PARTS I and II - STATEMENT OF FACTS AND POINTS IN ISSUE

1. CCPI adopts the statement of facts and the Points in Issue set out in the Respondent's factum.

PART III - ARGUMENT

A. Overview of CCPI's Position

2. CCPI's position is that the sentencing issues before the Court on this appeal need to be resolved in light of a recognition of systemic patterns of discrimination and disadvantage affecting poor people in the criminal justice system and in Canadian society. Parliament's intent, in CCPI's submission, was that these historical patterns of inequality and injustice be addressed pro-actively by courts when offenders are unable to pay a fine.

3. While the case deals in part with a technical question of whether a conditional sentence is available as an alternative to serving time in default, the broader question raised by the judgments below is how judges should arrive at an appropriate sentence for impoverished offenders who are unable to pay a fine. The courts below resolved that question in this case by imposing a conditional sentence. In CCPI's view, this sentence was excessive, and symptomatic of a systemic pattern that pervades the criminal justice system.

4. Had the offender in this case been affluent, he would have been fined the statutory minimum only. Both the trial judge and the Court of Appeal agreed that no period of incarceration, served either in prison or in the community as a conditional sentence, would have been imposed as a sentence for a first offence of this nature if the offender had been able to pay the fine. In all likelihood, such an offender would pay the fine and get on with his life.

5. The offender in this case, however, was disabled and reliant on social assistance, with a dependent daughter. He could not pay the minimum fine and Ontario provided no fine-option program through which he could work off a fine. In these circumstances, the sentencing judge recognized that any penalty imposed for non-payment of the fine would amount to a penalty for the offence itself, so he turned to the question of the appropriate sentence for the offence in these circumstances. Noting that "a conditional sentence with appropriate, severe conditions is a significant deterrent and denunciatory penalty," he determined that the appropriate sentence was a 75-day term of incarceration, to be served in the community as a conditional

sentence.[1] In response to the offender's poverty, and in the absence of a fine-option program, the trial judge, in effect, "bumped up" the sentence to a more serious sanction – a deprivation of liberty in the form of house arrest.

6. The majority of the Ontario Court of Appeal agreed with the trial judge that a conditional sentence was an appropriate sanction for the offence in the circumstances, explaining its rationale in the following terms:

> The imposition of a fine of $9,600 that could not and would not be paid would amount to a hollow sentence that would fail to adequately sanction the respondent's wrongful conduct. The imposition of a conditional sentence in default of immediate payment of the fine allowed the trial judge to arrive at a sentence that respected the letter of the law, was closely tailored to the circumstances of the offender, and gave appropriate emphasis to the goals of deterrence and retribution.[2]

7. Both the trial judge and the Court of Appeal sought to avoid imposing a prison term in a case which, it was agreed, did not warrant prison. Nevertheless, a conditional sentence, which is also a serious deprivation of liberty, with potentially severe consequences for poor people with disabilities, was considered an appropriate way for the court to emphasize "the goals of deterrence and retribution." In short, a sentence which would have been considered excessive in the context of an affluent offender able to pay the fine without hardship, was found to be appropriate in the circumstances of an impoverished offender unable to pay the fine. The fact that the respondent's poverty left him unable to pay a fine resulted in his *Charter*-protected liberty interest being devalued by the justice system.

8. CCPI's position is that the reasoning of the courts below demonstrates a systemic pattern which often results in poor people serving sentences which are harsher in their effect than sentences imposed on affluent offenders. Poor offenders continue to face serious deprivations of liberty because of their poverty.

9. Equality and fairness for the poor, even in the criminal justice system, often relies on the availability of provincial government programs. Governments' failures to provide programs may have serious repercussions for the equal enjoyment of the constitutional rights of the poor. In the present case

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[1]Reasons for Sentence in the Ontario Court of Justice by the Honourable Mr. Justice Renaud, *Appellant's Record* Tab 2, p.7; *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 36.

[2]Reasons for Judgment of the Court of Appeal for Ontario, *per* Sharpe, J.A., *Appellant's Record*, Tab 4, para. 19.

the trial judge noted that his sentencing options were restricted by the absence of a fine-option program. Other programs affect sentencing as well, however. In provinces where those serving conditional sentences are cut off of welfare, or where a community support for a disability is not provided, judges may determine that a conditional sentence is not viable and sentence impoverished offenders to prison instead. Failures of governments to provide programs can have serious implications for fairness and for poor peoples' liberty interests in sentencing.

10. In *Prosper* and *J(G)* this Court addressed the obligations of governments to ensure access to duty counsel and legal aid to protect the constitutional rights of the poor. The present case raises the question of whether it is permissible for poor people to be sentenced to a deprivation of liberty because of a government's failure to implement a program that would provide the judge with an appropriate alternative sentencing option.[3]

11. The effects on individuals living in poverty of the systemic sentencing patterns in evidence in this case may be severe. Incarceration, either in prison or under house arrest, often has serious consequences for poor people. These may be overlooked by sentencing judges. Where a prison term means, for example, that a single parent on social assistance will be cut off of social assistance, lose family housing and perhaps lose custody of children, even a short sentence to prison may have serious long term consequences. House arrest as well, may have severe consequences where an offender lacks access to basic needs, lives in inadequate housing or has no job through which to maintain constructive and dignified social relations during the period of house arrest.

