
CANADA / JUDGMENT

R. v. Wu

2003 SCC 73

COURT

Supreme Court of Canada

DECIDED

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R. v. Wu

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2003 SCC 73

Report

[2003] 3 SCR 530

Case number

29053

Judges

McLachlin, Beverley; Gonthier, Charles Doherty; Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; Arbour, Louise; LeBel, Louis; Deschamps, Marie

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 29053

Decision Content

R. v. Wu, [2003] 3 S.C.R. 530, 2003 SCC 73

Her Majesty The Queen Appellant

v.

Yu Wu Respondent

and

Charter Committee on Poverty Issues Intervener

Indexed as: R. v. Wu

Neutral citation: 2003 SCC 73.

File No.: 29053.

2003: June 4; 2003: December 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Criminal law — Sentencing — Conditional sentence — Possession of contraband cigarettes — Accused unable to pay minimum financial penalty mandated by Excise Act — Whether prison appropriate — Whether trial judge erred in imposing conditional sentence — Criminal Code, R.S.C. 1985, c. C-46, s. 742.1 — Excise Act, R.S.C. 1985, c. E-14, s. 240(1) .

The accused was convicted of possession of 300 cartons of contraband cigarettes. Section 240(1.1) (a)(i) of the Excise Act carried a minimum penalty of \$0.16 per cigarette, which amounted to \$9,600. The trial judge concluded that the accused was not now and would not in the foreseeable future be able to pay such a heavy fine. The trial judge was also of the view that imprisonment for any length of time would not be a fit sentence in this case. He said he was “satisfied that, but for the minimum fine provisions [in the Excise Act], this would be a case for a suspended sentence”. In the absence of a regime in Ontario “permitting offenders to work off the fines”, and believing that incarceration of the accused in default of paying the fine would not be just, he concluded that a conditional sentence would be appropriate.

Accordingly, the accused was fined \$9,600, given no time to pay, and in default of payment was immediately given a conditional sentence of 75 days to be served in the community (i.e., at home) subject to a curfew from 6 p.m. to 6 a.m. every day except for absences required “for employment, medical, dental or worship”. He was allowed two hours extra liberty on either Saturday or Sunday.

Both the summary conviction appeals judge and the majority of the Court of Appeal upheld the sentence. At issue in this appeal is whether the conditional sentence was validly imposed.

Held (Deschamps J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: The trial judge erred in law in imposing a conditional sentence. Conditional sentences are not “probation under a different name” but rather sentences of imprisonment served in the community. In this case, the statutory conditions precedent to a conditional sentence were not met in two important respects. First, the trial judge’s explicit finding that this was a proper case for a suspended sentence and probation, and that imprisonment was not warranted, puts this case outside the scope of a conditional sentence. Second, nowhere in the Criminal Code is it suggested that conditional sentences are available to enforce unpaid fines.

The purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment. A conditional sentence is a form of imprisonment. Unless, in the terms of s. 734.7(1), the Crown can establish that such a defaulter has “without reasonable excuse, refused to pay”, a warrant of committal should not be issued.

If an offender does not have the means to pay a fine immediately, he or she should be given a reasonable time to pay. The offender may also be eligible for provincial fine option programs in which the fine may be discharged “in whole or in part by earning credits for work performed during a period not greater than two years” (s. 736). In the event of default, the Crown can resort to a number of civil remedies such as suspending licences or other instruments until the fine is paid in full or registering the fine owing with the civil courts. The option of jail for default is fenced in with important restrictions. A fine default is not punishable by committal unless the other statutory remedies, including licence suspensions and civil proceedings, are not appropriate in the circumstances (s. 734.7(1)(b)(i)), or the offender has, without reasonable excuse, refused to pay the fine or discharge it under s. 736 (s. 734.7(1)(b)(ii)). Where the offender’s reasonable excuse for failure to pay a fine is simple poverty, it is not open to a court to jail him or her under s. 734.7(1)(b)(i). Here, a functioning fine option program was not available in Ontario and there was no evidence as to what, if any, federal permits or licences were held by the accused.

It cannot be assumed that the financial circumstances of an offender at the date of the sentencing will necessarily continue into the future. An immediate committal order should only be made in exceptional circumstances, which did not exist here. The facts were simply that the accused was on welfare and lacked the ability to pay. An offender’s inability to pay is precisely the reason why time is allowed, not a reason why it should be altogether denied. While it would have been appropriate to impose the minimum fine plus time to pay plus 30 days in jail in default of payment, the trial judge erred in jumping directly from imposition to committal without passing through the intermediate stages of alternative collection procedures, default, and, only if the Crown thinks it has grounds to proceed, a s. 734.7(1) committal hearing.

The conditional sentence should therefore be set aside. However, since the accused has served his conditional sentence, which, if properly imposed, would bar all further collection procedures, further collection procedures are stayed.

Per Deschamps J. (dissenting): The trial judge did not err in imposing a conditional sentence in default of the payment of a fine. It is impossible to reconcile, in the case of an impecunious person, all of the sentencing principles contained in the Criminal Code with a provision prescribing a minimum fine. In principle, a sentence must take into account all aggravating and mitigating circumstances relating to the offender's situation. The judge must consider that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. A minimum fine does not allow the particular circumstances of the offender to be taken into account. Given that in Ontario there is no organized scheme for community service, the judge who seeks an alternative solution, or even a means of encouraging payment of the fine, has little room to manoeuvre. The Criminal Code confers discretion on the judge to impose imprisonment in default of payment of a fine when he or she knows that imprisonment is, in practice, the sanction actually imposed for the offence committed. The judge is not obliged to allow time for payment. In this case, the trial judge did not really ever contemplate imposing the minimum fine along with a time for payment and a period of imprisonment in the event of default. He wanted to impose a realistic and suitable punishment and did not believe that incarceration was necessary. His decision to impose a conditional sentence in default of payment was enlightened and sensitive to the particular circumstances of the case. It also respected the principles of gradation of sentences and properly balanced the relevant penological goals.

Knowing that the offender did not have any money, the judge could order imprisonment in default of payment of the fine. While such an order, at first glance, seems to punish the poor more severely and appears contrary to Parliament's intent, the adjustment required in the sphere of sentencing to take into account the poverty of an offender cannot be reduced to a concern for ensuring that absence of means does not become a reason for imprisonment. All of the effects of a sentence and the different impact that certain sentences may have on different individuals must be taken into account. In this case, a conditional sentence could not be ruled out on any policy grounds.

Cases Cited

By Binnie J.

