Over-Indebted Criminals in Canada

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ABSTRACT

The criminal justice system often imposes financial, as well as penal, consequences upon offenders. Often these fines and surcharges are levied on those who are least able to bear the cost. This article examines the "justice debt" regime, including the formerly mandatory victim surcharge, to illustrate the ways it interacts with the lives of indigent Canadians. After canvassing American scholarship on the topic, the authors conclude with recommendations on how the problem can be alleviated, and how the topic can be more fully researched in a Canadian context.

I. INTRODUCTION

Gerry Williams, a 45-year-old man from a First Nations reserve near James Bay, had accumulated over $65,000 of debt by 2016.[1] This was not the result of reckless spending, or poor financial management, like an ill-advised second mortgage or suddenly losing ones job. Mr. Williams' debt largely arose from fines he accumulated while living on the streets and battling his addiction to alcohol.

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1 See generally Alex Ballingall "Judge Drops $65,000 in Fines Against Former Homeless Man", *Toronto Star* (4 October 2016), online: <www.thestar.com/news/gta/2016/10/04/judge-drops-65000-in-fines-against-former-homeless-man.html> [perma.cc/8JAY-AY3X] [Ballingall]; "Osgoode Law Student Helps Drop $65K in Fines

Debt is often seen as a middle-class problem. A person funds purchases through credit, and then struggles to repay the loan. Underpinning this idea is the agency of the debtor: the borrower has access to credit, and chooses to spend beyond their means. Difficulty in repayment is the inevitable consequence of that decision. Put simply, debt is seen as the result of someone's choices, and an accumulation of debt is often viewed as a side-effect of profligacy. This narrative stands in stark contrast to Mr. Williams' story, and the daily experiences of many homeless or indigent offenders.

The costs of regulatory or criminal offences—the fine, potential court appearances with associated fees, and further sentencing—are often unaffordable for those who bear the costs. This debt that results from the non-payment of regulatory offence penalties, criminal offence fines, court fees, restitution, and victim surcharges, is referred to in this article as "justice debt." Many of the fees and fines that make up justice debt cannot be waived or reduced for indigency. The resulting debt is also not released after a bankruptcy, furthering the cycle of financial hardship and poverty.

Justice debt has recently attracted the attention of Canada's highest court. In *R v Boudreault*, a majority of the Supreme Court of Canada (SCC) found the mandatory victim surcharge regime to be invalid.[2] The surcharge was imposed in connection with certain criminal justice offences.[3] The Court strongly articulated the gross disproportionality of these potentially indeterminate sentences by saying:

> The inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system. Sentencing in a free and democratic society is based on the idea that offenders will face a proportionate sentence given their personal circumstances and the severity of the crime. Criminal sanctions are meant to end. Indeterminate sentences are reserved for the most dangerous offenders. Imposing them in addition to an otherwise short-term sentence flouts these fundamental principles and is grossly disproportionate. [4]

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for Former Homeless Man", *CBC News* (3 October 2016), online: <www.cbc.ca/news/canada/toronto/programs/metromorning/law-student-homeless-tickets-fines-appeal-1.3788734> [perma.cc/JK4E-QDV3] [CBC]; Ashifa Kassam, "Former Homeless Man's £38,500 Fines Quashed by Court in Canada", *The Guardian* (6 October 2016), online: <www.theguardian.com/world/2016/oct/06/former-homeless-mans-38500-fines-quashed-by-court-in-canada> [perma.cc/7DJ4-2UWV].

2 *R v Boudreault*, 2018 SCC 58 at para 5 [*Boudreault*].

3 *Ibid* at para 1.

4 *Ibid* at para 79.

This paper argues that these sentiments are equally applicable for the other components of justice debt not at issue in *Boudreault*. The holding of the SCC that mandatory victim surcharges rise to the level of cruel and unusual punishment is the first of many steps required to properly recognize the issue, and address the consequences of justice debt in Canada.

In Canada, most of the research on the post-conviction interaction between the criminal justice system and poverty is focused either on sentencing (without much consideration of the consequence of the sentence on the offender), or on if fines are a suitable alternative to prison time. Despite the limited research on the consequences of justice debt, it is nevertheless a real and pressing issue for indigent offenders in Canada. Research in the U.S. is more developed, and illustrates that justice debt has significant consequences for those that are least able to pay.[5]

Justice debt is a unique and understudied aspect of debtor/creditor and consumer protection law that deserves the attention of bankruptcy and consumer protection practitioners, researchers, and regulators. It also merits greater involvement by criminal law stakeholders, including lawmakers, judges, advocates and officials, and improved data collection on the consequences of justice debt for indigent offenders. This article seeks to examine and assess the challenge in the Canadian context, before presenting areas for future research and reform. In Part II, an overview of the fees and fines in the Canadian criminal justice system will be provided.

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[5] Three reports were produced in 2016 as part of a collaborative project between the Criminal Justice Policy Program at Harvard Law School and the National Consumer Law Center called *Confronting Criminal Justice Debt: A Comprehensive Project for Reform*. One report discusses the urgent need for reform and the other two are guides for litigation and policy reform respectively. The project is tailored to tackling the justice debt problem in the U.S. As a result of the differences between the U.S. and Canadian criminal justice fines and fees regimes (discussed in more detail in Part III), we have relied on the project as an initial source to understand the justice debt problem; however, we refer to the underlying research of the project to support the arguments and views of this article. See generally Abby Shafroth & Larry Schwartzol, "Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform" (2016), online (pdf): *National Consumer Law Centre* <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-1.pdf> [perma.cc/T8N5-VP7T]; Abby Shafroth et al, "Confronting Criminal Justice Debt: A Guide for Litigation" (2016), online (pdf): *National Consumer Law Centre* <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf> [perma.cc/8NBE-55ZZ]; National Consumer Law Centre, "Confronting Criminal Justice Debt: A Guide for Policy Reform" (2016), online (pdf): <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-3.pdf> [perma.cc/WRF7-VUAC].

Personal narratives emerging from the case law will then be utilized to illustrate how indigent Canadians interact with, and are burdened by, the fees and fines within the Canadian criminal justice system. This section will conclude with an assessment of the victim surcharge regime in Canada in light of the SCC's recent judgement in *Boudreault*. In Part III, *Boudreault* and research from the U.S. will be used to explore the consequences of justice debt on indigent offenders in Canada. Finally, the paper will conclude by suggesting a number of reforms aimed at alleviating the burden of justice debt, and outlining the key areas where further research would benefit this area of study.

II. JUSTICE DEBT IN CANADA

Research on the effects of justice debt on indigent offenders is scarce in Canada.[6] The statutory frameworks affecting this area of law, the *Criminal Code* and the *Bankruptcy and Insolvency Act*, do not sufficiently address the effects of justice debt on indigent offenders in Canada. [7] This section begins by offering a brief presentation of the fees and fines associated with the Canadian criminal justice system to frame the subsequent analysis. This overview is followed by the narratives from two offenders who exemplify the unaffordability of the criminal justice system for indigent Canadians. Finally, the section will conclude with a discussion of the state of the mandatory victim surcharge law in Canada leading up to and including the decision in *Boudreault*.

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6 These issues can be traced to the eighteenth-century British policy of penal transportation. At that time, there were harsh sentences for petty crimes (*e.g.* petty theft, etc.), which led to overcrowded British prisons. That the British prisons at the time were private resulted in prisoners accumulating a debt just for being incarcerated. Eventually, overcrowded prisons prompted a policy of transporting prisoners to the British Colonies—originally to the American colonies and then to the Australian colonies after the outbreak of the American Revolutionary war. For a general discussion of these issues, see Philippa Hardman, *The Origins of Late Eighteenth-Century Prison Reform in* England (PhD Dissertation, University of Sheffield, 2007) [unpublished]; R V Jackson, "Jeremy Bentham and the New South Wales Convicts" (1998) 25:2/3/4 Intl J Soc Economics 370.

7 See *Criminal Code of Canada,* RSC 1985, c C-46 [*Criminal Code*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1)(a) [*BIA*]. Both the *Criminal Code* and the *BIA* address only one element of justice debt, making comprehensive reform more difficult.

A. Understanding the Origins of Justice Debt

Justice debt may be accumulated in several ways, including as a penal consequence, a regulatory offence, or a fee associated with use of the court system. Criminal fines are incurred as a result of a criminal charge are framed as restitution for the harm committed.[8] The mandatory victim surcharge, which will be discussed in detail later in this section, is perhaps the most notable example of a criminal fine.[9] Regulatory offences, like panhandling or loitering, have a much lower threshold for liability than criminal offences.[10] Rather than require the presence of a "guilty mind" to be found guilty of an offence, conducting the prohibited action alone is sufficient to incur liability.[11] These "on the spot fines" are often viewed as an administratively simple way of dealing with the large volume of offences ranging from environmental protection, to gambling, to managing noise.[12] Ontario's *Safe Streets Act*, which is explored later in this paper, is one such example.

