

# Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada

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S A R A H F E R E N C Z \*

## ABSTRACT

Social drug supply is non-commercial drug supplying, or sharing, among friends and acquaintances for little to no profit. Given the increasing research and international recognition of the social supply of drugs, this paper critically assesses how Canadian law has incorporated social supply in drug trafficking. While the *Cannabis Act* includes a limited exception for social supply, the overall approach to drug trafficking law in Canada is overly broad and over emphasizes drug trafficking as inherently predatory. This approach does not adequately account for the social nature of drug supplying. Considering the recognition that social supplying is less morally blameworthy than commercial dealing, the fact that many people who use drugs do not regard social sharing as trafficking, and the harm reduction benefits associated with social supply as an alternative to other forms of dealing, law reform is needed in Canada. Three avenues for law reform are proposed: (1) educate judges and lawyers about the lived experiences of people who use drugs and the phenomenon of social supply; (2) use the language of social supply and minimally commercial supply in sentencing submissions to gradually challenge ideas about drug use and supply; and (3) pursue strategic *Charter* arguments under section 7 against the overly broad definition of drug trafficking.

**Keywords:** drug trafficking; social supply; drug dealing; drug supply; user-dealers; minimally commercial supply; friend supply; sentencing; illicit drug use; substance use; criminal law; social sharing; harm reduction; drug policy; regulation of vice

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## I. INTRODUCTION

Social science research in Canada shows that social supplying behaviours are common within social networks of people who use drugs. These behaviours include buying drugs together, buying drugs for another person, and pooling money to purchase a larger quantity of drugs to be shared with a social group.<sup>1</sup> The concept of social supply<sup>2</sup> has been recognized in international drug policy and research as qualitatively different from commercial drug trafficking. International researchers do not agree on a universal definition of social supply, but two central elements are that it is an exchange of drugs with little to no profit and that it occurs between friends or acquaintances.<sup>3</sup> Where a small profit is obtained in the exchange of drugs within a social group, some researchers have also used the term “minimally commercial supply.”<sup>4</sup> In Canada, social supply has not explicitly been recognized in law and policy.<sup>5</sup> However, some discussion of social supply has emerged in the context of cannabis, with some exceptions made in the *Cannabis Act* for sharing small quantities of cannabis.<sup>6</sup> Beyond cannabis, social supply conduct continues to be prosecuted as drug trafficking.<sup>7</sup>

Given the increasing research and international recognition of the social supply of drugs, this paper critically assesses how Canadian law has (and has not) incorporated social supply into understanding drug trafficking and provides recommendations for how the concept can be leveraged by legal advocates. Overall, I argue that the current understanding of drug trafficking, represented by an overly broad definition of drug trafficking and case law’s overemphasis on drug trafficking as inherently predatory, does not adequately account for the social nature of drug supplying. Considering

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<sup>1</sup> Gillian Kolla & Carol Strike, “Practices of Care Among People Who Buy, Use, and Sell Drugs in Community Settings” (2020) 17:27 *Harm Reduction J* 1 at 9.

<sup>2</sup> Case law and research varies in the language used. In this paper, I use the terms social supply, social sharing, social dealing, and social trafficking interchangeably.

<sup>3</sup> Ross Coomber et al, “The Burgeoning Recognition and Accommodation of the Social Supply of Drugs in International Criminal Justice Systems: An Eleven-Nation Comparative Overview” (2018) 58 *Intl J Drug Policy* 93 at 95 [Coomber et al, “Recognition and Accommodation”].

<sup>4</sup> *Ibid* at 95.

<sup>5</sup> *Ibid* at 99.

<sup>6</sup> *Cannabis Act*, SC 2018, c 16, ss 9–10 [*Cannabis Act*].

<sup>7</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 2 [*CDSA*].

the recognition that social supplying is less morally blameworthy than commercial dealing, the fact that many people who use drugs do not regard social sharing as trafficking, and the harm reduction benefits associated with social supply as an alternative to other forms of dealing, law reform is needed in Canada. A reliance on police and prosecutorial discretion is an inadequate approach, given that it creates disparate results between jurisdictions and that the police exercise discretion to enforce drug laws in a way that perpetuates the marginalization of some groups. Some researchers have advocated for creating a separate offence for social supply or minimally commercial supply.<sup>8</sup>

I argue instead that more education is needed on social supply within the legal system, and I consider how drug trafficking could be challenged under section 7 of the *Charter of Rights and Freedoms*.<sup>9</sup> Further education is necessary to address the misconceptions that lawyers and judges have about people who use and supply drugs.<sup>10</sup> One modest way that lawyers can contribute to systemically changing misconceptions about drug trafficking is to refer to the research on social supply and minimally commercial supply in sentencing submissions to advance arguments that these types of trafficking offences are less culpable and deserving of harsh punishment, even where the offence involves opioids. Legal advocates could also pursue a more ambitious *Charter* challenge under section 7 for violating the principle against overbreadth. The effect of a *Charter* challenge might result in the law treating social supply offences equivalent to possession offences or otherwise direct Parliament to redraft the law in a minimally impairing manner.

This paper is structured as follows. First, I review the international research and policy context recognizing the concept of social supply, with a focus on English common law legal systems. Second, I thoroughly analyze the legal context in Canada. In this section, I briefly consider the research

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<sup>8</sup> See e.g. Leah Moyle, Ross Coomber & Jason Lowther, “Crushing a Walnut with a Sledge Hammer? Analysing the Penal Response to the Social Supply of Illicit Drugs” (2013) 22:4 Soc & Leg Studies 553.

<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>10</sup> Haley Hrymak, “The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System” (2020) 43:1 Dal LJ 1 (there is a lack of understanding of addiction within the criminal justice system) [Hrymak, “The Opioid Crisis”]; Kolla & Strike, *supra* note 1 (popular perceptions of drug trafficking are predatory, but people who use drugs often have positive perceptions of people who supply their drugs).

focus in Canada on cannabis, followed by an analysis of social supply as drug trafficking under the *Controlled Drugs and Substances Act* (CDSA). I also discuss how social trafficking is considered at sentencing. Third, I address the inadequacy of relying on prosecutorial and police discretion to pursue more serious forms of trafficking. Fourth, I consider several law reform strategies that legal advocates could consider that would address the shortcomings in drug trafficking law in Canada. Overall, I argue that the Canadian legal system should more explicitly acknowledge social supply as distinct from commercial drug dealing. Law reform efforts should account for the harm reduction insights of people who use and supply drugs and draw on the research and insights from international drug policy.

## II. INTERNATIONAL RESEARCH AND POLICY ON SOCIAL DRUG SUPPLY

Social science research and international drug policy scholars have identified social drug supply as qualitatively different from profit-motivated drug dealing.<sup>11</sup> In this section, I provide a general overview of how social drug supply has been defined internationally, drawing largely on the literature review of Ross Coomber and colleagues.<sup>12</sup> This burgeoning research originated in the United Kingdom (UK). Since then, several criminal justice legal frameworks have accounted for a distinction between social supply from more serious forms of drug dealing in criminal codes, sentencing frameworks, and in the common law.<sup>13</sup> As this research has been expanded in the Canadian context, two important insights have emerged: (1) social supplying is the preferred mode of drug supplying among people who use drugs, especially youth,<sup>14</sup> and (2) social supply is a form of harm reduction.<sup>15</sup>

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<sup>11</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* at 96, 99. See e.g. Andrew Hathaway et al, “It’s Really No Big Deal”: The Role of Social Supply Networks in Normalizing Use of Cannabis by Students at Canadian Universities” (2018) 39:12 *Deviant Behavior* 1672 [Hathaway et al, “Social Supply Networks”].

<sup>15</sup> Kolla & Strike, *supra* note 1.

## A. International Recognition of Social Supply in Research

In 2000, the UK Police Foundation published a report (*Police Foundation Report*) on the *United Kingdom's Misuse of Drugs Act (UK Drugs Act)*, which recognized a distinction within prosecuted drug supply offences between more serious commercial drug supply and a less serious, more social drug supply, whereby friends share smaller quantities of drugs between each other.<sup>16</sup> The *Police Foundation Report* criticized that this less serious form of drug dealing was disproportionately prosecuted, contrary to the legislative intent of the *UK Drugs Act*.<sup>17</sup> Thus, the *Police Foundation Report* proposed drawing a distinction between drug dealing and group supply and that the law should recognize this distinction with a separate offence for group supply, as the latter is less serious criminal conduct.<sup>18</sup>

The *Police Foundation Report* emerged around the time that the normalization of recreational drug use was emerging in developed countries, which some researchers have suggested includes the normalization of recreational, non-commercial drug supply for drug users.<sup>19</sup> In other words, people who use drugs are increasingly engaged in informal drug sharing for little to no profit. According to UK researchers, these social suppliers often do not regard themselves as drug dealers, and drug purchasers often do not consider the sellers to be dealers either.<sup>20</sup>

In Ross Coomber and colleagues' review of the literature, they note several social supply practices that empirical research has identified.<sup>21</sup> These practices include gift giving among cannabis users, 'party buying' among clubbers, and social drug distribution of performance and image enhancing drugs in gyms.<sup>22</sup> Additionally, people who are engaged in social drug supply

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<sup>16</sup> "Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971" (28 March 2000), online: *The Police Foundation* <[www.police-foundation.org](http://www.police-foundation.org)> [perma.cc/6FUK-2T6J].

<sup>17</sup> *Ibid* at 62–63.

<sup>18</sup> *Ibid* at 63.

<sup>19</sup> Howard Parker, Judith Aldridge & Fiona Measham, *Illegal Leisure: The Normalization of Adolescent Recreational Drug Use (Adolescence and Society Series)* (London, UK: Routledge, 1998); Howard Parker and Judith Aldridge "The Normalisation of 'Sensible' Recreational Drug Use: Further Evidence From the North West Longitudinal Study" (2002) 36:4 *Sociology* 941.

<sup>20</sup> See Camille Jacinto et al, "'I'm Not a Real Dealer': The Identity Process of Ecstasy Sellers" (2008) 38:2 *J Drug Issues* 419; Ross Coomber, *Pusher Myths: Re-situating the Drug Dealer* (London, UK: Free Association Books, 2006).

<sup>21</sup> Coomber et al, "Recognition and Accommodation", *supra* note 4.