Considered: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5; referred to: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. R.A.R.*, [2000] 1 S.C.R. 163, 2000 SCC 8; *R. v. Snider* (1977), 37 C.C.C. (2d) 189; *Regimbald v. Chong Chow* (1925), 38 Que. K.B. 440; *R. v. Andrews*, [1974] 2 W.W.R. 481; *R. v. Brooks*, [1988] N.S.J. No. 94 (QL); *R. v. Beaton* (1984), 49 Nfld. & P.E.I.R. 15; *R. v. Tessier* (1957), 21 W.W.R. 331; *Attorney General of Canada v. Radigan* (1976), 33 C.R.N.S. 358; *R. v. Natrall* (1972), 9 C.C.C. (2d) 390; *R. v. Zink* (1992), 13 B.C.A.C. 241; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Hebb* (1989), 69 C.R. (3d) 1; *R. v. Zachary*, [1996] R.J.Q. 2484; *R. v. MacFarlane* (1997), 121 C.C.C. (3d) 211; *Clergue v. H. H. Vivian and Co.* (1909), 41 S.C.R. 607; *Re International Woodworkers of America*, Local 2-306

and Miramichi Forest Products Ltd. (1971), 21 D.L.R. (3d) 239.

By Deschamps J. (dissenting)

R. v. Proulx, [2000] 1 S.C.R. 61, 2000 SCC 5; R. v. Gladue, [1999] 1 S.C.R. 688.

Statutes and Regulations Cited

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Excise Act, R.S.C. 1985, c. E-14, s. 240(1) [repl. 1994, c. 29, s. 15], (1.1)(a)(i) [ad. idem; am. 1999, c. 17, s. 144(1)(z.20)].

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APPEAL from a judgment of the Ontario Court of Appeal (2001), 160 C.C.C. (3d) 321, 48 C.R. (5th) 183, 152 O.A.C. 300, [2001] O.J. No. 4885 (QL), affirming a judgment of the Superior Court of Justice affirming a judgment of the Ontario Court of Justice. Appeal allowed, Deschamps J. dissenting.

Peter DeFreitas and Marie Comiskey, for the appellant.

Lawrence Greenspon, Blair Crew and Trevor Brown, for the respondent.

Vincent Calderhead and Roger Burrill, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by

1 Binnie J. — In this appeal we are asked to consider whether a conditional sentence was validly imposed on the respondent offender for possession of contraband cigarettes. The offender might otherwise have been sent to jail for 30 days for non-payment of a mandatory \$9,600 fine. In the trial judge's view, jail was not appropriate for this offender. On the other hand, the offender simply had no means to pay the fine. The trial judge thought a conditional sentence to be served by the offender in his home offered a way to avoid jail. I agree with the trial judge's initial conclusion that this was not an appropriate case for jail. I disagree with his sentencing solution. The Criminal Code, R.S.C. 1985, c. C-46, properly interpreted, offered the sentencing judge a range of alternative solutions for this offender but a conditional sentence was not amongst them.

2 Debtors' prison for impoverished people is a Dickensian concept that in civilized countries has largely been abolished. Imprisonment for civil debt was abolished in Ontario by the end of the 19th century. In its 1996 sentencing reforms, Parliament decreed that jail should be reserved for those whose conduct deserves to put them there. Here, the trial judge thought a fit sentence would be a suspended sentence with probation, but this was not possible under the Act. Yet debtors' prison "in the community", which is what a conditional sentence amounts to, is repugnant in the case of an individual who is undeserving of jail yet who simply cannot pay.

3 As will be seen, the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment. A conditional sentence is a form of imprisonment. Therefore, a conditional sentence is not an appropriate sentence to impose on an offender simply because he or she has no means to pay a fine. Nothing in the Code authorises a conditional sentence to be used for collection purposes. Unless, in the terms of s. 734.7(1), the

Crown can establish that a defaulter has “without reasonable excuse, refused to pay”, a warrant of committal should not be issued.

4 The conditions precedent to the imposition of a conditional sentence were accordingly not met. The sentencing judge commented that “hard cases make bad law and this is a hard case”. In my view, with respect, it also made bad law. I would allow the appeal.

I. Facts

5 The respondent, Yu Wu, was convicted of possession of 300 cartons of contraband cigarettes. The Excise Act, R.S.C. 1985, c. E-14, s. 240(1.1) (a)(i), carried a minimum penalty of \$0.16 per cigarette, which amounted to \$9,600. The circumstances, as related by the accused, were curious. He explained that he had injured his back in 1994, had been unemployed since then, and was supporting himself and his 16-year-old daughter in Toronto on welfare payments of \$965 per month. He went to gambling casinos three to five times a week. At the Niagara Falls Casino in late May or early June 1998, he had struck up an acquaintance with a man he identified only as “Mike”. In July 1998, he agreed to help “Mike” drive to Montreal to gamble. They took Mike’s car. Along the way, Mike pulled into a house in Cornwall. In this stranger’s house, Mr. Wu waited for almost 8 hours. Finally, the owner of the house told Mr. Wu that Mike had left and that he should drive Mike’s car back to Toronto. On the way home to Toronto in Mike’s car, the respondent was stopped by police. He testified that it was only when the police pulled him over that he realized that the back seat of the car contained 300 cartons of contraband tobacco.

6 Mr. Wu conceded that he did not know “Mike’s” last name, phone number, or address. The only way that he could contact Mike would be if he happened to run into Mike at an Ontario casino. Otherwise, Mr. Wu would have to wait for Mike to call Mr. Wu’s pager or come to Mr. Wu’s home. Apparently, they did not meet and “Mike” never did call.

7 The accused was prosecuted under s. 240(1) of the Excise Act for possession of contraband tobacco.

II. Court Proceedings

A. Ontario Court of Justice — Renaud J.

8 After considering the facts, the trial judge stated that imprisonment for any length of time would not be appropriate in this case. He was “satisfied that, but for the minimum fine provisions [in the Excise Act], this would be a case for a suspended sentence”. The accused “is an individual with very little to be said of him, positive or negative. [He] is someone who has not demonstrated a tendency to engage in any [anti]-social behaviour and [he] is someone who should respond positively to a period of probation.” However, in view of the minimum fine provisions of the Excise Act, the trial judge concluded that probation or a conditional discharge were not available sentencing options.

9 Referring to the decision of this Court in *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, the trial judge commented that it was clear that “jail should be reserved for those individuals who are a danger to the community. This individual is not a danger to the community”.

10 That said, the mandatory fine scheme “evidences Parliament[’s] wish that smuggling be deterred”. The Cornwall area “is plagued by smuggling” and the Court of Appeal had warned trial judges “to steel themselves to be harsh in imposing sentences on very sympathetic individuals” because the smuggling rings deliberately recruited runners who would be seen by the courts as sympathetic people.

11 The sentencing judge concluded that the respondent was not now and would not in the foreseeable future be able to pay such a heavy fine. In the absence of a regime in Ontario “permitting offenders to work off the fines”, and believing that incarceration of the accused in default of paying the fine would not be just, he concluded that a conditional sentence would be appropriate.

12 Accordingly, the accused was fined \$9,600, given no time to pay, and in default of payment was immediately given a conditional sentence of 75 days to be served in the community (i.e., at home) subject to a curfew from 6 p.m. to 6 a.m. every day except for absences required “for employment, medical, dental or worship”. He was allowed two hours extra liberty on either Saturday or Sunday.

B. Superior Court of Justice — Robertson J.

13 The summary conviction appeals judge concluded that the trial judge had not erred in imposing a sentence “particular to the specific facts of this case”. The Crown’s appeal was dismissed.