In the Canadian context, nearly every court-related interaction gives rise to a fee. Provincial regulations dictate the fees associated with each court action. For example, *Ontario Regulation* 293/92 outlines the fees associated engaging with the Ontario Superior Court of Justice and the Court of Appeal.[13] Fees are charged for the most common court interactions, including for commencing a proceeding, filing documents, scheduling hearings, or seeking the enforcement of judgments or court orders.

Fee waivers are available to alleviate the cost of court fees for indigent parties who meet the statutory guidelines set out in provincial legislation. In Ontario, fee waivers are governed by the *Administration of Justice Act* and its regulations.[14] The statute specifies how and when an individual can apply for a fee waiver, as well as the financial criteria required for eligibility. As of April 2019, a waiver is available if the individual's annual income falls

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8 See Patrick Healy, "Sentencing from There to Here and From Then to Now" (2013) 17:3 Can Crim L Rev 291 at 301.

9 *Ibid.*

10 See generally Frederico Picinali, "The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification" (2017) 11:4 Crim L & Philosophy 681 at 683–686.

11 *Ibid* at 681.

12 See Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies*, (New York: Routledge-Cavendish, 2009) at 79–80.

13 See generally *Superior Court of Justice and Court of Appeal – Fees*, O Reg 293/92.

14 *Administration of Justice Act*, RSO 1990, c A.6; *Fee Waiver*, O Reg 2/05.

within a set threshold based on the number of individuals in their household, if their liquid assets are less than $2,600, and if their household net worth is less than $10,500.[15] Waivers are available for proceedings in family, civil, and small claims court. However, there are exceptions to eligibility beyond meeting the financial criteria. In Ontario, an individual whose court or enforcement fees are paid by Legal Aid or whose lawyer was retained under a contingency fee agreement is not eligible for a fee waiver. Waivers are also unavailable for criminal matters; there is no alternative for indigent offenders to seek relief from restitution orders, victim surcharges, or court-imposed fines. [16]

The application process for a fee waiver is substantially similar across the country. A fee waiver can be requested at any time before or during a case, including the enforcement stage. In Ontario, if the applicant meets the financial requirements for a fee waiver, they must complete a "Fee Waiver Request to Registrar, Clerk, or Sheriff" form. If a person is not financially eligible for a fee waiver, but still believes they should be entitled to one, they can complete a "Fee Waiver Request to Court" form instead.[17]

Indigent parties who are ineligible for fee waivers, such as those facing criminal charges, or are unaware of their existence often find themselves unable to pay. Non-payment of fees does not necessarily have serious consequences. In Ontario, it is possible to request an extension if an offender needs more time to pay a fine. This requires that the debtor speaks to a justice of the peace who will review the request. [18] However, the requirement of a formal interaction with the court may act as barrier for disenfranchised members of society. Parties who feel alienated by the justice system, such as homeless or those from marginalized communities, may be less likely to seek formal avenues of relief. A 2013 cross-country study conducted by the Canadian Bar Association concluded that the majority of

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15 O Reg 2/05, *supra* note 14, s 2.

16 *Ibid*.

17 See generally Ministry of the Attorney General, "A Guide to Fee Waiver Requests" (2005), online (pdf): <www.ontla.on.ca/library/repository/mon/10000/249893.pdf> [perma.cc/DG8X-XSN5] [Fee Waiver Guide].

18 See Ontario Ministry of the Attorney General, "Tickets and Fines" (last modified: 27 Nov 2018), online: <www.attorneygeneral.jus.gov.on.ca/english/justice-ont/tickets_and_fines.php> [perma.cc/U4UB-FGZ2].

those interviewed felt that, "the greater one's marginalization, the more distant the enforcement of their legal rights."[19]

Debtors who fail to pay a fine or fee, absent a request for an extension or a fee waiver, may face conviction for their failure to pay. Once this process has started, it imposes a deadline on the offender for payment of outstanding amounts, including court fees. Failure to pay after a conviction is entered could result in collateral consequences, such as the suspension of the debtor's driver's license, or information about the default being provided to a credit bureau.[20] These consequences will make it harder or more expensive for the debtor to receive credit, and could affect the debtor's ability to generate the income needed to pay the fine. Incarceration, the gravest available penal consequence, is also possible for non-payment of fines in Canada.[21] Committal in default is available when the court is satisfied that: (i) the other statutory remedies (provided by sections 734.5 and 734.6) "are not appropriate in the circumstances" or (read as "and") "(ii) that the offender has, without reasonable excuse, refused to pay the fine…"[22] If a fine is not paid, the debtor may be incarcerated for the lesser of the amount of the fine, divided by eight times the provincial minimum hourly wage; and the maximum jail term the judge could have imposed at conviction.[23]

In contrast to prescribing penal consequences for non-payment of criminal justice fees and fines, all jurisdictions in Canada—with the exception of Newfoundland and Labrador and Ontario—have Fine Option Programs.[24] These initiatives allow individuals to settle fines owed to the court by doing unpaid community service work. Manitoba's program, for

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19 See Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members" (2013) at 2, online (pdf): *Canadian Bar Association's Access to Justice Committee* <www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf> [perma.cc/UB9K-9FTE].

20 *Supra* note 18.

21 *Criminal Code*, *supra* note 7, s 734(1).

22 *Ibid*, ss 734(1)(b)(i)-(ii). The SCC has clarified that, in cases where "the offender's 'reasonable excuse' under subparagraph (ii) for failure to pay a fine is poverty," both elements of section 734(1)(b) must be present. See *R v Wu*, 2003 SCC 73 at para 61 [*Wu*].

23 *Criminal Code*, *supra* note 7, ss 734(4)-(5).

24 See Canada, Department of Justice, *The Federal Victim Surcharge: The 2013 Amendments and Their Implementation in Nine Jurisdictions*, by Moira A Law, (Ottawa: DOJ, 2016) at vii-viii, 18, 24, online (pdf): <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr16_vic/rr16_vic.pdf> [perma.cc/DRC3-C476].

example, allows offenders to work a certain number of pre-determined hours helping residents in the community, or repairing and maintaining community spaces including churches, schools, and parks.[25] However, Fine Options Programs are not always a complete solution to justice debt. In Manitoba, the program is not available for "Provincial Offence Act, Highway Traffic Act, parking offences and surcharges."[26] Similar alternatives have been contemplated or put in place in other parts of the world, and will be explored in greater depth in Section IV.

B. Personal Narratives

1. Gerry Williams

By 2016, Mr. Williams had accumulated over $65,000 of justice debt following a nine-year period of battling alcoholism and homelessness. The debt was tied to approximately 430 tickets issued for quasi-criminal, regulatory offences that included violating liquor laws, public intoxication, trespassing on private property, and panhandling.[27]

In 2016, Justice Mulligan agreed to a Crown-defense deal to wipe Mr. Williams' provincial debt, in return for Mr. Williams serving two years of probation and completing 156 hours of community service for a single conviction of "soliciting in an aggressive manner" under the *Safe Streets Act* [*SSA*].[28] At the time the story gained media attention, Mr. Williams also held approximately $5,000 of debt for outstanding federal tickets that were the subject of a separate appeal.[29]

The case of Mr. Williams' debt is unfortunately not unique. This sort of debt is prevalent among the homeless in the province of Ontario.[30]

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25 See Manitoba Justice, "Fine Option Program" (last visited 18 July 2019), online: <www.gov.mb.ca/justice/courts/fine.html> [perma.cc/U9AN-UP2M].

26 *Ibid*.

27 Ballingall, *supra* note 1; CBC, *supra* note 1.

28 See Joseph Marando, "The Unconscionable and Unconstitutional Safe Streets Act" (26 July 2017), online: *Homeless Hub* <www.homelesshub.ca/blog/unconscionable-and-unconstitutional-safe-streets-act> [perma.cc/E3Y3-D86Y]; Ballingall, *supra* note 1; *Safe Streets Act*, SO 1999, c 8 [SSA].

29 CBC, *supra* note 1.

30 See Daniel Ciarabellini "The Problem with Handing Out Fines to Homeless People", *National Post* (7 October 2016), online: <www.nationalpost.com/opinion/daniel-ciarabellini-the-problem-with-handing-out-fines-to-homeless-people> [perma.cc/433G-HLH7].