<sup>22</sup> *Ibid* at 95.

may share, swap, or combine their money to buy a larger quantity of drugs as a group. These practices help people who do not otherwise have access to drug supply networks to protect themselves from criminalization. In return, the person buying the drugs may obtain free drugs or a monetary contribution for the time and risk taken to purchase the group supply.<sup>23</sup>

Some researchers have recommended using the term “minimally commercial supply” to account for situations where a minimal profit motive is present and the dealer is also a user of those drugs.<sup>24</sup> For example, heroin user-dealers might engage in drug selling to maintain access to a drug supply and to retain a reliable income for purchasing their drugs. These individuals do not engage in the kind of drug selling that leads to lavish lifestyles. Instead, drug dealing occurs for the purpose of acquiring the means to obtain their next “hit” and as an alternative to other forms of income-generating crimes.<sup>25</sup> Ross Coomber and Leah Moyle argue that user-dealer drug supplying is equivalent to the “group supply” that is described by the *Police Foundation Report* as a less severe supply offence.<sup>26</sup> User-dealing often occurs between small and self-contained groups, it is non-predatory, and it is usually limited to dealing to people who are already addicted to the substance.<sup>27</sup> Therefore, what distinguishes predatory commercial dealing from minimally commercial dealing is the motivation, intent, and associated harm of the conduct: motivation is minimal financial gain and acquiring one’s own supply of drugs; the intent is non-predatory and supplied within a contained group; and the associated harm is contained within the smaller group, as the dealer does not seek out new, vulnerable purchasers.<sup>28</sup>

Researchers have also found that social drug supplying reduces drug related harms for people who use and purchase drugs, as compared to purchasing drugs from more commercial dealers.<sup>29</sup> The common perception portrayed in the media and the general public is that people who sell drugs

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<sup>23</sup> *Ibid.*

<sup>24</sup> Ross Coomber & Leah Moyle, “Beyond Drug Dealing: Developing and Extending the Concept of ‘Social Supply’ of Illicit Drugs to ‘Minimally Commercial Supply’ (2014) 21:2 *Drugs: Education, Prevention & Policy* 157 [Coomber & Moyle, “Beyond Drug Dealing”].

<sup>25</sup> *Ibid* at 161.

<sup>26</sup> *Ibid* at 162.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 162–63.

<sup>29</sup> See e.g. Kolla & Strike, *supra* note 1.

are inherently predatory, aggressive, and violent.<sup>30</sup> However, the role that social suppliers play in reducing harm for people who use drugs challenges these views. Securing a safe drug supply is a key concern for people who use drugs and purchasing drugs from trusted sources is a key form of harm reduction.<sup>31</sup> For example, trusted drug suppliers may receive information about an overly potent drug source and will respond to this information by informing their social network of the toxic supply and preventing them from unknowingly accessing it, thereby preventing overdoses.<sup>32</sup>

Additionally, people who supply drugs can be an important resource for communicating between more commercial suppliers, as some people who use drugs have better skills than others in navigating conflict, negotiation, and avoiding a bad deal in unregulated drug markets.<sup>33</sup> As such, social suppliers reduce the interactions that people who use drugs have with organized crime groups,<sup>34</sup> reduce the risk of criminalization and police exposure for a greater number of people who use drugs,<sup>35</sup> and assist people who are addicted to drugs in getting access to the drugs they rely on in their daily lives.<sup>36</sup> Gillian Kolla and Carol Strike describe these procuring and group-buying strategies as “practices of care” among people who use drugs.<sup>37</sup>

## B. Comparative English Common Law Approaches

Various countries have incorporated social supply into policy and law,

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<sup>30</sup> *Ibid* at 4.

<sup>31</sup> *Ibid* at 2, 8–9.

<sup>32</sup> *Ibid* at 2, 7.

<sup>33</sup> *Ibid* at 8.

<sup>34</sup> *Ibid* at 10 (for example, Kolla and Strike contrast their research with research on “crack houses”, which are often affiliated with organized crime groups. Social suppliers who purchase drugs on behalf of a small group of friends from a commercial dealer can be an alternative drug source that exposes one to less criminal harm, even if that individual keeps a profit from doing so). See also Elise Roy & Nelson Arruda “Exploration of a Crack Use Setting and Its Impact on Drug Users’ Risky Drug Use and Sexual Behaviors: The Case of Piauless in a Montréal Neighborhood” (2015) 50:5 Substance Use & Misuse 630.

<sup>35</sup> *Ibid* at 8–9. See also Vendula Belackova & Christian Alexander Vaccaro “A Friend with Weed is a Friend Indeed’: Understanding the Relationship Between Friendship Identity and Market Relations Among Marijuana Users” (2013) 43:3 J Drug Issues 289 at 306.

<sup>36</sup> See e.g. Kolla & Strike, *supra* note 1 at 8–9.

<sup>37</sup> *Ibid* at 1.

either implicitly or explicitly. While I focus on the Canadian situation in this paper, it is important to contextualize this with a brief discussion of comparative law. I draw heavily on Ross Coomber and colleagues' article and limit the analysis to several English common law jurisdictions which yield useful insights for the Canadian context.<sup>38</sup>

In England and Wales, where the concept of social supply originated, the law explicitly references social supply in policy and judicial discourse, but implicitly in sentencing frameworks.<sup>39</sup> In accordance with the principle of proportionality, social supply conduct is considered at the sentencing stage. In this context, non-commercial and minimally commercial supply is less culpable, warranting a less severe sentence, than more commercial drug supplying.<sup>40</sup> This distinction focuses on the harm associated with the specific offence and the level of involvement in the supply chain. Threshold quantities are also identified to distinguish suppliers from users.<sup>41</sup> Even though social supply language appears in sentencing cases, the Sentencing Council does not employ the term social supply, as it includes drug supply that is commercial in nature but occurs between friends. Instead, the Sentencing Council emphasizes the profit motive – supply for little to no financial gain is less culpable than supply for financial gain.<sup>42</sup>

Some researchers in England and Wales have criticized current sentencing practices in the UK for focusing on the profit motive and for not recognizing minimally commercial supply as a separate offence.<sup>43</sup> Ross Coomber and Leah Moyle recommend creating a separate offence for minimally commercial supply in the UK, as sentencing frameworks focus too much on the profit motive and drug quantities, while not accounting for the fact that many people who sell drugs do so to support their own drug habits.<sup>44</sup> In fact, the focus on the profit motive has confused many sentencing judges and resulted in frequent appeals of overly harsh sentences

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<sup>38</sup> Coomber et al, "Recognition and Accommodation", *supra* note 4.

<sup>39</sup> *Ibid* at 99.

<sup>40</sup> *Ibid* at 97-98.

<sup>41</sup> *Ibid* at 98. See also UK, Sentencing Council, *Drug Offences: Definitive Guidelines* (London, UK: Sentencing Council, 2012).

<sup>42</sup> Coomber et al, "Recognition and Accommodation", *supra* note 3 at 99; UK, Sentencing Council, *Drug Offences Guideline: Public Consultation* (London, UK: Sentencing Council, 2011).

<sup>43</sup> See Coomber & Moyle, "Beyond Drug Dealing", *supra* note 24.

<sup>44</sup> *Ibid* at 159.

for minimally commercial dealing.<sup>45</sup> As well, the quantities of drugs considered commercial are too low and not reflective of the quantity of drugs that one might expect to be purchased by someone who is addicted to drugs, purchasing drugs for themselves, or purchasing drugs for their social group.<sup>46</sup>

Australian law does not define social supply formally, but case law occasionally refers to the concept with the discretion of the judge as a less culpable form of drug dealing.<sup>47</sup> Principally, Australian sentencing courts are concerned with the level of commerciality in drug supply offences (distinguishing suppliers from users) and consider quantity thresholds in this assessment.<sup>48</sup> One case example of this is *R v Urbanski*,<sup>49</sup> which has been referenced in Canadian legal scholarship.<sup>50</sup> In that case, a person was found with 18 ecstasy tablets. The defendant bought nine of those tablets, was holding the other nine tablets on behalf of another person and did not intend to sell any of these tablets. The Supreme Court of South Australia held that the accused was liable for supplying drugs (i.e. drug trafficking) but explicitly classified the facts of the case as social supply, as distinct from commercial trafficking, thus warranting a less severe sentence.<sup>51</sup> Similar to the criticisms of the legal system in England and Wales, some critics have raised that these threshold amounts are too stringent and continue to unjustifiably capture users in drug trafficking liability.<sup>52</sup>

Policy discourses on drug trafficking and cannabis law reform efforts in New Zealand recognize the concept of social supply.<sup>53</sup> Overall, legal advocates in New Zealand have recommended that social supply should be explicitly distinguished from commercial dealing and treated more like simple possession.<sup>54</sup> In 2010, the New Zealand Law Commission

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<sup>45</sup> *Ibid* at 161–62.

<sup>46</sup> *Ibid* at 160.

<sup>47</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 99, 100, 101.

<sup>48</sup> *Ibid* at 99.

<sup>49</sup> [2010] SASFC 57 at para 105 (Austl SASC) [*Urbanski*].

<sup>50</sup> Bruce A MacFarlane, Robert J Frater & Croft Michaelson, *Drug Offences in Canada* (Toronto: Thomson Reuters, 2015) (loose-leaf updated 2019, release 4) at 5:40.120.40.60 [MacFarlane, Frater & Michaelson, *Drug Offences in Canada*].

<sup>51</sup> *Urbanski*, *supra* note 49.

<sup>52</sup> See e.g. Austl, Commonwealth, Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* by Caitlin Hughes et al (Canberra: Australian Government Publishing Services, 2014).

<sup>53</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 95, 99.

<sup>54</sup> *Ibid* at 100.

(Commission) recommended distinguishing social supply from other supply drug offences.<sup>55</sup> The Commission considered creating a separate offence and suggested that it could be defined as follows: that the supply was a small quantity, that the offender was also using the drugs, that the supply was for friends or acquaintances, and the offence was not motivated by profit.<sup>56</sup>

However, the Commission ultimately found that this definition was not precise enough and it would be better to reform the law with a sentencing guideline approach and with a presumption against imprisonment for social supply offences.<sup>57</sup> Since 2017, the New Zealand Drug Foundation has recommended removing social supply and simple possession from criminal sanction wholly, stating that social supplying should be regarded as equivalent to simple possession, and neither should be criminalized.<sup>58</sup>

Despite the strong push in the New Zealand legal community, no formal recognition appears in legislation or the common law, and there is no social science research on the subject in the country.<sup>59</sup> However, in advance of a referendum to legalize cannabis, the *Cannabis Legalization and Control Bill* provides a limited exception for social sharing. Clause 34(1) would generally prohibit gifting, sharing, or any other form of supplying cannabis unless the recipient is under 20 years old, the amount is less than 14 grams of dried cannabis (or its equivalent), and there is no exchange of consideration or other benefit obtained in doing so.<sup>60</sup> This exception is very narrow. Thus, the only formal recognition of social supply in New Zealand

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<sup>55</sup> NZ, Law Commission, *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (Wellington, New Zealand: Law Commission, 2011), online: <[www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R122.pdf](http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R122.pdf)> [perma.cc/K3LT-AKCZ] [NZ Law Commission, *Controlling and Regulating Drugs*].

<sup>56</sup> *Ibid* at 199.

<sup>57</sup> *Ibid* at 200–01.