C. Ontario Court of Appeal (2001), 160 C.C.C. (3d) 321

1. Sharpe J.A. for the majority

14 The trial judge had given the accused no time to pay, which indicated that he “ha[d] determined, then and there, that the appropriate sanction for the offender’s conduct is either immediate payment or immediate imprisonment” (para. 18). As the “legal and practical effect of the sentence is to send the offender directly to jail” (para. 18), Sharpe J.A. concluded that the conditions precedent to a conditional sentence were satisfied. While the trial judge was required to impose a fine, he was not required to impose a term of imprisonment in default of payment. However, “[t]he 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” (para. 19). Accordingly, in the majority view, 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” (para. 19).

2. Doherty J.A., dissenting

15 Doherty J.A. took the view that once the trial judge had decided that imprisonment would not be an appropriate sentence, the statutory conditions precedent for a conditional sentence were not met. Further, the conditional sentence was imposed here not by reason of the offence, but to enforce the non-payment of the fine (at para. 40):

I think it is just as much an error in principle to impose a conditional sentence in these circumstances as it would have been to impose a custodial sentence. Both amount to deprivation of liberty, not as a fit sanction for the offence committed, but because the offender is unable to pay a fine. Economic imprisonment whether in jail or in the community is offensive to the present provisions of the Criminal Code relating to fines.

He would therefore have allowed the Crown's appeal.

III. Analysis

16 The principles of sentencing include Parliament's direction that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", and "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders" (s. 718.2(d) and (e) of the Code (emphasis added)).

17 Applying these principles, the trial judge concluded very firmly that the respondent should not go to jail for what was seen as a relatively minor role in this cigarette smuggling operation. The respondent did not bring the goods across the border. He had no previous record for such an offence. He was no danger to the community. He was the sole support for his teenage daughter. Yet, in default of payment of a mandatory minimum \$9,600 fine, which the judge believed the respondent had no ability to pay, he felt obliged to consider a significant period of incarceration. Indeed, the Crown Attorney at trial calculated that under s. 734(5) the statutory formula would "deem" the period of imprisonment in default of payment of a \$9,600 fine to be 174 days. (The Crown conceded the formula was inapplicable to a fine imposed under the Excise Act.) The judge found he retained a discretion to order a shorter sentence and would have sentenced the respondent to 30 days in jail in default of payment were a conditional sentence not an available option.

18 That said, the trial judge concluded that a conditional sentence was available. The following exchange occurred at the sentencing hearing:

[DEFENCE]: So it would make sense to me, if I can just get this off my chest, it would make sense to me that if you can give a conditional sentence . . .

THE COURT: For a manslaughter

[DEFENCE]: . . . for a manslaughter or for anything else when jail is an appropriate sentence, surely on a fine situation, for a tax [evasion], surely, it would be logical to say that you can give a conditional sentence in that circumstance.

...

THE COURT: ... Why would a non-violent offender actually be detained in a custodial facility while a violent offender does not, if [he or she] doesn't threaten the safety of the community. ...

19 Ordinarily, of course, the appellate courts will defer to the sentence considered appropriate by the trial judge, who "possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system": *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91; see also *R. v. R.A.R.*, [2000] 1 S.C.R. 163, 2000 SCC 8, at para. 19. Moreover, "the sentencing judge will generally have a better knowledge of the community in which the offences occurred and is therefore in a better position to craft an appropriate sentence" (*R.A.R.*, *supra*, at para. 19). In this case, however, the Crown argues that the trial judge made an error of law in concluding that a conditional sentence was an available option. I agree.

20 The Crown has a very practical interest in the subject matter of this appeal. Imprisonment terminates the Crown's power to pursue civil enforcement remedies to collect the money (s. 734.7(4) of the Code). Some individuals with savings in the bank might prefer spending 75 days under house arrest rather than paying \$9,600. In this case, however, the evidence is that the respondent's poverty left him with no choice in the matter.

A. The Mandatory Minimum Fine

21 Parliament is quite specific about the range of penalties in s. 240 of the Excise Act :

240. (1) Subject to subsections (2) and (3), every person who sells or offers for sale or has in the person's possession any manufactured tobacco or cigars, whether manufactured in or imported into Canada, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with this Act and the ministerial regulations

...

(b) is guilty of an offence punishable on summary conviction and liable to

(i) a fine of not less than the amount determined under subsection (1.1) and not more than the lesser of \$500,000 and the amount determined under subsection (1.2), or

(ii) both the fine described in subparagraph (i) and imprisonment for a term not exceeding two years. [Emphasis added.]

22 The trial judge could, in a proper case, have concluded that a fit sentence would include both the mandatory minimum fine and a period of imprisonment. He emphatically decided that imprisonment was not a fit punishment. Indeed, as stated, his preference would have been to impose no more than a suspended sentence with probation. Yet in *Proulx* itself, Lamer C.J. stated, at para. 55:

At one end of the range, Parliament denied the possibility of a conditional sentence for offenders who should receive a penitentiary term. At the other end, Parliament intended to ensure that offenders who were entitled to a more lenient community measure — such as a suspended sentence with probation — did not receive a conditional sentence, a harsher sanction in this legislative scheme. [Emphasis added.]

23 A mandatory minimum fine of \$9,600 imposed irrespective of the offender's means to pay is a legislated exception to the usual sentencing principles. Even before the 1996 sentencing reforms, the correct rule was that a fine should be assessed having regard to "the offender's ability to pay" (R. v. Snider (1977), 37 C.C.C. (2d) 189 (Ont. C.A.), at p. 190). It was quite open to Parliament to impose a minimum fine, but Parliament's amendments did not require that inability to pay should necessarily land the offender in jail. Indeed, the 1996 amendments show that Parliament did not intend to send the impoverished to jail by reason only of their inability to pay.

B. Availability of Conditional Sentences

24 Conditional sentences were introduced with the 1996 sentencing reforms of the Code. The Minister of Justice explained the purpose of his bill as follows:

A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.

(House of Commons Debates, vol. 133, 1st Sess., 35th Parl., September 20, 1994, p. 5873)

The conditional sentencing regime is dealt with in s. 742.1 of the Code which provides as follows:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

25 In Proulx, supra, it was held that the requirement that the court impose "a sentence of imprisonment of less than two years" was intended to identify the type of offenders who could be entitled to a conditional sentence (para. 55). Specifically, Parliament did not intend conditional sentences to be "probation under a different name" (para. 28). A conditional sentence is a sentence of imprisonment, albeit the sentence is served in the community. It is imprisonment without incarceration. Only when the sentencing judge has rejected other sentencing options, such as a conditional discharge, a suspended sentence, probation or a fine, and has concluded

that a term of imprisonment of less than two years is required by the gravity of the offence and the degree of responsibility of the offender, does a conditional sentence arise for consideration. At that point, the question is where the term of imprisonment is to be served, in a penal institution or, under punitive conditions, in the community. “It is this punitive aspect that distinguishes the conditional sentence from probation” (Proulx, *supra*, at para. 22).

