THE PURPOSE ERROR IN THE MODERN APPROACH TO STATUTORY INTERPRETATION

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The modern approach to statutory interpretation mandates that statutes be read with an eye toward harmonizing their text, context, and purpose. This article notes that jurists can stray from the modern approach by prioritizing abstract statutory purposes over the specific legal rules by which an act pursues these objectives, a mistake here identified as the "purpose error." The article argues that the purpose error contradicts the principle of legislative supremacy and recent guidance by the Supreme Court. The article furthers suggests that two factors generally drive the commission of the purpose error. First, the definition of the statutory purpose at an unduly high level of abstraction. Second, the failure to qualify a statute's primary purpose by considering other competing secondary purposes that the act also aims to achieve. The article finally submits that awareness of the "purpose error" is key to ascertaining the scope of the "making available" right under the Copyright Act *— a question that will soon come before the Supreme Court.*

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I. INTRODUCTION

The Supreme Court says that statutes should be interpreted according to their text, context, and purpose.[1] This so-called "modern approach"[2] "acknowledges that the meaning of language is imprecise and measures words against contextual, schematic, and purposive considerations."[3] In other words, naked text cannot be the sole determinant on which the meaning of a statute is determined by a court because it will not capture the entirety of legislative expression.[4] Yet the Supreme Court has provided only limited guidance about the ways in which text, context, and purpose should align, simply stating that the "relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a *harmonious* whole."[5]

Whatever this means, when it comes to the specifics, there is a disturbing reality: Canada likely "lacks a coherent and consistent methodology of legal interpretation."[6] A crucial part of this reality concerns the role of purpose in interpretation and its relationship to the text, a problem of considerable vintage.[7] The use of purpose in interpretation has a natural imprecision that could lead even the wiliest judge astray.[8] This is because there are often multiple purposes within a statute.[9] These purposes are often stated at different levels of abstraction.[10] Inevitably, courts attempt to achieve all statutory purposes, at all levels of abstraction, across the statutory context. But because legislation is in reality a series of compromises, not every purpose will be achieved at all costs.[11] Relatedly, beyond the typical

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1 Cases over the years have repeated this mantra. For a list, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40:1 Revue Juridique Thémis 131 at 135–40. For the seminal Canadian statutory interpretation case, see *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo*].

2 See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 118 [*Vavilov*] (describing the modern approach as mandating a reading of "the language chosen by the legislature in light of the purpose of the provision and the entire relevant context"). See also *Rizzo*, *ibid* at para 21.

3 Cameron J Hutchison, "Which *Kraft* of Statutory Interpretation? A Supreme Court of Canada Trilogy on Intellectual Property Law" (2008) 46:1 Alta L Rev 1 at 8.

4 *Ibid.* See also Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012) at 204 [Ekins, *Legislative Intent*]. Ekins describes the so-called "underdetermination thesis" which holds that "semantics underdetermines the meanings that speakers are likely to or may intend to convey when they utter a sentence." See also Stephen Neale, "Pragmatism and Binding" in Zoltan Gendler Szabo, ed, *Semantics vs Pragmatics* (Oxford: Oxford University Press, 2005) 165 at 166, 193.

5 *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 [emphasis added] [*Trustco*]. See also para 41.

6 Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998–1999) 30:2 Ottawa L Rev 175 at 178 [Sullivan, "Supreme Court"]. See also *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at 995–96, L'Heureux-Dubé J concurring [*Quebec*].

7 See e.g. Eric Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to *St. Peter's*" (1985) 35 UTLJ 113 at 116–23, outlining the various interpretive approaches using text and purpose throughout English history.

8 Ekins, *Legislative Intent*, *supra* note 4 at 204; Antonin Scalia & Bryan A Garner, *Reading Law* (St Paul: Thomson/West, 2012) at 19.

9 The Supreme Court has recently accepted this point: see e.g. *MediaQMI inc v Kamel*, 2021 SCC 23 at para 39 [*MediaQMI*]. Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at 113: "Purposive interpretation assumes that every legal text has multiple objective and subjective purposes"; Max Radin, "Statutory Interpretation" (1930) 43:6 Harv L Rev 863 at 876, 878.

10 See *MediaQMI*, *ibid*. See also Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 2016) at 187: "it is apparent that most legislation has multiple purposes that operate at different levels of generality"; Barak, *ibid* at 115: "Vertical purposes exist at different levels of abstraction."

11 The Supreme Court has acknowledged this point: *Sun Indalex Finance LLC v United Steelworkers*, 2013 SCC 6 at para 174.

boilerplate description of the modern approach in *Rizzo*,[12] there is no ex ante assignment of weight given to text and purpose in interpretation. It is up to interpreters to make that decision for themselves. But the method to do so is not clear in Canadian statutory interpretation, beyond the important injunction in *Rizzo* that text, context, and purpose must be read "harmoniously."[13]

A harmonious interpretation implies an approach that does not erroneously maximize purpose to the expense of other tools of interpretation.[14] When courts do this, they commit a purpose error. When courts fail to harmoniously interpret a statute, they can do so by giving too much weight to primary purposes of a statute[15] — *why* a statute was enacted at a high level of abstraction — over secondary purposes[16] represented in legal rules and standards sourced in text — *how* a statute aims to accomplish its goals.[17] Both component parts, the *why* and the *how*, must be given effect as a matter of legislative sovereignty, but courts sometimes fail to do so by prioritizing more abstract purposes at the expense of the text. This purpose error is not a merely theoretical matter: the Supreme Court will again be in a position to avoid it in a blockbuster interpretation case, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*,[18] and a failure to clearly address this confusion imperils a sound approach to statutory interpretation.

This article identifies the purpose error in Canadian statutory interpretation and endorses recent attempts by the Supreme Court to address this problem, even if those attempts did not identify its exact nature.[19] Again, the purpose error arises when a court, tempted by an abstract purpose, bases an interpretation analysis on this purpose without adequately qualifying that purpose in the textual scheme that underlies it. While the modern approach

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12 See *Rizzo*, *supra* note 1 at para 21: although much has been written about the interpretation of legislation (see e.g. Ruth Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997); Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Markham: Butterworths Canada, 1994) [Sullivan, *Construction of Statutes*]; Pierre-André Côté, *The Interpretation of Legislation in Canada*, translated by Katherine Lippel & William Schabas (Cowansville: Les Éditions Yvon Blais, 1991)), Elmer Driedger, *Construction of Statutes* (Toronto: Butterworth, 1983) best encapsulates the approach upon which I prefer to rely. Driedger recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At 87, he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

13 *Rizzo*, *ibid*.

14 As we will see, courts commit this error when they fail to do as the authorities suggest and properly balance different sorts of purposes in relation to text. See also Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 61 [Sullivan, "Nutshell"]:

> The challenge in purposive analysis is threefold: (1) to put words to each purpose – that is, to articulate each one in an express formulation that is rhetorically effective; (2) when there are two or more purposes, to work out the relationship among the purposes and, if necessary to rank or balance them; and (3) to provide evidence that the legislature intended to pursue the purposes identified and to rank or balance them as suggested.

Hutchison, *supra* note 3 at 8 [footnotes omitted]: "In the absence of a preamble, how does a judge determine the purpose of a particular statute? If there is more than one purpose, and two of which conflict, how can this approach resolve the controversy?"

15 I will describe what I mean by "primary purposes" below.

16 I will describe what I mean by "secondary purposes" below.

17 See Sullivan, *Statutory Interpretation*, *supra* note 10 at 186–87.

18 *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*ESA*]; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2021 CanLII 32434 (SCC).

19 Other judges in other courts have also drawn attention to the issue: see *Hillier v Canada (Attorney General)*, 2019 FCA 44 at para 25 [*Hillier*]; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 79 [*Wilson*], rev'd but not on this point; *Alexis v Alberta (Environment and Parks)*, 2020 ABCA 188 at paras 47–49 [*Alexis*].

is sometimes conflated with a "large and liberal interpretation," a purposive interpretation of a text that is invited by the modern approach is bounded by the text itself,[20] and courts must pay attention to purposes discernible through a reading of the text and the scheme it establishes. This understanding leads to a number of normatively desirable conclusions: (1) it is more faithful to the ideas of legislative sovereignty and intent as defined by the Supreme Court; (2) it is more consistent with the theory underlying the Supreme Court's modern approach, including in the seminal *Rizzo* case; and (3) it ultimately provides a more "structured and deliberate" methodology for statutory interpretation.[21]

In Part II, I describe the development of the Supreme Court's modern approach to interpretation. Under this approach, the overall conceptual work done in statutory interpretation is to establish, as an objective construct, legislative intent.[22] Doing so, on the Supreme Court's terms, requires a harmonious interpretation between purpose and text.[23] This means that purpose should not be maximized as a tool of interpretation; a purposive interpretation of a text, on the Supreme Court's understanding, is bounded by the text itself.

In Part III, I describe how the purpose error arises and point out recent examples of cases where courts had to deal with it: *TELUS Communications Inc. v. Wellman*,[24] and *R. v. Rafilovich*.[25] In my estimation, and while there is no precise formula discernible from the cases, two factors generally influence whether a court is likely to fall into a purpose error: (1) a court reasons from a purpose stated at a high level of rhetorical abstraction and; (2) fails to qualify that purpose or root it in the text of the statute and the secondary purposes the text discloses. The modern approach, as I will argue, means something more subtle and complex: it means capturing not only *why* a legislature adopted a law but *how* it chose to achieve its stated goals in text. These cases demonstrate how majorities of the Supreme Court have addressed this problem, even without identifying it.

In Part IV, I move to the normative argument reviewing the four reasons noted above to prefer an approach that avoids the purpose error. Each of these reasons are standalone justifications for identifying the purpose error and addressing it as *Telus* and *Rafilovich* suggest.