<sup>58</sup> “New Zealand Drug Foundation Submission on the Mental Health and Addiction Inquiry” (7 June 2018) at 7, 20, online (pdf): *New Zealand Drug Foundation* <[www.drugfoundation.org/assets.pdf](http://www.drugfoundation.org/assets.pdf)> [perma.cc/Y85T-NEK9] [NZ Drug Foundation, “Mental Health and Addiction Inquiry”]. See also “*Whakawātea te Huarahi: A Model Drug Law to 2020 and Beyond*” (2017) at 1, 4, online (pdf): *New Zealand Drug Foundation* <[www.drugfoundation.org.nz/assets.pdf](http://www.drugfoundation.org.nz/assets.pdf)> [perma.cc/6G46-SPWX].

<sup>59</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 96, 99–101.

<sup>60</sup> NZ, “Cannabis Legalisation and Control Bill: Exposure Draft for Referendum”, 2020, PCO 22159/24.0, cl 34(1), online: <[www.referendums.govt.nz/materials/CannabisLegalisation-and-Control-Bill-Exposure-Draft-for-Referendum.pdf](http://www.referendums.govt.nz/materials/CannabisLegalisation-and-Control-Bill-Exposure-Draft-for-Referendum.pdf)> [perma.cc/3Q46-765F] [NZ, “Cannabis Legalisation and Control Bill”].

is within the context of potentially legalizing cannabis and, even in this context, it is a narrow exception.

While other countries have begun to recognize social supply, there is little recognition of the concept in the United States (US).<sup>61</sup> Among the minimal research that has been done in the US, the research focus has been on middle class, male university students engaged in the social supply of ecstasy and other recreational drugs.<sup>62</sup> In practice, US criminal justice personnel are unfamiliar with the concept of social dealing as distinct from profit-motivated drug dealing. Broadly, US sentencing does not account for profit motive, and sentencing judges focus on the type and quantity of the drug in determining sentencing severity.<sup>63</sup>

Overall, the recognition of social supply in English common law legal systems occurs at sentencing. Sentencing courts consider commercial drug dealing, characterized by profit motivations and large quantities, to be a more serious offence than social supply, which is less motivated by profit dealing and often involves a smaller drug quantity. Beyond sentencing, there have been some considerations in research and among law reform organizations to create an entirely separate offence for social supply, as distinct from other forms of drug trafficking.<sup>64</sup> At this time, none of the countries discussed in this paper (United Kingdom, Australia, New Zealand, and the US) have created a separate offence, nor removed social supply from criminal sanctions all together.<sup>65</sup> As discussed below, Canada similarly prosecutes drug supply offences as drug trafficking and considers the level of commercialism involved at the sentencing stage.

### III. SOCIAL SUPPLY IN CANADIAN RESEARCH AND LAW

In this section, I discuss the Canadian context in greater detail. First, I briefly discuss the social science research published in Canada. Second, I

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<sup>61</sup> *Ibid* at 99.

<sup>62</sup> *Ibid* at 96, 98-100.

<sup>63</sup> *Ibid* at 100.

<sup>64</sup> See Coomber & Moyle, “Beyond Drug Dealing”, *supra* note 24 (UK researchers who recommend creating a separate offence for minimally commercial supply); NZ Law Commission, *Controlling and Regulating Drugs*, *supra* note 55 (the Commission considered how a separate offence of social dealing could be defined, but ultimately did not recommend creating a separate offence).

<sup>65</sup> See generally Coomber et al, “Recognition and Accommodation”, *supra* note 3 for a comprehensive review of international legal approaches to social supply.

discuss the unique context of cannabis legalization in Canada, which distinguishes social supply to a degree in the *Cannabis Act*. Third, I discuss how Canadian courts prosecute social supply of other drugs under the CDSA. In turn, I review how sentencing courts indirectly consider social supply through the analysis of commercialism at sentencing.

## A. Research Focus in Canada

While social supply research has explored drug supplying in many drug markets, research in Canada is mostly limited to the study of cannabis.<sup>66</sup> This is likely due to the social context in Canada, whereby attitudes towards cannabis have shifted over time, becoming normalized among Canadian youth and in broader society.<sup>67</sup> Still, this research is limited to young people in universities. For example, in Andrew Hathaway and colleagues' study of a sample of university students in Alberta and Ontario who use cannabis, most participants reported purchasing drugs from friends. Friends acted as brokers to the drug supply and trust, convenience, and safety were cited as benefits, thereby reducing the harm and risk in purchasing drugs.<sup>68</sup> Students regarded some of these friends as unlike "real dealers", while emphasizing trust, normalcy, and the advantage of avoiding "real dealers."<sup>69</sup> However, the distinction between dealers and users was overall subjective, as some friends regarded their friends as dealers, while others regarded their friends as a middle-person between the user and the dealer.<sup>70</sup>

Beyond cannabis, in a more recent study published in 2020, researchers considered the social supply of other drugs, including heroin, through ethnographic research of a peer-led harm reduction program in Toronto.<sup>71</sup> This study is also discussed above in Part II-A. The program employed people who used drugs as peer workers to help others access harm reduction equipment, but the researchers found that these peer workers went beyond this by helping their peers obtain a safe supply of drugs as well. Overall, the researchers observed several social supplying practices that were common among participants including buying drugs together, buying drugs for

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<sup>66</sup> *Ibid* at 96.

<sup>67</sup> See Hathaway et al, "Social Supply Networks", *supra* note 14.

<sup>68</sup> *Ibid* at 1676-78.

<sup>69</sup> *Ibid* at 1676.

<sup>70</sup> *Ibid* at 1676.

<sup>71</sup> Kolla & Strike, *supra* note 1.

another person, and pooling money to purchase a larger quantity of drugs to be shared with the group.<sup>72</sup>

## B. Canadian Legislation and Common Law

Canadian law and sentencing practices around social supply drug trafficking have historically depended on the type of drug at issue. Prior to the enactment of the CDSA in 1996, the *Narcotic Control Act (NCA)* defined drug trafficking in the same way that the CDSA currently defines trafficking, meaning to “manufacture, sell, give, administer, transport, send, deliver or distribute.”<sup>73</sup> However, drugs previously scheduled under the *Food and Drugs Act (FDA)* did not include the word ‘give’ in its definition of trafficking.<sup>74</sup>

Therefore, depending on what legislation a particular drug was scheduled under, giving drugs may or may not attract criminal sanction. This was illustrated in *R v Rogalsky* where an accused was found guilty of drug trafficking cannabis under the *NCA* but was only found to be guilty of possession of LSD under the *FDA*.<sup>75</sup> Between 1996 and 2018, all illicit drug offences were included in the *CDSA*.<sup>76</sup> As I discuss below, the *CDSA* prosecutes drug trafficking broadly, capturing acts of social sharing within its definition. In 2018, following the legalization of certain activities around cannabis, the regulation of cannabis was removed from the *CDSA* and replaced with the *Cannabis Act*.<sup>77</sup> Under the *Cannabis Act*, persons can share drugs in smaller amounts without attracting criminal liability.<sup>78</sup>

### 1. The Cannabis Act

Consistent with the social supply research in Canada, recognition of social supply in Canada is more explicit in the cannabis context and it emphasizes the protection of youth as a key statutory objective. In section 7 of the *Cannabis Act*, the purpose reads (among a list of other purposes) “to protect public health and public safety and, in particular, to (a) protect the health of young persons by restricting their access to cannabis; (b) protect

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<sup>72</sup> *Ibid* at 4, 9.

<sup>73</sup> *Narcotic Control Act*, RSC 1986, c N-1, s 2, as repealed by *Controlled Drugs and Substances Act*, SC 1996, c 19; *CDSA*, *supra* note 7, s 2. See this legislation discussed in *R v Kernaz*, 2019 SKCA 37 at para 15 [*Kernaz* 2019].

<sup>74</sup> See *R v Rogalsky*, [1975] 4 WWR 418 at 400-02, 23 CCC 2d 399 (SKCA) [*Rogalsky*].

<sup>75</sup> *Ibid*.

<sup>76</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 2:100.

<sup>77</sup> *Ibid* at 2:120.

<sup>78</sup> *Ibid* at 5:40.80.

young persons and others from inducements to use cannabis.”<sup>79</sup> Given that social supply research has been documented as common among youth who use cannabis,<sup>80</sup> it is unsurprising that the recognition of social supply arose in the context of drug supply and distribution offences under the new legal regime that aims to protect youth.

While the language in the *Cannabis Act* is similar to the *CDSA*, there are several subtle, but important differences. The *Cannabis Act* prohibits drug trafficking in section 9, but it uses the term ‘distribution’ instead. Section 2 of the *Cannabis Act* defines distributing as “administering, giving, transferring, transporting, sending, delivering, providing or otherwise making available in any manner, whether directly or indirectly, and offering to distribute.”<sup>81</sup> Notably, the word ‘includes’ signals a broader definition than the *CDSA*’s definition which uses the word ‘means’: the former indicates a non-exhaustive list, whereas the latter is exhaustive.<sup>82</sup>

Distribution under the *Cannabis Act* is also more complex, with several exceptions that accommodate social sharing. Under subsection 9(1)(a)(i), the federal limit is that persons 18 years or older can lawfully distribute up to 30 grams of dried cannabis.<sup>83</sup> Persons under 18 can distribute up to five grams of dried cannabis, pursuant to subsection (9)(1)(b)(i).<sup>84</sup> As discussed below, this is a departure from the *CDSA*, which continues to prohibit social sharing for those drugs scheduled under it, irrespective of quantity.

In section 10 of the *Cannabis Act*, ‘sell’ is separately defined and likely requires an exchange of money (or another form of consideration) to meet the definition, which is a departure from the *CDSA* definition of sell. The *CDSA* defines the word ‘sell’ with the additional language, “have in possession for sale and distribute, whether or not the distribution is made for consideration.”<sup>85</sup> Drug distribution situations without the exchange of consideration necessarily captures social supplying within criminal liability, given social supply is the exchange of drugs for little to no profit. The decision to exclude the consideration language in the *Cannabis Act* was likely a deliberate parliamentary decision, and a reasonable interpretation could

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<sup>79</sup> *Cannabis Act*, *supra* note 6, s 7.

<sup>80</sup> See e.g. Hathaway et al, “Social Supply Networks”, *supra* note 14.

<sup>81</sup> *Cannabis Act*, *supra* note 6, s 2.

<sup>82</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>83</sup> *Cannabis Act*, *supra* note 6, s 9(1)(a)(i).

<sup>84</sup> *Ibid*, s 9(1)(b)(i). See also MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.80.