26 The trial judge’s explicit finding that this was a proper case for a suspended sentence and probation, and that imprisonment was not warranted, puts this case outside the scope of a conditional sentence. As stated in Proulx, at para. 37: “Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise have been sent to jail” for the offence that gave rise to the conviction.

27 The statutory conditions precedent to a conditional sentence were not met in two important respects:

- (i) The trial judge, with the best of intentions, stood the Proulx reasoning on its head. He was searching for a mechanism to deal with an offence that in his view did not warrant imprisonment at all. He thought justice would be served by keeping the respondent, if at all possible, out of jail entirely. But the conditional sentencing regime is predicated on a finding in a particular case that jail for less than two years would be a fit sentence. The effect of the trial judge’s approach would be to widen the net of the conditional sentencing regime to imprison in their homes offenders under punitive conditions purely on the basis of their inability to pay a fine. Net widening is repugnant to the conditional sentence regime: Proulx, *supra*, at para. 56. What is more, if the punitive conditions are breached, the offender would face the prospect of serving the balance of the sentence in an institution without possibility of parole (Proulx, at paras. 42-44), thereby adding further to the high rates of incarceration that the 1996 sentencing reforms were designed to alleviate.
- (ii) Conditional sentences are presented in s. 742.1 of the Code as a sentencing option, if the conditions precedent are met, for the original offence, as Doherty J.A. emphasized in the present case. The distinction between sentencing provisions and enforcement of sentences is of long standing: *Regimbald v. Chong Chow* (1925), 38 Que. K.B. 440, at p. 445. Section 240 of the Excise Act permits the sentencing judge to send an offender to jail on summary conviction for up to two years. The trial judge rejected jail as a fit punishment for this offence. Jail only entered his calculation as a default provision for non-payment. As such, jail was triggered by the default, not the offence. No default, no jail. The decision of the judge to collapse the sentencing hearing into a default of payment hearing was done for administrative convenience, apparently, but it did not eliminate the fact that legally there was a shifting of gears from sentence to default to consideration of the appropriate sentence for default to committal. The conditional sentence is a creature of statute and nowhere in s. 742.1 or elsewhere in the Code is it suggested that conditional sentences are available to enforce unpaid fines.

C. The Trial Judge's Dilemma

28 The trial judge's dilemma was that he was required by the Excise Act to impose a minimum fine of \$9,600, rising to a maximum of \$14,400 based on a mechanical formula applied to the quantity of contraband cigarettes found in the offender's possession. The trial judge did not dispute the logic of the minimum mandatory fine because in his view contraband is a serious problem in the community. His concern was the perceived inevitability of incarceration that would arise from enforcement action consequent on the respondent's inability to pay.

29 The error in the trial judge's approach, with respect, was his conclusion that, in the case of this respondent, the only alternative to a conditional sentence was actual jail time.

30 As a matter of law, there was nothing inevitable about incarceration in the event the respondent was simply unable to pay the \$9,600 fine by reason of his poverty.

D. No Time Given for Payment

31 As stated, the trial judge gave the respondent no time to pay. This was in accordance with a request from the defence, which sought to lay the basis for a conditional sentence. But it was an error. If it is clear that the offender does not have the means to pay immediately, he or she should be given time to pay: see *R. v. Andrews*, [1974] 2 W.W.R. 481 (B.C.S.C.), and *R. v. Brooks*, [1988] N.S.J. No. 94 (QL) (C.A.). The time should be what is reasonable in all the circumstances: *R. v. Beaton* (1984), 49 Nfld. & P.E.I.R. 15 (P.E.I.C.A.), and *R. v. Tessier* (1957), 21 W.W.R. 331 (Man. Co. Ct.). In *Attorney General of Canada v. Radigan* (1976), 33 C.R.N.S. 358, the Quebec Court of Appeal allowed the offender to pay a fine of \$5,000 through semi-annual instalments of \$625. The courts have considerable flexibility to respond to the particular facts of an offender's situation. It is wrong to assume, as was done in this case, that the circumstances of the offender at the date of the sentencing will necessarily continue into the future.

32 Here, the trial judge issued a committal order forthwith. The Code provides that "[w]here no time has been allowed for payment of a fine and a warrant committing the offender to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal" (s. 734.7(2)). This language suggests that only in exceptional circumstances that call for judicial explanation should an immediate committal order be made. Here there were no exceptional circumstances. The reason given was simply that the respondent was on welfare and lacked the ability to pay.

33 An offender's inability to pay is precisely the reason why time is allowed, not a reason why it should be altogether denied: *R. v. Natrall* (1972), 9 C.C.C. (2d) 390 (B.C.C.A.), at p. 397; *R. v. Zink* (1992), 13 B.C.A.C. 241. It is true that the fine could not have been paid immediately, and perhaps never in full, but the mandatory minimum fine scheme imposed by Parliament was effectively nullified by immediately shifting the penalty from the respondent's financial interest to his liberty interest. Parliament clearly intended that an economic punishment be imposed for an economic offence. The Crown in its factum says that tobacco smuggling results in an estimated \$1 billion loss in tax revenue per year. As noted, committal of an offender for default of payment

terminated the operation of all other enforcement mechanisms to collect the fine (s. 734.7(4)). It is often difficult to predict with certainty whether an offender will in future acquire the means to pay the fine, whether through his or her own labour, or perhaps a windfall.

E. Imprisonment for Debt

34 The trial judge of course put his finger on a serious problem. Debtors' prison, a dreadful institution excoriated by Charles Dickens in *Little Dorrit*, is no longer with us. But according to the most recent report from Statistics Canada, 17 percent of all people in custody in provincial or territorial institutions in 2000-2001 were jailed for default on unpaid fines, i.e., at least one of the causes for their committal arose from a fine default: see Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 2000-2001* (2002), at Table 7. The numbers are fairly steady, if in slight decline, from 20 percent in 1998-1999 to 19 percent in 1999-2000.

35 A similar picture was presented by the National Council of Welfare in its report *Justice and the Poor* (2000), at p. 76. The Council says that in 1989-1990, fine default "played a major role" in the imprisonment of women, especially of Aboriginal women in the Prairie provinces. At the time, 47 percent of female prisoners in Saskatchewan were admitted for fine default. On a provincial basis, the Council noted of the Quebec system, at pp. 76-77, for example:

A 1994 Quebec survey found that 35 percent of the imprisoned defaulters had been fined for offences under the Criminal Code or other federal criminal laws (average fine of \$262 or, in case of default, average of 26 days in prison), 10 percent for both federal and provincial offences (average \$1,366 or 50 days), and 55 percent for violations of provincial laws (average \$342 or 13 days) or municipal bylaws (average \$116 or 8 days). The vast majority (65 percent) of the fines had been issued for driving/traffic offences, mostly under provincial laws (45 percent). The rest of the fines were for thefts and other property offences under the Criminal Code (5 percent), violations of drug laws and other federal statutes (3 percent), assaults and other offences against the person (2 percent), illegal hunting, poaching and other violations of provincial laws (2 percent), failure to appear in court and other Criminal Code violations (15 percent) as well as unspecified municipal offences (8 percent).