12. This case also raises the concern, acknowledged by the courts below, that in the case of impoverished offenders unable to pay a minimum fine, sanctions for fine default flow automatically and function, in effect, as sanctions for the offence itself. Time in default, if ordered, is one of those sanctions, but there are others as well, in the category of "civil remedies." These include suspension of driver's licence and the registering of a civil judgment against the offender, which damages the person's credit rating and may result in garnishment of income. These civil remedies, as well, may have very severe

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[3] In the case of Ontario, what is interesting is that, since 1990, it has had in place statutory provisions and promulgated "Fine Option Program" regulations to permit offenders to work off their fines. While three districts in Ontario had programs, all were revoked on April 1, 1994. *Provincial Offences Act*, R.S.O. 1990, c. P. 33, s.67 and *Fine Option Program*, R.R.O. 1990, Reg. 948. See also: Segal, Murray D. et al., *The 2002 Annotated Provincial Offences Act*

consequences for an offender who has no ability to pay a fine. Suspension of a driver's licence for a parent in a rural community may have severe consequences and a negative credit-rating makes it extremely difficult to rent an apartment in tight rental markets. Parliament introduced these tougher measures to encourage fine payment and penalize those who willfully refuse to pay a fine. This case raises the question of whether it is appropriate that they function in the case of impoverished offenders as additional penalties for the offence.

13. This appeal is thus animated by the question of how courts ought to address systemic issues of inequality facing the poor and ensure that the criminal justice system does not exacerbate these inequalities – how unique circumstances of poverty can be incorporated into sentencing and how courts can ensure that poor people receive equal benefit of principles of restorative justice that have been expressly incorporated into sentencing by Parliament.

14. This case presents an opportunity for the Court to provide much needed guidance to lower courts that:

> i) An offender should never be deprived of liberty because of an inability to pay a fine and in this case, the trial judge ought to have exercised his discretion *not* to order imprisonment in default;
>
> ii) More generally, basic constitutional principles of equality and social justice require that sentencing of the poor should not exacerbate systemic social patterns of discrimination and social exclusion, so that in this case, the offender should not have been subject to a harsher sanction than would have been applied to a more affluent offender;
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> iii) The unique circumstances and needs of the poor must be taken into account in the fashioning of appropriate sentences, so that in this case the trial judge should have considered in more detail the circumstances of the Respondent;
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> iv) That courts ought not to impose harsher penalties on the poor on account of governments' failures to provide necessary programs, so, in this case, the Respondent should not have suffered adverse consequences for the government's failure to provide a fine-option program; and
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> v) Courts ought to ensure that sanctions designed to encourage fine payment and penalize willful refusal to pay a fine should not flow automatically on poor offenders, so in this case, the court should have provided for no time limit on payment, ensuring that potentially severe civil and administrative enforcement mechanisms would not come into effect.

(Carswell, 2002) at 189.

B. Recognizing Systemic Discrimination Against the Poor

15. While this is not a *Charter* case, CCPI submits that the conferral of discretion made explicit in the applicable legislation[4] needs to be exercised in a way that is consistent with the *Charter* and constitutional principles, including the democratic value of "a commitment to social justice and equality".[5] Of particular importance is this Court's jurisprudence on the right to equality under s.15 of the *Charter*, the "broadest of all guarantees." That guarantee ought to ensure that sentencing discretion is exercised so as to ensure, as nearly as may be possible, "an equality of benefit and protection" and so as to recognize that differential treatment, in a substantive sense, can be brought about "by a failure to take into account the underlying differences between individuals in society."[6]

16. It is well recognized by Parliament and by this Court that in exercising discretion in sentencing, judges need to address themselves to issues of social and historical disadvantage and systemic patterns of discrimination and inequality in Canadian society.[7] This Court has established that sentencing judges may take judicial notice of the prevalence of discrimination faced by groups protected "in nation-wide quasi-constitutional provincial and federal human rights legislation" or under section 15 of the *Charter*.[8] In CCPI's submission, this Court ought to take judicial notice of the fact that poor people and those relying on social assistance, such as the offender in the present case, face systemic patterns of discrimination and inequality that are relevant and important considerations in sentencing.

17. Because of the close nexus between social exclusion and crime, it is particularly important that the criminal justice system not become a vehicle for reinforcing patterns of social and economic inequality within society. Disadvantaged offenders have the right to, and indeed have a unique need of, the benefit of

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[4] *Excise Act*, s. 240(4), *Criminal Code*, ss. 734-737 and s. 742.1.

[5] *Slaight Communications Inc.* v. *Davidson*, [1988] 1 S.C.R. 1038 at 1078; *Arsenault-Cameron* v. *P.E.I.,* [2000] 1.S.C.R. 3 at para. 30 and *Baker* v. *Canada*, [1999] 2. S.C.R. 817 at para. 53; For the constitutional principle of democracy: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 64.

[6] *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at 165; *Law v. Canada* (*Minister of Employment and Immigration*), [1999] 1 S.C.R. 497 at para.25.

[7] *R. v. Gladue*, [1999] 1 S.C.R. 688. See the review of authorities by Hill J. in *R.* v. *Hamilton*, [2003] O.J. No. 532 at paras. 187-192. See also *R. v Brown* [2003] O.J. 1251 (Ont. C. A.) and cases cited therein.

[8] *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 at para. 46; *R. v Parks* (1993) 84 C.C.C. 3d 353 (Ont. C.A.) at pp. 366-69.