According to Mr. Williams, a homeless person can receive anywhere from five to ten tickets a day.[31] Needless to say, individuals in these circumstances cannot afford to pay the fines. As a result, the tickets are often thrown away without the prospect of collection, and the police often decline to pursue their enforcement.[32]

2. Sunshine Madeley

Sunshine Madeley was 36 years old when she was arrested for threatening to cause death and for breach of probation after making a threatening gesture to a store clerk who had caught her shoplifting. At the time of the court hearing, Ms. Madeley was unemployed, addicted to drugs, and was supported by the Ontario Disability Support Program. She also had a history of mental illness, homelessness, and run-ins with the law. Her criminal record included an array of offences relating to prostitution, theft, and breach of court orders.[33]

Ms. Madeley appeared in court to challenge the constitutionality of a $200 victim surcharge that was a required levy for every conviction, in addition to any fines that might have been ordered.[34] She argued that the surcharge would cause her undue hardship, and would violate her s. 15 *Charter* rights. [35] Justice Paciocco (as he then was) agreed.[36] In his judgment, Justice Paciocco commented critically on the mandatory victim surcharges, especially for an offender who is clearly indigent and suffers from mental distress:

> [T]he marginalization and pointless harassment of the impoverished disabled with mandatory surcharge levies is a cost that is too heavy to bear in order to remedy distrust of judicial discretion in the collection of funds for victim services, even bearing in mind that the mentally disabled who are harassed by outstanding victim surcharge obligations have been convicted of offences. They are independently being sentenced for their crimes by sanctions that are tailored to their circumstances. I do not believe that the *Charter* can accept that the cost of this form of discrimination should be borne by the mentally ill, in order to achieve the

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31 CBC, *supra* note 1.

32 *Ibid*.

33 See *R v Madeley*, 2016 ONCJ 108 at para 2 [*Madeley* 2016].

34 *Criminal Code*, *supra* note 7, s 737(1).

35 See *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

36 *Madeley* 2016, *supra* note 33 at para 172.

> benefit of collecting money for victim services that might otherwise be lost through appealable abuses of judicial discretion.[37]

Unfortunately, Ms. Madeley's exoneration was reversed on appeal.[38] The Ontario Superior Court of Justice found that the "evidentiary record…does not support the conclusions reached by the trial judge."[39] While the SCC has since invalidated the victim surcharge law, the declaration is only prospective in effect for non-parties.[40]

C. *Boudreault* and the Mandatory Victim Surcharge Law

The most notable case on the victim surcharge has been the SCC's decision in *R v Boudreault*. In that case, the majority judgement highlighted the danger of sentence that cannot be discharged on indigent offenders.[41] It also emphasized the harm faced by an already disadvantaged group posed by the fear of imprisonment, the reality of short-term detention before a hearing for non-payment, and the risk that judges may not be able to distinguish an ability to pay compared to a refusal to pay.[42] The majority went on to stress that the victim surcharge regime "ignores the 'fundamental principle' of proportionality set out in s. 718.1 of the *Code*…[and that] it does not allow sentencing judges to consider mitigating factors or to look to the appropriate sentences received by other offenders in similar circumstances."[43] Finally, the majority also noted that the law "utterly ignores the objective of rehabilitation," which must be tailored to the specific offender, and that it "undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison."[44]

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37 See *R v Madeley*, 2016 ONCJ 579 at para 52; See also "Piling Fines on the Homeless Makes no Sense: Editorial", *The Toronto Star* (11 October 2016), online: <www.thestar.com/opinion/editorials/2016/10/11/piling-fines-on-the-homeless-makes-no-sense-editorial.html> [perma.cc/24US-RVYB].

38 See *R v Madeley*, 2018 ONSC 391 at para 45.

39 *Ibid* at para 43.

40 *Boudreault*, *supra* note 2 at para 105.

41 *Ibid* at para 3.

42 *Ibid* at paras 69–71.

43 *Ibid* at para 81.

44 *Ibid* at paras 82–83.

1. The State of the Law Pre-Boudreault

Concerns about the legality of fines for indigent offenders are not new. Both the *Magna Carta* and the *Bill of Rights* of 1688 forbade excessive fines.[45] Scholarship was developed before the advent of the *Charter* on how these fines could constitute cruel and unusual punishment, although jurisprudence was lacking in a Canadian context.[46] Since the introduction of the *Charter*, this definition has been elaborated upon, most notably in the eventual declaration that the mandatory victim surcharge violates s. 12.

In the years leading up to *Boudreault*, there was a series of cases in the lower courts that challenged the law's validity based on the infringement of sections 7 and 12 of the *Charter*. The Courts of Appeal in Ontario and Quebec had established the validity of the law, despite the disagreement on the issue in the courts of first instance across the country.[47]

The constitutional validity of the mandatory victim surcharge regime had been in question shortly after the amendments removing judicial discretion came into force. In 2014, Justice Paciocco found that the victim surcharge regime violated section 12 of the *Charter* as cruel and unusual punishment.[48] In his decision, Justice Paciocco was critical of the consequences of justice debt for indigent offenders:

> In the case of victim surcharges, imposing unpayable monetary penalties is a legislatively accepted consequence. If it proves to be true that Mr. Michael never gets out from under the debt the impugned legislative scheme seeks to impose, it is a consequence that would befall him. He will remain indebted to society with all of the stigma and stress that imposes.
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> ...
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> [E]xtending time to pay for someone who will not be able to pay in the foreseeable future is nothing more than a promise of ongoing legal obligation, with all of the stress and risks that this implies, only that stress is compounded by the imposition of impending deadlines that are apt to be unrealistic from the start.[49]

In the same year, Justice Schnall also determined that mandatory victim surcharges violate section 12 of the *Charter*, a finding made in five other

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45 See KB Jobson, "Fines" (1970) 16:4 McGill LJ 633 at 674.

46 See e.g. *ibid* at 673.

47 See *R v Tinker*, 2017 ONCA 552 [*Tinker* CA]; *R c Boudreault*, 2016 QCCA 1907.

48 See *R v Michael*, 2014 ONCJ 360 at para 75, 81 [*Michael*].

49 *Ibid*. This decision pre-dated the Ontario Superior Court of Justice's decision in *R v Tinker*, 2015 ONSC 2284 [*Tinker* SCJ]. In *R v Eckstein*, 2015 ONCJ 222, a decision that followed *Tinker* SCJ, Justice Paciocco reluctantly held that the victim surcharge regime was constitutional. However, between paragraphs 18 and 25 of *Eckstein*, Justice Paciocco opined on the shortcomings of the *Tinker* SCJ decision.

cases that had come before her.[50] In contrast to the decisions of Justice Paciocco and Schnall, Justice Fergus O'Donnell found, with some caution, that the mandatory victims charges were constitutional.[51] He arrived at this decision without relying on earlier case law upholding the constitutionality of the mandatory victim surcharge regime.[52] Elsewhere, Justice Murphy of the Supreme Court (Trial Decision) in Newfoundland and Labrador, held that the victim surcharge is a punishment; however, it does not violate section 12 of the *Charter*.[53]

Prior to the SCC's declaration of invalidity, trial judges had developed a workaround to issuing the mandatory victim surcharge in cases where the sentence did not combine incarceration and probation.[54] Judges would choose to award nominal fines for offences, resulting in a surcharge calculated at 30 per cent of the nominal fine, as opposed to the fixed fines based on the offence. In Quebec, Justice Healy in *R c Cloud*, used the nominal fine method in order to avoid awarding the blanket $100–200 surcharge per offence.[55] This approach was also used by Justice Paciocco, among other judges across Ontario.[56] The SCC, in contemplating the appropriate remedy in *Boudreault*, noted that imposing a nominal fine for the purpose of reducing the victim surcharge ignores legislature's intent, and that striking down the law was a more principled approach.[57]

2. Victim Surcharges Going Forward

In declaring the law invalid, the SCC, found a middle ground on the submissions put before it. On the one hand, it refused the Crown's request to allow the victim surcharge regime to remain in effect for 6 to 12 months, while on the other hand, refusing the appellant's request to read the discretion removed by Parliament in 2013 back into the *Criminal Code*.[58]

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50 See *R v Flaro*, 2014 ONCJ 2 at para 8.

51 See *R v Novielli*, 2015 ONCJ 192 at para 12.

52 See *Tinker* SCJ, *supra* note 48.

53 See *R v Williams*, 2017 NLTD(G) 45 at para 41 [*Williams*].

54 See *R v Blacquiere* (1975), 24 CCC (2d) 168 (Ont CA), [1975] OJ No 443 (QL); *Williams*, *supra* note 53 at para 100. The SCC prohibited judges from imposing fines—even nominal ones—when the sentence includes a combination of incarceration and probation.

55 *R c Cloud*, 2014 QCCQ 464 [*Cloud*].

56 *Michael*, *supra* note 49 at para 102.

57 *Boudreault*, *supra* note 2 at para 92.

58 *Ibid* at paras 98–99.