In Part V, I conclude by applying these insights to the Supreme Court's upcoming *Entertainment Software Association* case.

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20 See Barak, *supra* note 9 at 342: "The language of the statute is a primary source for understanding its subjective purpose. In most cases, the legislature succeeds in achieving the goals of the statute through the statutory language. The interpreter, then, learns the purpose from the language, and the purpose in turn helps him or her determine the legal meaning of the statute's language."

21 Justice Malcolm Rowe & Michael Collins, "Methodology and the Constitution" (2021) 42 Windsor Rev Legal Soc Issues 1 at 6.

22 See recently, *Michel v Graydon*, 2020 SCC 24 at para 21 [*Michel*]. I will describe the idea of legislative intent and the concept of an objective construct below.

23 See e.g. *Rizzo*, *supra* note 1 at para 21.

24 2019 SCC 19 [*Telus*].

25 2019 SCC 51 [*Rafilovich*].

II. THE LAW OF STATUTORY INTERPRETATION IN CANADA: SETTING THE STAGE

A. CANADA'S "HARMONIOUS" MODERN APPROACH

For generations, courts and scholars have suggested that establishing "legislative intent" is the typical goal of statutory interpretation. For example, William Blackstone, took the intent of the sovereign as the object of interpretation.[26] Intent, however, is at best "a confusing word"[27] and at worst seriously misleading. This is because the search for legislative intent does not track to any particular interpretive methodology.[28] The practical question of how to interpret a statute remains. It is this question with which the "modern approach" is concerned.

The answer to this question has vacillated over the years.[29] At some points, English (and Canadian) courts focused on the "great sun" of an interpretive principle: the plain meaning approach.[30] That approach told courts that "it is not profitable or necessary to go beyond the words themselves."[31] As J.A. Corry noted, the plain meaning approach "assumes that words have definite and exact meanings and invites a philosophical discussion about the meaning of meaning."[32] The plain meaning approach obviously has a deep connection to the idea of legislative intent, so long as that intent is expressed within the four corners of the statute. But courts did not always yield to the plain meaning approach, and in fact, it and other alternatives[33] all had "deep roots in the common law tradition."[34] Eventually, courts and scholars attacked the plain meaning rule as an implausible account of language and judging.[35] Courts instead sometimes applied different rules to get at legislative intent: for example, they frequently consulted the "mischief" the law was designed to solve,[36] even if that mischief went beyond the text and addressed the "social policy" of the statute.[37]

Eventually, the Supreme Court generally resolved the issue in favour of the "mischief" rule, insomuch as the reason or "purpose" that a law is adopted is a key part of the methodology. *Rizzo* confirms this in its famous passage, relying on the seminal work of Elmer Driedger:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)),

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26 William Blackstone, *Commentaries on the Laws of England: Book I: Of the Rights of Persons*, ed by Wilfrid Prest & David Lemmings (Oxford: Oxford University Press, 2016) at 59.
27 James M Landis, "A Note on 'Statutory Interpretation'" (1930) 43:6 Harv L Rev 886 at 888.
28 John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1 at 3.
29 See e.g. Theodore Plucknett, *A Concise History of the Common Law*, 5th ed (Indianapolis: Liberty Fund, 2010).
30 Willis, *supra* note 28 at 1.
31 JA Corry, "Administrative Law and the Interpretation of Statutes" (1936) 1:2 UTLJ 286 at 289.
32 *Ibid* at 290; Willis, *supra* note 28 at 10.
33 For a classic account of these approaches, including the plain meaning rule, the "golden rule," and the "mischief rule" which I briefly address below. See also Willis, *ibid*.
34 Tucker, *supra* note 7 at 119.
35 See Sherwin Lyman, "The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation" (1969) 3:2 Man LJ 53 at 55 *et seq*; Corry, *supra* note 31 at 292; Willis, *supra* note 28 at 1.
36 *Heydon's Case*, (1584) 3 Co Rep 7a.
37 Willis, *supra* note 28 at 14.

> Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
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>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[38]

The *Rizzo* formula outlines, at least in basic form, the task for interpreters. There are two parts: (1) the tools of interpretation include (a) the words, (b) their context, (c) the scheme of the Act, and (d) the object of the Act; (2) these tools must be used "harmoniously" given the legislative context. At least as a positive law matter, a harmonious interpretation generally means one where neither the plain meaning of the text nor some rarified "object" or "purpose" dominates.

The goal of achieving a harmonious interpretation is the establishment of "legislative intent."[39] Accordingly, in order to balance these various tools of interpretation, courts and observers proceed on the assumption that statutory interpretation is the establishment of legislative intent on the precise question before the court, to which the various tools of interpretation (including purpose) are directed.[40] In *Vavilov*, for example, the Court speaks of legislative intent as the goal of the process — as what must be "understood" — through the use of tools like "the language chosen by the legislature" in its purpose and context.[41] This is essentially the theory of "imaginative reconstruction":[42] on this understanding, intent is a construct that the court creates to determine what a legislature would have intended on the particular question.[43] Put differently, the tools of interpretation that have been used by courts, text and purpose for example, are directed towards the creation of a plausible construct of what the legislature might have intended on the question before the court.[44]

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38 *Rizzo*, *supra* note 1 at para 21.

39 See e.g. *R v Monney*, [1999] 1 SCR 652 at para 26 [*Monney*]: "The most significant element of this analysis is the determination of legislative intent"; *Vavilov*, *supra* note 2 at para 118: "This Court has adopted the 'modern principle' as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context"; *Michel*, *supra* note 22 at para 21: "It is now trite law in Canada that statutory interpretation entails discerning legislative intent."

40 See *Michel*, *ibid*. See also Sullivan, *Statutory Interpretation*, *supra* note 10 at 29: "What interests interpreters is not the abstract meaning of a text but its meaning in relation to particular facts.… It is this concrete sense of meaning — the text as it applies, or does not apply, to particular facts — that is sought in statutory interpretation."

41 *Vavilov*, *supra* note 2 at para 118.

42 John F Manning, "Textualism and Legislative Intent" (2005) 91 Va L Rev 419 at 421–22 [Manning, "Intent"]; Richard A Posner, "Statutory Interpretation — in the Classroom and in the Courtroom" (1983) U Chicago L Rev 800 at 817.

43 John F Manning, "Without the Pretense of Legislative Intent" (2017) 130:9 Harv L Rev 2397 at 2431 [Manning, "Pretense"].

44 My goal here is not to provide a theory of legislative intent. It is merely to describe the general thrust of how courts and observers in Canada describe the concept of "legislative intent."

B. TEXT

The fact that text and purpose are relevant considerations in interpretation does not answer the real question: how do they work together? The modern approach has, at least in theory, solved this issue by asking that various tools of interpretation be used in "harmony." But what this means in particular contexts is unclear, and the addition of purpose to the interpretive equation complicated matters. This is because it is not always evident what the purpose(s) of a statute is and whether that purpose is co-extensive with the words of a statute.[45]

The starting point in the modern approach, despite the addition of purpose, is the continued importance of the text. As part of a harmonious interpretation, and as the Supreme Court states, what courts "must interpret *is the text* through which the legislature seeks [its objective]."[46] For her part, Sullivan argues that what interpreters seek is the concrete meaning of text as applied to the facts.[47] Therefore, while establishing a plausible construct of legislative intent is the goal of the interpretive process in theory, and purpose is indispensable in that task, the main subject of the analysis is the text, in its ordinary meaning.[48]

Quite evidently, the text will not contain all the answers. But understanding how text works in context and as applied to facts is the core interpretive task. Words at certain levels of generality will indicate different legal rules and purposes, and courts should pay close attention to how the legislature chooses to "set meaningful boundaries on the purposes it wishes courts and agencies to pursue."[49] For example, in *Vavilov*, the Court notes that in assessing the discretion afforded to administrative decision-makers by delegatory clauses, courts should pay close attention to "the language chosen by the legislature in describing the limits and contours of the decision maker's authority."[50] The language is the focus: it can be "precise and narrow" or "broad, open-ended or highly qualitative" or anywhere in between,[51] but the textual expression in its purposive context is key in ascertaining the "how" and "why" of the statute enabling a decision-maker.

At a broader level, text must be analyzed in semantic context but also in relation to the overall plan or scheme the legislature establishes and where possible the statute book on the whole.[52] Legislative text discloses an entire scheme, with undergirding purposes. As Sullivan notes:

> The drafter's primary job is to transform the proposed plan into a legislative scheme by formulating a series of provisions which, *if acted upon as written*, will create the necessary structures and offices, confer the necessary powers, issue appropriate directives and prohibitions, and establish suitable procedures.[53]

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45 Tucker, *supra* note 7 at 118.
46 *MediaQMI*, *supra* note 9 at para 39 [emphasis added].
47 Sullivan, *Statutory Interpretation*, *supra* note 10 at 29.
48 For a slightly different view, see e.g. Richard Ekins, "Objects of Interpretation" (2017) 32:1 Const Commentary 1 at 2, where Ekins endorses an approach where courts do not interpret "words" but instead interpret "language use." Contrast with the Canadian approach: *MediaQMI*, *supra* note 9 at para 39.
49 John F Manning, "The New Purposivism" (2011) Sup Ct Rev 113 at 137 [Manning, "New Purposivism"].
50 *Vavilov*, *supra* note 2 at para 110.
51 *Ibid.*
52 Sullivan, *Statutory Interpretation*, *supra* note 10.
53 *Ibid* at 177 [emphasis added].

Paying attention to this textual legislative scheme, as we shall see, is a key part of purposive interpretation. The scheme will disclose rules, standards, and delegations that shape the primary purposes of statutes.