Parliament's emphasis on restorative justice as an over-riding goal in sentencing. As noted by the Irish Law Reform Commission's Report on Sentencing:

> There is now substantial evidence that much crime is associated with certain social conditions. The incidence and type of crime in a society has been linked to, among other things, unemployment, poverty, a culture of violence, inadequate schooling, the wide availability and consumption of drugs, and changes in traditional institutions of social control such as the family and established religion. These are not conditions for which any individual is responsible. Of course not all the individuals react to such conditions by engaging in crime, but the incidence of crime would appear to be in some way related to the existence of these conditions. In our view, society bears a responsibility for such conditions and, as a corollary, has obligations towards offenders whose personal history or whose offence suggests a link between the offending conduct and the presence of such conditions.[9]

18. Many intersecting prejudices and patterns of disadvantage intersect in poverty. Other disadvantaged groups which have been recognized as facing systemic discrimination in the criminal justice system, such as Aboriginal people and African Canadians are over-represented among the poor and systemic discrimination against these groups is in part related to their poverty.[10]

19. Discrimination against the poor and those relying on social assistance has now been broadly recognized in nation-wide human rights legislation. As noted by Laskin, J. of the Ontario Court of Appeal:

> Most provincial human rights codes prohibit, for some purposes, discrimination on a ground related to receiving welfare: discrimination is prohibited on the basis of "receipt of public assistance" in Ontario and Saskatchewan, on the basis of "source of income" in Alberta, Manitoba, Nova Scotia and Prince Edward Island, on the basis of "social condition" in Quebec and on the basis of "social origin" in Newfoundland.[11]

These provisions of human rights legislation have been interpreted broadly to provide protection against systemic discrimination linked with poverty or low level of income of social assistance recipients and other disadvantaged groups.[12]

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[9]Cited in *R. v. Hamilton*, *supra*, at para. 192.

[10] Regarding Aboriginal peoples, this Court commented in *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 65: "The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people."

[11]*Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.) at para. 90.

[12]See, for example, *Shelter Corporation et al. v. Ontario Human Rights Commission et al* (2001), 143 O.A.C. 54; *Québec (Comm. des droits de la personne) v. Whittom* (1993), 20 C.H.R.R. D/349 (Qué. Trib), affirmed in (1997), 29

20. Recently, the *Canadian Human Rights Act* was reviewed by a special panel chaired by former Supreme Court Justice Gérard La Forest at the request of the Minister of Justice. The panel was requested to consider, among other things, whether the ground "social condition" should be added to the *Act*. During the consultations, the panel "heard more about poverty than about any other single issue."[13]

21. After extensive consultation, the panel released a report entitled *Promoting Equality*, in which it recommended the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the *Act*.[14] The panel concluded after its consultations that:

> Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy.[15]

22. In *Charter* jurisprudence, there is also an emerging recognition by courts in Canada that poverty or reliance on social assistance is a pervasive ground of discrimination analogous to those enumerated in s.15.[16] While this Honourable Court has not yet considered whether poverty or receipt of public assistance is an analogous ground of discrimination, it has certainly recognized that the poor are "one of the most disadvantaged groups in society"[17] and that when it comes to poverty-related barriers to the equal enjoyment of *Charter* rights, the poor, in the words of the Chief Justice, ought not to be treated as

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C.H.R.R. D/1 (Qué. C.A.)

[13]Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 106.

[14]*Ibid.*, at pp. 106-112.

[15]*Ibid.* at 107.

[16]The Nova Scotia Court of Appeal in *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993),101 D.L.R. (4th) 224 (N.S.C.A. *en banco*) at pp. 233-34, found that poverty is an analogous ground of discrimination under s.15. Similarly, the Ontario Court of Appeal found receipt of social assistance to be an analogous ground in *Falkiner*, *supra*, at paras. 84-93. See also, *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.) at p. 361, finding poverty to be an analogous ground; *Federated Anti-Poverty Groups of British Columbia* v.*British Columbia* (*AG*) (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.) at p.354 finding that "persons receiving income assistance" constitute a group protected by s.15.

[17]*R. v. Prosper*, [1994] 3 S.C.R. 236 at p.288 *per* L'Heureux Dubé, J. (Dissenting but not on this point).

"constitutional castaways".[18] In interpreting the scope of the right to freedom of association in *Dunmore*, the Court found that the Government had a positive obligation to extend the protection of collective bargaining legislation to agricultural workers, a disadvantaged group of workers whose "working conditions are characterized by long hours, low wages, little job security or social recognition"[19]. Similarly, in *G(J)* the Court found that section 7 of the *Charter* imposed an obligation on the provincial government to provide state funded counsel to represent a mother on social assistance in a custody hearing.[20]

23. The criminal justice system is not immune from the effect of prejudice and discrimination against the poor and against social assistance recipients that has been recognized to exist in society at large. A number of years ago the Police Complaints Board in Nova Scotia found that a Police Constable had breached the Code of Conduct and Discipline of the *Police Act* after he was reported to have stated during a public meeting on drug abuse that parents of kids on welfare are "dipping into a limited gene pool" and ought to be on birth control.[21] While these types of invidious prejudices may be rarely expressed, Justice La Forest and the CHRA review panel pointed to examples of mainstream media coverage suggesting that it is morally irresponsible for poor women to have children and that children of poor parents "have the parental deck stacked against them."[22] Poor people are subjected to widespread hostility, public scrutiny and moral condemnation. Highly publicized campaigns against alleged welfare fraud through the use of "snitch lines" are a well-recognized example of how discriminatory prejudice and stereotype can spill over into the criminal justice system.[23]

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[18] *Ibid.,* at 302 *per* McLachlin J.