The SCC emphasized that explicitly overruling Parliament on their recent decision would be intrusive.[59] The Court determined that the most principled approach was the declaration of invalidity, which would afford Parliament the opportunity to freely "consider how best to revise the imposition as well as the enforcement of the surcharge."[60]

The invalidity of the law is a victory for many. However, it is not a relief for those who had previously been charged the victim surcharge because the declaration only applies to future cases.[61] Indigent Canadians who were sentenced to pay victim surcharges still need to either pay the sentenced amount, seek continuous extensions, or "seek relief in the courts…by recourse [of] s. 24(1) of the *Charter*."[62]

3. The Government of Canada's Plan to Reintroduce Discretion in Victim Surcharges

The SCC's decision to only award a declaration of invalidity awards a degree of deference to Parliament's decisions on how best to address the law. In October 2016, the Minister of Justice, introduced Bill C-28 with the primary intention to return discretion in ordering victim surcharges back to judges.[63] However, the Bill was abandoned after the first reading. The issue remained dormant until March 2018, when the Minister of Justice introduced Bill C-75, which proposed a reform to the victim surcharge law as part of a broader set of amendments.[64] Bill C-75 received Royal Assent in June 2019, once again giving judges the flexibility to decline to order the

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59 *Ibid* at para 100.

60 *Ibid* at para 101.

61 *Ibid* at para 105.

62 *Ibid* at para 109.

63 See Gloria Galloway "New Legislation Will Empower Judges to Waive Victim Surcharge", *The Globe and Mail* (21 October 2016), online: <www.theglobeandmail.com/news/politics/new-legislation-will-empower-judges-to-waive-victim-surcharge/article32481681> [perma.cc/8V9M-6996]; Bill C-28, *An Act to Amend the Criminal Code (Victim Surcharge)*, 1st Sess, 42nd Parl, 2016 (first reading 21 October 2016).

64 See Andrew Stobo Sniderman & Vincent Larochelle "Larochelle and Sniderman: High Time to do Away with the Mandatory Victim Surcharge", *Ottawa Citizen* (16 April 2018), online: <ottawacitizen.com/opinion/columnists/larochelle-and-sniderman-high-time-to-do-away-with-the-mandatory-victim-surcharge> [perma.cc/E5F8-QS6Y].

levy on indigent offenders.[65] In the 2009/2010 fiscal year, victim surcharges were imposed anywhere from 52% of cases in Prince Edward Island to 4% in Nunavut.[66] If discretion is going to be reintroduced in the application of the victim surcharge, an understanding of the consequences of the charge on indigent offenders is essential.

III. THE CONSEQUENCES OF DEBT ON INDIGENT OFFENDERS[67]

The SCC discussed the consequences of justice debt in *Boudreault*, which, while focused on mandatory victim surcharges, equally applies to all justice debt:

> Many of the people involved in our criminal justice system are poor, live with addiction or other mental health issues, and are otherwise disadvantaged or marginalized. When unable to pay the victim surcharge, they face what becomes, realistically, an indeterminate sentence. As long as they cannot pay, they may be taken into police custody, imprisoned for default, prevented from seeking a pardon, and targeted by collection agencies. In effect, not only are impecunious offenders treated far more harshly than those with access to the requisite funds, their inability to pay this part of their debt to society may further contribute to their disadvantage and stigmatization. [68]

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65 See Bill C-75, *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (Royal Assent 21 June 2019).

66 See Minister of Justice and Attorney General of Canada, *Inquiry of Ministry* (Response to Q-170, from Mr. Cotler (Mount Royal)) (6 December 2013) at 1. The statistics for the other provinces and territories are: 52% in Prince Edward Island; 36% in the Yukon; 34% in New Brunswick; 31% in Nova Scotia; 30% in Newfoundland & Labrador; 29% in Alberta; 29% in British Columbia; 26% in the Northwest Territories; 23% in Saskatchewan; and 4% in Nunavut.

67 While this section relies almost exclusively on English sources, there are a number of relevant French sources which may be consulted for additional detail. See generally Marilyn Coupienne, *L'Emprisonnement pour Non-Paiement d'amendes des Personnes en Situation d'itinérance est-il un Traitement Cruel et Inusité au sens du Pluralisme Philosophique en Droit Pénal Canadien?* (LLM, McGill University, 2017); Céline Bellot et Marie-Eve Sylvestre, "La Judiciarisation de l'Itinérance à Montréal: Les Dérives Sécuritaires de la Gestion Pénale de la Pauvreté" (2017) 47 RGD 11; Véronique Fortin & Isabelle Raffestin, "Le Programme d'Accompagnement Justice – Itinérance à La Cour Municipale de Montréal (PAJIC): Un Tribunal Spécialisé Ancré dans le Communautaire" (2017) 47 RDG 177.

68 *Boudreault*, *supra* note 2 at para 3.

Indigent offenders are at a greater risk for remaining under the constant supervision of the criminal justice system. They live in fear of imprisonment, despite no matter how unlikely that might be. In the case of victim surcharges, offenders in Ontario, for example, receive a form with "[a]lmost half of the front… dedicated to threatening the offender with imprisonment if he or she fails to pay [the fee]."[69] Moreover, indigent offenders and those with prior convictions for non-attendance at court, are more likely to be detained while waiting for a committal hearing if they default on payments.[70]

In considering the consequences of justice debt on indigent offenders, we present them under two branches: economic and non-economic. The former considers the loss of income and spending power, as well as the financial burden on the offender's extended family. Non-economic consequences assess the psychological strain and disenfranchisement experienced by indigent offenders burdened by justice debt. The overwhelming consensus is that justice debt perpetuates financial hardship, and unfairly affects indigent and marginalized Canadians.

As a result of the limited research exploring justice debt in Canada, the remaining sections of this article draw heavily on U.S. scholarship. The similarity between fees and fines in the Canadian and American criminal justice systems enables the extension of U.S.-specific research to Canada. While the regimes have differences in scope and implementation, they both contribute to indigency in a way that is not easily addressed by the debtor.

In order to apply the U.S. scholarship to Canada, the first subsection that follows explores the differences between the fees and fines in the Canadian and American criminal justice systems. Understanding the differences allows for a more accurate and relevant application of U.S. scholarship to the Canadian context. The second subsection explores the economic and non-economic consequences of justice debt on indigent offenders in Canada.

A. Differences Between the Canadian and American Criminal Justice Fee Systems

The major points of difference between the Canadian and American regimes are the interest charged on non-payment of fees, and privatized

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69 *Ibid* at para 69.

70 *Ibid* at para 70.

probation. Canadian provinces do not charge interest on court fees and fines, nor do they add late penalties. Offenders in the U.S. are charged both interest fees and late penalties for not paying court fees and fines on time. For example, the interest rate in Washington was 12% in 2017.[71] Interest and penalties further increases the burden of justice debts, and increases the difficulty of becoming debt-free. Beyond interest charges and late penalties, the privatized probation branch in the U.S. results in extended offender supervision and potential conflicts of interest. The highly privatized system for probation in the U.S. is referred to as the "offender-funded" model.[72] Offenders are charged a "supervision fee" by private probation companies who monitor their payment of court-ordered fees and fines.[73] Conversely, in Canada, provincial governments handle probation without sending offenders to third-party agencies, and supervision fees are not required.

In our process of applying American scholarship to the Canadian context, we verified that the consequences discussed in the following subsection are those that Canadian offenders face. As Canadian research increases on this topic, it will be possible to delve deeper into these consequences and rely less on American scholarship. More depth on the topic in Canada will also help identify the consequences most prevalent and costly to indigent offenders.

B. The Economic and Non-Economic Consequences of Justice Debt on Indigent Offenders

The overwhelming consequence of justice debt is the perpetuation of indigency and poverty. Economically, indigent offenders and their families are prevented from maximizing their earnings and see their spending power reduced. On the other hand, non-economic consequences inhibit the offender's ability to more fully reintegrate into society. They increase the possibility of recidivism, developing health problems, and difficulty maintaining a stable life, all of which acts as a further barrier to overcoming indigency.

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71 See Neil L Sobol, "Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses" (2017) 88:4 U Colo L Rev 841 at 874.

72 See Human Rights Watch, "Profiting from Probation America's 'Offender-Funded' Probation Industry" (2014) online: <www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry#> [perma.cc/H3TA-Z6K8] [Profiting from Probation].

73 *Ibid*.

The most commonly identified consequences of justice debt are economic in nature. In the simplest form, economic consequences include the loss of personal and family income.[74] Indigent offenders are often forced to choose between paying their legal debt or meeting their basic needs.[75] These problems can be further exacerbated when offenders are forced to borrow money from their families and friends, which leads to potential interrelation tensions.[76] Justice debt is also problematic because it take money from the public to fund government expenditures related to legal debt collection, rather than fund more accessible public goods.[77]

Debt also makes it difficult, if not impossible, for offenders to obtain loans or credit, which limits their attempts to maximize resources. Indigency is not static.[78] Justice debt, even if it not immediately due, significantly hinders the ability of these members of society to access credit that could be used to assist with monthly living or work-related expenses. Contrary to popular belief, low-income and indigent Canadians have access to a variety of credit.[79] The types of debt held by these groups include mortgages, vehicle

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74 See Abbye Atkinson, "Consumer Bankruptcy, Nondischargeability, and Penal Debt" (2017) 70:3 Vand L Rev 917 [A Atkinson]; Torie Atkinson, "A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prison" (2016) 51:1 Harv CR-CLL Rev 189 [T Atkinson].