C. PURPOSE

While the textual scheme is important in the modern approach, it is not conclusive because of the role of purpose. Historically, as noted above, purpose referred to the "mischief" the statute was designed to solve,[54] which was an important traditional tool for courts who had no qualms about re-writing legislation to suit the judicial view of purpose.[55] But nowadays, for Canadian courts, the best starting point is the basic principle that the bare text is not the sole determinant of legislative meaning. Instead, the "total context" of the provision, including its purpose, must be consulted, "no matter how plain the disposition may seem upon initial reading."[56] As a result, purpose should be considered in every case — not only where there is textual ambiguity. Additionally, courts can (with caution) use legislative history[57] and rely on limited consequential reasoning[58] to ascertain relevant purposes.

One could speak of purposes at different levels. Purposes can be "primary," which "may refer to the primary aim or object of an enactment — that is, the effect the legislature hopes to produce through the operation of its rules or scheme."[59] Purposes at this level of abstraction can often be stated very simply: the purpose of a statute may be "access to justice" (as we shall see), or "health and safety," or "deterring crime." These purposes are primarily about *what* the legislature wants to achieve in passing a law.

Primary purposes can be found by interpreters at different levels of abstraction[60] and from different physical sources. Purposes can come from the fundamental premises of the legal system, reasoning down to certain categories of legislation, and finally reaching particular purposes governing the enactment of the legislation itself. Relatedly, purposes can be sourced from the text itself, but they can also be sourced from other places, including legislative history, preambular statements, or perhaps even from the general "evil" at which the statute was aimed. Purposes that are discerned from these sources, however, are likely to be more general. For example, legislative statements about purpose are generally "spontaneous" in nature[61] and are therefore expressed in general, imprecise terms,[62] as opposed to a close analysis of a statute's scheme that may reveal more particular purposes

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54 The so-called mischief rule originated in *Heydon's Case*, *supra* note 36.

55 See W Ivor Jennings, "Courts and Administrative Law" (1936) 49:3 Harv L Rev 426 at 435: "The older rule, laid down by Plowden and Coke, was that a statute must be interpreted in the light of the evils that it was intended to remedy. This rule was derived from the practice of judges who themselves drafted the statutes." See also *Dr. Bonham's Case*, (1610) 8 Co Rep 107.

56 *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 48. See also *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 34.

57 *MediaQMI*, *supra* note 9 at paras 37–38.

58 Sullivan, "Supreme Court," *supra* note 6 at 199–200.

59 Sullivan, *Statutory Interpretation*, *supra* note 10 at 186. See also Radin, *supra* note 9 at 876 who describes these purposes as "ulterior" purposes.

60 *MediaQMI*, *supra* note 9 at para 39.

61 *Ibid* at para 37.

62 *Alexis*, *supra* note 19 at para 45.

relevant to the interpretive dispute.[63] Purpose and preamble clauses create this same problem.[64]

There are also "secondary purposes": "principles or policies that the legislature wishes to observe, or considerations it is obliged to take into account, in pursuing its primary goals."[65] While primary purposes concern what the legislature wants to accomplish, secondary purposes are how the legislature wants to accomplish its goals.[66] These purposes simply include the means used to enact some primary purpose — whether by rule, standard, delegation,[67] or "statutory recipe" that sets out the precise details of the scheme.[68] Sullivan notes that secondary purposes are expressed in different ways:

- "in words of restriction, qualification, or exception that limit the reach or effectiveness of the main goals"
- "in provisions that confer discretion on officials, permitting them to respond to a range of factors"
- "in the choice of program design and enforcement mechanism, which may be more, or less, comprehensive and effacious."[69]

Sullivan's point illustrates the importance of paying close attention to the relationship between textual elements of the statute. Those elements may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation. For example, while an overall purpose of a statute might be to slow cars on highways, the statute could, in its text, disclose different ways of accomplishing that goal: it may confiscate cars that go over the limit, it might institute a series of escalating fines for repeat offences, or it may allow a sort of "three-strikes" rule. In each case, the statute aims at the same goal but uses different means to achieve that goal. The means will tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal.

The point is that legislation can and should be viewed as a "complex scheme of means-end relations."[70] It is the task of the interpreting court, in order to avoid the purpose error, to give

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63 See *MediaQMI*, *supra* note 9 at para 37.

64 The Uniform Convention on Legislative Drafting, for example, recommends against the use of preamble and purpose clauses. This is because "the object of well-drafted legislation should become clear to the person who reads it as a whole" without the need for "statements of a non-legislative nature." See Uniform Law Conference of Canada, "Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention, Report of the Working Group" (2014), online: <ulcc-chlc.ca/Civil-Section/Drafting/Principles-for-Drafting>.

65 Sullivan, *Statutory Interpretation*, *supra* note 10 at 186.

66 There may be some slippage in the way "secondary purposes" is used here, as a phrase. Purposes are ends, but the way I have described secondary purposes here is related to means — how the legislature wishes to accomplish its ends. However, and while this may be an imperfect phrase, I follow Sullivan in using it to describe the ways in which primary purpose relates to the scheme that it motivates. Sullivan, *Statutory Interpretation*, *ibid*.

67 Frank Easterbrook, "Statutes' Domains" (1983) 50:2 U Chicago L Rev 533 at 546.

68 See e.g. *Canada (Attorney General) v Almon Equipment Limited*, 2010 FCA 193 at paras 38–39.

69 Sullivan, *Statutory Interpretation*, *supra* note 10 at 186–87.

70 Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber et al, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018) 86 at 100; Sullivan, *Statutory Interpretation*, *ibid*.

effect to both means and ends. Put this way, courts should not choose different means,[71] because the means chosen are a *legislative* judgment as to how to obtain a certain goal that the *legislature* has specified.[72] Doing so would subvert the means, or secondary purposes, chosen by the legislature, contrary to the positive law requirement that courts must work between purposes.[73]

Read in light of these principles, the *Rizzo* formula — whatever it means — may accomplish one thing. It seeks to place purpose and text in their proper interpretive areas in a sort of balance. They work together synthetically to create a plausible reconstruction of legislative intent. It is for this reason that the Supreme Court's warnings about the improper use of purposes dovetails with the call for a harmonious interpretation. In *Canada v. Antosko*, for example, the Court cited what would later become the important passage in *Rizzo* and concluded that analysis of purpose "cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed."[74] Most notably, in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, the Court cautioned that the underlying purpose of a provision cannot be used to "supplant" or "create an unexpressed exception to" text.[75] Importantly, and as the Court states, none of this should be taken as an endorsement of a plain meaning approach.[76] Instead, it is simply an important reminder of balance inherent in the modern approach: "courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation."[77]

III. THE PURPOSE ERROR DESCRIBED AND ANALYZED

This plausible reconstruction of the Supreme Court's method of interpretation sets the stage for the purpose error to arise. If courts give too much weight to purpose over the way that purpose is achieved through the textual scheme, the error occurs, and a court could create an implausible construct of legislative intent. In this section, I describe the conditions that create the purpose error and review two cases that present the error: *Telus* and *Rafilovich.*

A. THE ERROR DEFINED

It is probably impossible to set out a clear definition of the circumstances in which the purpose error can arise, but case examples show that two factors generally drive a court's

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[71] See the dissent of Justice Miller in *R v Walsh*, 2021 ONCA 43 at para 171, which outlines this basic point of statutory interpretation.

[72] Easterbrook, *supra* note 67 at 546: "Like any other rule, *Y* is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule *Y* on the argument that, by doing so, it can get more of Goal *X*. The judicial selection of means to pursue *X* displaces and directly overrides the legislative selection of ways to obtain *X*."

[73] Sullivan, *Statutory Interpretation*, *supra* note 10 at 187: "In sophisticated purposive analysis, the interpreter attempts to identify and work with the primary objects, the secondary considerations, and the specific functions of legislation at all levels, from the words to be interpreted and the provision in which they appear to larger units of legislation and the Act as a whole."

[74] *Canada v Antosko*, [1994] 2 SCR 312 at 327.

[75] 2006 SCC 20 at para 23, citing Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 5th ed (Toronto: Thomson Carswell, 2005) at 569.

[76] *65302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at para 51.

[77] *Ibid*.

commission of the error:[78] (1) an acceptance of a rhetorically abstract purpose; and (2) the attachment of too much weight to this abstract purpose, without paying sufficient attention to text, scheme, and secondary purposes. To be clear, these should not be seen as items on a checklist that are applicable in all cases. These two factors are set out to make a simple point: the risk of the purpose error occurring is heightened when courts base their reasoning on an abstract purpose with little representation in text. The result is a distortion of how the legislature intended its expression (its text) to apply.

1. Rhetorically Abstract Purpose

Primary purposes of statutes, understood as goals the statute is designed to achieve, can be defined in quite general terms. It is this reality that can sometimes lead an interpreter astray. Because purposes can be stated so abstractly, they can fail to constrain an interpreter's discretion and can be used to justify any result that may or may not be consistent with a finely-wrought statutory scheme. This is the first aspect of the purpose error.

Abstraction is the centrepiece of this aspect of the purpose error. Barak describes the situation this way:

> At a low level of abstraction, the statute's purpose is the individual objectives that the statute is designed to achieve. At a higher level, interpreters focus on the objectives that a statute of that particular category or type is designed to achieve. At the highest level are the fundamental values of the system which constitute the general objective purpose shared by all legislation. This last purpose is a kind of "normative umbrella" that extends to all norms in the system.[79]

Barak describes three levels of abstraction: (1) the individual statutory objectives, (2) the statutory objectives of related statutes, and (3) the normative objectives of the legal system as a whole. The purpose error begins if the court frames a purpose at too high a level of rhetorical abstraction,[80] failing to lead courts to a plausible, justifiable outcome on a particular interpretive question. Put differently, a highly abstract purpose, sourced within or outside the statute, will only have so much to say about a certain specific, complex interpretive problem under consideration. As Ekins notes, "[o]ne cannot legislate abstractly in isolation from relevant facts or argument about specific proposals. It would be unreasonable for citizens to stipulate ends to be sought unless those ends were so abstract, and subject to such wide qualifications, that they did little to constrain legislative deliberation."[81] Because purposes can be general in nature, they can fail to adequately shed light on the real interpretive issue before the court.