[19] *Dunmore* v. *Ontario* (*Attorney General*), [2001] 3 S.C.R. 1016 para. 102.

[20] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46.

[21] *People on Welfare for Equal Rights* v. *Constable Michael Spurr* (Nova Scotia Police Review Board Decision, Halifax, October 8, 1991) at pp. 4-5.

[22] *Promoting Equality, supra*, at p.109. The Report cites a number of examples of this, such as a 1999 article in the Toronto Sun characterizing single mothers as "impossibly selfish" for entering parenthood "single, as a lark, because you just felt it would be a fun thing to do," and a Globe and Mail editorial which stated that "children in poor families have the parental deck stacked against them in the first three years of their life."

[23] Janet Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other," in S. Neysmith (ed.), *Restructuring Caring Labour* (Toronto: Oxford University Press, 2000) Chapter 2 esp. pp. 43-46; Margaret Little "A Litmus Test for Democracy: The Impact of Ontario Welfare Changes on Single Mothers," *Studies in Political Economy*, Vol. 66, Autumn 2001, pp. 9-36 esp. pp.23-26.

24. Ferrier, J. of the Ontario Superior Court recently considered the question of whether challenge for cause in jury selection may include questions related to bias against the poor and the homeless. After reviewing evidence on this, he concluded:

> I have no difficulty on the evidence in concluding that there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight. It is not a large leap to conclude that this bias could incline a juror to a certain party or conclusion in a manner that is unfair.[24]

25. Systemic patterns of discrimination and inequality against the poor have long been recognized in research into the criminal justice system in Canada. In the late 1970's Lorne Tepperman reviewed a number of studies and concluded that "the evidence suggests that whenever discretion is available, it is used in ways ultimately damaging to poor people. Such is the case at virtually every level of the criminal or delinquency processing system."[25] Subsequent studies have found evidence of similar patterns of inequality at various stages of the criminal justice system.[26]

26. In addition to the effect of differential sentencing patterns, poor people also suffer from the differential *effect* of particular sentences. This was demonstrated in the recent Coroner's Inquest in Ontario into the death of Kimberly Rogers.[27] The Inquest considered the effect of a six month sentence to house arrest imposed for failing to report attendance at college while in receipt of assistance. Ms Rogers was pregnant at the time of sentencing and suffered from depression. At the time of sentencing, she was to

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[24] *R. v. Clarke et al.* Superior Court of Justice (Toronto Region) Ruling of Ferrier, J. January 29, 2003 at p. 12.

[25] Lorne Tepperman quoted in W.K. Greenaway, "Crime and Class: Unequal Before the Law, in J. Harp and J.R. Hofley (eds.) *Structured Inequality in Canada* (1980) p. 256.

[26] See, for example, Edward Renner and Allan Warner, "The Standard of Social Justice Applied to an Evaluation of Criminal Cases Appearing Before Halifax Courts (1981) 1 *Windsor Yearbook of Access to Justice*, 62 at p.63. This study of over 1,000 criminal cases appearing in the Halifax courts in 1981 found that those of lower socio-economic status, and particularly those who were unemployed, tended to be sentenced more harshly. 27% of employed first offenders convicted of summary offences received discharges compared to only 8% of unemployed first offenders. See also: Merick Debicki, "Sentencing and Socio-Economic Status", in D. Gibson and J. Baldwin (eds.) *Law in a Cynical Society* (1985), 219-239 This study of 1,194 cases in the Winnipeg Provincial Court found a clear correlation between socio-economic status and the likelihood of incarceration. Single unemployed individuals on welfare had the highest rate of incarceration, at 30%. See also National Council of Welfare, *Justice and the Poor*, (Ottawa: Minister of Public Works and Government Services Canada, Spring, 2000) at pp. 75-77.

[27] *Verdict of Coroner's Jury into the death of Kimberly Ann Rogers*, (December 19, 2002).

be cut off from welfare and drug benefits automatically for three months upon conviction.[28] This sentence, served alone, in an overheated apartment during the summer, was clearly different in its effects from the same sentence, were it to be served by a professional living in an air conditioned home who, being employed, would be permitted to go out to work each day to interact with colleagues.

C. Fines and the Poor

27. The fine is the most common disposition imposed on people who appear before judges for sentencing[29]. During the legislative process leading to the enactment of the sentencing reforms in Bill C-41, the then Justice Minister, the Honourable Allan Rock, informed the Justice and Legal Affairs Committee of the House of Commons that:

> ….the record shows that in 51% of cases involving criminal penalties, fines are involved either as the only or as one of the punishments meted out by the court.[30]

28. The popularity of the fine as a sentence for less serious offences is not surprising. Being ordered to pay a fine does not disrupt the offender's social and economic ties with the community. It is an expedient and inexpensive sanction to administer, as it requires relatively few supervisory personnel, while generating revenue for the state.[31] More generally, the idea of 'paying the price' for one's (criminal) mistakes is well understood and accepted in Canadian society.