75 See Tamar R Birckhead, "The New Peonage" (2015) 72:4 Wash & Lee L Rev 1595 at 1596; American Civil Liberties Union of Washington & Columbia Legal Services, "Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor" (2014) at 4, online (pdf): <www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> [perma.cc/UG66-DNUE] [Debtors' Prisons]; Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (New York: Russell Sage Foundation, 2016) at 49 [*Harris*].

76 See Mitali Nagrecha, Mary Fainsod Katzenstein & Estelle Davis, "First Person Accounts of Criminal Justice Debt When All Else Fails, Fining the Family" (2015) at 20, online (pdf): *Centre for Community Alternatives* <www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf> [perma.cc/QS68-JM89].

77 See Ed Spillane "Why I Refuse to Send People to Jail for Failure to Pay Fines", *Washington Post* (8 April 2016), online: <www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.a696034909f4> [perma.cc/KM72-HUQA].

78 *Wu*, *supra* note 22 at para 31. Justice Binnie, writing for the majority, recognized at para 31 that "[i]t is wrong to assume… that the circumstances of the offender at the date of the sentencing will necessarily continue into the future."

79 See generally Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45 Osgoode Hall LJ 471 at 475–477.

loans, credit cards, and student debt.[80] The latter is especially targeted to assist students with the greatest need for financial assistance and, similar to justice debt, is not dischargeable.[81] Access to credit, however, is limited when applicants already hold debt that is not in active repayment.

A unique economic consequence is borne out of the non-dischargeable nature of justice debt.[82] In the U.S., the logic for designating justice debt as non-dischargeable is based on the notion that offenders incurred the debt through misconduct.[83] This arbitrary distinction between dischargeable and non-dischargeable debt has negative economic and social implications for disenfranchised communities, where these debts may be concentrated.[84] The problem is further exacerbated when we consider that these communities are the least able to bear such ongoing debt.[85] Furthermore, the structure of the debt relieves the debtor from the possibility of a financial clean slate through bankruptcy. The non-dischargeable nature of justice debt forces offenders back into the court system to seek a remedy, similar to the process that Mr. Williams undertook.

Non-economic consequences can be less apparent, despite being just as pervasive as their economic counterparts. Justice debt affects the physical and mental health of offenders and can create a feeling of guilt and shame.[86] Research using national data from the U.S. has found that offenders, or those "who have contact with the criminal justice system regularly avoid making contact with institutions like medical facilities, financial institutions, workplaces and schools."[87] Life expectancy is generally lower for those with lower socioeconomic status, and debt can be "destructive to mental health."[88] While the health consequences relating to debt are potentially applicable to all debtors, justice debt is particularly damaging, as it is disproportionately borne on the indigent and low-income members of society. Criminal fines and fees have also been shown to incentivize criminal

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80 *Ibid* at 476; Statistics Canada, "Survey of Financial Security, 2016 – Table 2", online: <www150.statcan.gc.ca/n1/daily-quotidien/171207/dq171207b-eng.htm> [perma.cc/XG5V-853E].

81 *Ibid*.

82 *BIA*, *supra* note 7, s 178(1)(a).

83 A Atkinson, *supra* note 74 at 917.

84 *Ibid*.

85 *Ibid*.

86 T Atkinson, *supra* note 74 at 222.

87 Harris, *supra* note 75 at 49.

88 *Ibid*.

behaviour and increase the risk of recidivism, as offenders attempt to meet the payment amounts.[89] These difficulties are worsened by "collateral" consequences, such as license suspension and wage garnishment, which create job, housing, and family instability.[90]

Ultimately, beyond the direct consequences of justice debt on indigent offenders, this structure of criminal justice fines and fees also shifts accountability from the system to the offenders. An offender accountability system functions under the expectation that offenders need to take responsibility for their crimes while under supervision.[91] This is in contrast to system accountability, which refers to "how criminal justice procedures and resources support or further punish individuals involved in the criminal justice system."[92] A system reliant on monetary sanctions effectively shifts the accountability from the justice system to the offenders.[93] That many offenders may never be able to pay their justice debts means that the implications on these offenders are unknown.[94] Moreover, such a system results in monitoring offenders well after they have served time and, in the U.S., may put offenders in certain supervision programs that effectively creates a perpetual paternalistic system.[95]

IV. PROPOSED REFORMS

Before avenues for reform are considered, it is important to consider the stakes of continuing to get this policy wrong. Penal consequence that fails to achieve its desired purpose has the potential for wide-ranging effects that can harm offenders, their families, and the communities they live in. Indigency and contact with the justice system are related, making it especially harmful to place an additional financial burden on those least capable of repayment. In 2008, 70% of those entering prison had not

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89 See Roopal Patel & Meghna Philip, "Criminal Justice Debt: A Toolkit for Action" (2012) at 2, online (pdf): *Brennan Center for Justice at the NUY School of Law* <www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf> [perma.cc/37CM-YUUV].

90 See Kevin R Reitz, "The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)" (2015) 99:5 Minn L Rev 1735 at 1744.

91 Harris, *supra* note 75 at 150.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid* at 144-145.

completed high school, and a similar figure had "unstable job histories."[96] These pressures may result in the opposite of what the policy was intended to do – rather than discouraging offenders from re-offending, it may only exacerbate the pressures that prompted the infraction.

The problems associated with justice debt should be addressed in two ways. First, Parliament should implement a series of legislative and administrative reforms; and second, by changing the structure of the criminal justice system to reflect the *Boudreault* decision and recognize the perpetuation of indigency associated with justice debt. The remainder of this article calls on researchers and stakeholders within the justice system, as well as scholars and practitioners, to contribute the missing data and research necessary to appropriately address the problem of justice debt.

This section of the article presents possible reform solutions that have been identified based on the holistic review of the research on justice debt. These reforms generally focus on: increasing participation in the use of fee exemptions, abolishing fines for low-level offences, offering alternatives to monetary fines and fees, implementing an offender-tailored sanctioning system, and implementing administrative reforms tailored to supporting indigent offenders through the criminal justice process. We posit that these reforms will be effective in Canada, both as stand-alone measures and in conjunction with other changes.

A. Increasing the Availability of Fee Exemptions and Educating Key Stakeholders

Costs associated with the criminal system are ineligible for fee waivers. The first step of this recommendation is to extend the fee waiver programs to include costs associated with criminal proceedings. Once this is complete, it is vital to educate offenders in the criminal justice system about the availability of fee exemptions for indigency and perform indigency checks as part of court hearings. Although Canada has a fairly comprehensive system in place to waive court fees for indigent Canadians, this is ineffective if they are not aware of the potential relief.[97] Educational programs that inform offenders of their rights can help promote access to justice. This

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96 See Hugh Segal, "Tough on Poverty, Tough on Crime", *Toronto Star* (20 February 2011), online: <www.thestar.com/opinion/editorialopinion/2011/02/20/tough_on_poverty_tough_on_crime.html> [perma.cc/GL4V-Z8G7].

97 *Ibid* at 14; Debtors' Prisons, *supra* note 75 at 20.

reform can go hand-in-hand with ensuring indigent offenders have access to counsel before appearing in court for fee or fine collection matters.[98]

Educating offenders about the availability of fee exemptions can also work in concert with performing indigency checks as part of court hearings. Indigency checks can further elevate the onus of raising the fee exemption issue in favour of offenders. The checks would have the greatest desired impact if completed at the early stages of the offender's interaction with the justice system: "Ideally…before costs, penalties, and additional fees accrue and before the [offender] reaches the point of nonpayment."[99]

In line with educating the offenders and running indigency checks, educating judges and justices of the peace on the availability and use of alternatives to incarceration is essential. Increasing the awareness of relief programs across the justice system creates additional opportunities to promote access to programs available to help indigent Canadians. It may also be beneficial in assisting offenders arrive at a solution to pay their legal debt.[100]

B. Abolishing Fines for Low-Level Offences and Eliminating Collateral Consequences

In Canada, abolishing non-restitution monetary sanctions for low-level criminal and quasi-criminal offences would be a significant reform, as these financial burdens are ineligible for fee waivers or bankruptcy.[101] Ordering indigent offenders to pay these fees and fines is counterproductive to the process of rehabilitation and reintegration into society.[102] We should note that the abolition of fines for low-level, non-restitution offences are currently in place at all three levels of government. While criminal fines can be abolished federally, regulatory offences must be dealt with provincially, and city by-laws addressed municipally.

An example of a non-restitution monetary sanction is the SSA, which prohibits "solicitation in aggressive manner," as well as "solicitation of

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98 Patel & Philip, *supra* note 89 at 20.