One can see this issue with abstraction as one ascends the statutory ladder of generality. At Barak's highest level of abstraction, perhaps all statutes could be said to pursue "justice and security."[82] The problem with this purpose is that it does not seriously help an interpreter:

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78 Obviously, this is not a hard-and-fast statement or rule. The claim is only that where these factors are true, an abstraction error is likely to result.

79 Barak, *supra* note 9 at 115.

80 Sullivan, "Nutshell," *supra* note 14 at 61.

81 Ekins, *Legislative Intent*, *supra* note 4 at 153–54.

82 Radin, *supra* note 9 at 876.

every statute could be said to pursue these goals to a greater or lesser extent and in very different ways. Similarly, it may be more defensible to suggest that legislation of a certain class has a uniting purpose: say, "benefits-conferring" legislation, which is to be interpreted "liberally."[83] However, even using this "purpose" may be improper in the circumstances: how far benefits-legislating legislation goes will depend on an analysis of the particular statute under interpretation. Simply reasoning from this or another category, as some courts do, may lead to an improper ascertainment of legislative intent.[84] Finally, a court is most likely to avoid the purpose error if it focuses on purposes that are connected to these more abstract purposes but which find particular expression in a statute.[85]

2. Excess Weight on Abstract Primary Purpose

Properly defining the purpose, however, does not insulate an interpreter from falling into the purpose error. That is because, as noted above, it is not open to a court to simply ignore abstract purposes that *are* incorporated in legislation. Courts must give effect to all aspects of legislation, no matter the abstractions required.[86] In other words, a court may correctly choose a purpose, represented in legislation, that is quite abstract, but this will not necessarily be fatal if the court adequately qualifies this purpose. This means that courts must typically pay close attention to secondary purposes, giving these secondary purposes the appropriate weight in a plausible construct of legislative intent. Specifically, courts should look to how a statute constructs a scheme through rules, standards, and delegations.

There are substantive and pragmatic concerns that arise when a court commits the purpose error at this stage of the analysis. The substantive concern is connected to the idea of legislative intent. Courts cannot treat legislative intent as some useless abstraction, because in Canada (and within constitutional limits) the legislature is sovereign.[87] "Legislative intent" is the particular formula courts use to translate the broader principle of legislative sovereignty. If a court ignores the text or expands it unnecessarily, it is no longer looking at persuasive evidence of legislative intent. It is, instead, suggesting that the court, in interpretation, has some separate reserve of authority to redesign legislation.[88] Yet this is clearly contrary to the basic idea of legislative intent: if a court is seeking legislative intent, it is acting as an agent of the legislature in applying the legislature's intended meaning to a particular factual dispute.

Pragmatically, and assuming a judicial actor that wishes to authentically determine legislative intent, overreliance on an abstract, primary purpose at the expense of particular secondary purposes could lead a court astray. The result of this sort of interpretation, relying

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83 See *Rizzo*, *supra* note 1 at para 40.

84 See the discussion, for example, in *Wilson*, *supra* note 19 at para 86. See also *Rizzo*, *ibid* at paras 22, 36, 40, where the reliance on a "liberal interpretation" played a large part in the Supreme Court's conclusion.

85 Radin, *supra* note 9 at 876.

86 Sullivan, *Statutory Interpretation*, *supra* note 10 at 136, 187.

87 *Ibid* at 32.

88 Such an independent reserve used to exist as a doctrine known as the "equity of the statute." Needless to say, and as I explain, the existence of such an independent authority is generally inconsistent with modern notions of the courts as "faithful agents" of the legislature seeking legislative intent: see John F Manning, "Textualism and the Equity of the Statute" (2001) 101 Colum L Rev 1 [Manning, "Equity"], speaking generally of faithful agent theory versus equity of the statute doctrine.

on a poorly-abstracted purpose, enables "crabbed interpretations to limiting provisions and unrealistically expansive interpretations to narrow provisions."[89] This ultimately leads to a distorted construct of legislative intent.

This aspect of the purpose error is easy for courts to commit. This is because of the temptation of abstract purposes as a way to override text. Once a purpose has been defined broadly, it can fail to constrain interpretive discretion. Once that occurs, any sort of interpretive result can possibly be justified. The failure to root a purpose in the textual scheme can lead to this result. The goal of qualifying highly abstract purposes in the text is to constrain "the range of possible outcomes to those justifiable as per the methodology" set out by the modern approach.[90] This should not be seen as rank formalism; rather, it is a commitment to principled interpretation that focuses on the text as the object of interpretation, as required by the modern approach.[91]

B. THE CASES: *TELUS* AND *RAFILOVICH*

Parties before courts, and sometimes judges on these courts themselves, fall victim to the purpose error. The following cases either present the opportunity for a court to commit a purpose error because of the arguments of a party, or judges of the Supreme Court have arguably fallen victim to the purpose error. The first case is *Telus*; the second is *Rafilovich*. These cases show the respective courts dealing with the spectre of the purpose error.

1. *TELUS*

Telus involved a question of statutory interpretation under Ontario's *Arbitration Act* and *Consumer Protection Act*.[92] In the case, Wellman filed a class action against Telus, which consisted of both "consumers and non-consumers."[93] The action alleged that Telus "engaged in an undisclosed practice of 'rounding up' calls to the next minute such that customers were overcharged."[94] There was a clause in all of the contracts in the case providing that any claims "arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and failing that, arbitration."[95]

Telus applied for a stay of the class action under the *Arbitration Act*. Telus sought a stay in relation to all of the class members — consumers and non-consumers alike — because of the arbitration clauses in the contracts. But under the *Consumer Protection Act*, the arbitration clauses respecting the consumers in the contracts would be invalid.[96] Telus conceded this point.

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89 Scalia & Garner, *supra* note 8 at 20.
90 Rowe & Collins, *supra* note 21 at 5.
91 *Ibid* at 6.
92 *Arbitration Act, 1991*, SO 1991, c 17; *Consumer Protection Act, 2002*, SO 2002, c 30.
93 *Telus*, *supra* note 24 at para 2.
94 *Ibid*.
95 *Ibid* at para 3.
96 *Ibid* at paras 4, 15.

The core interpretive difficulty in the case was the fact that some of the putative members of the class were non-consumer, business customers. Could Telus' requested stay reach *these* customers? The relevant statutory provisions of the *Arbitration Act* say the following:

> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).
>
> 7(2) However, the court may refuse to stay the proceeding in any of the following cases:
> 1. A party entered into the arbitration agreement while under a legal incapacity.
> 2. The arbitration agreement is invalid.
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
> 4. The motion was brought with undue delay.
> 5. The matter is a proper one for default or summary judgment.
>
> …
>
> 7(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.[97]

This is the terrain on which the parties differed. For Wellman, section 7(5) gave the court the ability *to refuse the stay on all of the parties* — consumers and non-consumers alike.[98] On this theory, the class proceeding can continue because there is discretion in a court to refuse to grant a stay despite a valid arbitration clause. On the other hand, Telus argued that "a court has no authority to refuse to stay claims that are subject to an otherwise valid and enforceable arbitration agreement."[99] In support of this claim, Telus pointed to section 7(2) of the statute, arguing that these were the only exceptions to the general stay provision under section 7(1).[100] Put differently, the interpretive difficulty centred around the function of section 7(5): could it be read to permit a court to *refuse* to grant a stay against the business customers?

The Court sided with Telus.[101] Justice Moldaver for the majority held that section 7(5) does not permit a general deviation from section 7(1) and that the stay should be applied to the non-consumer customers. To him, section 7(5) contains no textual evidence that would grant a court a power to refuse a stay.[102] He noted that while the overall purpose of the *Arbitration Act* was to ensure that "parties to a valid arbitration agreement should abide by their agreement,"[103] that particular purpose was instantiated in the stay provisions: "[i]ssuing

97 *Aribitration Act*, *supra* note 92, s 7.
98 *Telus*, *supra* note 24 at para 6.
99 *Ibid* at para 7.
100 *Ibid*.
101 *Ibid* at para 8.
102 *Ibid* at para 73.
103 *Ibid* at para 51.

a stay of court proceedings is one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement."[104] In other words, this purpose, which focuses on party autonomy as a key motivator of arbitral agreements absent legislative intervention, was directly related to the scheme of the provisions that allowed a court to grant a stay. Those provisions would be undermined if the business customers, not subject to the *Consumer Protection Act*, could escape the stay.

On the other hand, however, a more abstract purpose was proposed by Justices Abella and Karakatsanis in dissent, blasting the majority's approach as a "return of textualism."[105] The dissent would have read section 7(5) to encompass a discretion to allow the non-consumer customers to continue in the class.[106] The dissent began its analysis with what it considered the overriding purpose of the statute. For the dissent, "[t]he overall purpose of the *Arbitration Act, 1991* was to promote access to justice."[107] While the dissent does not consistently define what it means by "access to justice," it notes that the result of the majority's approach would leave the business customers to deal with a mandatory, boilerplate arbitration clause that undermines party autonomy.[108] In other words, it would be contrary to the dissent's notion of access to justice to subject the business customers to contracts that they did not freely negotiate. The situation, for the dissent, represented "an *absence* of choice."[109]

Justice Moldaver responded that these abstract policy objectives (access to justice among them)

> cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretative process…the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.[110]

In regard to the specific purpose of access to justice, Justice Moldaver noted that it "was by no means the legislature's sole objective in adopting the Act."[111] Indeed:

> [W]hile there can be no doubt as to the importance of promoting access to justice…this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*, including ensuring that parties to a valid arbitration agreement abide by their agreement. Respectfully, my colleagues' approach would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting.[112]

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[104] *Ibid*.
[105] *Ibid* at para 109.
[106] *Ibid* at para 115.
[107] *Ibid* at para 137.
[108] *Ibid* at paras 165–66.
[109] *Ibid* at para 166 [emphasis in original].
[110] *Ibid* at para 79.
[111] *Ibid* at para 82.
[112] *Ibid* at para 83.