29. By definition, however, a fine strikes at the very core of the vulnerability and disadvantage of those living in poverty. In the absence of a fine-option program, a fine imposed on a person in poverty struggling to provide basic requirements for a family, with a deadline for payment, *amounts to a court order that the offender and her or his dependents are to be deprived of basic necessities*. There are no other options in the sentencing menu that have such a close correspondence to a personal characteristic which has been found to be a basis of disadvantage in *Charter* and human rights jurisprudence. A fine imposed on a person in these circumstances with a limited time to pay can be seen as falling within the

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[28] *R.v. Rogers*, [2001] O.J. 5203. See also Margaret Little, ""A Litmus Test for Democracy: The Impact of Ontario Welfare Changes on Single Mothers", *supra*.

[29] *Canadian Sentencing Commission*, *Sentencing Reform: A Canadian Approach* (Ottawa, 1987) at p. 374.

[30] Canada. *House of Commons, Minutes of Proceedings and Evidence of the Justice and Legal Affairs Committee*, Issue No. 62, November 17, 1994, at p. 62:7.

[31] *Canadian Sentencing Commission, supra,* at p. 375.

category of "suspect decision making or potential discrimination"[32] inasmuch as it "fails to take into account a claimant's actual situation"[33], and thereby serves to diminish their essential human dignity.

30. It is an accepted norm in Canadian law that no court should order that an individual, or the individual's dependents, be deprived of basic necessities. Ensuring that no one is deprived of basic necessities is recognized in Canada as a critical component of the respect for personal security, dignity and the rule of law, in both civil and criminal justice.[34] In *Gosselin* v. *Quebec*, the majority of the Court left open the question of whether the right to security of the person under the *Charter* places positive obligations on governments to provide adequate levels of financial assistance. In the context of the present case, however, involving judicial process, it is certainly clear that it would be contrary to section 7 of the *Charter* for a sentence to be imposed and enforced so as to result in the deprivation of basic requirements of the Respondent or his dependent.[35] There is a clear consensus that welfare rates across Canada fall well below (frequently less than half) the poverty line.[36] Surviving with dignity on social assistance at these rates for oneself and one's children is nearly impossible, quite apart from having to take money from the food allowance to make payments on a fine.

31. Sentencing discretion must also be exercised consistently with the values of international human

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[32]*Corbiere v. Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203 at para. 8. See also Pothier, Dianne. "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 1 at 51-53.

[33] *Law*, *supra*, at para. 70.

[34]In debtor-creditor law, for example, all jurisdictions have exemptions from both asset seizures and income garnishees to ensure that indebted individuals will have sufficient resources to provide basic necessities for themselves and their families.(C.R.B. Dunlop, *Creditor-debtor Law in Canada* (Toronto: Carswell, 1995) at p.449 *et. seq*). In bankruptcy law, provision is made to ensure that a bankrupt and his/her family have both sufficient income and assets to "maintain themselves and their families at a reasonable standard of living." (*Re Pearson* (1997), 46 C.B.R. (3d) (Alta. Q.B.) at para. 24; see generally ss. 67 and 68 of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3.) In family law, the *Divorce Act* and parallel provincial legislation ensures that child support awards are sufficient to meet children's needs (*Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.) s. 15.2(4)) *The Canada Assistance Plan Act*, which governed the manner in which provincial social assistance programs developed and were administered from 1966 until 1996, ensured that anyone in need, regardless of the cause of need, would be provided with assistance that took into consideration the person's "basic requirements." (Canada Assistance Plan Act; *Finlay v. Canada (Minister of Finance),* [1993] 1 S.C.R. 1080 at 1125) Within the *Criminal Code*, the failure to provide basic necessities for dependents is the basis for a criminal offence (*Criminal Code*, R.S.C. 1985, c. C-46, as amended, s. 215, 734(2).

[35]*Gosselin, supra*, *per* Bastarache J. at para. 216.

[36]National Council of Welfare, Welfare Incomes 2002 (Ottawa: Minister of Public Works and Government Services Canada, 2003) at pp. vii, 25-28. Attached as Appendix B to this Factum.

rights law ratified by Canada.[37] Under international law, access to adequate food, clothing and housing has been recognized as a fundamental human right, at least from the time of the adoption of the *Universal Declaration of Human Rights* and in virtually all human rights instruments that have been adopted since that time.[38] Access to basic necessities has also been recognized as a fundamental component of the right to life in article 6 of the *International Covenant on Civil and Political Rights*[39] - an interpretation that Canada has affirmed before the U.N. Human Rights Committee.[40] The U.N. Human Rights Committee has made it clear that ensuring that access to basic requirements for those subject to incarceration upon criminal conviction are "minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult."[41]

D. Parliament's Recognition that Unpayable Fines Ought not to be Imposed Upon the Poor

32. In 1985 Parliament amended the *Criminal Code* to permit people who had been ordered to pay fines to work off their fines under provincially operated fine-option programs. Permitting an alternative method of discharging the fine was significant recognition that it is inappropriate to impose an unpayable monetary fine on persons living in poverty, making them automatically subject to the harsher penalties for default on fines, such as imprisonment.

33. More far-reaching reforms were adopted in 1996 in Bill C-41. The new sections 734 through 737 of the *Code* implemented constitutional values of social justice and equality by ensuring, for example, that a fine can "only" be imposed where a court has determined that the offender has the ability to pay it or

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[37] *Baker v. Canada, supra*.