99 T Atkinson, *supra* note 74 at 234–235.

100 See Jessica M Eaglin, "Improving Economic Sanctions in the States" (2015) 99:5 Minn L Rev 1837 at 1865.

101 Fee Waiver Guide, *supra* note 17 at 2.

102 See Alexes Harris, "The Cruel Poverty of Monetary Sanctions" *The Society Pages* (4 March 2014), online: <thesocietypages.org/papers/monetary-sanctions/> [perma.cc/7XA9-HG42].

captive audience."[103] If an individual is found guilty of violating the Act, they are subject to "a fine of not more than $500" for a first conviction, and "a fine of not more than $1,000 or...imprisonment for a term of not more than six months, or...both" for subsequent convictions.[104] The Act was passed in response to concerns around "squeegee kids," and after confrontations between panhandlers and the police.[105] The "broken window" theory is also present in this legislation. The theory suggests that "the absence of social and legal responses to petty crime and to the first signs of disorder in a neighbourhood, [like a broken window,] may signal to potential offenders that a neighbourhood is not concerned with preserving order in its public spaces and that crime will be tolerated or accepted."[106]

In theory, the *SSA* is a means of regulating the survival techniques of indigent Canadians, in particular, though not exclusively homeless Canadians. However, in practice, the vague definition of "solicitation" "question[s]...the legality of an indigent person in public space."[107] Following the passage of the *SSA* and similar legislation in British Columbia, the frequency of ticketing increased starkly.[108] Between 2000 and 2006, Ontario saw an 870% increase in the number of tickets issued.[109] There has also been a concentration in who the tickets are being issued to. In Toronto, 6.2% of those ticketed accounted for 51.4% of the total tickets issued.[110] It has been demonstrated that this dramatic increase in ticketing is unrelated to an increase in the level of crime, the number of people who are homeless, the prevalence of aggressive solicitation, complaints from the

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103 See e.g. Catherine T Chesnay, Céline Bellot & Marie-Ève Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55 Can J Corr 161. See also Marie-Eve Sylvestre & Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Martha Jackman & Bruce Porter eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 155; *SSA*, *supra* note 28, ss 2(2), 3(2); *Safe Streets Act*, SBC 2004, c 75, ss 2-3.

104 *SSA*, *supra* note 28, s 5(1).

105 Chesnay, Bellot & Sylvestre *supra* note 103 at 166.

106 Sylvestre & Bellot, *supra* note 103 at 166.

107 Chesnay, Bellot & Sylvestre, supra note 103 at 167.

108 *Ibid* at 170-173.

109 *Ibid* at 170.

110 *Ibid* at 172.

public, or in relation to gang-linked crime.[111] Effectively, the SSA and other laws that directly affect the homeless—either by constraining their mobility or survival techniques, or by aiming to control public spaces—penalize homelessness and push them away from the public sphere.[112]

The taxing nature of regulatory offences is reflected in the cases like Gerry Williams', where many hours of work are necessary to obtain relief for individual plaintiffs through a burdensome appeals process.[113] While the most effective way to obtain relief would come from challenging the constitutionality of laws like the SSA, it is not without its challenges. The SSA was challenged in Ontario on *Charter* grounds, only to be upheld by the lower courts and affirmed by the Court of Appeal.[114] Moreover, neither indigency nor homelessness have been accepted by the Canadian courts as analogous grounds under section 15 of the *Charter*.[115] Legislative action at the provincial level, especially if undertaken as part of comprehensive reforms, could offer a more complete response to the harms and potential inequalities inherent with these laws.

In line with abolishing fines for low-level offences, legislators should also consider eliminating the collateral consequences for non-willful failure to pay justice debt. While not directly monetary, collateral consequences arising from justice deb make it extremely difficult for offenders to maintain stability in their lives. For example, the suspension of an indigent offender's driver's license is an unnecessary and counterintuitive burden which can become an obstacle to obtaining or maintaining gainful employment.[116] In turn, the offenders have an even greater difficulty paying the court fees and fines owed.

The non-payment of justice debt also undermines the policy's ability to act as a revenue-generating tool for the issuing jurisdiction. According to a study conducted by the Canadian Observatory on Homelessness at York University, between 2000 and 2010, police issued at least 4 million dollars

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111 See Bill O'Grady, Stephen Gaetz & Kristy Buccieri, "Tickets...and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act" (2013) 39:4 Can Pub Pol'y 541 at 552–553.

112 Sylvestre & Bellot, *supra* note 103 at 168. For commentary on the penalization of homelessness, see also Chesnay, Bellot & Sylvestre, *supra* note 103.

113 Ciarabellini, *supra* note 30.

114 See *R v Banks*, 2007 ONCA 19.

115 Sylvestre & Bellot, *supra* note 103 at 157.

116 Birckhead, *supra* note 75 at 1603; Ministry of the Attorney General, *supra* note 17.

in panhandling tickets, at the cost of approximately $1 million.[117] Ninety-nine percent of these remained unpaid at the time the study was conducted in 2004.[118] It is clear that the fine system, at least for panhandling, is highly ineffective and costly, both for the offender and the public purse. A more effective response to the challenges of indigency and disenfranchised communities would use valuable government resources to address the source of the challenge, not expend capital to deepen the problem.

C. Alleviating the Burden Criminal Justice Fines and Fees and Alternative Payment Options

1. The Quantum of Fees and Fines Should be Reduced, or Redirected

Perhaps the simplest method to alleviate the burden of justice debt on indigent offenders is to reduce the quantum of monetary sanctions. Lower monetary sanctions reduce the likelihood of probation revocation and rearrests. The steeper the fees and fines in the criminal justice system, the more likely it is that probation will be revoked.[119] Moreover, "those sentenced to lower monetary sanctions are more likely to pay back the amount in full, and…defendants who pay more toward their owed restitution have lower re-arrest rates."[120] Consequently, higher fees have the potential for an inverted effect, where they can encourage offenders reoffend instead of reintegrating into society.

An alternative to lower monetary sanctions is the implementation of a fine option payment program in every province, which would act as a productive alternative to dichotomy between a "fine or jail." Fine option programs afford individuals the opportunity to settle fines by doing unpaid, supervised community service work as an alternative to financial payments.[121] Although these programs exist in various Canadian provinces,

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117 See Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Can I See Your ID? The Policing of Youth Homelessness in Toronto*, (Toronto: Justice for Children and Youth & Homeless Hub Press, 2011) at 35, online (pdf): <homelesshub.ca/sites/default/files/CanISeeYourID_nov9.pdf> [perma.cc/BAR8-M27C].

118 *Ibid* at 81.

119 Harris, *supra* note 75 at 25.

120 *Ibid* at 25-26.

121 See Government of Saskatchewan, "Alternatives to Paying a Provincial Fine" (last visited 18 March 2019), online: <www.saskatchewan.ca/residents/justice-crime-and-the-law/courts-and-sentencing/alternatives-to-paying-a-provincial-fine> [perma.cc/V4ME-5CFM].

including Alberta, Saskatchewan, Manitoba, Nova Scotia, and New Brunswick, they do not exist nation-wide. A federal initiative to implement such programs in every province would promote productive use of indigent offenders' time, while decreasing their crippling justice debt. Other alternatives in lieu of paying a fine include community service at non-profit agencies or government entities, as well as educational classes for anger management or therapeutic care for other cognitive disabilities.[122] These classes can help reduce the likelihood of committing certain crimes or regulatory offences by providing certain resources that indigent or low-income Canadians may not have access to because of the cost.

Focusing the efforts of the criminal justice system on rehabilitation through meaningful workforce development and training can also improve the ability of offenders to pay and manage their debt. Skills education and training programs are a powerful tool in increasing the likelihood that offenders will be able to successfully reintegrate back into their communities and abstain from reoffending.[123] This is especially true for indigent offenders who need a source of income to pay their justice debt.

2. Applying Gladue for Indigent Indigenous Offenders' Criminal Justice Debt

A potential relief available to Indigenous offenders is the application of *Gladue* criminal sentencing principles to reduce the monetary amount of a criminal justice penalty.[124] The principles holds that, when sentencing Aboriginal offenders, judges must consider:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

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122 Spillane, *supra* note 77.

123 Patel & Philip, *supra* note 89 at 3; Birckhead, *supra* note 75 at 1675.

124 See *R v Gladue*, [1999] 1 SCR 688 at para 66, [1999] SCJ No 19 (QL) [*Gladue*]; It has been suggested by the decision in Mr. Williams's case that there is potential for applying *Gladue* criminal sentencing principles to regulatory quasi-criminal offences in Ontario. See Fair Change, "Fair Change Makes Headlines" (17 October 2016), online: <www.fairchange.ca/blog/2016/10/17/fair-change-makes-headlines> [https://web.archive.org/web/20190319143641/http://www.fairchange.ca/blog/2016/10/17/fair-change-makes-headlines].

> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[125]

For the *Gladue* principles to apply, a Court will need to accept that the assignment of fines as sanctions or punishment in the context of sentencing.

Both the majority and dissent in *Boudreault* agreed that victim surcharges constitute punishment.[126] This finding is fundamental to the potential application of the *Gladue* sentencing principles to victim surcharges in the future. *Gladue* sentencing is hinged on the concept of restorative justice, rather than denunciation.[127] In *Boudreault*, the SCC explicitly noted that "[j]ust as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order."[128] While victim surcharges indirectly benefiting the communities harmed, they are a form of punishment.

Since *Gladue* and *Boudreault*, the courts have not yet applied them to the context of mandatory victim surcharges.[129] However, in *R v Shaqu*, the court recognized that all aspects of sentencing should reflect the *Gladue* principles, and consequently applied a nominal fine workaround established in *Cloud*.[130] Since victim surcharges are part of a sentence, "[w]here a surcharge is mandatory, a sentencing judge is precluded from determining if the punishment is proportionate to the level of wrongdoing of the offender as required by s. 718.2(e) of the *Criminal Code*, a requirement given constitutional status in *R v Gladue* and *R v Ipeelee*."[131] If victim surcharges are considered a part of sentencing by the SCC, then *Gladue* principles should offer an alternative avenue of relief for Aboriginal offenders.

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125 *Gladue*, *supra* note 124 at para 66.

126 *Boudreault*, *supra* note 2 at paras 37, 125.

127 *Gladue*, *supra* note 124 at paras 70-72; *R v Ipeelee*, 2012 SCC 13 at para 59.

128 *Boudreault*, *supra* note 2 at para 83.

129 See *R v Chamakese*, 2014 SKQB 44. In *Chamakese*, the court imposed a $200 surcharge to an aboriginal woman with a *Gladue* report and whom the court thought would struggle to pay.

130 See *R v Shaqu*, [2014] OJ No 2426, 2014 CarswellOnt 6741 (WL Can) at para 11 (ONCJ).

131 See Graham Mayeda, "Squeezing Blood from the Stone: Narrative and Judicial Resistance to the Mandatory Victim Surcharge" (2016) 21 Can Crim L Rev 195 at 232.

The *Gladue* principles can also potentially relieve, in part or in full, the monetary fines that could be ordered against indigent Indigenous offenders. Considering an offender's Indigenous status may result in creative and restorative justice. In *R v Nagano*, the court was unwilling to make a decision regarding the novel argument that *Gladue* and *Ipeelee* should be applied to fines.[132] However, the court did consider several factors in determining sentencing including: "Ms. Nagano's Aboriginal status, and the fact that her conduct is particularly detrimental to members of her own community and the First Nation fishery in general…that there is value in including in her sentence a component that she make reparations to her own First Nation."[133] The ultimate fine of $5,000 was divided into two separate payment orders. One half was payable through a 12-month probation order. The other half was to be a donation of five hats and five mitts produced by Ms. Nagano using her traditional skills to the Tr'ondëk Hwëch'in Justice Program, where each item was valued at $250.[134]

D. Implementing Offender-Tailored Sanctions

The implementation of a day-fine system would incorporate consideration of the offender's socio-economic situation, and decrease outstanding amounts. The system is based on proportionality and considers both the severity of the crime and the offender's income.[135] The amount owed by an offender is determined using a penalty unit, assigned based on the seriousness of the convicted offence, multiplied by the defendant's adjusted daily income.[136] Although this system involves certain administrative costs in obtaining the daily income of defendants, it has the potential to increase revenue and collection if fines are tailored to an offender's ability to pay.[137] This system is successfully used in parts of Europe, including Finland. For example, Finish day-fines are set at "half of a daily discretionary income," and is accessible for the police in a national database.[138] An offender-tailored system would mean that indigent

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132 See *R v Nagano*, 2014 YKTC 55 at paras 50-51.

133 *Ibid* at para 52.

134 *Ibid* at paras 53-59.

135 T Atkinson, *supra* note 74 at 235.

136 *Ibid* at 56; T Atkinson, *supra* note 74 at 235.

137 See Beth A Colgan, "Graduating Economic Sanctions according to Ability to Pay" (2017) 103:1 Iowa L Rev 53 at 89.

138 T Atkinson, *supra* note 74 at 235.

offenders, such as Mr. Williams or Ms. Madeley, would face considerably lower fines that, in hand with reasonable time to pay, could be affordable.

A further alternative to the current blanket criminal justice fines and fees system is to utilize a graduated fine system for minor offences, where only a warning is issued for the first offence, before graduating to a fine. For many low-level offences, criminal justice fines for a single violation may be a difficult barrier to overcome. Instead, it may be more appropriate to have a recorded warning at the first instance of violation.[139] Providing a time period to remedy the violation before having to pay a fee allows indigent offenders time to resolve the issue without further consequences.[140] Such a system could function similarly to the tickets the police may issue requiring that car headlights or signalled be fixed. If the issue is not remedied after the prescribed length of time, the ticket can be waived. Moreover, such a system promotes and emphasizes addressing the violation of the law over simply punishing an offender for the violation.

Finally, implementation of individualized personal payment plan programs is a further alternative that would allow indigent offenders the opportunity to pay fees that are within their means.[141] Such a system is consistent with s. 734(5) of the *Criminal Code*, which states that an individual may only be incarcerated for non-payment of a court fine or fee when it is willful, fairer, and more effective. In this way, judges would also have more flexibility in their rulings.[142]

E. Administrative Reform to Offer More Support to Indigent Offenders

1. Creating a Mechanism to Hear and Relieve Justice Debt for Indigent Offenders

The SCC in *Boudreault* proposed a possible administrative remedy to ensure that the *Charter* rights of those already ordered to pay victim surcharges are protected.[143] While the Court did not go into the details of such a mechanism, governments could set up an administrative body to adjudicate if victim surcharges rise to the level of cruel and unusual

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139 *Ibid* at 229.

140 *Ibid*.

141 Profiting from Probation, *supra* note 72 at 8, 14.

142 *Criminal Code*, *supra* note 7, s 734.

143 *Boudreault*, *supra* note 2 at para 109.

punishment for that offender. Relying on an administrative body alleviates the need for offenders to enter the formal criminal justice system to receive a just remedy after the declaration of invalidity. In the same vein, the mechanism also relieves the possible strain on courts from hearing the individual challenges of victim surcharges already imposed.

We believe that this administrative alternative can also be an effective remedy for relief of justice debt from other criminal and quasi-criminal fines and fees, including those discussed in Part II and that burdened Mr. Williams. Governments would have flexibility in determining the process to ensure the efficiency and effectiveness of protecting offenders' *Charter* rights.

2. Creating More Child-Friendly Courtrooms

Although children are permitted in all levels of Canadian courts, it can still be difficult for parents with young children to appear in court. Moreover, a parent's fear of stigma or shame from appearing in court before their children may disincentivize parents from making court appearances. Encouraging courtrooms and their surrounding areas to become more child-friendly could ease this burden for parents. For example, creating an area outside courtrooms equipped with colouring books and toys can keep children occupied while their parents appear in court.[144] More child-friendly courtrooms could reduce the number of parents who fail to appear at court.

3. Allowing Justice Debt to be Discharged for Indigent Offenders and Eliminating the Cost of Filing for Bankruptcy

As discussed in Parts I and III, justice debt is non-dischargeable. Allowing a legislative mechanism to discharge justice debt through bankruptcy for the truly indigent could play an essential role in preventing justice debt from perpetuating indigency. For indigent offenders, bankruptcy could be the fastest and most effective means to overcome the lasting financial consequence of justice debt. It would allow those working toward reintegration, such as Mr. Williams, to more easily restart their lives. Moreover, it would alleviate the need for lengthy and resource-demanding appeals to the courts, which frees judicial resources, and allows legal clinics to help more clients.

The difficulty of this type of legislative reform is in defining and prove "truly indigent." The focus would need to be on the state of the offender

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144 Spillane, *supra* note 77.

before and during the accumulation of the justice debt. There are obvious cases with strong public policy reasons for bankruptcy to not be available for an indigent offender because of the crimes he or she has committed. For example, it would be inappropriate for the orchestrator of a financial fraud to receive the benefits of a bankruptcy.