Why does the dissent commit the purpose error? One might say that the majority and the dissent simply came to different, reasoned views of the statutory scheme. But the purpose error is a specific problem that can be identified in the dissent's opinion that leads to a distorted construct of legislative intent on the question. First, recall that there are two steps for the introduction of the purpose error. First, using Barak's categories as heuristics, the judge must accept a purpose at a high level of abstraction. Second, the judge must take this purpose at a high level of abstraction and fail to qualify it in relation to important secondary purposes (means) reflected in text. Again, these may be delegatory clauses, enforcement mechanisms, statutory recipes, or factors that a decision-maker must consider. The goal is to come to a defensible construct of legislative intent that gives due effect, given the context, to both the primary, abstract purpose and the secondary purposes.

Here, the dissent committed the purpose error. The problem begins with the definition of "access to justice" that the dissent adopts. The term, in Barak's formulation, would clearly fall in the upper echelons of the ladder of abstraction. While the term can have many meanings, it does border on violating Ekins' rule that purposes must be able to guide legislative deliberation — legislators and judges must be able to understand what the term actually means. This is clear in the dissent's own wrestling with the term. At one point, the dissent simply says that access to justice involves "giving parties the choice of resolving disputes outside the court system."[113] However, it advances a more radical conception of the concept later in the opinion, suggesting that true access to justice involves a fair bargaining process that eschews contracts of adhesion and mandatory arbitration clauses.[114] The fact that "access to justice" is so rhetorically abstract allows the dissent to advance this more radical conception of the concept. But the problem becomes: there is no evidence offered by the dissent that these specific policy concerns animating its idea of access to justice are included in the statutory scheme, and in fact, the scheme itself suggests a different role for courts.

This becomes clear once one moves to the second step and considers the legislative scheme instantiating the access to justice purpose. The relevant discretionary stay provision, section 7(5) of the *Arbitration Act*, exists in a scheme of legislation (along with the *Consumer Protection Act*), that allows for limited court intervention in cases of arbitration. That scheme gives place of priority to the *Consumer Protection Act* and the protection of consumers from the "ordinary enforcement of arbitration agreements."[115] As the majority notes, this distinction between consumers and non-consumers is a "careful policy choice to exempt consumers — and only consumers — from the ordinary enforcement of arbitration agreements."[116] Otherwise, the general rule in the *Arbitration Act* remains and the parties abide by their agreements. This is consistent with a conception of access to justice that is deeply tied to the idea of party autonomy, no matter how mandatory the contract, defined as the initial choice to sign the contract of any kind rather than more expansively as a right to a certain type of process or contract.[117] It was this conception of party autonomy — without any indication of the more expansive one preferred by the dissent — that was understood by

113 *Ibid* at para 137.
114 *Ibid* at paras 165–66.
115 *Ibid* at para 80.
116 *Ibid* [emphasis omitted].
117 *Ibid* at para 83.

courts to animate the *Arbitration Act* in the first place.[118] Indeed, the supposed unconscionability of the mandatory contracts was not at issue in the case,[119] despite the dissent's claims otherwise. Under these circumstances, to permit a court to refuse to grant a stay is not equivalent, as the dissent says, to granting a stay — the former option violates the coordinated scheme between the *Arbitration Act* and the *Consumer Protection Act*.

The result is a conception of legislative intent that permits more court intervention in arbitrable matters. But this result is clearly at odds with the party autonomy conception of access to justice: it would allow well-resourced parties to escape their agreements. Here, the purpose error as I understand it arose in the dissent's opinion because the dissent failed to demonstrate how its chosen purpose was consistent with the specific legislative policy choices disclosed by the text.

2. *RAFILOVICH*

In *Rafilovich*, the Court was faced with the proceeds of crime provisions of the *Criminal Code*, and the provisions in the *Criminal Code* for the return of seized property for the purposes of legal fees.[120] The issue was whether property that was returned to the accused to pay for "reasonable legal fees" could later be subject to a fine by the Crown, if the property was not available for forfeiture. This meant that the government could later "clawback" money a court originally ordered for the purposes of legal fees if, after the fact, those monies were found to be sourced from proceeds of crime.[121] Justice Martin wrote the opinion for the majority, in which she outlined the process by which these two sets of provisions worked:

- The accused is charged with a "designated offence" under section 462.3(1) of the *Criminal Code*;

- Property is seized under *Criminal Code* provisions that allow the state to take property from an accused on the basis of reasonable and probable grounds that the property may eventually be proven to be proceeds of crime;

- The accused makes an application for the return of the seized property for the purpose of paying for reasonable legal fees (sections 462.34(4)–(6) of the *Criminal Code*). Seized property can only be returned "if the judge is satisfied that the applicant has no other assets or means available" to pay for legal expenses (section 462.34(4)(c)(ii)).

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118 See *ibid* at paras 49, 54. See also *ibid* at para 50:

> During legislative debate on the bill that later became the *Arbitration Act*, the Attorney General of Ontario stated that one of the "guiding principles" of the *Arbitration Act* is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 256). He later emphasized that under the new legislation, "the law and the courts will ensure that the parties stick to their agreement to arbitrate."

Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess, 35th Parl, 5 November 1991 at 3384.

119 *Ibid* at para 85.

120 *Rafilovich*, *supra* note 25 at para 7; *Criminal Code*, RSC 1985, c C-45.

121 *Rafilovich*, *ibid* at paras 22–28.

- The onus shifts to the Crown to prove that certain property meets the statutory definition of proceeds of crime. Only property determined to be "proceeds of crime" is subject to forfeiture or a fine in lieu of forfeiture.

- If the property which is proceeds of crime is no longer available for forfeiture, the judge may order a fine instead of forfeiture (sections 462.37(3) and (4)).[122]

For Justice Martin, the overall purpose of the proceeds of crime section of the *Criminal Code* is to ensure that crime does not pay, and specifically, "to deter offenders by depriving them of their ill-gotten gains."[123] At first blush, this would counsel an approach that permits a fine to be levied to recover *any* ill-gotten gains. However, this was not the only purpose at play in the proceeds of crime provisions.

Justice Martin outlined two other purposes that are particular to the legal fees scheme: (1) ensuring access to counsel and (2) upholding the presumption of innocence.[124] For Justice Martin, these purposes were dispositive, and must be "given an active role in the statutory interpretation analysis,"[125] leading to a conclusion that a court cannot levy a fine as a way to clawback monies spent on legal expenses. Justice Martin began the analysis by reinforcing the point of statutory interpretation: it is concerned "with legislative intent."[126] In a case like *Rafilovich* with multiple purposes,[127] courts must give "purpose and meaning to each provision."[128] This entails an analysis that avoids "fixating on one objective to the exclusion of others."[129] According to Justice Martin, then, "the overarching purpose of a legislative *scheme* informs, but need not be the decisive factor in the interpretation of a particular *provision* within that scheme."[130] Practically, this meant that while "Parliament was clearly motivated by the desire to remove the financial incentive from certain crimes, it also wanted to ensure that accused persons would have access to legal representation and that the presumption of innocence would be protected, in order to maintain a procedure that is fair to the accused."[131] For Justice Martin, "[t]hese purposes constrain the pursuit of the primary objective," such that a correct interpretation "does not ignore or minimize the secondary purposes in order to achieve the primary goal of ensuring crime does not pay."[132]

For Justice Martin, this meant that if the return of funds is simply viewed as a loan that can be called back, "then the accused's ability to access legal counsel is largely illusory."[133] This is because an accused may apprehend that she will be subject to a fine in the future and "may choose not to apply for the return of funds at all and to represent themselves instead."[134] For Justice Martin, then, there was a general purpose of "crime does not pay" that runs through the proceeds of crime provision — but that purpose was qualified.

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122 *Ibid* at paras 1–87.
123 *Ibid* at para 2.
124 *Ibid* at para 53.
125 *Ibid* at para 30.
126 *Ibid* at para 20.
127 *Ibid*.
128 *Ibid*.
129 *Ibid* at para 30.
130 *Ibid* [emphasis in original].
131 *Ibid* at para 49.
132 *Ibid*.
133 *Ibid* at para 55.
134 *Ibid*.

Justice Moldaver took the opposite approach in dissent. For him, the distinction drawn between "primary" and "secondary" purposes was useless, since "the statutory regime's primary objective of ensuring that crime does not pay need not and should not be sacrificed either to achieve the 'secondary purposes' of the restoration provision or to give effect to the intention underlying them."[135] For Justice Moldaver, Justice Martin's approach sacrifices "the primary objective of ensuring that crime does not pay in order to achieve the 'secondary purposes' of the restoration provision."[136] In fact, the secondary purposes do not seem to arise on this understanding because, once an "accused" has been convicted, she becomes an "offender," and the funds that might have been returned for legal fees are now known to be proceeds of crime.[137] Failing to permit a court the power to levy a fine against these known proceeds would, in Justice Moldaver's view, undermine the primary objective of the proceeds of crime provisions.