[38] *Universal Declaration of Human Rights*, G.A. Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, A/810(1948) 71, articles 22, 25; *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, articles 9, 11; *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, articles 11(1)(e), 11(2)(b), 13(a); *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, articles 26, 27; *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, article 5(e)(iv); *European Social Charter (Revised)* E.T.S. No. 163, Articles 12, 13, 14, 30, 31. Part II; see generally S. Liebenberg, "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa," (2001) 17 *South African Journal of Human Rights* 232.

[39] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No.47.

[40] *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983) at p. 23.

discharge it under a fine-option program (s.734(2)). Parliament also sought to ensure that imprisonment for fine default would be reserved for only those who willfully refused to pay a fine (s. 734.7). The provisions of s. 718.2(b), (d) and (e) articulate sentencing principles calling upon judges to ensure, *inter alia*, inter-offender equity in sentencing; that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate"; and that imprisonment should be used as a last resort. These reforms responded to an unbroken consensus among academic commentators, law reform reports and other interested parties that something had to be done about the fact that unacceptable numbers of poor people in Canada, many of them Aboriginal, were facing incarceration simply because of their poverty.[42] They contemplate not just an end to Canada's appalling history of jailing the poor,[43] but a thoroughgoing mandate for courts to bring about equality and social justice in sentencing

34. The reforms to the *Criminal Code* responded to three fundamental concerns. First, Parliament addressed the unacceptable reality that even though a person who is ordered to pay a fine is someone whom a court has already determined should *not* be imprisoned for the offence,[44] correctional data showed that until the enactment of Bill C-41 (1996) a breathtaking portion of all admissions to provincial jails was actually for fine default.[45] Justice Minister Rock explained the importance of the proposed reforms with reference to "the appalling statistic that fully one-third of the admissions to provincial institutions are for non-payment of fines."[46]

35. Second, Parliament recognized the fact of systemic discrimination against the poor. The legislative reforms were specifically designed to address what had been described as discrimination by the Canadian

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[41] *Mukong v. Cameroon* (458/1991) CCPR/C/51/D/458/1991 paras. 9.3 and 9.4.

[42] Appendix A to this factum contains a list of some of the authorities which, over the past three decades, have been critical of imprisonment for fine default.

[43] "Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty": from the *Report of the Royal Commission to Investigate the Penal System of Canada* (Archambault Commission, 1938), as cited in *Sentencing Reform, supra,* at p. 42.

[44] *Canadian Sentencing Commission supra,* at p. 381*; Canadian Committee on Corrections (1969). Report of the Canadian Committee on Corrections*: *Toward Unity: Criminal Justice and Corrections,* ('Ouimet Report'), at p. 198.

[45] Appellant's factum Appendix 'B'; *Canadian Sentencing Commission supra*, at p.381.

[46] Canada. House of Commons, *Minutes of Proceedings and Evidence of the Justice and Legal Affairs Committee*, Issue No. 62, November 17, 1994, at p. 62:7.

Sentencing Commission (the 'Archambault Committee'):

> The imposition of a semi-automatic prison term for fine default has been the subject of relentless criticism in the sentencing literature. There is statistical evidence to support the conclusion that the imprisonment of fine defaulters without reference to their ability to pay discriminates against impoverished offenders."[47]

36. Third, Parliament recognized that discrimination against the poor intersects with discrimination against particular disadvantaged groups such as Aboriginal people. The Justice Minister noted that: "Studies have shown that Natives are most at risk of being incarcerated for failing to pay fines."[48] Women, too, had been found to be at greater risk of fine default, as a result of their overall lower incomes and insecurities related to that income.[49]

37. The 1996 reforms should also be understood in the context of the 1989 judgment of the Nova Scotia Supreme Court in *R*. v. *Hebb* wherein the court referred to many of these same sources, in the course of holding that the previous *Code*'s fine-default regime violated s. 15 of the *Charter*. The Court concluded by remarking:

> Some things are so offensive to the rule of common sense and so offend our sense of propriety that there is no need for precedent of law to condemn them or requirement of scholastic constitutional principle to denounce them. The *Charter* is a fresh but already treasured legacy that demands from our society those principles of fairness and justice which are inherent in the soul of a mature democracy. Our Constitution enshrines a system of justice based upon a belief in the inherent dignity and worth of every individual. That a person should be imprisoned only because of his or her inability to pay a fine is inconsistent with such a system.[50]

38. It is important to note that the reforms introduced in Bill C-41 went beyond simply ensuring that those unable to pay a fine should not be sent to prison for default. The reforms addressed head on the injustice associated with imposing an unpayable debt upon an impoverished individual in the first place, and thereby making the offender automatically subject to penalties and repercussions of failing to comply

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[47] *Sentencing Reform, supra*, at p. 380.

[48] Canada. *House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, p. 5872.

[49] *A Feminist Review of Criminal Law*, (Status of Women (Canada), 1986), p. 132; See also National Council of Welfare, *Justice and the Poor*, (Ottawa: Minister of Public Works and Government Services Canada, Spring, 2000) at p. 76.