It is important that this change accompany additional reforms to the bankruptcy system in general. For example, the fee paid to the Office of the Superintendent in Bankruptcy should be eliminated. Additional administrative costs associated with bankruptcy, including court fees, mailing costs, and government-set fees for filing, should be reduced or eliminated.[145] These reforms would eliminate the problem of an individual being "too poor to go bankrupt."[146]

4. Creating a Federal Framework for Justice Debt

Although federal frameworks exist to govern commercial debt, there is rarely a counterpart for criminal justice. While commercial debt is governed federally by the *BIA*, rules and regulations protecting consumers and prohibiting unfair and deceptive debt practices vary by province. [147] In contrast, the U.S. has the federal *Fair Debt Collection Practices Act*, as well as the Consumer Financial Protection Bureau (CFPB) to protect consumers.[148] Adopting similar federal legislation for justice debt in Canada would help many individuals address their financial obligations. Moreover, an active agency like the CFPB could provide outreach and training programs for both debt collectors and the general public.[149]

5. Creating Province-Wide Public Defense Programs for Indigent Persons

Currently, there is no overarching right to legal aid in Canada – it only arises when an accused cannot afford a lawyer.[150] The existence of public defenders can be integral to maintaining access to justice for indigent

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145 See Bankruptcy Canada "What is The Cost of Bankruptcy?" (last visited 18 March 2019), online: <www.bankruptcy-canada.ca/cost-of-bankruptcy> [perma.cc/XR6E-NSFB].

146 A Atkinson, *supra* note 74 at 971.

147 *BIA*, *supra* note 7.

148 Sobol, *supra* note 71 at 884-885, 893.

149 *Ibid* at 908.

150 See *R v Rowbotham*, 25 OAC 321 at para 183, 41 CCC (3d) 1; *R v Smart*, 2014 ABPC 175 at para 91.

offenders. Province-wide public defense programs can be individually operated to assist in upholding the rights of indigent offenders.[151] Government-funded public defense programs can allow indigent offenders access to competent legal representation. By making these programs independently operated and headed by a commission or board, offenders can be confident they are receiving objective advice that is in their best interest.[152] A province-wide program is also desirable in that it allows for enforceable, uniform performance and standards for public defenders, thus further promoting equality.[153]

In *Boudreault*, the SCC alluded to the benefit of having defence counsel representation in the victim surcharge context. It noted that self-represented offenders are more likely to plead guilty to all charges and pay higher victim surcharges, in contrast to offenders represented by defence counsel.[154] Many indigent offenders represent themselves in criminal proceedings due to financial concerns, while being unable to qualify for or access Legal Aid.

V. CONCLUSION[155]

Without underlying empirical data that is specific to the Canadian context, reform is unlikely to succeed. Nevertheless, we hope that this article can act as a starting point for future research and data collection on the effects of justice debt in Canada.

To address any of the reforms mentioned in the previous section, the data collection must be extensive and exhaustive. It should come from all levels of government to be able to gain a complete picture of offenders' interactions with both criminal and regulatory offences. At the minimum, it should focus on the following areas: the financial costs of both the status quo and alternative models; the leading crimes or regulatory offences that result in justice debt; and increased statistics on offenders, including the percentage owing justice debt, how justice debt is distributed geographically,

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151 See Norman Lefstein, "Will We Ever Succeed in Fulfilling Gideon's Promise?" (2018) 51:1 Ind L Rev 39 at 48.

152 *Ibid*.

153 *Ibid*.

154 *Boudreault*, *supra* note 2 at para 87.

155 The ideas governing this section are largely inspired by Alexes Harris's *A Pound of Flesh*. While the book is focused on the U.S. and, in particular, the state of Washington, her research acts as a helpful catalyst for areas in Canada where we either need more data collection or further academic analysis. See Harris, *supra* note 75.

the average amount that each offender carries, and demographic data on offenders carrying debt. Finally, researchers should conduct localized, first-hand interviews of the experiences of indigent offenders, court staff, judges, and police officers. This research should reveal the extent and perception of justice debt from the perspectives of both stakeholders and decision makers.

In Ontario, the existing research on the costs of running justice debt systems and their effectiveness is severely lacking. One study, mentioned earlier, found that between 2000 to 2010, police had issued at least $4 million in panhandling tickets, costing the police approximately $1 million.[156] Another study found that, between 2000 and 2006, only 0.3% of certificates of offences issued in Ontario were paid.[157] In Montreal, offenders spent over 70,000 days in prison between 1994 and 2003 for default of statements of offences.[158] At an average daily expenditure of approximately $141.72 per night in 2003 and 2004, the cost of defaulted tickets in Montreal over that period constituted several millions of dollars.[159] However, these reports are only the first step in helping us understand the cost of issuing, tracking, and pursuing regulatory and criminal fines. Similar research conducted in a county in Washington showed that the county was not generating the cost of "prosecution, sentencing, and incarceration of debtors, nor [did] it generate large amounts of money in restitution for defendants."[160] It is crucial for all levels of government to enable data collection on a mass scale and for researchers to have access to the results in order to analyze the effectiveness of the current criminal justice fines and fees system.

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156 O'Grady, Gaetz & Buccieri, *supra* note 117 at 35.

157 See Marie-Eve Sylvestre et al, "Le Droit est Aussi une Question de Visibilité: Occupation des Espaces Publics et Parcours Judiciaires des Personnes Itinérantes à Montréal et à Ottawa" (2011) 26 RCDS 531 at 550.

158 Céline Bellot et al, "Judiciarisation et Criminalisation des Populations Itinérantes à Montréal" (2005) at 111, online (pdf): *Réseau d'aide aux Personnes Seules et Itinérantes de Montréal* <www.rapsim.org/docs/rapport_Bellot_05_VF.pdf> [perma.cc/3Z4R-LT9D]; Sylvestre & Bellot, *supra* note 103 at 181.

159 See Statistics Canada, *Adult Correctional Services in Canada, 2005/2006*, by Laura Landry & Maire Sinha, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, June 2008) at 24, online (pdf): <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2008006-eng.pdf?st=FOaq4uQn> [perma.cc/ZJ7G-62R5]; Sylvestre & Bellot, *supra* note 103 at 181.

160 Harris, *supra* note 75 at 93.

The research from Washington went on to illustrate that less than half of the amounts received from justice debt were allocated to the actual victims.[161] The funds from the debt that was repaid tended to be used as revenue for the counties.[162] In some counties, the revenue to the county represents a higher percentage than the amounts allocated to restitution.[163] It would be beneficial to conduct similar analyses in Canada to identify how courts distribute the money received from offenders. Does restitution take priority in Canada? This analysis would be significant in order to determine whether the fines and fees are truly effective.

Moreover, studies should be conducted on the awareness of the different stakeholders on the effects of justice debt and their perception of indigent offenders. First-hand interviews have the potential to reveal the perception of decision makers in the criminal justice system. For example, interviews conducted in Washington revealed that court officials and county clerks believed that indigent offenders should be searching for work.[164] They often believed if they could not see the offender working hard to pay the fines, then they must not be working at all.[165] One prosecutor even suggested that indigent offenders could collect cans to make money to pay the fees.[166] There is a mentality held by some that, if the offender has money to buy drugs or food, they have money to pay the fees.[167] Another official revealed that there are options to waive up to half of the accumulated interest rates for offenders who cooperate, but that this information is not given to the offenders initially.[168] The information is revealed only when the court official finds that the offender is compliant with court orders.[169] There also appeared to be a gap in judicial understanding of how the collections system worked, including the time and cost required to monitor and collect fees.[170] The result is a system that functions bureaucratically, without an understanding of the overall consequence of the actions. It is crucial to

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161 *Ibid.*
162 *Ibid* at 95-97.
163 *Ibid* at 96-97.
164 *Ibid* at 142.
165 *Ibid* at 141.
166 *Ibid* at 142.
167 *Ibid.*
168 *Ibid* at 143.
169 *Ibid.*
170 *Ibid.*

conduct similar research to understand whether this disconnect exists in the Canadian context.

In *Boudreault*, the SCC recognized that, while some judges will look at the specific circumstances of an offender, others may take a less deferential approach to the current financial position of offenders.[171] The Court cited *Tinker* SCJ,[172] where Justice Glass opined that "[i]f a person does not choose to set aside money or pay in instalments when given very reasonable time to pay, the individual becomes the author of their own misfortune when they come to the end of the period given to pay the surcharge."[173] These comments, and similar opinions that may be shared by other members of the judiciary, give credence to the SCC's fear that judges may struggle "to draw the line between an inability to pay and a refusal to pay."[174] These are the opinions that must be understood and addressed in order to realize change and address the consequences of justice debt on indigent offenders.

The research from Washington helps illustrate the types of insights that may be gained by similar research in the Canadian context. If the mindset in Canada is similar to that in the U.S., policies would need to be implemented to address it. In the same vein, if stakeholders already have ideas and opinions on how the system could be improved, these should be considered. The combination of interview research and extensive statistical analyses can help provide both the grand picture and the case-by-case realities, which will bring us closer to the full story on criminal justice and debt in Canada.

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171 *Boudreault*, *supra* note 2 at para 71.

172 *Ibid.*

173 *Tinker* SCJ, *supra* note 48 at para 41.

174 *Boudreault*, *supra* note 2 at para 71.