<sup>85</sup> *CDSA*, *supra* note 7, s 2(1).

be that Parliament did not intend to capture social supply conduct within its definition of selling. However, case law from the CDSA's predecessor, the NCA, has informed the interpretation of the CDSA. So, it is possible that CDSA jurisprudence around drug trafficking without consideration will be applied to the current *Cannabis Act*.<sup>86</sup>

Overall, the accommodation of social supply or social sharing conduct within the *Cannabis Act* reflects the consultation which underpinned cannabis legalization. Following the election of the Liberal Government in 2015 and their electoral promise to legalize and regulate cannabis, the government formed a task force, chaired by the prior Minister of Justice, Anne McLellan.<sup>87</sup> In their final report, the Task Force recommended creating exclusions for social sharing, as the focus of trafficking should be on commercial gain.<sup>88</sup> However, the *Cannabis Act* did not go so far as to enact a social supply exclusion, as recommended. Some critics have raised that the limited exceptions for sharing smaller amounts did not fully respond to the Task Force's recommendations, and the legal scheme remains largely punitive.<sup>89</sup> However, the *Cannabis Act*'s limited exception for social suppliers is less limited than what is currently proposed in New Zealand.<sup>90</sup> Further, in comparison to the CDSA, the *Cannabis Act* is a step in the right direction.

## ***2. The Canadian Drugs and Substances Act***

Section 5 of the CDSA defines the prohibited act and punishment for trafficking and possession for the purposes of trafficking. Similar to the *Cannabis Act*, the CDSA defines trafficking broadly in subsection 2(1) which reads, in respect of substances listed in "Schedules I to V, (a) to sell, administer, give, transfer, transport, send or deliver the substance, (b) to sell an authorization to obtain the substance, or (c) to offer to do anything mentioned in paragraph (a) or (b), otherwise than under the authority of

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<sup>86</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5A:60.20.

<sup>87</sup> Canada, *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Marijuana Legalization and Regulation*, Anne McLennan, Chair (Ottawa: Minister of Health, 30 November 2016), online: <[www.canada.ca/en.html](http://www.canada.ca/en.html)> [perma.cc/WV8T-JT69] [*Task Force on Marijuana Legalization and Regulation*].

<sup>88</sup> *Ibid* at 5, 39.

<sup>89</sup> See e.g. Andrew Hathaway "Evidence-Based Policy Development for Cannabis? Insights on Preventing Use by Youth" (2019) 62:4 *Can Public Administration* 593 at 596 [Hathaway, "Evidence-Based"].

<sup>90</sup> See NZ, "Cannabis Legalisation and Control Bill", *supra* note 60.

the regulations.”<sup>91</sup> As previously discussed, the CDSA is unlike the *Cannabis Act*, as “to sell” is explicitly included within the definition of trafficking, in addition to its separate definition that includes selling without the exchange of consideration. Unlike the *Cannabis Act*, this definition does not make exceptions for social sharing, but there is some recognition of social trafficking as distinct from more commercial drug dealing at sentencing. In this section, I review case law in Canada, describing how Canadian courts have included social supplying under the broad definition of drug trafficking in the CDSA.<sup>92</sup>

### **i. To Give**

Given that the CDSA defines drug trafficking as including situations where one ‘give[s]’ drugs, many social supply practices are considered drug trafficking in law.<sup>93</sup> In cases where persons are alleged to have committed drug trafficking under the CDSA for giving drugs, the Crown is not required to lead evidence of the accused’s purpose or motive<sup>94</sup> and it extends to persons who pool their money to purchase drugs in bulk for later joint consumption.<sup>95</sup> Despite the policy concerns of this broad definition, which are considered in greater depth below, Canadian prosecutors and courts continue to use their discretion to prosecute drug trafficking within this broad category.

In 2019, in *R v Kernaz*, the Saskatchewan Court of Appeal (SKCA) reaffirmed that sharing drugs for no profit constitutes drug trafficking under the CDSA.<sup>96</sup> While this decision was appealed to the Supreme Court of Canada (SCC), the appeal was denied by the SCC with an oral decision rendered on the same day that the appeal was heard.<sup>97</sup> Notably, within the SKCA decision and the appellant’s SCC factum, there is no reference to the concept of social supply as distinct from other forms of trafficking.<sup>98</sup>

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<sup>91</sup> CDSA, *supra* note 7, s 2(1).

<sup>92</sup> While many of these cases predate the CDSA, they remain reliable authority for interpreting the CDSA.

<sup>93</sup> CDSA, *supra* note 7, s 2.

<sup>94</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40:80, citing *R v Verge*, [1971] 4 WWR 116, 3 CCC (2d) 398 (BCCA).

<sup>95</sup> *R v Taylor*, [1974] 5 WWR 40 at 40–41, 17 CCC (2d) 36 (BCCA) [*Taylor*].

<sup>96</sup> *Kernaz* 2019, *supra* note 73.

<sup>97</sup> *R v Kernaz*, 2019 SCC 48.

<sup>98</sup> *Kernaz* 2019, *supra* note 73 at para 5; *R v Kernaz*, 2019 SCC 48 (Factum of the Appellant).

However, the case concerns facts that are properly described as an intention to socially supply drugs.

Nicholas Kernaz was charged with possession of methamphetamine and cocaine for the purpose of trafficking, contrary to subsection 5(2) of the CDSA.<sup>99</sup> The police arrested him after he parked a borrowed car in front of a house that he was visiting.<sup>100</sup> The subsequent search of his pockets and the borrowed vehicle produced incriminating evidence including, but not limited to, over three grams of methamphetamine, pipes, a container with over 25 grams of cocaine, a large sum of cash, six cell phones, three guns, and ammunition.<sup>101</sup> Nicholas Kernaz testified that he intended to share his drugs with “the girl” in the house and stated, “I had plans with the girl to snort some meth, and hang out”, and affirmed that she was going to use the meth that he provided, but that he “wasn’t expecting any money or anything like that from her for it though.”<sup>102</sup> The Crown argued that this constituted an admission, whereas the defence argued that this only indicated “a possibility of sharing it” and that there was no agreement made at that point.<sup>103</sup> Defence counsel also acknowledged that giving drugs to someone could constitute trafficking.<sup>104</sup>

The trial judge convicted Nicholas Kernaz of the lesser offence of simple possession because merely expressing an intention to give drugs was not enough to constitute trafficking.<sup>105</sup> Further, much of the evidence was inadequate to constitute possession for the purpose of trafficking because it could not be concluded that these items were subject to his use and control, as the offence requires. Only those drugs he admitted as being in his possession were found to be in his control. The Crown appealed this decision to the SKCA on the basis that the trial judge made an error in law for failing to properly apply the legal test which includes giving drugs. The issue central to the Crown’s appeal was whether Nicholas Kernaz’s testimony was an admission of the offence charged.<sup>106</sup> The SKCA allowed this appeal, setting aside the acquittal of possession for the purpose of trafficking and conviction of simple possession, and entered a verdict of

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<sup>99</sup> Kernaz 2019, *supra* note 73 at para 1.

<sup>100</sup> *Ibid* at para 3.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid* at para 5.

<sup>103</sup> *Ibid* at para 6.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid* at paras 1, 9–11.

<sup>106</sup> *Ibid* at para 16.

guilty for possession for the purpose of trafficking.<sup>107</sup> The SKCA accepted the Crown's argument and stated that there was no need for a prior agreement to establish the offence of possession for the purpose of trafficking.<sup>108</sup>

The outcome in *Kernaz* is consistent with past cases, showing that where an accused admits to an intention to share drugs with others, the offence of possession for the purpose of trafficking is committed. In *Rogalsky*, the accused was found guilty of possession for the purpose of trafficking after admitting that sharing his cannabis is proper etiquette when using drugs among others.<sup>109</sup> In *R v Taylor*, a group of friends pooled their money to purchase hashish in bulk with an intention to equally share it and the accused who made the purchase was found guilty of trafficking.<sup>110</sup> This reasoning was adopted in *R v O'Conner* a year later in 1975, which was denied leave to the SCC.<sup>111</sup>

In *O'Conner*, the accused was convicted of trafficking after purchasing drugs to share with his wife, using money they jointly owned, and heading home to use the drugs together.<sup>112</sup> More recently, in *R v Beek*, the British Columbia Court of Appeal (BCCA) found that a proven intention to share drugs will often constitute trafficking, but the trial judge also explained that expressing that one sometimes shares drugs at a party is only expressing a possibility of sharing drugs, and a mere possibility does not meet the definition of trafficking.<sup>113</sup> In *Kernaz*, the SKCA held that the case at issue was more analogous to the drug trafficking in *O'Conner* and *Taylor* and distinguishable from the non-trafficking situation in *Beek*.<sup>114</sup> In other words, Nicholas Kernaz's intention to share drugs went beyond a mere possibility and, therefore, it constituted trafficking. Demonstrably, the line between these cases is subtle and it exemplifies the broad discretion that the Crown and the court have for prosecuting social sharing as drug trafficking.

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<sup>107</sup> *Ibid* at paras 1–2, 25.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Supra* note 74 at 399–400.

<sup>110</sup> *Supra* note 95.

<sup>111</sup> [1975] 3 WWR 603, 23 CCC (2d) 110 (BCCA) [*O'Connor*], leave to appeal to SCC refused, 24114 (17 February 1975).

<sup>112</sup> *Ibid*.

<sup>113</sup> 2014 BCSC 971 [*Beek*].

<sup>114</sup> *Kernaz* 2019, *supra* note 73.

## ii. To Distribute

Other cases where Canadian courts have found social supply conduct to constitute drug trafficking have occurred in the context of trafficking by distributing. Under the CDSA, distributing drugs falls within the extended definition of ‘sell’ under section 2.<sup>115</sup> As cited in *Taylor*, the ordinary meaning of distribute, as per the Oxford Universal Dictionary is, “to deal out or bestow in portions or shares among many or a number of recipients; to allot or apportion as his share to each person of a number; to spread.”<sup>116</sup> Therefore, within the definition of trafficking by distribution, there must be more than one recipient of the drugs. The Crown must show evidence of at least two transactions, of at least two different recipients to prove trafficking by distribution. Evidence of an exchange of money, or any other passing of consideration, does not need to be shown, pursuant to section 2 of the CDSA.<sup>117</sup> In *Taylor*, the accused was found guilty of trafficking by distributing for getting a bulk purchase of hashish and apportioning the drugs amongst the group, splitting the cost.<sup>118</sup> This case clearly resembles the social supply conduct described in the social science research.

## iii. To Transfer

Another area where the concept of social supply could apply within the definition of drug trafficking is transferring. The Canadian Oxford Dictionary defines transfer as “move (a thing etc.) from one place to another... hand over the possession of (property, rights, etc.) to a person.”<sup>119</sup> Black’s Law Dictionary defines transfer as “[a]n act of the parties, or of the law, by which the title to property is conveyed from one person to another.”<sup>120</sup> In accordance with these definitions, Bruce MacFarlane, Robert Frater, and Croft Michaelson argue that transfer has two dimensions: “a physical movement of drugs, and a notional conveyance of

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<sup>115</sup> CDSA, *supra* note 7, s 2(1).

<sup>116</sup> *Taylor*, *supra* note 95 at 40.

<sup>117</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.40.

<sup>118</sup> *Supra* note 95 at 36–39.