[50] *R*. v. *Hebb*, (1989), 69 C.R. (3d) 1 (N.S.S.C.) at p. 22. The approach to remedies in *Hebb* was referred to with

with a court order to pay a fine. As had been noted by the court in *Hebb*, imposing fines upon the poor made the harsher penalties for default into penalties for the offence itself, solely because of the economic circumstances of the offender. Measures designed to penalize those who choose not to pay a fine were inappropriately applied to those who had no ability to pay it:

> For the impecunious offenders, however, imprisonment in default of payment of a fine is not an alternative punishment - he or she does not have any real choice in the matter. At least, this is the situation until fine option programs or related programs are in place. In effect, imprisonment of the poor in default of payment of a fine becomes a punishment that wouldn't otherwise be imposed except for the economic limitations of the convicted person.[51]

39. In its reforms to the *Criminal Code*, Parliament not only sought to ensure, by way of 734.7, that impoverished offenders would not be sent to prison for nonpayment of fines. It further sought to ensure that fines would not be imposed on impoverished offenders in the first place. In this way, Parliament sought to prevent the broader pattern of injustice against the poor, through which harsher sanctions for default become sanctions for the offence itself when committed by a person living in poverty.

E. Conditional Sentences and the Poor

40. In *Gladue* this Court recognized that the 1996 reforms to sentencing represented "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."[52] As well as addressing systemic discrimination against the poor and against Aboriginal people, the 1996 reforms to the *Criminal Code* also introduced a new sentencing option designed to reduce incarceration in prison in general, and to promote principles of restorative justice. By reducing the excessive reliance on prison in Canada, the conditional sentence was intended to assist those disadvantaged groups that were over-represented in the prison population by permitting them, where appropriate, to serve their sentence in the community.[53]

41. There are two issues related to conditional sentences in the present case which need to be distinguished:

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approval by this Court in *Schachter*, [1992] 2 S.C.R. 679 at 712-714.

[51] *Ibid*., at p.13.

[52] *Gladue*, *supra*, at para. 39

[53] *Gladu*e, *supra*.

i) Whether a conditional sentence is available to sentencing judges as an alternative way of serving 'time in default'; and

ii) Whether a conditional sentence is an appropriate alternative to the payment of a fine where a person is unable to pay a fine.

42. With respect to the first question, CCPI agrees with the Respondent that there is no reasonable basis for assuming that Parliament did not intend to extend the benefits of conditional sentences to situations where a person is found to have unreasonably failed to pay a fine. One consideration that should be brought to bear on this is that even if those who are unable to pay a fine because of poverty are no longer required to serve time in default, it is still likely that those who go to prison rather than pay a fine are economically and socially disadvantaged. In addition, increasing rates of incarceration among women may be related to sentences for time in default imposed on those who, because of dependency relations, choose to go to prison rather than deprive dependents of financial support.[54] Where time in default is deemed appropriate, permitting defaulters to serve time in the community is consistent with the purpose of Parliament's reforms to the *Criminal Code* and with ensuring that disadvantaged groups receive the full benefit of these reforms.

43. With respect to the second question, however, CCPI is deeply concerned about a trend toward the use of conditional sentences as an alternative to fine payment for those unable to pay a fine, as was done by the courts below in the present case. This result would be entirely inconsistent with Parliament's intent that poor people not be subject to more severe sanctions or to deprivations of liberty on account of their poverty, for offences which, had they been committed by a more affluent offender, would not warrant incarceration.

44. The nub of the problem is that as courts implement the explicit direction from Parliament that a fine not be imposed on a person unable to pay it, they are left with the difficulty of finding an appropriate alternative to the fine. Where governments fail to meet their obligation to provide alternative sentencing options that would be consistent with equitable treatment of the poor and with the *Code*'s sentencing principles, judges may be left with limited options. The trial judge in the present case, having ascertained that the offender could not pay the minimum fine, simply advanced a step up the sentencing ladder, from a

fine to a more serious sanction, a conditional sentence.

45. As noted by Justice Doherty in dissent, responding to an offender's poverty by stepping up the sentencing ladder from a fine to incarceration is wrong in principle. Conditional sentences are a serious deprivation of liberty analogous in kind to a prison term and should not flow as a result of poverty. The effect of house arrest, particularly on the poor, is considerably harsher than the effect of a fine on an offender with the financial means to pay it.

46. Moreover, once sentencing judges begin to consider incarceration as an appropriate replacement for fine payment when offenders are impoverished, the end result in many circumstances can be prison. Sentencing judges are frequently confronted with situations in which a conditional sentence is also not a viable sentencing option because of poverty or absence of programs. A necessary program for a disability or an addiction may be unavailable because of a program cut, or house arrest may be impossible because the offender has no stable housing. In Nova Scotia, anyone serving a conditional sentence for more than 30 days is cut off of welfare and has no means of support.[55] In Ontario, where conviction for welfare fraud commonly results in a conditional sentence, recipients of social assistance are, upon conviction, ineligible for **any** future social assistance. Having decided that incarceration is an appropriate substitute for a fine in the first place, sentencing judges may determine in such circumstances that a conditional sentence is not viable and that a prison term is appropriate. People living in poverty will keep being "bumped up" the sentencing ladder on account of their poverty.

47. The inherent problem with allowing conditional sentences as an alternative sentence for those unable to pay a fine is the fundamental injustice of imposing a deprivation of liberty on the impoverished offender which would not have been considered appropriate for an affluent offender. This is the very injustice that Parliament sought to redress in the sentencing reforms. For sentencing judges to avoid imposing fines on the poor only to substitute conditional sentences or prison is a subversion of Parliament's intent and is inconsistent with *Charter* values of equality and social justice.

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[54]National Council of Welfare, *Justice and the Poor*, (2000) at 76.