36 It is curious that, while a force behind the 1996 sentencing reforms to the Code was a reaction to the overuse of prison as a sanction (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 57), prison as an enforcement mechanism for unpaid fines remains at such a high level. In its 1987 report, the Canadian Sentencing Commission had observed that "[t]he 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": *Sentencing Reform: A Canadian Approach — Report of the Canadian Sentencing Commission* (1987), at p. 380. The Commission recommended that "a quasi-automatic prison term not be imposed for fine default and that offenders only be incarcerated for wilful breach of a community sanction" (p. 381), meaning probation or fines (p. 347). In its 1996 sentencing reforms, Parliament took these views into account.

37 I do not overlook the corollary problem that poverty should not become a shield against any punishment at all. Otherwise, smugglers will simply be encouraged to redouble their efforts to recruit impoverished people as runners. Nor is it suggested that jail is never a fit sentence for people in the respondent's position. In this case, however, we are confronted with a specific finding by the sentencing judge, not unreasonable in the circumstances, that jail was not a fit sentence for this offender.

38 It is one thing if the judge forms the view that jail is a fit sentence, albeit one from which the offender can extricate him- or herself by payment of a fine. It is another thing altogether where the judge, as here, concludes that jail time is not appropriate.

F. Encouragement to Pay

39 The appellant Crown states in its factum on the present appeal, "[t]he purpose of a term of imprisonment in default is to encourage fine payment; it is not punishment for an offence." "Encouragement" presupposes the offender has the wherewithal to somehow organize payment. If, as the collection lawyers say, you cannot get blood from a stone, no amount of "encouragement" is going to cause the stone to bleed.

40 The Crown's submission finds an echo in late 18th century England. A leading scholarly study of the King's Bench debtors' prison points out that what creditors wanted was, above all, the power to threaten imprisonment. A debtor who was brought to court, even if he could put up bail, received a forceful reminder of his perilous situation. Court appearance might well induce a debtor with resources to re-order his priorities and settle outstanding claims. Even a debtor without resources might find himself able, under the shadow of the law, to dredge up sufficient funds from friends and relatives. [Emphasis in original.]

(J. Innes, "The King's Bench prison in the later eighteenth century: law, authority and order in a London debtors' prison", in J. Brewer and J. Styles, eds., *An Ungovernable People: The English and their law in the seventeenth and eighteenth centuries* (1980), 250, at p. 254)

41 Debtors' prison was used to enforce civil debts. In this case, we are dealing with debts owed to the Crown. One of the ideas underlying the 1996 sentencing reforms is that it was no more appropriate to use jail as a general collection agency for debts owed to the Crown than it is for debts owed to ordinary citizens.

42 It is true, of course, that some of those serving jail time in default of payment even today are doing so for reasons of personal preference, a matter of choice, as documented in a recent study for the British Home Office: R. Elliott and J. Airs, *New Measures for Fine Defaulters, Persistent Petty Offenders and Others: The Reports of the Crime (Sentence) Act 1997 Pilots* (2000), at pp. 32-35, 44 and 68-69.

43 However, the illusory nature of the "choice" between fine or imprisonment in many situations was noted by Kelly J. in *R. v. Hebb* (1989), 69 C.R. (3d) 1 (N.S.S.C. (T.D.)), at p. 13:

It is irrefutable that it is irrational to imprison an offender who does not have the capacity to pay on the basis that imprisonment will force him or her to pay. If the sentencing court chooses a fine as the appropriate sentence, it is obviously discarding imprisonment as being unnecessary under the particular circumstances. However, default provisions may be appropriate in circumstances where the offender may choose not to pay, presumably on principle, and would elect to spend time incarcerated rather than make a payment to the state. 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 would not otherwise be imposed except for the economic limitations of the convicted person. [Underlining added.]

44 It was to address some of these weaknesses in the sentencing options that the Minister of Justice subsequently introduced Bill C-41, proclaimed in force on September 3, 1996.

G. No Constitutional Question Raised

45 Both the respondent and the intervener Charter Committee on Poverty Issues expressed the view that a Charter challenge ought to have been taken against the mandatory fine provision of the Excise Act . In particular, the Charter Committee on Poverty Issues contended that the law operates unequally as between the rich and the poor. A similar Charter challenge was made and rejected in *R. v. Zachary*, [1996] R.J.Q. 2484 (C.A.), and *R. v. MacFarlane* (1997), 121 C.C.C. (3d) 211 (P.E.I.C.A.). In the absence of a successful Charter challenge, we take the law as Parliament has passed it. This was accepted by the trial judge who rightly felt he had no option but to impose a \$9,600 fine.

H. The 1996 Sentencing Reforms

46 The 1996 amendments made a number of important clarifications in this area of the law.

47 Firstly, Parliament rejected in general the notion that a fine should be set without regard to an offender's ability to pay. A means inquiry is now a condition precedent to the imposition of a fine except where otherwise provided by law. Section 734(2) of the Code now provides:

734. . . .

- (2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

In this case, of course, Parliament did impose a minimum fine which, in his present circumstances, the respondent was unable to pay.

48 Secondly, in s. 734(2), Parliament cross-referenced s. 736 which introduced into the Code recognition of provincial “fine option programs” in which, assuming such a plan exists and the offender is eligible for it, the fine may be discharged “in whole or in part by earning credits for work performed during a period not greater than two years”.

49 Thirdly, Parliament provided that a defaulting offender should not be sent to jail unless he or she has “without reasonable excuse, refused to pay the fine or discharge it under s. 736” (see s. 734.7(1) of the Code).

50 The Court of Appeal expressed concern that a fine that is not backed up with the threat of jail might be seen as a “hollow” sentence. The 1996 amendments make it clear, however, that while impoverished offenders are not to be jailed simply because of an inability to pay, they are nevertheless subject to available collection methods short of jail, including an obligation to work off their debts where a fine option program is in place. Moreover, the sentencing judge can certainly impose a fine plus a period of jail in default of payment to encourage payment. The problem here was that the sentencing judge moved directly from imposition to committal without passing through the intermediate stages of default and a s. 734.7(1) committal hearing.

51 If no “fine option program” is in place and the offender defaults, the Crown has a number of civil remedies, including refusal to “issue or renew or may suspend [any] licence, permit or other instrument until the fine is paid in full” (s. 734.5 of the Code), or the criminal court order may be filed as a judgment in a court of civil jurisdiction, with all the usual civil law collection remedies (s. 734.6). A third option is committal to jail for default, but, as will be seen, this option is fenced in with important restrictions.

(i) The Lack of a Functioning Fine Option Program in Ontario

52 The trial judge in this case made it clear that if a fine option program had been available in Ontario, he would have enrolled the respondent to work off the debt over a period of time through community service. “[I]f there was a regime in this province permitting offenders to work off the fines”, he said, “this entire discussion would be obviated”.

53 All provinces and territories have a fine option program in place except for British Columbia, Newfoundland and Labrador, Nunavut and Ontario. Of these four jurisdictions, Newfoundland and Labrador has enabling legislation in place to allow the program, but has not promulgated a regulation to create the program: see Provincial Offences Act, S.N.L. 1995, c. P-31.1, s. 38. Nunavut is in the process of drafting legislation to create a program. British Columbia does not at present have a statute that allows for the creation of such a program.