<sup>119</sup> Katherine Barber, ed, *The Canadian Oxford Dictionary* (Oxford: Oxford University Press, 2004) sub verbo “transfer”, cited in MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>120</sup> Bryan A Garner, ed, *Black’s Law Dictionary* (St. Paul, MN: Thomson Reuters, 2014) sub verbo “transfer”, cited in MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

a right to them.”<sup>121</sup> Notably, this method of trafficking has not received judicial consideration because the CDSA predecessors’ definitions of trafficking did not include ‘transfer’. The conduct that could be caught by this definition also overlaps with the definition of transporting and giving; thus, the same conduct can be prosecuted by transporting or giving instead.<sup>122</sup> One can imagine how transferring drugs might capture social supply, such as gifting drugs to a friend.

#### iv. Joint Possession and Purchasing

The cases cited above also illustrate that joint possession does not necessarily preclude the offence of drug trafficking from also being made out. The concept of joint possession is encompassed within the definition of possession pursuant to subsection 4(3) of the *Criminal Code*.<sup>123</sup> Generally, the courts have interpreted joint supply to mean one person being in possession of drugs on behalf of a group, with the group’s knowledge and consent.<sup>124</sup> In *Taylor*, the defence argued that the drugs were held for joint possession and not for the purpose of trafficking. This argument was rejected by the BCCA, affirming the conviction of trafficking as it did “not alter the nature of the physical act of giving, delivering or distributing the narcotic to another or others, which in itself constitutes the offence.”<sup>125</sup> Joint ownership between spouses does not alter the trafficking nature of the act either.<sup>126</sup>

Alternatively, if the joint purchasers or owners transport the drugs together, both may only be guilty of the lesser offence of joint possession.<sup>127</sup> In *R v Binkley*, the accused drove a vehicle, travelling with a passenger whom he jointly possessed drugs with. The accused had no intention of transporting or distributing the drugs further and, therefore, was only guilty of simple possession, held jointly with the passenger.<sup>128</sup> Similarly, in *R v Gardiner* the police stopped a vehicle, in which the accused was a passenger and found to be in possession of cocaine. In deciding whether this

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<sup>121</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>122</sup> *Ibid* at 5:40:100

<sup>123</sup> *Criminal Code*, RSC 1985, c C-46, s 4(3) [*Criminal Code*].

<sup>124</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 4:120.20.

<sup>125</sup> *Taylor*, *supra* note 95 at 41.

<sup>126</sup> O’Connor, *supra* note 111.

<sup>127</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.120.40.60.

<sup>128</sup> *R v Binkley* (1982), 15 Sask R 251 at 465, 69 CCC (2d) 169 (SKCA) [*Binkley*].

constituted drug trafficking or joint possession, the Ontario Court of Appeal (ONCA) found that it was more credible that the accused was only in possession of the drugs because the joint owners, who had pooled their resources to purchase the drugs, were also present in the car.<sup>129</sup>

The key distinction between the *Binkley* and *Gardiner* line of cases, where joint possession was found, from the *Young, Taylor*, and *O'Conner* line of cases, where trafficking was made out, is whether the joint owners are present upon arrest. When everyone is together, it is more credible to the court that the accused is simply in joint possession, compared to cases where others are not present and may not be charged with possession themselves.<sup>130</sup> This distinction may seem arbitrary and has been criticized for overlooking the definition of possession under subsection 4(3) of the *Criminal Code*, which has an extended reach. In fact, one could consider the individuals awaiting the accused's delivery of drugs in *Young, Taylor*, and *O'Conner* as being in constructive possession. Nonetheless, this distinction does not necessarily apply to trafficking by giving, selling, or delivering because those acts constitute the promotion of distribution in and of themselves, whether the other party is present or not.<sup>131</sup>

#### **v. Drug Possessors are not Aiders and Abettors of Trafficking**

The SCC considered the offence of aiding and abetting of drug trafficking for simple possession and ruled that it was outside of the scope of drug trafficking. In *R v Eccleston*,<sup>132</sup> cited by the SCC in *R v Greyeyes*,<sup>133</sup> the BCCA stated, “the definition of trafficking so as to encompass conduct that right-minded people would say is not trafficking is damaging and to be avoided.”<sup>134</sup> In *Greyeyes*, the SCC cited this quote to hold that drug possessors should not be held as aiders and abettors to drug trafficking.<sup>135</sup> As the phenomenon of social drug sharing grows with drug normalization and people who use drugs turn to this form of drug supplying as a more trustworthy source, a similar argument can potentially be made – encompassing social supply as drug trafficking is damaging and should be

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<sup>129</sup> *R v Gardiner* (1987), 35 CCC (3d) 461, 21 OAC 177 (ONCA) [*Gardiner*].

<sup>130</sup> *Ibid* at 465.

<sup>131</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 6:100.20.40.20.

<sup>132</sup> [1975] 5 WWR 141, 24 CCC (2d) 564 (BCCA) [*Eccleston*].

<sup>133</sup> [1997] 2 SCR 825, 148 DLR (4th) 634 [*Greyeyes*].

<sup>134</sup> *Ibid* at para 5, citing *Eccleston*, *supra* note 132 at 568, per Justice Seaton.

<sup>135</sup> *Ibid* at para 8.

avoided. The subtle distinctions in the case law between possession and drug trafficking show that the line between drug user and drug supplier is tenuous. This tenuous distinction is consistent with the social science research which shows that many people who use drugs do not regard drug supply as drug trafficking.<sup>136</sup>

## C. Sentencing Considerations

Similar to sentencing practices in other English common law countries, social supply is considered a less severe form of drug trafficking than more commercial dealing in Canada. With a focus on commercialism, Canadian courts have compared social supply conduct with more organized commercial drug trafficking. In this section, I first consider the SCC's decision in *R v Lloyd*, where the Court stated that sharing drugs for no profit is less morally blameworthy than more commercial trafficking and, with all factors being considered, warrants a less severe sentence.<sup>137</sup> I then turn to a discussion of the sentencing principles in the *Criminal Code*, which frame how sentencing courts could theoretically consider the relevance of social supply as distinct from commercialism. Referring to cases in Alberta where courts more explicitly consider social trafficking, I show that Canadian courts disparately consider social supply between provinces.

### 1. Constitutional Considerations of Sentencing Social Traffickers

Canada's highest court has clearly signalled that treating commercial drug trafficking as equivalent to social trafficking at sentencing is unconstitutional. In *Lloyd*, in 2016, the SCC considered the reasonable hypothetical of a social supplier where the Court held that the mandatory minimum sentencing provisions for trafficking offences were unconstitutional and struck down.<sup>138</sup> The SCC indicated that social supplying conduct is less morally blameworthy and deserving of punishment than other forms of trafficking, even though the case was not centrally about supply.<sup>139</sup>

In *Lloyd*, the Court found that mandatory minimum sentences for drug trafficking violated section 12 of the *Charter*, which protects the accused

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<sup>136</sup> See e.g. Jacinto et al, *supra* note 20.

<sup>137</sup> 2016 SCC 13 [*Lloyd*].

<sup>138</sup> *Ibid* at paras 23, 27-35.

<sup>139</sup> *Ibid* at paras 28-32.

from cruel and unusual punishment.<sup>140</sup> Hypothetically, a one-year sentence for someone who possesses a small amount of a Schedule I drug to share with a spouse or friend would be grossly disproportionate to the penal goals and sentencing principles as articulated in the CDSA and *Criminal Code*.<sup>141</sup> The SCC also found that it would be “abhorrent” or “intolerable” to Canadians to punish these offences in the same way.<sup>142</sup> The mandatory minimum sentence casts its net too broadly, as “it applies indiscriminately to professional drug dealers who sell dangerous substances for profit and to drug addicts who possess small quantities of drugs that they intend to share with a friend, a spouse, or other addicts.”<sup>143</sup> The definition of trafficking within the CDSA also captures conduct so broadly, such that it captures people who give small amounts of drugs to friends, regardless of the reason for doing so. The SCC states:

At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of Schedule I substances, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before. I agree with the provincial court judge that most Canadians would be shocked to find that such a person could be sent to prison for one year.<sup>144</sup>

Despite the strong language from the majority, in dissent, Justices Wagner, Gascon, and Brown argue that social sharing might be less blameworthy, but a one-year sentence for a social supplier is constitutional.<sup>145</sup> According to them, the societal harms of trafficking remain the same, writing:

Whether the offender traffics by sharing, or to support her own addiction, or purely for profit, she facilitates the distribution of dangerous substances into the community. She may provide drugs to people who would not otherwise have had access to them. The harm to the community – in the form of overdose, addiction, and the crime that sometimes comes with supporting addiction – remains the same regardless of the offender's motives.<sup>146</sup>

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<sup>140</sup> *Ibid* at para 37; *Charter*, *supra* note 9, s 12.

<sup>141</sup> *Lloyd*, *supra* note 137 at paras 22, 37.

<sup>142</sup> *Ibid* at para 24.

<sup>143</sup> *Ibid* at para 29.

<sup>144</sup> *Ibid* at para 32.

<sup>145</sup> *Ibid* at para 93.

<sup>146</sup> *Ibid*.

The dissenting justices' comments reflect a larger issue within society and the justice system where overly-punitive views of people who use and supply drugs persist, without consideration of how social suppliers can reduce harm for people who use drugs.<sup>147</sup> Arguably, so long as social supply remains captured within the definition of social trafficking, many judicial actors maintain an association to the broader harms of trafficking even with low-level trafficking offences.

While the dissent did not win the day, the dissenting justices also strongly emphasized the existence of other factors, specifically a prior criminal record, which would warrant a more severe sentence, even for those cases involving social supply.<sup>148</sup> The majority did not appear to disagree with this part of the dissent and signals that the reasonable hypothetical of the person who shares their drugs with a friend is only one element among many that are considered at sentencing. As can be seen in the majority's passage included above, the reference is made to the type and quantity of drugs, as well as the presence of a prior criminal record.<sup>149</sup> Any recognition of social supply is ultimately balanced against other aggravating and mitigating principles recognized in Canadian law. Further, in a 2018 paper published in the *Manitoba Law Journal*, Haley Hrymak analyzes case law involving street-level fentanyl trafficking and finds that trafficking fentanyl will necessitate a greater emphasis on deterrence and punishment, thereby deserving a more severe punishment.<sup>150</sup> As such, social trafficking might be a relevant factor, but additional factors such as the context of the overdose crisis and the potency of the drug (e.g. fentanyl) tend to weigh more heavily at sentencing.

## ***2. Commercialism as a Sentencing Principle***

The general principles at sentencing are prescribed in sections 718 to 718.2 of the *Criminal Code*.<sup>151</sup> Like England and Wales, proportionality is a fundamental principle at sentencing in Canada, which means that sentencing "must be proportionate to the gravity of the offence and the

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<sup>147</sup> See e.g. Kolla and Strike, *supra* note 1 at 4; Hrymak, "The Opioid Crisis", *supra* note 10.

<sup>148</sup> Lloyd, *supra* note 137 at paras 77, 94.

<sup>149</sup> *Ibid* at para 32.

<sup>150</sup> Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149 [Hrymak, "A Bad Deal"].