Justice Moldaver's opinion in *Rafilovich* presents the purpose error, though the case is not as clear as in *Telus*. The "crime does not pay" purpose is indeed a primary purpose of the statute, and it, like all primary purposes, must be given effect. Here, the framework for assessing a purpose error in interpretation is useful. At the first stage, while it is not as abstract as the "access to justice" purpose at issue in *Telus*, the "crime does not pay" purpose is not a self-executing term either; it could mean many different things in the context of this statutory scheme. While Justice Moldaver could have avoided the purpose problem by paying attention to the secondary purposes of the statute, he failed to do so by choosing not to carve out an exception in his interpretation to account for the detailed return scheme for legal fees.

And it is here, at the second stage of the purpose error analysis, where Justice Moldaver's opinion goes wrong. The return provisions of the *Criminal Code* lodge a discretion in the court to permit the return of funds "if the judge is satisfied that the applicant has no other assets or means available" to pay for legal expenses.[138] Again, this is the sort of "discretion" that is envisioned by Sullivan as revealing a secondary purpose. The return of funds is done with the secondary purpose of access to legal counsel in mind. A discretion to order a fine in all cases would clearly undermine the scheme of the statute that contemplates an accused (1) applying for the return of property that is already suspected to be proceeds of crime and (2) actually receiving and spending those funds if the discretion is exercised in her favour.

It is not convincing for Justice Moldaver to suggest that his interpretation accounts for all of the statute's objectives.[139] As Justice Martin noted, the "wording of the relevant provisions and the elaborate and detailed nature of the return provision indicates that Parliament clearly and deliberately sought to address an accused's need for legal counsel"[140] so that a "safety net" could be provided for those who are in financial need.[141] Justice Moldaver's interpretation effectively reads out this safety net, minimizing the secondary purposes or

[135] *Ibid* at para 148.
[136] *Ibid* at para 153.
[137] *Ibid* at para 150.
[138] *Criminal Code*, *supra* note 120, s 462.34(4)(c)(ii).
[139] *Rafilovich*, *supra* note 25 at para 153.
[140] *Ibid* at para 37.
[141] *Ibid*.

failing to give effect to them at all.[142] This is because Justice Moldaver's interpretation provides an incentive for indigent parties to simply represent themselves: if the legal fees provided can be clawed back in the future, a rational accused would simply choose, if she does not have the money, to not be represented. The creation of this incentive is an important sign that Justice Moldaver's opinion does not do what he says it does — it does not truly give effect to the secondary purposes, particularly the purposes relating to access to legal counsel, because it will leave many accused in the position of not choosing legal representation.

On that note, it might be argued, as Justice Moldaver did, that Justice Martin's opinion fails to give adequate weight to the "crime does not pay" purpose. The general rule set out by Justice Martin maximizes that primary purpose but merely carves out a sort of exception where there is a demonstrated imperiling of the access to counsel. As Justice Martin notes: "While seizing funds helps protect the state's contingent interest in the property, Parliament has signalled that this contingent interest should take a back seat where it imperils an accused's ability to access counsel."[143] This conclusion is supported by the scheme itself, which only permits a return of funds where the court is satisfied that the accused is truly indigent. This discretion lodged in a court is, as noted above, an important schematic consideration that gives a court a choice to return funds in cases of true need. Permitting another discretion, on top of the return discretion, to order a fine would render the original exercise of discretion to return monies illusory. It would also commit the purpose error: it would use the "crime does not pay" purpose to arguably change the textual scheme established by the *Criminal Code*.

IV. NORMATIVE ARGUMENT AND APPLICATION TO *ESA*

In this section, I hope to show why the majority's approach in *Telus* and *Rafilovich* is best, and a preferable way to solve the problem in *ESA*. Specifically, rooting interpretation in text encourages: (1) consistency with structural constitutional principles, including legislative sovereignty, because a legislature both intends ends and means; (2) consistency with a "purposive approach" to statutory interpretation, which the Supreme Court of Canada apparently endorses; and (3) rigor in the methodological approach to interpretation in Canada. With these insights in mind, I suggest a potential result to the Supreme Court's upcoming decision in *ESA*.

A. THE PURPOSE ERROR DISRESPECTS LEGISLATIVE SOVEREIGNTY

The purpose error disrespects legislative sovereignty because it undermines the role of courts as "faithful agents" of the legislature. The Constitution influences, but does not mandate, the particular interpretive approaches courts should favour over a range of cases.[144]

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142 Of course, there may be legitimate debate about which of these things occurred: did Justice Moldaver simply read out the secondary provisions or minimize them? This is a distinction without a difference; the problem is that insufficient weight was put on these secondary purposes, as demonstrated by the creation of the incentive Justice Martin points out.

143 *Rafilovich*, *supra* note 25 at para 43.

144 In this sense, I fully agree with Manning, "Equity," *supra* note 88 at 56: "And with respect to the particular question of judicial authority to interpret statutes, inferences from the constitutional structure are especially probative of the legitimacy of any given interpretive method"; see also generally John F Manning, "Constitutional Structure and Statutory Formalism" (1999) 66:3 U Chicago L Rev 685 at 689–93.

Over time, courts in Canada have shifted from the "plain-meaning" approach, to the more liberalized "modern approach," and it has never been suggested that the Constitution prevented one or the other approach. This is generally because both approaches plausibly aim at the same goal: the ascertainment of legislative intent. In this formulation, courts act as "faithful agents" of the legislatures.[145]

The "faithful agent" theory is preferable to alternative theories because it aims at an important principle of the constitutional order: the principle of legislative sovereignty. As always, one must start with the text. The *Constitution Act, 1867* does not explicitly enshrine a principle of legislative sovereignty, but there are numerous textual clues that indicate that legislative sovereignty was an obvious emanating principle.[146] For one, section 17 of the *Constitution Act, 1867* clearly establishes "One Parliament for Canada" and the form by which the Constitution "particularize[s] the participants in the law making process."[147] This implies a federally sovereign legislative body, as do the preambular clauses to each of the listed classes of subjects in sections 91 (federal powers) and 92 (provincial powers).[148] Those clauses vest exclusive law-making authority in relation to those classes of subjects in each of the federal government and the provinces.

This text also must be understood against a background unwritten principle of legislative sovereignty. As the Supreme Court noted in the *Pan-Canadian Securities Reference*, "[p]arliamentary sovereignty is a foundational principle of the Westminster model of government"[149] that is qualified in Canada, but not in the relevant way. Absent constitutional objection, legislation binds in the sense that "the legislative branch of government remains supreme over both the judiciary and the executive."[150] This is an important point, by deduction. While the judiciary is the independent guardian of the Constitution,[151] charged with applying the Constitution's limits to legislative action, the judiciary cannot subvert legislative action.

As such, it is important that text remains the focus of interpretation, even if it is imperfect. The form of the legislative process particularizes how the legislative scheme is to be enacted — as a *text* that courts must interpret. The "currency" is written word, or text, that has been passed through the prescribed law-making process.[152] To understand these texts, courts have developed "off-the-rack" tools, presumptions, and canons to interpret the semantic meaning of the text understood in its context.[153] This is not a mechanic process, but there is shared understanding of the conventions of the language such that interpretation is a task worth pursuing.

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145 For more on "faithful agent theory," see Manning, "Equity," *ibid* at 10–20. While Manning is speaking in an American context, his analysis is consistent with Canadian understandings of statutory interpretation. See Stephen Ross, "Statutory Interpretation in the Courtroom, the Classroom and Canadian Legal Literature" (1999–2000) 31:1 Ottawa L Rev 39 at 46.

146 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

147 *Ibid*, s 17; *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 74.

148 *Constitution Act, 1867*, *ibid*, ss 91–92.

149 2018 SCC 48 at paras 54, 56.

150 *Ibid* at para 58.

151 See e.g. *Ell v Alberta*, 2003 SCC 35 at para 23.

152 Manning, "New Purposivism," *supra* note 49 at 155.

153 William N Eskridge Jr & Phillip P Frickey, "Foreword: Law as Equilibrium" (1994) 108:1 Harv L Rev 26 at 67.

One criticism may run in response: if one is reasoning on the basis of the hierarchy of laws, then it would be incomplete to ignore the *Interpretation Act*. The *Interpretation Act* was an important consideration in the Supreme Court's framing and application of the modern approach in *Rizzo*.[154] The relevant provisions of the federal *Interpretation Act* provide the following:

> 12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[155]

On first blush, a plain reading of this provision would seem to support an approach that takes a wide view of applicable purposes, and gives certain abstract principles (say, like access to justice in *Telus*) a larger platform. But this would be a mistake. The provision ends by noting that a liberal construction is preferred in order to ensure "the attainment" of a statute's "objects." In other words, a "liberal interpretation" is permitted *to the extent* that it helps to achieve the statute's purposes. This sort of injunction does not mean that courts can read the purposes *themselves* liberally: it simply means that the text should be fairly and reasonably read to encompass all that it encompasses. The *Interpretation Act* is best seen as a response to unsound "strict constructionist" methods;[156] it is not a reason for "judicial libertines" to interpret statutes in a way designed to achieve certain results.[157]

Another criticism might run that this focus on text harkens back to a plain-meaning approach to interpretation or one that gives too much weight to semantic clarity. However, as noted above, this argument ignores the important role that purposes play in understanding text. Text cannot be understood without understanding the various purposes that undergird it. Text must be understood in its entire context. However, the focus does remain the text nonetheless.