54 Ontario has a regulation in place that establishes such a program in designated areas, but, as part of budget cuts, it has dismantled the administrative apparatus required to support it. Specifically, the Fine Option Program, R.R.O. 1990, Reg. 948, made pursuant to the Provincial Offences Act, R.S.O. 1990, c. P.33, contemplated a fine option program in Ontario, but while the regulation has never been repealed, the administrative apparatus essential to administer the program was eliminated in 1994: see O. Reg. 925/93.

(ii) Licence Suspension and Revocation

55 Enforcement options available to the Crown include the suspension or revocation of licences and permits held by the respondent. In the present case, the fine was imposed under the federal Excise Act . There is no evidence of what federal permits or licences, if any, were held by the respondent. It is possible that he possessed a Canadian passport.

56 In most cases, revocation or suspension of permits is a potent collection tool, especially where the fine is owed to the provincial Crown. Anyone who has tried to renew a driving licence despite an unpaid fine is familiar with the procedure. While suspension or revocation do not themselves produce payment of the fine, they put pressure on the offender to find the money. This remedy is frequently resorted to. It appears that in 2002 there were 95,909 driving permits in Ontario suspended as a result of default in the payment of fines: Ontario, Ministry of Transportation, Driver Control Statistics (2003). Apart from driving licences, suspension or revocation would be available provincially in respect of registration of vehicles, taxicab licences, hunting permits, work permits, timber cutting permits, mineral exploration licences, building permits and the full range of activities touched by the apparatus of the regulatory state.

57 It may be that suspension of federal permits and licences would not have produced any significant payment in the respondent's case, but nevertheless, where applicable, it would be a punishment less restrictive of his liberty than house arrest.

(iii) Civil Enforcement

58 Governments use collection agencies. If there is money to be found, these people are nothing if not persistent.

59 Under s. 734.6, the Crown can register the unpaid sentence as a civil judgment. Providing the civil judgment is renewed at appropriate intervals, it carries on indefinitely. The fact the respondent was impoverished on the day of his sentencing does not mean he will be ever thus.

(iv) Committal Proceedings

60 Under the Code, a fine default is not punishable by committal unless the other statutory remedies, including licence suspensions and civil proceedings, are “not appropriate in the circumstances”, or “the offender has, without reasonable excuse, refused to pay the fine or discharge it under section 736 [fine options program]” (emphasis added). Section 734.7(1) of the Code provides:

734.7 (1) [Warrant of committal] Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine

- (a) until the expiration of the time allowed for payment of the fine in full; and
- (b) unless the court is satisfied

(i) that the mechanisms provided by sections 734.5 and 734.6 are not appropriate in the circumstances, or

(ii) that the offender has, without reasonable excuse, refused to pay the fine or discharge it under section 736.

61 Where the offender's "reasonable excuse" under subpara. (ii) for failure to pay a fine is poverty, the question is whether it is nevertheless open to a court to jail him or her under subpara. (i) because the self-same poverty makes it "not appropriate", i.e., futile, to resort to civil collection methods or permit suspensions. In my view, such a reading of s. 734.7, despite the drafter's use of the word "or" at the end of s. 734.7(1)(b)(i), would be absurd.

62 Courts have not infrequently read "or" as "and" where the legislative context so requires: *Clergue v. H. H. Vivian and Co.* (1909), 41 S.C.R. 607, *Re International Woodworkers of America, Local 2-306 and Miramichi Forest Products Ltd.* (1971), 21 D.L.R. (3d) 239 (N.B.C.A.), and *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 66-69. See also, on this specific point, A. Manson, *The Law of Sentencing* (2001), at p. 249.

63 If poverty were to be upheld as a stand-alone justification for a committal court to find collection methods other than jail "not appropriate", then the "without reasonable excuse" limitation in s. 734.7(1)(b)(ii) would afford poor people no protection at all. Yet it was the concern about overuse of jail for poor people for unpaid fines that was an important impetus behind the 1996 sentencing reforms.

64 Use of the word "refused" in s. 734.7(1)(b)(ii) indicates a parliamentary expectation that the offender's particular circumstances allow him or her a choice. In this case, at least at the date of the sentencing, the respondent had no choice.

65 The Crown, in its factum, fully accepted that committal proceedings are governed by the principle in s. 734.7(1)(b)(ii) that "the offender has, without reasonable excuse, refused to pay the fine or discharge [the debt]" (emphasis added). For example, the Crown argues:

By operation of the warrant of committal provisions in s. 734.7 of the Criminal Code, there must be a judicial determination that an offender has "without reasonable excuse, refused to pay the fine" before he or she is ordered into custody.

...

While the "slamming of the jail door" is the incentive to make offenders with means pay their fines, no one will go to jail for their genuine inability to pay.

...

However, as will be discussed below, where a sentencing judge chooses to impose a default term of imprisonment, the warrant of committal provision in s. 734.7 of the Criminal Code operates to ensure that only those who wilfully evade payment will be incarcerated.

...

If the judge was satisfied that the Respondent was not wilfully evading the payment of the fine, there would be no basis for issuing a warrant of committal and the Respondent would not go to jail. [Emphasis in original.]

66 Parliament has imposed a mandatory minimum fine in s. 240 of the Excise Act , but it has with equal authority provided in s. 734.7(1) of the Code that the offender should not go to jail for failure to pay it unless it is shown that he or she has “without reasonable excuse, refused to pay”. That was not the position of the respondent when he was sentenced. He ought not to have been sentenced to serve a “term of imprisonment” in an institution or in the community.

I. The Proper Order

67 In my view, the trial judge ought to have proceeded with his initial instinct to impose the mandatory minimum fine of \$9,600 plus a reasonable time to pay and 30 days in default. If, as the trial judge expected, the respondent went into default despite the Crown’s resort to available remedies short of committal, the Crown would then have had the choice whether to proceed further or not.

68 If, as the trial judge anticipated, the respondent had continued simply to be unable to pay, the Crown, on its own acknowledgement to this Court, would not have sought such a committal.

69 If, on the other hand, the respondent had come into money to pay all or part of the debt, he should quite properly have been required to do so.

IV. Disposition

70 The appeal is allowed. As the respondent has served his conditional sentence, which would bar all further collection procedures under s. 734.7(4) of the Code, the Crown ought not to take any further collection procedures as a result of the conditional sentence’s being set aside. A stay is therefore entered against any further collection procedures. As the appeal was brought by the Crown as a test case, the respondent should have his costs in this Court.

English version of the reasons delivered by

71 Deschamps J. (dissenting) — I can appreciate the Cartesian logic of my colleague Binnie J., but in my opinion, a more nuanced approach is necessary.