<sup>151</sup> *Criminal Code*, *supra* note 123.

degree of responsibility of the offender.”<sup>152</sup> One of several factors listed in the *Criminal Code* is whether “the offence was committed for the benefit of, at the direction of or in association with a criminal organization.”<sup>153</sup>

Outside of the statutory sentencing framework, courts have considered the presence of commercialism in drug transactions as an aggravating factor. Serious forms of commercialism may include involvement with a criminal organization. However, Canadian courts do not have clear indicia of what amounts to commercialism.<sup>154</sup> In *R v Webber*, the Alberta Court of Appeal (ABCA) stated that commercialism is not met simply by the exchange of drugs for money.<sup>155</sup>

Prior research of social supply in Canadian case law has noted that trafficking offences can be organized into three categories, ranked by increasing order of severity: social sharing, petty retail operations, and full-time commercial operations.<sup>156</sup> However, upon a search of jurisprudence using WestlawNext Canada and a reading of a prominent publication on drug offences in Canada,<sup>157</sup> I was unable to identify a legal authority which shows that trafficking offences are actually categorized in this way. Instead, the discussion of social sharing or social trafficking in Canadian sentencing appears to be disparate and inconsistently considered between provinces, with no formal legal test established.

One frequently cited case which explicitly refers to social trafficking as a less serious offence emerges from the ABCA.<sup>158</sup> In *R v Maskell*, a young university student with no criminal record was found guilty of possession of cocaine for the purpose of trafficking.<sup>159</sup> The circumstances of the case involved a commercial operation that was “more than a minimal scale.”<sup>160</sup>

At sentencing, the Court stated, “[i]f this were a case of social trafficking, or an isolated sale, adopting as we have the position that cocaine is not as serious or dangerous a drug as heroin, a lesser sentence may have

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<sup>152</sup> *Ibid*, s 718.1.

<sup>153</sup> *Ibid*, s 718.2(a)(iv).

<sup>154</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 33:80.40.40.

<sup>155</sup> 2013 ABCA 189 at para 26 [*Webber*].

<sup>156</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 98; Hathaway, “Evidence-Based”, *supra* note 89 at 595.

<sup>157</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50.

<sup>158</sup> Whereas neither the SCC in *Lloyd*, *supra* note 137, nor the *Criminal Code*, *supra* note 123 sentencing provisions explicitly use the terms social trafficking or social supply.

<sup>159</sup> (1981), 58 CCC (2d) 408, 5 WCB 490 [*Maskell*].

<sup>160</sup> *Ibid* at para 20.

been imposed.”<sup>161</sup> In this regard, the ABCA indicates that social trafficking and isolated sales are closer to minimal scale trafficking offences. Given the more commercial elements to the case at issue, the ABCA imposed a more severe sentence of three years imprisonment.<sup>162</sup> This case has been cited in 223 cases according to WestlawNext Canada, as of 2 June 2020, but its application outside of Alberta remains limited.<sup>163</sup>

*Maskell* is often cited for its reference to “minimal scale” as a starting point for the severity of drug trafficking, but what constitutes a “minimal scale” offence is unclear.<sup>164</sup> More recently, in *R v Gittens* in 2019, the ABCA stated that the characterization of something as more than a minimal scale is a fact-finding exercise for the trial judge.<sup>165</sup> The ABCA also notes that there have been more cases characterized as more than a minimal scale than cases that are of a minimal scale.<sup>166</sup> However, this may be a result of joint submissions, which are common practice in Canadian courts, such that minimal scale offences (such as social trafficking) do not come before appellate courts.<sup>167</sup> The ABCA also states that it is likely that many minimal scale drug trafficking cases are diverted to drug court, such that the consideration of drug supply is not reflected in case law per se.<sup>168</sup> As the ABCA states, “for all we know, the ‘minimal scale’ cases might well be the majority.”<sup>169</sup> As such, one might argue that prosecutorial and police discretion are exercised for low-level social supply offences; thus, in effect, social supply is diverted out of the court already and this is considered a satisfactory outcome. In the next section, I critically consider the topic of discretion.

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<sup>161</sup> *Ibid* at para 19.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Maskell*, *supra* note 159 has only been cited five times in BC, for example (*R v Massey*, 2012 BCSC 935; *R v Shusterman*, 2012 BCSC 362; *R v Newman*, 2010 BCCA 109; *R v Desjardins*, 2006 BCPC 441; *R v Saulnier*, [1988] 2 WWR 546, 21 BCLR (2d) 232). Within these five decisions, there is no reference to its discussion of social trafficking or the minimal scale analysis; therefore, this part of the analysis has not been applied in BC. The majority of the citations are for cases within Alberta (175).

<sup>164</sup> See e.g. *R v Gittens*, 2019 ABCA 406 at paras 5–6 [*Gittens*].

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid* at para 22.

<sup>167</sup> *Ibid* at para 31.

<sup>168</sup> *Ibid* at paras 30–34.

<sup>169</sup> *Ibid* at para 32.

## IV. THE LIMITS OF DISCRETION

The dissenting justices' views in *Lloyd* reflect a larger tendency in the justice system to rely on police, prosecutors, and sentencing judges to exercise their discretion to not enforce drug laws that are otherwise overly broad and unjust. The justices argued that the reasonable hypothetical of a low-level social sharer is “far-fetched” and there are “very few reported cases where offenders have been convicted of trafficking for sharing drugs.”<sup>170</sup> Similarly, one social supply scholar from Australia has argued that relying on police and judicial discretion to refrain from charging and prosecuting social supply is an adequate legal approach.<sup>171</sup> The problem with this perspective is that reported cases do not reflect the many incidents where people who supply drugs come into conflict with the justice system and experience the stigma of criminalization in their daily lives. As well, the majority in *Lloyd* stated, in rejecting the argument that discretion justified maintaining mandatory minimum sentences, that exemptions “based on Crown discretion provide only ‘illusory’ protection against grossly disproportionate punishment.”<sup>172</sup>

Contrary to the dissenting judges' views in *Lloyd*, social supply offences continue to come before Canadian courts as drug trafficking offences. Many of these cases may not be published because, as the ABCA in *Gittens* stated, it is likely that many low-level social cases are diverted through joint submissions and drug courts.<sup>173</sup> Furthermore, as the prior analysis of Canadian case law demonstrated in part III-B, there are a myriad of ways that social supply conduct is prosecuted as drug trafficking through giving, distributing, transferring, and jointly possessing or purchasing drugs. While many of these cases are dated, they continue to be cited in current case law, such as *Kernaz* in 2019.<sup>174</sup> Thus, social supply cases remain criminalized and prosecuted with apparent disparities in how it is considered at sentencing.

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<sup>170</sup> *Lloyd*, *supra* note 137 at para 91.

<sup>171</sup> Gary Potter “Exploring Retail-Level Drug Distribution: Social Supply, ‘Real’ Dealers and the User/Dealer Interface” in Zsolt Demetrovics, Jane Fountain & Ludwig Kraus, eds, *Old and New Policies, Theories, Research Methods and Drug Users Across Europe* (Lengerich: Pabst Science Publishers, 2009) 50 at 66-67.

<sup>172</sup> *Supra* note 137 at para 34, citing *R v Nur*, 2015 SCC 15 at para 94.

<sup>173</sup> *Gittens*, *supra* note 164 at paras 30-34.

<sup>174</sup> *Kernaz* 2019, *supra* note 73 (I recognize that the facts surrounding this case appeared to be more serious on its face, as there were large cash amounts, weapons, and larger drug quantities found. However, this evidence was found not to be in Mr. Kernaz's

One might also argue that police themselves are not pursuing low level trafficking offences, such as social trafficking. However, local police forces have broad authority to adopt their own policy on discretion. For example, according to the British Columbia (BC) Ministry of Mental Health and Addictions, police agencies in BC “have embraced a harm reduction approach to people with substance use disorders, and focus its enforcement efforts on those who import, manufacture, and traffic drugs.”<sup>175</sup>

Nonetheless, it is unclear to what extent this policy is being implemented and how it is being interpreted throughout BC. This harm reduction approach does not specify whether it means a focus away from non-commercial forms of trafficking or whether this discretion extends to casual users who do not have substance use disorders.<sup>176</sup> In fact, the Vancouver Police Department’s (VPD) publicly available drug policy asserts that “street-level drug trafficking remains a priority” and police will not use their discretion to distinguish between user-dealers.<sup>177</sup> The VPD also states it will direct “more” attention towards “traffickers who exhibit higher degree of organization and coordination.”<sup>178</sup> Whether other police agencies in BC and Canada use their discretion in this way is largely unknown. Overall, as a US legal scholar critiques in a 2015 article published in the *Howard Law Journal*, police policy and discretion are hidden from public scrutiny and subject to the internal policy direction of local police agencies.<sup>179</sup> This creates a patchwork of discretionary policies between communities and allows for police, without adequate oversight, to unevenly apply laws between neighborhoods and groups in a way that can disadvantage marginalized communities.<sup>180</sup>

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possession and was excluded from the consideration of whether trafficking occurred. Intention to traffic was found based on the simple fact that he admitted to his intention to share his drugs with a woman he was meeting up with).

<sup>175</sup> British Columbia, Ministry of Mental Health and Addictions, *Escalating BC’s Response to the Overdose Emergency* (Victoria, BC: Ministry of Mental Health and Addictions, last visited 21 June 2020) at 17, online: <[www2.gov.bc.ca/assets/gov/overdoseawareness/mha\\_escalating\\_bcs\\_response\\_report\\_final\\_26feb.pdf?bcgovtm=CSMLS](http://www2.gov.bc.ca/assets/gov/overdoseawareness/mha_escalating_bcs_response_report_final_26feb.pdf?bcgovtm=CSMLS)> [perma.cc/B7BF-B6N6].

<sup>176</sup> *Ibid.*

<sup>177</sup> British Columbia, *Vancouver Police Department Drug Policy* (Vancouver, BC: VPD, adopted September 2006) at 5, online: <[vancouver.ca/police/assets/pdf/reports-police/vpd-policy-drug.pdf](http://vancouver.ca/police/assets/pdf/reports-police/vpd-policy-drug.pdf)> [perma.cc/7THJ-BDLX].

<sup>178</sup> *Ibid.*

<sup>179</sup> Eric J Miller “Challenging Police Discretion” (2015) 58:2 *How LJ* 521.

<sup>180</sup> *Ibid.* at 521–23, 530–32.

The incidence of over-policing of certain communities in Canada, such as Indigenous people and Black Canadians, has been well studied and documented in empirical research.<sup>181</sup> In a recent study on youth experiences with the police, having a low income and a prior criminal record was significantly related to whether the police charged youth for drug offences.<sup>182</sup> This same study of youth experiences with police also found that gender non-binary and Indigenous youth were more likely to be handcuffed or arrested than other youth.<sup>183</sup> Prior analyses of official crime statistics also show that street and low-level crimes are disproportionately reported in comparison to higher level, corporate crimes and that this is directly related to policing practices and policy focuses.<sup>184</sup> Overall, these findings show that police exercise their discretion to enforce drug laws in a way that disproportionately targets socially marginalized groups including poor, racialized, and gender non-conforming youth.

