law to eliminate judicial discretion to credit time served for those awaiting trial.

Current and proposed legislation will promote the on-going construction of new federal, as well as provincial and territorial prisons across the country. It is estimated that the expanded capacity of 6,000 spaces will cost of over $2 billion for construction and $310 million a year in operating costs. These figures are considered to be conservative estimates. Unfortunately, despite having campaigned on a platform of accountability and transparency, the government refused to disclose what its new criminal law and penal reforms will cost Canadians. Although yesterday, they signaled they might retreat from their mantra that such information is protected by Cabinet confidence, there is still a paucity of accurate information regarding the cost of current criminal justice reforms. As such, the breach of fiduciary obligations to Canadian taxpayers continues.

<u>So, where do we go from here?</u>

We want to continue to challenge lawyers and judges to throw out cases that bring the administration of justice into disrepute. How can this not be the case for welfare fraud for instance? Why have those responsible for the regressive legislative and policy decisions not been called to account? Why do the provincial and federal governments routinely intervene to restrict access to justice by the oppressed, rather than assist them by intervening on behalf and in support of progressive laws and policies, for example, cases involving breaches of section 15 of the *Canadian Charter of Rights and Freedoms*?

We also need to challenge current definitions of ***mens rea*** and theories regarding definitions of what is a crime? The opportunity for this was explored by the Law Commission of Canada – before they were obliterated -- regarding the definition of what is considered to be a crime. Resources are always an issue when it comes to matters of equality and social justice, so we also need to ensure that adequate and flexible resources exist to assist women's, Aboriginal, anti-poverty, and other grassroots groups and those living the oppression to alleviate – indeed eliminate -- the structural inequity occasioned by current social, economic and legal policies and law reforms.

We need to breath life into the initiatives proposed by true leaders, women like Louise Arbour, who have called on us to demand a Canada that pushes for human rights that equate with freedom from want. We must push municipal, provincial and federal governments to restore or develop

sorely needed housing, social assistance, supportive women-directed counseling, educational and advocacy services, and facilitating access to them is another.

Encouraging and facilitating the access of advocacy groups like ours and others doing feminist, anti-racist, anti-poverty and human rights work, to provide women and girls with accurate and accessible information and tools as to how to advocate individually and collectively, is yet another strategy. Currently, our Elizabeth Fry Societies in Ontario are being denied access to women in provincial jails and information booklets regarding their rights are being seized and being labeled as "contraband" within the prisons.

Affordable academic and vocational training opportunities for women and girls is another vital need for women in and from prison. In a time where governments will be cutting social services in an attempt to balance their books, such spending is not only fiscally disastrous for all of us, but the diversion of funds into prison systems will further erode the social fabric of Canada. It is more than disingenuous of our Parliamentarians of all political stripes to not challenge this rise in penal expenditure at a time when Canada is described as having a stable 'crime' rate. Most of us do not want to have our tax dollars spent on building prisons instead of on social services, schools, and hospitals.

It costs substantially less to host and maintain community programs, than it does to build more prisons. Furthermore, community-based prevention and sentencing options are more effective than prison in promoting public safety.

Members of Parliament and Senators have a fiduciary responsibility to exercise due diligence and cost benefit analysis before they spend taxpayer dollars. By passing the current crime bills without any idea as to how much they will cost Canadians, they have abdicated their fiduciary responsibility. Moreover, by expecting taxpayers to write the government a blank cheque, they are further violating this relationship of trust.

We applaud recent efforts of Members of Parliament to exercise their public offices more responsibly. We must stand up and object to the current trend to send more people to prison instead of college and university. Penal expansion has far reaching consequences beyond prison walls which are extremely damaging to all of us.

Much is possible, right now, if we merely have the will to stand together, to collaborate and confront the myths, misconceptions as well as the realities that are out current challenges.

Crime is a theory.

Name any behaviour and we will be able to identify times when it is considered legal and times when it is not. Law and criminalization are theories and choices made by those who we give the authority, as well as those who take power.

Who among us does not already acknowledge that jails are not the shelters battered women need, that they are not treatment centres or places of healing, that they are not an appropriate substitution for adequate and affordable housing, education or skills development. We know who

is and who is not in prison. With few exceptions, the wealthy and most privileged are not jailed. Crime is a theory -- defined, monitored and enforced for specific identifiable purposes.

Rather than personalizing the various legal, human rights and social justice struggles and uprisings of prisoners, we are hopeful that increasingly, all will recognize that it is always in our collective interest when the oppressed resist and challenge their oppression. Increasing prisoner access to the justice and equality occasioned by social inclusion will benefit all of us and all of our communities of interest.

We encourage you to join the growing world-wide political, economic, and social coalition to stop the increased intrusion of the state in terms of surveillance and social control as well as the retreat of the state in terms of the provision of supportive social, health and educational services.

And, as Lilla Watson, an Aboriginal woman in Australia has stressed, we need to work together to correct current injustice. I will conclude with her words, shared with me more than 19 years ago by a woman inside.

If you have come here to help me,

you are wasting our time.

If you have come here because your liberation is bound up with mine,

then let us work together.

I dedicate these words to the memory of Ashley Smith, and Kami Pozniak, a young Indigenous woman whose prison experiences killed her spirit and led to her death two months ago, as well as the far too numerous other men, women and children who have died unnatural and preventable deaths in our prisons…

Thank you to all of you for the part you do now and will do, to change the world, and try to prevent harm befalling others. And, to women and girls with the lived experience who are my constant allies, agitators, mentors and friends, your strength, courage and perseverance continue to inspire and drive me.

Thank you

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