72 The difficulty of this case arises from the impossibility of reconciling, in the case of an impecunious person, all of the sentencing principles contained in the Criminal Code, R.S.C. 1985, c. C-46 , with a provision prescribing a minimum fine. In principle, according to s. 718.2 (a) and (d), a sentence must take into account all aggravating and mitigating circumstances relating to the offender’s situation. The judge must consider that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. A minimum fine does not allow the particular circumstances of the offender to be taken into account. Given that

in Ontario there is no organized scheme for community service, the judge who seeks an alternative solution, or even a means of encouraging payment of the fine, has little room to manoeuvre. I therefore propose a purposive sentencing approach, like the one adopted by the Court in *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at paras. 55 and 127, in order to determine if imposing a conditional sentence in default of the payment of a fine is an error in principle. As the following reasons will make clear, I find that it is not.

I. Comparison Between Fines and Conditional Sentences

73 In *Proulx*, *supra*, the Court established a gradation of sentences. At one end of the spectrum are restorative sentences and at the other, punitive sentences. Lamer C.J. described restorative justice as follows (at para. 18):

A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done

74 Thus, in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 43:

Restorative sentencing goals do not usually correlate with the use of prison as a sanction.

Releases and suspended sentences are therefore classified as restorative sentences.

75 In *Proulx*, *supra*, the Court discusses two punitive sentences, namely, incarceration and conditional sentences, insisting that the latter form of sentence is also consistent with the objectives of restorative justice (at para. 22):

The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. [Emphasis omitted.]

76 The analysis developed in *Proulx* did not concern fines, but it seems obvious to me that the imposition of a fine has little in common with restorative justice. In fact, while the offender is allowed to go free, and while this type of sentence promotes a sense of responsibility in the offender, fines do not help to repair the harm caused to the victim. In contrast, when an offender is subject to a probation order in the context of a remedial order, the court can order that he or she make restitution to the victim on one or a number of counts (s. 738 Cr. C.). Furthermore, there is no follow up that can ensure that an individual ordered to pay a fine will develop a sense of his or her responsibility. Finally, in the case of an impecunious offender, the restorative objective of rehabilitation will perhaps never be achieved if he or she does not manage to pay the fine. A fine imposed on the offender, especially on one of limited means, is therefore nothing other than a punishment.

77 A fine is, nevertheless, the least severe sanction to qualify as punitive justice, just like conditional sentences. In the Criminal Code, the provisions concerning fines (s. 734) are found before those dealing with conditional sentences (s. 742). In terms of the gradation of sentences, and if all the necessary nuances are made to take into consideration the offender's wealth or poverty and the terms that can be imposed on conditional sentences, these two forms of punishment, when combined, give the judge the latitude necessary to tailor the sentence when a punitive order must be given. Thus they naturally coalesce.

78 The issue raised in this case is whether a judge can use the discretion at his or her disposal (s. 718.3(1) Cr. C.) in sentencing to order a conditional sentence in default of payment of a fine.

II. Conditional Sentences in Default of Payment of Fines

79 It is accepted that the sentencing judge has the discretion to impose imprisonment in default of payment of a fine (ss. 718.3 and 734.7 Cr. C.). It is just as indisputable that the judge is not obliged to allow time for payment (s. 734.7(2) Cr. C.). The issue is thus limited to determining the power of the judge to impose imprisonment in default of payment when he or she knows that imprisonment is, in practice, the sanction actually imposed for the offence committed.

80 If this were a well-to-do smuggler who had concealed his assets beyond the reach of justice and who had informed the court of his intention not to pay, I believe that the judge could, without risk of criticism, make such an order. There are circumstances in which imprisonment in default of payment of a fine is, in practice, the only way to punish an offender. Such an order does not therefore amount to a travesty of Parliament's intent.

81 The sentencing options given by Binnie J. in his opinion are not alternative solutions to payment of the fine. They are but methods for encouraging payment. A refusal to issue or renew a licence or a permit, or a decision to suspend them, remains in force "until the fine is paid in full". They do not, therefore, replace the fine (s. 734.5 Cr. C.). Similarly, civil enforcement of a debt (s. 734.6 Cr. C.) is often impossible when the offender is, as in this case, impecunious. In such a case, repeated visits by the bailiffs are only incentives, admittedly oppressive ones, but serve no truly penological purpose.

82 The court can always order the offender to submit to an organized community service scheme enabling him or her to repay the fine (s. 736 Cr. C.). However, no scheme of this kind exists here. Further, just as with the refusal or suspension of licences and civil enforcement, this option could restrict the offender's liberty even more than a conditional sentence that is flexible and tailored to the circumstances, such as the one imposed in this case, at least from the offender's point of view.

83 The Criminal Code therefore confers discretion on the judge to impose imprisonment in default of payment of a fine when he or she knows that imprisonment is, in practice, the sanction actually imposed for the offence committed. With the existence of this discretion established, it must now be asked if it could be used here to tailor the sentence imposed on an indigent offender.

III. The Judge's Order

84 First, one might object that a judge who rules out imprisonment cannot then order a conditional sentence. It is also submitted that a conditional sentence can only be ordered when the offender is sentenced to a term of imprisonment of less than two years.

85 Contrary to what Binnie J. seems to suggest, the trial judge did not really ever contemplate imposing the minimum fine of \$9,600 along with a time for payment and a period of imprisonment in the event of default. In my view, he would have preferred to impose a suspended sentence: "I am satisfied that, but for the minimum fine provisions, this would be a case for a suspended sentence." The law, however, did not authorize him to pass such a sentence. Moreover, he was authorized to impose a term of imprisonment in default of payment of the fine. In the context of his judgment, I believe that the distinction between imprisonment and incarceration made by Lamer C.J. in *Proulx*, *supra*, at paras. 21 and 40, must apply:

The conditional sentence . . . is a meaningful alternative to incarceration for less serious and non-dangerous offenders.

...

Although a conditional sentence is by statutory definition a sentence of imprisonment, this Court, in *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 21, recognized that there "is a very significant difference between being behind bars and functioning within society while on conditional release". See also *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 150, per McLachlin J. These comments are equally applicable to the conditional sentence. Indeed, offenders serving a conditional sentence in the community are only partially deprived of their freedom. Even if their liberty is restricted by the conditions attached to their sentence, they are not confined to an institution and they can continue to attend to their normal employment or educational endeavours. They are not deprived of their private life to the same extent. Nor are they subject to a regimented schedule or an institutional diet.

86 When the trial judge states that the offender is not a candidate for imprisonment, I believe that he means that he does not think it necessary to incarcerate him. The trial judge is the one on the front lines. Even if some of his reasons could be perceived as interfering with the domain of prison authorities, and as such debatable as a strict matter of law, they denote a keen awareness of reality and a pragmatism that often eludes the appellate courts. In giving reasons for the conditional sentence, the judge expresses himself clearly:

Here, I have to impose much more than that [the judge is referring here to a case where he imposed a lesser fine for a more serious crime] and that is Parliament's wish and I have to give effect to that wish. On the other hand, I cannot blind myself to two circumstances. Firstly, if there was a regime in this province permitting offenders to work off the fines, this entire discussion would be obviated. Secondly, there is a very difficult tendency where sentences do not end up being translated within the system in the appropriate fashion. . . . It is one thing to impose an eight-year sentence. It's another thing to understand that the person is within the community on

day parole within a fraction of that period. If I impose a 90-day sentence, for example, it may well be that Mr. Wu will be released within a matter of days through a work program. If I impose a 90-day sentence, it may well be that Mr. Wu will be released within a matter of days with a bracelet. It may be that Mr. Wu will be released simply because they only have so many rooms at the inn, so to speak, and he is not a dangerous individual and it's a revolving door situation. I have to be mindful of the fact that if I incarcerate someone for a non-violent offence, that it is also a great tax and concern to the community.