Further, in Pivot Legal Society's *Project Inclusion Report* involving a year-long study interviewing people who use drugs throughout BC, participants reported frequent experiences with the police involving harassment and disruption of harm reduction activities.<sup>185</sup> Social service providers shared stories about people living in low-barrier shelters who were charged with drug trafficking when undercover police asked them to help them find fentanyl.<sup>186</sup> As drug users themselves, their motivation was to support their own addictions, as well as a desire to help other people who use drugs with finding a drug supply.<sup>187</sup>

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<sup>181</sup> See e.g. Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012); Akwasi Owusu-Bempah & Scot Wortley "Race, Crime, and Criminal Justice in Canada" in Sandra M. Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (New York, NY: Oxford University Press, 2014) 281.

<sup>182</sup> Alissa Greer et al, "Police Discretion to Charge Young People who use Drugs Prior to Cannabis Legalization in British Columbia, Canada: A Brief Report of Quantitative Findings" (2020) *Drugs: Education, Prevention & Policy* 1.

<sup>183</sup> Kiffer G Card et al, "Event-level Outcomes of Police Interactions with Young People in Three Nonmetropolitan Cities across British Columbia, Canada" (2020) *Intl J Drug Policy* 1 at 5.

<sup>184</sup> Susan Boyd, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada* (Nova Scotia: Fernwood Publishing, 2016) at 48-49.

<sup>185</sup> Darcie Bennet & DJ Larkin, "Project Inclusion: Confronting Anti-Homelessness and Anti-Substance Use Stigma in British Columbia" (2018), online: *Pivot Legal Society* <[www.pivotlegal.org/full\\_report\\_project\\_inclusion\\_b](http://www.pivotlegal.org/full_report_project_inclusion_b)> [perma.cc/7MYM-CM9S].

<sup>186</sup> *Ibid* at 50.

<sup>187</sup> *Ibid* at 50-52.

One participant who was charged with drug trafficking in another community described an undercover officer who approached her asking for help to get drugs.<sup>188</sup> In describing the encounter, she said “[s]o I get the dope, I give it to her, get the money, give it to him, that’s it. If she had asked me to fix her bike, if she asked me to find her puppy, if she asked me to paint her garage door I’d have done it for her and that’s what she asked me to do and I did” and then stated “I’m not a drug dealer.”<sup>189</sup> This undercover police encounter demonstrates how police criminalize the practices of care which public health scholars have lauded for reducing drug use harms.<sup>190</sup> Ultimately, these kinds of encounters are not limited to BC and because of the nature of police discretion, it is difficult to know the extent to which these policing methods occur throughout Canada and impact the day-to-day lives of people who use drugs.<sup>191</sup>

## V. AVENUES FOR LAW REFORM

This paper has highlighted a critical issue necessitating law reform. In this section, I consider various avenues for law reform for legal advocates to consider. I consider the arguments proposed by past researchers that legislators should create a separate offence and outline several limitations to this approach. Given the lack of clarity in considering the level of commercialism at sentencing, I call on lawyers and judges to draw on the concepts of social supply and minimally commercial supply to help clarify the principle of commercialism in determining a proportionate sentence. Finally, I consider arguments which legal advocates could advance under section 7 of the *Charter*. Overall, these recommendations are modest and

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<sup>188</sup> *Ibid* at 50–51.

<sup>189</sup> *Ibid*.

<sup>190</sup> Kolla and Strike, *supra* note 1.

<sup>191</sup> See e.g. *R v Shenfield*, 2008 ABPC 47 (a case from Alberta showing that under-cover operations that target social suppliers are conducted and prosecuted in other provinces as well. Similar to the encounter described by the participant in *Project Inclusion* (see Bennet & Larkin, *supra* note 185), this case involved an Indigenous woman who was a known sex worker. An undercover police officer approached her for assistance in finding drugs. She did not have drugs on her at that time, nor a cell phone. The police offered their phone and she called a drug dealer. She then walked the officer’s money to the dealer, took the drugs, but did not keep a portion of the money for herself. She was sentenced as a drug trafficker, albeit leniently.

should be considered alongside the priority of challenging drug possession offences.

### A. Separate Offence for Social Supply

The potential challenges and unintended consequences of creating a separate offence for social supply or minimally commercial supply may outweigh the benefits in doing so. While some scholars in the UK have recommended a separate offence for social supply or a minimally commercial drug supply,<sup>192</sup> no country has created a separate offence to date<sup>193</sup> and the UK government rejected this recommendation.<sup>194</sup> Legal advocates might face similar challenges in Canada. As well, Gary Potter has argued that the differences between commercial and social drug supply are not adequately defined in the scientific literature and translating unclear scientific concepts into legal definitions is difficult.<sup>195</sup> Thus, he argues that the law should remain clear.<sup>196</sup> For example, judges might struggle to interpret a definition that includes subjective elements of friendship and a profit motive.<sup>197</sup> Potter's emphasis on maintaining legal clarity is important in the Canadian context, particularly in consideration of access to justice concerns around the increasing complexity and length of criminal trials.<sup>198</sup> More serious offences, including drug trafficking and homicide, already involve more court appearances on average than less serious offences.<sup>199</sup>

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<sup>192</sup> See Coomber & Moyle, "Beyond Drug Dealing", *supra* note 24.

<sup>193</sup> See generally Coomber et al, "Recognition and Accommodation", *supra* note 3.

<sup>194</sup> Potter, *supra* note 171 at 66.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid* at 71.

<sup>197</sup> Simon Lenton et al, "The Social Supply of Cannabis in Australia: Definitional Challenges and Regulatory Possibilities" in Bernd Werse & Christiane Bernard, eds, *Friendly Business: International Views on Social Supply, Self-Supply and Small-Scale Drug Dealing* (Essen, Germany: Springer, 2016) 29 at 43.

<sup>198</sup> See Canada, Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (Report), by Albert Currie (Canada: DOJ, Research and Statistics Division, last modified 7 June 2015) at 7-9, online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03\\_5/rr03\\_5.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf)> [perma.cc/AFL5-SS3Q] [DOJ], *Riding the Third Wave*].

<sup>199</sup> Statistics Canada, *Measuring Efficiency in the Canadian Adult Criminal Court System: Criminal Court Workload and Case Processing Indicators*, by Maisie Karam et al, Catalogue No 85-002-X (Ottawa: Statistics Canada, 5 March 2020) at 12-13, 19, online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.pdf](http://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.pdf)> [perma.cc

This increasing complexity further burdens accused persons through increasing legal fees.<sup>200</sup>

## B. Educating Criminal Lawyers and Judges on Social Supply

A general and more practical recommendation for law reform is to educate Canadian judges and the practicing criminal law bar on the nuances of drug supplying and the misconceptions about drug supplying as inherently predatory. As demonstrated by the dissent in *Lloyd* and the analysis of drug trafficking cases in BC, there is some resistance within Canadian courts to recognize social supply as less culpable, especially where the offence involves fentanyl and within the context of the overdose crisis.<sup>201</sup>

This is unfortunate given that social supply research shows that social suppliers can actually reduce the risk of opioid overdoses.<sup>202</sup> Therefore, increasing education of social supply within the legal system is needed. Australian scholars have argued that educating lawyers and judges on social supply adequately balances Ross Coomber and Leah Moyle's arguments in favour of a separate offence with Gary Potter's emphasis on clarity and judicial discretion.<sup>203</sup> Hopefully, this paper will contribute, in part, to this education.

Defence counsel should also clarify the differences between social supply, minimally commercial supply, and organized dealing in sentencing submissions to challenge sentencing judges' common misconceptions of drug trafficking offences. Arguably, judges already consider social supply at sentencing, given that *Lloyd* explicitly described sharing drugs as less culpable and that the level of commercialism is already a sentencing principle. In sentencing a husband for trafficking for transporting drugs to his wife in *O'Connor*, the BCCA even stated "when we come to the matter of sentence in this case it should be regarded as a case of possession without any element whatever of a commercial dealing in the drugs."<sup>204</sup> However, as

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/3]3J-L763]. The median time to close an adult criminal case is 121 days. By comparison, drug trafficking, production, and importing and exporting averages 218 days and homicide is 286 days.

<sup>200</sup> DOJ, *Riding the Third Wave*, *supra* note 198.

<sup>201</sup> *Lloyd*, *supra* note 137 at paras 57-100; Hrymak, "A Bad Deal", *supra* note 150 (showing how sentencing judges are overly punitive of trafficking cases involving fentanyl, even in those cases with user-dealers).

<sup>202</sup> See e.g. Kolla & Strike, *supra* note 1.

<sup>203</sup> Lenton et al, *supra* note 197 at 43.

<sup>204</sup> *R v O'Connor*, 1975 CarswellBC 842 (BCCA) at 3 [O'Connor, Sentencing Decision].

I have argued in Part III, courts have not identified clear indicia for what amounts to commercialism and other factors, such as the presence of fentanyl, tend to weigh more heavily in favour of a more severe sentence. Therefore, it would be useful for counsel to employ the language and definitions of social supply and minimally commercial supply in sentencing submissions, especially in those cases involving opioids, to assist courts in exercising their discretion in a more nuanced way. For example, legal counsel can draw on the New Zealand Law Commission's definition of social supply, referenced in Part II.<sup>205</sup>

As the Australian legal scholar Kate Seear argues, legal counsel have an important role in reinforcing, perpetuating, or challenging perceptions in the criminal justice system around illicit drug use.<sup>206</sup> Judges are largely constrained by the arguments put forward by counsel.<sup>207</sup> Therefore, legal submissions can either perpetuate or challenge harmful views of people who use and sell drugs. In *R v Smith*, in which the BCCA set out the sentencing range for street-level trafficking offences, the Crown submitted evidence of the increasing presence of fentanyl in Canada and the overdose crisis.<sup>208</sup>

This evidence was used to successfully argue for a more severe sentence.<sup>209</sup> As Haley Hrymak's analysis shows, *Smith* helped establish a pattern of overly punitive sentences imposed on street-level dealers who are often people who use drugs themselves who are selling drugs to support their own addictions.<sup>210</sup> Defence counsel can similarly use sentencing submissions as an opportunity to submit general evidence and use it as an opportunity to challenge the habitual misconceptions in the judicial system about people who use drugs (and by extension, people who supply drugs). Lawyers ought to recognize their role in advancing strategic arguments that can either perpetuate stigma or challenge longstanding stereotypes, thereby creating new ideas in legal discourse about people who use and supply drugs that are rooted in harm reduction and the autonomy of people who use drugs. In the end, the collective actions of Crown and defence counsel can

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<sup>205</sup> NZ Law Commission, *Controlling and Regulating Drugs*, *supra* note 55.

<sup>206</sup> See generally Kate Seear, *Law, Drugs and the Making of Addiction: Just Habits*, 1st ed (New York, NY: Routledge, 2020).