Finally, it could be said that there are alternative theories of interpretation that find a home in Canada. William Eskridge's theory of "dynamic statutory interpretation," for example, argues that statutes should be interpreted "in light of their present societal, political, and legal context."[158] Indeed, one might argue that there are still independent reserves of authority for courts, in Canada, to deny the application of text as written in cases of absurdity[159] or scrivener's error.[160] But these are narrow exceptions to the general rule, and are consistent with faithful agent theory and legislative intent as understood by the Supreme Court. The point of statutory interpretation is the ascertainment of legislative intent, but as noted above, the Supreme Court does not understand this intent as subjectively existing or as depending on "the conclusion that a hypothetical legislative majority actually subscribed to the likely meaning that a reasonable person, conversant with the relevant conventions, would attach

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[154] *Rizzo*, *supra* note 1 at para 22.

[155] *Interpretation Act*, RSC 1985, c I-21, s 12. See also the analysis in *Hillier*, *supra* note 19 at para 37.

[156] It should be noted that even the most ardent textualists now reject cramped plain-meaning interpretation: see Scalia & Garner, *supra* note 8 at 33, 39, endorsing a fair-reading method and rejecting plain-meaning interpretation (so-called "strict constructionism").

[157] See Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47:4 Colum L Rev 527 at 529. Closer to home, *Vavilov* endorses the proposition that legislative interpretation should be conducted non-tendentiously, putting aside personal preferences. See *Vavilov*, *supra* note 2 at para 121.

[158] William N Eskridge, "Dynamic Statutory Interpretation" (1987) 135:6 U Pa L Rev 1479 at 1479.

[159] Sullivan, *Statutory Interpretation*, *supra* note 10 at 212–13.

[160] *Ibid* at 298.

to the enacted text."[161] On this understanding, the result of the interpretive process will be the establishment of an "authentic" construct of legislative intent, and in most cases, the text will be the focus of interpretation as a practical matter. Sometimes, however, the text will disclose such a clear error or absurdity that to follow the text would clearly undermine a statutory purpose. In such cases, it is consistent with faithful agent theory to apply the intent that the legislature would have wanted, despite extreme mistakes in legislative language. This will generally be rare and exceptional, but it allows a court to create a plausible construct of legislative intent that best encompasses the legislative expression.

B. THE PURPOSE ERROR IS INCONSISTENT WITH PURPOSIVISM AS ENDORSED BY THE SUPREME COURT

Secondly, an approach that avoids the purpose error is more consistent with the entire idea of purposive interpretation, as endorsed by the Supreme Court. As noted above, the impetus behind most of the common interpretive methods is "faithful agent theory." This is no less true in a system of purposive interpretation, which is a part of the modern approach. Indeed, the premises of classic purposivist theory hold that the legislature "passes legislation for a purpose and that a faithful agent must interpret the statute to fulfill its purposes."[162] But if this is the basis of purposivist theory, as endorsed by the Supreme Court, then as John Manning notes, "the textual constraint element … follows."[163] In other words, and as noted above, using purpose to ascertain legislative intent necessarily entails paying attention to how the legislature expressed its purposes through the generality or specificity of language.[164] Put this way, the Supreme Court understands that purpose and text must be interpreted "harmoniously."[165] A purposive approach, as understood by the Supreme Court, does not mean an approach that puts purpose above all else: it means an approach that uses purpose plausibly.

De-coupling purpose from text leads to pathologies that will distort the search for legislative intent, leading to disharmony and contradicting the tenets of purposivism. On one hand, if one simply follows text without knowing why the text was enacted, one could plausibly say that they are seeking legislative intent. However, there is a significant chance that such a reading would underdetermine the meaning of particular terms. Purpose, then, is an important tool used to understand why a legislature used certain words to achieve certain goals. On this account, words are signals that are used "primarily to let us know the statutory purpose."[166] A laser-focus on the "plain-meaning" of words could "produce results that cannot easily be ascribed to the actual understanding of the requisite legislative majority."[167]

However, an opposite approach that subordinates letter to "spirit" also misses the mark on the terms of purposivism as addressed by the Supreme Court. This is because legislation

161 Manning, "Intent," *supra* note 42 at 434.
162 Manning, "New Purposivism," *supra* note 49 at 147.
163 *Ibid*.
164 *Ibid* at 137. See also the way the Supreme Court describes the importance of legislative language in *Vavilov*, *supra* note 2 at para 110.
165 See *Rizzo*, *supra* note 1 at para 21; *Trustco*, *supra* note 5 at para 10, which uses the term "harmonious" in various forms no less than three times.
166 Max Radin, "A Short Way with Statutes" (1942) 56:3 Harv L Rev 388 at 400.
167 John F Manning, "What Divides Textualists From Purposivists?" (2006) 106:1 Colum L Rev 70 at 97 [Manning, "Textualists From Purposivists"].

is not just a list of disembodied purposes. It is also a "ground design" or "instructions" that are plausibly directed towards an administrator or court,[168] telling the receiving institution to implement the statute in a certain way in relation to a certain problem. Put differently, text can be read to determine the purpose for which the text was enacted, but how the text accomplishes its goal cannot be understood without seriously dealing with the text and the structural relationships between different provisions in the statute. Put this way, it is far from "hypertextualism" to focus on the text as the means by which the legislature communicates how it is to achieve its goals, so long as this text is understood in its purposive context.[169]

Accordingly, a court determining legislative intent in a purposive manner cannot simply reason from text alone or purpose alone; to do so would be to, on one hand, potentially ignore why a statute was enacted, and on the other hand, potentially ignore how it achieves its goals. This is why the Supreme Court notes that text, context, and purpose must be understood "harmoniously." Courts must harmoniously synthesize purpose and text, not allowing one or the other to overly dominate. If a court fails to follow the *Rizzo* injunction of harmony, it will — rather than acting as a faithful agent of the legislature, seeking to understand why and how a legislature sought to change the law — reconstruct the "how" of the statute to better achieve "more" of the why, the purpose.[170] This will lead to a purpose error.

This is far different than adopting a position that courts can routinely use purpose to change the means established by the legislature in absence of clearly defined situations of absurdity. Again, as the Supreme Court notes in *Telus*, the courts cannot generally change the text to suit some other policy justification they find more compelling.[171] As a result, there is generally no independent power for courts to reshape legislative text to suit an abstract purpose as they understand it.

C. IDENTIFYING AND ADDRESSING THE PURPOSE ERROR WILL LEAD TO A MORE PREDICTABLE INTERPRETIVE METHOD

Identifying the purpose error and addressing it as the majorities in *Telus* and *Rafilovich* do brings us closer to an ideal of more principled decision-making in statutory interpretation.

The role of judiciary in interpreting the law is, in part, deeply related to the rule of law.[172] Part of this role not only concerns the results of an interpretation, but the method that courts use to reach that result. In fact, as Justice Malcolm Rowe and Michael Collins note, "methodology can be central to key attributes of law, notably certainty, predictability, and

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[168] *Ibid* at 97, n 93.

[169] See Richard J Pierce Jr, "The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State" (1995) 95:4 Columb L Rev 749.

[170] See Easterbrook, *supra* note 67 at 546.

[171] *Telus*, *supra* note 24 at para 79.

[172] See most recently *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at paras 46–47:

> In keeping with the principle of the separation of powers, the task of interpreting, applying and stating the law falls primarily to the judiciary…. This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers.

stability."[173] A predictable interpretive methodology is important for any number of reasons, but one reason is that case-by-case adjudication, the application of loose standards, or adjudication based on totally abstract principles can lead to so-called "instrumentalism"[174] or what Roscoe Pound called "spurious interpretation":[175] the post facto justification of a result before a decision is made.[176] The Supreme Court, in its important *Vavilov* case, has clearly attacked this sort of reasoning.[177] The absence of a predictable methodology can lead to this outcome.

At the same time, interpretation is more of an art than a science.[178] Jerome Frank famously compared interpretation to the performance of music: "[t]he legislature is like a composer. It cannot help itself: It must leave interpretation to others, principally to the courts."[179] The idea is that an interpreter does not mechanically determine "legislative intention."[180] No methodology can *perfectly* account for the variable contexts in which statutes are written and operate. But that does not mean that methodology should not try to achieve the vision of principled, justified decision-making that the Supreme Court has envisioned.

To continue the music analogy, what is required is a sort of "mean" or "middle ground, between disregarding the composer's intention and being intelligently imaginative."[181] Justice Malcolm Rowe calls this middle ground a "structured or deliberate methodology."[182] Its goal is not to fetter an interpreter's discretion; rather it "guides analysis and constrains results, sometimes leading decision-makers to conclusions that do not align with their intuitions or policy preferences."[183] The idea is that courts should aim to create a justifiable conception of legislative intent that plausibly tracks to a convincing account of text and purpose.

Taken alone, *Rizzo* and the modern approach only loosely structure legal interpretation. As noted above, the purpose error remains a possibility because *Rizzo* does not assign weights to the particular tools of interpretation it counsels. While it suggests a harmonious approach, the purpose error necessarily upsets that harmony. Purpose, in particular, can be prone to abuse for the reasons noted above: the tool can be quite pliable if stated at too high a level of abstraction. This was arguably the issue in the *Telus* dissent, where the "access to justice" purpose, taken alone, does not structure interpretation. Indeed, it can lead to radically different conceptions of what access to justice actually means in the context of a coordinated legislative scheme.

By recognizing the purpose error and using text and scheme to constrain its commission, courts can ensure the promise of the modern approach to encourage a harmonious

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173 Rowe & Collins, *supra* note 21 at 1.
174 *Ibid* at 2.
175 Roscoe Pound, "Spurious Interpretation" (1907) 7:6 Colum L Rev 379 at 380.
176 *Ibid*.
177 *Vavilov*, *supra* note 2 at para 121.
178 See e.g. *Monney*, *supra* note 39 at para 26: "Admittedly, statutory interpretation in the context of constitutional review is not an exact science."
179 Jerome Frank, "Words and Music: Some Remarks on Statutory Interpretation" (1947) 47:8 Colum L Rev 1259 at 1264.
180 *Ibid* at 1266.
181 *Ibid* at 1261.
182 Rowe & Collins, *supra* note 21 at 4.
183 *Ibid*.

interpretation. Clarifying this aspect of the modern approach in Canadian interpretation can ensure a more structured and deliberate methodology.