At the end of the day, I don't see that this individual needs to be detained or confined in a correctional facility. I am satisfied that a conditional sentence is appropriate in light of the instructions of the Supreme Court that a conditional sentence with appropriate, severe conditions is a significant deterrent and denunciatory penalty. There is an element of public education. But this is for a first offender having been involved in very minimal behaviour and, of course, nothing that occurred during the defence is at all relevant.

87 The factual circumstances in this case do not lead to the conclusion that the judge did not want to impose imprisonment in default of payment. The judge wanted to impose a realistic and suitable punishment. He was aware that a warrant of committal would perhaps, in practice, not be executed and, above all, did not believe that incarceration was necessary. I would not, therefore, regard the reasons given by the judge as a justification for concluding that the judge could not order imprisonment in default of payment of the fine. In practice, a judge who does not give time for payment orders imprisonment. In this case, the trial judge was entirely aware of this when he made his decision.

88 The important issue, rather, is whether, knowing that the offender did not have any money, the judge could order imprisonment in default of payment of the fine. There is nothing in the text against it, but such an order, at first glance, seems to punish the poor more severely and appears contrary to Parliament's intent. In his opinion, Binnie J. explains this aspect of the matter very well, and I will not dwell on it. I do not dispute that incarceration for civil debts does not befit a civilized society.

89 Having recognized the principle, I believe it necessary to bring its limits to light. First, poverty is a complex situation. It has consequences on every aspect of the lives of those it afflicts. In the sphere of sentencing, the adjustment required to take into account the poverty of an offender cannot be reduced to a concern for ensuring that absence of means does not become a reason for imprisonment. Numerous authors emphasize the necessity of considering all of the effects of a sentence. B. Hudson states her point of view as follows ("Punishing the Poor: Dilemmas of Justice and Difference", in W. C. Heffernan and J. Kleinig, eds., *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (2000), 189, at pp. 205 and 209):

"[E]quality" of penal treatment is not a simplified sameness of treatment, but punishment of equivalent severity for offences of equal culpability with regard to all relevant circumstances.

...

Equality can be approached only if a system of sanctions for crimes most strongly correlated with poverty is instituted and which has as key principles not only commensurability of penalty and offense seriousness, but also appropriateness and feasibility of penalty to offender. [Emphasis in original.]

See also P. Pettit, “Indigence and Sentencing in Republican Theory”, in Heffernan and Kleinig, *supra*, 230; A. Ashworth, *Sentencing and Criminal Justice* (3rd ed. 2000), at pp. 82-83.

90 Admittedly, not all types of offences lend themselves to conditional sentencing. I do not, however, see any policy grounds that would rule it out in this case. The conditional sentence could and should remain an option open to the sentencing judge so that he or she has the broadest possible range of options for tailoring the sentence.

91 It is possible that certain offenders with the means to pay their fine might opt to stay in prison rather than pay a fine. It is also conceivable that individuals might choose, for show or on principle, to be put in jail rather than pay the fine. While we are faced with a different situation in the present case, it is not all that different.

92 The respondent, through his counsel, has supported the judge’s decision as far as this Court. Some would argue that this was not by choice, but I believe that the adoption of a paternalistic attitude must be avoided for a number of reasons.

93 Firstly, a prison term, once served, extinguishes the debt (s. 734.7(4) Cr. C.). An offender, even an impoverished one, should not be deprived of an avenue that is available to those who are more well-to-do. The greater the debt is, the more an offender will be tempted to choose this avenue. Even if, in principle, imprisonment in default of payment is supposed to encourage the payment of fines, in reality, certain offenders use it as a way to pay their debt. I cannot imagine that the most indigent offenders would be excluded simply because they are poor.

94 Secondly, a judge can adjust the conditions of a conditional sentence to take the particular circumstances and essential needs of an impecunious person into account, exercising a flexibility that he or she does not have where the law prescribes a minimum fine. In this case, the terms of the curfew are flexible and are minimal restrictions on the liberty of the respondent (i.e., daily curfew from 6:00 p.m. to 6:00 a.m. for 75 days, except for employment, health or worship reasons and two additional hours of freedom on the weekend).

95 Thirdly, in order to have a deterrent effect on the general public and on offenders who might not care about their rehabilitation, the fine must be accompanied by an incentive measure, or at least a sanction serving as an alternative measure. The sentence must contribute to respect for the law and to the maintenance of a just and safe society (s. 718 Cr. C.) and cannot therefore be perceived as an order with no real teeth.

96 Fourthly, the potential end result of a warrant of committal cannot be left to the discretion of the Crown prosecutor.

97 Fifthly, I believe that the contemporary philosophy of criminal law, which seeks the rehabilitation of offenders, is better served by measures that enable the offender to pay his or her debt to society within a reasonable period after sentencing. Counting on a windfall making it possible to pay the fine does not seem to be the solution. To compensate for the more significant effect of a fine on an impoverished person, the law must be flexible and accept that the less fortunate find themselves in special circumstances.

IV. Conclusion

98 It is sometimes more prudent for the courts to defer to Parliament in cases of doubt. In this case, however, Parliament cannot, unless it abandons minimum fines, show more flexibility towards the poor. It therefore serves no purpose to disregard the latitude clearly given by the Code.

99 In my view, the imposition of a fine along with an assurance that the prosecution will not be able to ask for the issuance of an arrest warrant does not constitute a just sanction. This sanction either does not allow an impoverished offender to see the end of his or her sentence in a reasonable time or, for those offenders for whom indebtedness is not a source of constraint, allows the offence to go unpunished. The sentence proposed by my colleague would be, in his opinion, more respectful of the respondent's liberty and of Canadian penological principles. The proposed sentence does not seem to be tailored to the circumstances of the case or respectful of the fundamental principles of the 1996 reforms. The concept of liberty must not be interpreted in an abstract manner. It must be the object of a personalized evaluation that takes the particular circumstances of each case into account and that does not disregard the different impact that certain sentences could have on different individuals.

100 The sentence handed down by the trial judge is not a panacea. Admittedly, it would have been preferable that the respondent benefit from a fine option program. Unfortunately, no such program was available. The trial judge had to work with the tools at his disposal. In my opinion, his decision was enlightened and sensitive to the particular circumstances of the case. It respected the principles of gradation of sentences and properly balanced the relevant penological goals.

101 For these reasons, I would dismiss the appeal.

Appeal allowed with costs to the respondent, Deschamps J. dissenting.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Karam, Greenspon, Ottawa.

Solicitor for the intervener: Nova Scotia Legal Aid, Halifax.

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