<sup>207</sup> *Ibid* at 61–62.

<sup>208</sup> 2017 BCCA 112 at paras 2, 9, 35–36, 45.

<sup>209</sup> *Ibid* at paras 9, 45; Hrymak, “A Bad Deal”, *supra* note 150 at 155–56.

<sup>210</sup> See generally Hrymak, “A Bad Deal”, *supra* note 150 at 155–56.

make things “otherwise in law.”<sup>211</sup>

### C. Challenging the Legal Definition of Drug Trafficking Under Section 7 of the *Charter*

A more ambitious avenue for law reform is to challenge the current definition of drug trafficking under section 7 of the *Charter*. This legal strategy is consistent with the New Zealand Drug Foundation’s recommendation to remove criminal sanctions of social supply along with possession, as the law should treat social supply and possession equally.<sup>212</sup>

A violation of section 7 occurs where a law deprives an individual of “the right to life, liberty, and security of the person” and where this deprivation is not “in accordance with the principles of fundamental justice.”<sup>213</sup> Where there is a threat of imprisonment for an offence, the liberty interest is engaged;<sup>214</sup> thus, the main question in a section 7 challenge would be whether the definition of trafficking violated a principle of fundamental justice (including the principles against arbitrariness, gross disproportionality, or overbreadth) for capturing social supply.<sup>215</sup> In effect, a successful challenge of social supply would mean that social supply would formally be considered equivalent to possession. Alternatively, it would open the door for Parliament to redraft the definition of drug trafficking to align with the exceptions for social supply in the *Cannabis Act*.<sup>216</sup>

The ONCA declined to answer whether the broad definition of trafficking is contrary to section 7 in *United States v Saad* in 2004 and *Canada (Attorney General) v Saad* in 2007.<sup>217</sup> However, the arguments were narrowly

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<sup>211</sup> See Seear, *supra* note 206 at 86. See also Alana Klein “Criminal Law and the Counter-Hegemonic Potential of Harm Reduction” (2015) 38:2 Dal LJ 447 at 451, 471. Klein argues that the adoption of “harm reduction within constitutional discourse likewise risks reinforcing rather than undermining hegemonies perpetuated through law” but its key features, including an orientation towards self-determination, remain important to challenging drug laws.

<sup>212</sup> NZ Drug Foundation, “Mental Health and Addiction Inquiry”, *supra* note 58.

<sup>213</sup> *Charter*, *supra* note 9, s 7. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 54–56 [*Carter*].

<sup>214</sup> See *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 84.

<sup>215</sup> *Carter*, *supra* note 213 at paras 71–72.

<sup>216</sup> See O’Connor, Sentencing Decision, *supra* note 204. While technically convicted of drug trafficking at sentencing, the BCCA recommended that he should be sentenced as if he was a joint possessor, thereby reducing the sentence from three years to three months.

<sup>217</sup> *United States v Saad* (2004), 237 DLR (4th) 623, 183 CCC (3d) 97 (ONCA) [*Saad* 2004]; *Canada (Minister of Justice) v Saad*, 2007 ONCA 75 [*Saad* 2007].

construed and the cases predate case law where harm reduction arguments have been successfully advanced under section 7.<sup>218</sup> In *United States v Saad*, the appellant argued that trafficking by giving was a violation of the right to fundamental justice, pursuant to section 7 of the *Charter*.<sup>219</sup> The applicant argued that including giving as a mode of trafficking within the definition “went too far in trying to shut down the trade in narcotics.”<sup>220</sup> The definition captures conduct, including “sharing drugs or purchasing drugs on behalf of a group of users”, which most “right-minded” people would not consider to be trafficking.<sup>221</sup> Therefore, the stigma of the trafficking conviction outweighs the blameworthiness of the conduct.<sup>222</sup> However, the ONCA found that the accused was guilty of trafficking by transferring instead and it was not necessary to decide the *Charter* issue, as the argument was limited to whether trafficking by giving was unconstitutional.<sup>223</sup> The ONCA relied on this decision, without further consideration, when the issue was argued again in 2007.<sup>224</sup> Therefore, the question of whether the definition of trafficking is unconstitutional remains open.<sup>225</sup>

One way a section 7 challenge could be advanced is that criminalizing social supplying within the definition of drug trafficking is contrary to the principle against overbreadth. Overbreadth occurs where the law is rational, in part, but it overreaches by capturing conduct that bears no connection to its objective.<sup>226</sup> At the stage where the court considers whether a principle of fundamental justice has been violated, the focus is on the individual.<sup>227</sup> Enforcement practicality that might justify an overly-broad law should be considered under section 1 of the *Charter*.<sup>228</sup> In *Canada (Attorney General) v Bedford*, the SCC found that a law that criminalized living on the avails of

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<sup>218</sup> *Saad* 2004, *supra* note 217 at para 37; *Saad* 2007, *supra* note 217 at paras 23–26. See e.g. *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 131 [PHS] (where harm reduction was discussed by the SCC for the first time), cited by Klein, *supra* note 211.

<sup>219</sup> *Saad* 2004, *supra* note 217.

<sup>220</sup> *United States v Saad*, 2003 CarswellOnt 1574 at para 7, 57 WCB (2d) 391 (ON Ct J) [*Saad* 2003].

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Saad* 2004, *supra* note 217 at para 37; *Saad* 2007, *supra* note 217 at paras 23–26.

<sup>224</sup> *Saad* 2007, *supra* note 217.

<sup>225</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.80.

<sup>226</sup> *Bedford v Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112–13 [*Bedford*].

<sup>227</sup> *Ibid* at para 113.

<sup>228</sup> *Ibid* at paras 101–02, 105, 113.

prostitution was overbroad because it captured non-exploitative relationships that the law was not intended to prohibit.<sup>229</sup> Specifically, the law was contrary to section 7 because it did not distinguish between exploitative pimps and individuals who could legitimately increase the safe working conditions for sex workers, such as bodyguards.<sup>230</sup>

The Ontario Court of Justice has more recently determined that laws which prohibit sex workers from working with other sex workers in non-exploitative business relationships are overbroad, given that working with other sex workers reduces workplace risks.<sup>231</sup> A similar argument could be advanced that drug trafficking is drafted too broadly, capturing conduct that the legislation was not intended to capture. In *Canada (Attorney General) v PHS Community Services*, the SCC found that the purpose of drug laws is to protect public health and safety.<sup>232</sup> Here, the overly-broad definition of trafficking criminalizes social suppliers who legitimately reduce harm for people who use drugs, as argued above, without distinguishing these individuals from more predatory, organized criminals. Overall, criminalizing social suppliers bears no relation to the object of the law – to protect health and safety.

The fact that it may be difficult for police to distinguish social suppliers from predatory commercial traffickers would not likely undermine the argument that the law is unconstitutional under section 7. In *Bedford*, the Attorney General of Canada argued that the line between exploitative pimps and other individuals, such as bodyguards, was unclear and reading down the law might mean exploitative pimps would escape criminal sanction.<sup>233</sup> The SCC rejected this argument, given that it was to be addressed under section 1 (whether the infringement is justified), and found that it was not justified because it was not minimally impairing.<sup>234</sup>

The law captured individuals such as bodyguards and receptionists, and the effect of this was to prevent sex workers from “taking measures that would increase their safety, and possibly save their lives”; this outweighed any positive effect of protecting sex workers from exploitation.<sup>235</sup> Similarly, laws that prevent people who use drugs from taking the necessary steps to

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<sup>229</sup> *Ibid* at paras 139–44.

<sup>230</sup> *Ibid* at paras 139–45.

<sup>231</sup> *R v Anwar*, 2020 ONCJ 103 at para 208.

<sup>232</sup> *Supra* note 218 at para 136.

<sup>233</sup> *Supra* note 226 at para 143.

<sup>234</sup> *Ibid* at paras 162–63.

<sup>235</sup> *Ibid* at paras 143, 162.

decrease their risk of overdose, including engaging in social supply, could be unconstitutional because it outweighs any benefit that could be obtained by possibly allowing some conduct of drug supplying to be excluded from prosecution under drug trafficking (acknowledging that it may remain illegal under the lesser offence of simple possession). Surely, legislators could draft drug trafficking in a less impairing manner.

Nevertheless, further research in the Canadian context may be needed to successfully bring a section 7 case challenging the overbreadth of the definition of drug trafficking. Notably, in *Bedford* and in *PHS*, the Court was presented with considerable evidence on the record and general social science evidence played a key role in these decisions.<sup>236</sup> Legal advocates should also learn from the failed section 7 argument in *United States v Saad* and draft the argument broadly. Advancing a broader framed argument (i.e. beyond 'giving') that draws on social science research on the Canadian drug supply situation may reform the law in a way that challenges longstanding misconceptions in the justice system about people who use and supply drugs.

## VI. CONCLUSION

In this paper I have argued that the Canadian approach to social drug trafficking remains inconsistent with social science and fails to account for the perspectives of people who use drugs. As the research has shown, acquiring drugs through social supply can be a form of harm reduction, and many people who use drugs would not categorize social drug suppliers as “real dealers.”<sup>237</sup> The SCC has clearly signalled that social sharing is less culpable than other forms of drug trafficking,<sup>238</sup> and that conduct which “right-minded people” do not constitute as trafficking should not be legally classified as trafficking at all.<sup>239</sup> Yet, people who socially supply drugs continue to face threats of criminalization and sentencing judges have

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<sup>236</sup> See *Klein*, *supra* note 211 at 462–63. The author cites these cases and their use of empirical social science in *Charter* claims framed around harm reduction. See also *Bedford*, *supra* note 226 at para 15 (“the evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined.”)

<sup>237</sup> See e.g. Hathaway et al, “Social Supply Networks”, *supra* note 14.

<sup>238</sup> See e.g. *Lloyd*, *supra* note 137.

<sup>239</sup> See e.g. *Greyeyes*, *supra* note 133 at para 5.

tended to view other factors, including criminal records and the type of drug, as more significant. Overall, policing and prosecuting people who socially supply drugs under the more serious offence of trafficking undermines the practices of care that people who use and supply drugs engage in to protect one another.<sup>240</sup>

When it comes to drug policy and law, our understanding of right-minded people ought to consider the perspectives of people who use drugs themselves. Given the misconceptions that persist in the justice system of people who use and supply drugs, the experiences of people who use and supply drugs can help inform drug law reform and educate lawyers and judges. While it might not be necessary to create an entirely new offence for social supply, legal advocates challenging misconceptions and stigmatizing views of people who use and supply drugs should consider the following law reform strategies: (1) educate judges and lawyers about the lived experiences of people who use drugs and the phenomenon of social supply; (2) use the language of social supply and minimally commercial supply in sentencing submissions to gradually challenge ideas about drug use and supply; and (3) pursue strategic *Charter* arguments under section 7 against the overly-broad definition of drug trafficking.

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<sup>240</sup> Kolla & Strike, *supra* note 1.