V. APPLICATION TO *ENTERTAINMENT SOFTWARE ASSOCIATION*

Taking these reasons together, one can now make sense of some of the Supreme Court's recent statutory interpretation cases. There appears to be a lack of consistency on methodology, with some judges sometimes avoiding the purpose error, and those same judges sometimes committing it.[184] Nonetheless, the reasons outlined above suggest that, normatively, the Supreme Court may have good reasons to identify and solve the purpose error as done by the majorities in *Telus* and *Rafilovich.*

That said, and for clarity's sake, it is worthwhile to explore the options available to the Court in *ESA*. *ESA* could be decided in one of two ways: (1) in a way that avoids the purpose error and (2) in a way that does not. If the Supreme Court wishes to follow *Telus* and *Rafilovich*, it will decide in *ESA* to avoid the purpose error.

A. FACTS

ESA involves many important issues, including standard of review and the role of international law, but for our purposes, the legislative interpretation issue is the centrepiece. The Society of Composers (SOCAN) filed with the Copyright Board proposed tariffs for the communication to the public of works through an online music service. After SOCAN filed its proposed tariffs, the *Copyright Act* was amended to include a definition of "making … available to the public."[185] This provision defines "communication of a work … to the public" as including "making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public."[186] The main question for our purposes was the following: does the making available of a work on an online server for later downloading constitute "an event for which a tariff was payable"?[187] If it was, obviously, SOCAN could collect tariffs from such events.

Complicating matters was a Supreme Court case on point. In *Rogers*,[188] the Court held that the "transmission over the Internet of a musical work that results in a download of that work is not a communication by telecommunication,"[189] meaning SOCAN could collect the tariffs. Of course, the new provision of the *Copyright Act* at issue here, section 2.4(1.1), arguably affected the status quo ante: a literal reading of this deeming provision suggests, despite what the Court held in *Rogers,* that the new provision makes it so that a musical work that is later downloaded *does* constitute a communication by telecommunication.

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[184] For example, Justice Moldaver penned the majority in *Telus*, *supra* note 24, where he avoided the purpose error but committed the purpose error in his *Rafilovich*, *supra* note 25*,* dissent.

[185] RSC 1985, c C-42, s 2.4(1.1).

[186] *Ibid*.

[187] *ESA*, *supra* note 18 at para 4.

[188] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.

[189] *ESA*, *supra* note 18 at para 5.

The Copyright Board agreed.[190] As such, the Copyright Board's holding meant that there were two separate "tariff-triggering events": (1) the actual "making of a work available" whether by stream or download; and (2) the subsequent transmission, such as a stream or download on the user end.[191] For the Board, section 2.4(1.1) served the narrow purpose of a deeming provision, ensuring that "making a work available to the public" is a "communication to the public" within the legal meaning of the statute.[192] This meant that SOCAN could apply two tariffs for each event[193] and that protection flowed to the "act of making a work available by telecommunication even where there was no transmission to the public."[194]

For the Court, this interpretation was unacceptable, and the Board "provided no meaningful reasons to support the idea that subsection 2.4(1.1) operates in this way."[195] Specifically, the Board relied on a number of sources to suggest that section 2.4(1.1) should lead to the adoption of two separate tariff-triggering events. First, it suggested that the preamble to the statute introducing section 2.4(1.1) demonstrated that the statute was designed to implement Canada's international obligations.[196] Upon an interpretation of those obligations, the Board concluded that the relevant international law supported its result.[197]

To the Board, *Hansard* evidence supported its interpretation. But to the Court, that evidence was "devoid of any guidance on subsection 2.4(1.1) that would support the Board's interpretation."[198] The Court read the evidence differently: instead, the *Hansard* evidence indicated that section 2.4(1.1) is a "narrow, limited-purpose provision aimed at 'clarify[ing] that the unauthorized sharing of copyrighted material over peer-to-peer networks constitutes an infringement of copyright.'"[199] If this is the proper interpretation, then the Board's interpretation does not make sense: it would penalize acts, such as the "making available" of a work for download, that do not constitute transmission or sharing.[200]

In total, the Court held that section 2.4(1.1) "does not create a new exclusive right."[201] The Court held that the limited, narrow purpose of section 2.4(1.1) was not designed to implement Canada's international obligations wholesale,[202] as the Board read them.[203] Instead, section 2.4(1.1) did not fundamentally change the situation as the Supreme Court saw it in *Rogers* and only provided power to SOCAN to collect fees for the exercise of the right at issue: the making available right, which only attaches to transmission, not to preparatory steps.[204] Section 2.4(1.1) cannot be read so broadly to achieve some larger purpose of congruence with all elements of international law, especially where the section

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190 *Ibid* at para 8.
191 *Ibid* at para 10.
192 *Ibid* at para 8.
193 *Ibid* at para 51.
194 *Ibid* at para 70.
195 *Ibid* at para 52.
196 *Ibid* at para 53.
197 *Ibid* at para 64.
198 *Ibid* at para 55.
199 *Ibid* at para 56.
200 *Ibid* at para 66.
201 *Ibid* at para 96.
202 *Ibid* at paras 74–75.
203 Part of the issue in *ESA*, *ibid*, was whether the Board's reading of the relevant international law was reasonable: see para 93. I do not address that issue here.
204 *Ibid* at para 66.

"does not explicitly adopt or incorporate [international law] wholesale and without modification."[205]

B. ANALYSIS

Fundamentally, as the Court points out in *ESA*, there is a "generality" problem here.[206] At the Board's level of generality, the dominant purpose of the statute was to implement, without reservation, certain of Canada's international obligations. Of course, as is common in the purpose error, this purpose at this level of generality may have some relevance for the interpretive task. But it cannot be taken to overwhelm more particular purposes and means discernible in the provision itself. As Justice Stratas noted for the Court, the specific purpose of the provision is arguably to implement and define the making available right. It is not, except incidentally, designed to fully encapsulate the mandates of international law. Instead, for Justice Stratas, the more local purpose, the creation of a limited right, in concert with Supreme Court precedent, made the best sense of the relevant text and Parliament's intention in enacting it.

Recall that there are two factors that tend to drive the commission of the purpose error by a court. A court could climb, first, the levels of generality and then fail to determine whether and how that purpose is qualified or changed by the written words and the relationship between them. *ESA* could lead the Court astray. On the first factor of generality, Barak's categories are relevant. The "implementation of international law" purpose is likely in one of Barak's highest categories of abstraction. These categories, again, concern general norms that could be said to apply to many statutes. As always, this may be a relevant purpose, but the risk is high that a highly abstract purpose, sourced outside of the statute, could lead to the purpose error, because such purposes are often capable of multiple readings. In this case, while the statute plausibly does aim at international law implementation, it is hard to determine whether this was the motivating primary purpose of the statute. This raises the prospect of the purpose error because, while "international law implementation" could be a purpose, it is more likely an effect of certain interpretations.

Instead, as the Court noted in *ESA*, the text of the provision arguably reflects a different goal: the enshrining and definition of a making available right that is connected to the specific act of transmission and sharing, the evils to which this provision were directed. This text may incorporate elements of international law, as the Court notes.[207] But in this case, the section does not explicitly "adopt or incorporate [international law] wholesale and without modification."[208] As such, the international law purpose which the Board largely found definitive seems to have less textual representation than the purpose the Court found more persuasive.

The point here is methodological. The Supreme Court, in reviewing *ESA*, may find other purposes relevant to the interpretive task. It may conclude that the provision under interpretation is aimed at some different purpose than the one assigned to it by the Court of

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205 *Ibid* at para 73.
206 *Ibid* at paras 53–54.
207 *Ibid* at para 53.
208 *Ibid* at para 73.

Appeal. What is important is whether the Supreme Court, in its analysis, relies on *Telus* and *Rafilovich* to do the hard work of ranking or purpose the legislative purposes that bear on the interpretive problem. Put differently, the Supreme Court should not simply view the question as one of whether international law is relevant to the interpretation: that is a question, but for our purposes, not the important one. Instead, the question is what the authentic meaning of the provision is, taking into account its purpose and the larger purposes of the statute as a whole.

VI. CONCLUSION

I have argued that the Supreme Court should decisively move beyond the purpose error, by clarifying that purpose and text must be interpreted harmoniously. In other words, abstract purposes, both on the Supreme Court's own doctrinal terms and normatively, should generally not be permitted to overwhelm specific purposes, means, and schemes set out in text.

The article began by reviewing what the Supreme Court has said about statutory interpretation and the roles of purpose and text. For the Supreme Court, and while this is not perfectly clear, the goal seems to be the creation of a plausible legislative construct. While legislative instructions will be recorded in text, this text cannot be understood separately from why it was enacted, the particular purposes undergirding it. These purposes must be given effect in every case.

Telus and *Rafilovich* provide examples of the Court struggling, one way or another, with the purpose error. The two cases demonstrate a normatively desirable way to solve the purpose error by focusing on how statutes aim to accomplish their goals. These cases properly solve the purpose error because they encourage interpretations that (1) are consistent with the idea of legislative sovereignty, (2) are consistent with the Supreme Court's understanding of purposivism, and (3) generally rely on probative sources of legislative intent. Applying these insights to *ESA* suggest an approach that avoids the purpose error.

While there is no perfect formula for avoiding the purpose error, and indeed, abstract purposes are inevitable in interpretation, these cases show how the Court can accomplish its goal of "harmonious" purposive interpretation. Doing so requires an approach that takes text seriously.

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