[55] *Employment Support and Income Assistance Regulations,* N.S. Reg.25/2001*,* s. 15(2) made under s. 21 of the *Employment Support and Income Assistance*, S.N.S. 2000, c.27

48. CCPI therefore urges this Court to reject the reasoning of the Court below with respect to the finding that a conditional sentence was necessary to give "emphasis to the goals of deterrence and retribution." We urge the Court to adopt, as a fundamental premise of the sentencing of impoverished offenders, consistent with Parliament's intent to address pro-actively systemic discriminatory patterns, that as a minimum, impoverished offenders ought never be subject to harsher sanctions than would be the case if they were better off.

F. Sentencing Informed by the Recognition of the Unique Circumstances and Systemic Disadvantage of Offenders Living in Poverty

49. In *Gladue*,[56] in the context of Aboriginal offenders, this Court held that a sentencing judge should take into account "background and systemic factors" in sentencing Non-Aboriginal as well as Aboriginal offenders, noting that the "overarching discretion of the trial judge to take into account the particular circumstances of the offender is essential to the imposition of a fair and just sanction." In CCPI's submission, it is consistent with Parliament's intent that poverty issues be addressed pro-actively in sentencing and with the recognition by courts and legislatures of widespread discrimination against the poor, for sentencing judges to take into consideration the systemic disadvantages linked to poverty in sentencing.[57]

50. An appropriate approach to the sentencing of poor offenders will both ensure that poor people are not 'bumped up' to harsher sentences because of their poverty and that the needs and circumstances linked with poverty are properly addressed in sentencing. This will require judicial recognition of the fact that poor people are made more vulnerable to inequality and social exclusion when governments fail to provide necessary supports or programs. In sentencing, judges need to recognize governments' responsibilities as well as those of the judiciary and those of the accused.

51. Considering a well-known recent example of the adverse consequences that can flow from the interaction between the poor and the criminal justice system, the Coroner's Jury inquiring into the death of Kimberly Rogers recently recommended that governments take on greater responsibility for ensuring that

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[56] *Gladue, supra,* at para. 69.

[57] *R. v. S. (R.D.)* [1997] 3 S.C.R. 484 at para. 46

poor people are treated fairly in the justice system and that appropriate sentencing options are made viable and humane through the provision of appropriate government support. For example, the Jury recommended that the lifetime ban on receipt of social assistance imposed upon conviction for welfare fraud be eliminated, that social assistance rates be reviewed for adequacy and that "when someone is serving a custodial sentence for house arrest, the government should ensure that adequate housing, food and/or medication is provided to the person."[58]

52. In the present case, the sentencing judge responded to the absence of a fine-option program by bumping up the Respondent to a harsher sentence. In CCPI's submission, this is the wrong approach, making a person living in poverty, who is dependent on governments in various ways, pay a personal penalty for the failures of governments to ensure equality and fairness. Sentencing of impoverished offenders needs to be properly situated in the social context of systemic disadvantage, and actively incorporate recognition of governments' obligations as well as those of offenders. In this case, the judge should have expressed an unwillingness to penalize the Respondent for the absence of a fine-option program and imposed the minimum fine with no time in default and no deadline for payment. In his reasons, he could have explained that if such a sentence is considered by governments to provide insufficient deterrence, then they should consider implementing programs which would provide sentencing judges with fair and equitable alternatives.

G. Civil and Administrative Remedies Upon Fine Default

53. The Courts below and the parties to the appeal refer to the civil and administrative remedies that are available to enforce the payout of a fine. This alternative enforcement mechanism is often referred to, almost as an afterthought, as the way in which fines are collected from the poor. However, these remedies are automatically triggered once the time allowed for payment of the fine has expired (s.734(3)of the *Code*).

54. The loss of a driver's licence/inability to renew a licence or, similarly, the garnishee of wages or the establishment of a bad credit rating are all significant burdens for people who are living in but hoping to

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[58]See the *Verdict of Coroner's Jury into the Death of Kimberly Ann Rogers*, (December 19, 2002). The Jury provided the rationale for this recommendation: "An individual placed under house arrest, who is faced with a suspension of Ontario Works benefits, and has no other financial resources, would find it difficult to survive, and should not be dependent on charitable organizations."

escape poverty. For the poor, they amount to further hardships and barriers to escaping poverty.

55. Consistent with the principle that sentences must impact equitably on the poor, CCPI submits that when the consequences for persons living in poverty are realized e.g., loss of a driver's licence or the filing of a civil judgment, it will be seen that they are significantly disproportionate to the payment of a fine by a person with money. These results have the unintended effect of worsening the marginalization of the poor, placing barriers in the way of their acquiring basic needs such as housing, and diminishing their social citizenship. Moreover, even after these penalties have been imposed, the outstanding fine remains fully payable. Creating a bind out of which there is no reasonable escape compounds the social and economic disadvantage of poor people and deprives them of dignity in a manner that is inconsistent with the purposes of restorative justice embraced by Parliament.

PART IV – COSTS

56. CCPI makes no submissions on costs.

PART V – NATURE OF ORDER SOUGHT

57. CCPI submits that the appeal be disposed of by a judgment which holds that:

In the context of the Respondent's poverty, no order for imprisonment in default (*per* s. 240(4) of the *Excise Act*) should have been imposed and no time limit ought to have been imposed for the payment of the mandatory fine.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 23rd day of May, 2003

Vincent Calderhead
Counsel for CCPI