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R. v. Safarzadeh-Markhali: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose

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Marcus Moore[*]

I. INTRODUCTION

1. *Markhali* and Construction of Statutory Purpose

The Supreme Court of Canada's decision in *R. v. Safarzadeh-Markhali*,[1] might be assumed to be primarily of interest to criminal lawyers. However, the case's greatest legal significance may lie in an altogether different and more technical realm of law: Statutory Interpretation. Specifically, *Markhali* decisively endorses a new rigorous approach to the matter of construing a legislative purpose. Previously, while the interpretation of legislation itself has been done employing rigorous general approaches based on long-established and progressively refined principles, construction of legislative objectives was typically done employing *ad hoc* approaches whose most common feature was the summary nature of the analysis. *Markhali*'s new framework recognizes this, and by contrast, may be characterized as a new "Rigorous Approach" to purpose construction that is distinct from prior approaches in at least

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[1] [2016] S.C.J. No. 14, 2016 SCC 14 (S.C.C.), affg [2014] O.J. No. 4194 (Ont. C.A.) [hereinafter "*Markhali*"].

four ways: (1) it expressly acknowledges how critical construction of the statutory purpose is to the outcome of many claims; (2) it is self-conscious of the potential for a less-than-rigorous approach to be self-defeating, given that the reason for construing the legislative object is often for subtle comparisons with the legislative means, effects, *etc*.; (3) it sets out overarching parameters that help clarify what kind of "purpose" it is the goal of the construction exercise to determine; and (4) it delineates the relevant indicia, and prescribes an analytical procedure to scrutinize them, in construing the purpose. The result is an approach that is rigorous in that it is clear, systematic, capable of consistent application, and solicitous of in-depth adversarial argumentation and judicial justification. The advent of this new Rigorous Approach may have a significant and salutary impact on the adjudication of cases where the statutory purpose is a key issue. Notable examples surveyed here include the prominent *Canadian Charter of Rights and Freedoms*[2] doctrines of overbreadth, discrimination, and proportionality. *Markhali*'s rigorous approach may be expected to structure the determination of legislative purpose, discipline argument and analysis concerning the purpose, and render the adjudication of claims which rely importantly on statutory objectives more transparent and predictable, thus strengthening the rule of law, and sheltering courts from unwelcome accusations of illegitimate policy-making.[3]

2. Structure of this Chapter

The discussion which follows proceeds in three parts. Part II outlines the Rigorous Approach to construction of statutory purpose which emerges from *Markhali*, and contrasts this with the Summary Approach to purpose construction typical of older cases. Part III assesses the impact of this development on future Charter jurisprudence, surveying several significant implications it may have in and around the adjudication of such claims. Part IV highlights a few key questions raised by the inauguration of the new Rigorous Approach, which remain to be worked out in subsequent case law. A short conclusion winds up the article's discussion of these themes.

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[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[3] As the Court said it would (*R. v. Moriarity*, [2015] S.C.J. No. 55, 2015 SCC 55, [2015] 3 S.C.R. 485 (S.C.C.) [hereinafter "*Moriarity*"]), I will use the words "purpose", "objective", and "object" interchangeably in this chapter. Likewise, no difference in meaning is intended by the variation between "statutory" and "legislative".

II. The New Rigorous Approach to Purpose Construction

1. The Rigorous Approach

(a) Development

The Rigorous Approach to construction of statutory purpose stems from the Supreme Court of Canada case, *R. v. Safarzadeh-Markhali*, a judgment of the full bench, under the pen of the Chief Justice. Seeds of the approach are present in two preceding unanimous judgments released around the time *Markhali* was heard in November 2015 (held concurrently under reserve until then): *R. v. Moriarity*[4] (heard May 12, 2015) and *R. v. Appulonappa*[5] (heard February 17, 2015). *Moriarity* can be seen to ponder the theoretical rationales for a self-conscious approach to purpose construction, point out potential pitfalls of trying to skip over this, and delineate overarching parameters for the type of purpose the construction aims to identify. *Appulonappa*, meanwhile, preoccupies itself with mechanics of the construction, including the factors to be considered and the manner in which to analyze them, illustrating this in-depth *Markhali*, in which these various elements are confirmed, combined, endorsed, and extended presents the Charter case law with a new, complete, and authoritative approach to construction of the legislative objective. As will be detailed, this approach is characterized by its rigour, in comparison to more summary approaches often used in older cases.

(b) Raison D'être

The emergence of the new Rigorous Approach must be seen as reflecting a recognition of how pivotal a role is played in many cases by a court's assertion of the statutory purpose. *Markhali* proclaims it as being "critically important" to correctly identify a law's purpose.[6] Similar sentiments are elaborated in *Moriarity*, which discusses a need to be "cautious", to anchor the articulated purpose in the proper sources, and to

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4 *Id*.

5 [2015] S.C.J. No. 59, 2015 SCC 59, [2015] 3 S.C.R. 754 (S.C.C.), varg [2014] B.C.J. No. 762 (B.C.C.A.) [hereinafter "*Appulonappa*"].

6 *Markhali*, *supra*, note 1, at para. 24.

avoid pre-judging the purpose as this tends to short-circuit analysis of the larger legal issue at hand.[7] *Appulonappa* says little about the importance of the construction exercise, but devotes 40 paragraphs, easily the longest of any of the cases, to investigation of the legislative objective. The Court had noted in that case that the scope of the impugned provision "is plain. The provision admits of no ambiguity."[8] Since the case consisted of an overbreadth claim, the result is that construction of the purpose then becomes dispositive, and therefore its construal comprises most of the Court's analysis. As these recent judgments demonstrate, the emergence of the Rigorous Approach seems to coincide with recognition by the Court — confirmed in emphatic terms in *Markhali* — of the decisive importance in many cases of the construed legislative objective.

(c) Overarching Parameters

Markhali's Rigorous Approach counsels attention to the theoretical rationales of the purpose construction, and commands conformity to a number of overarching parameters for the kind of purpose sought by the exercise. In this regard, *Markhali*'s Rigorous Approach reprises, summarizes, endorses, and extends some of the earlier commentary on these matters from *Moriarity*.

One such guideline is that the purpose must be distinguished from what the legislation actually provides.[9] In overbreadth cases, which compare these two elements, this might seem obvious. But there is a not-irrational temptation to avoid diving into the murk of other possible indicators, and cling to the actual provision as *terra firma* self-evidence of its purpose. The Court noted this in *Appulonappa*, acknowledging that "[i]t may be argued that since Parliament used these words, that is what it intended". However, the Court added that assumption is inadequate for it fails to consider "...[t]he potential for 'failures of instrumental rationality', in which a given law is not a rational means to achieve a legislative objective". The possibility that the law as provided diverged from its objective requires courts to look further.[10] In other words, the purpose is not always the same as what is provided because sometimes laws don't do what they were made to do.

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7 *Moriarity*, *supra*, note 3, at para. 32.
8 *Appulonappa*, *supra*, note 5, at para. 72.
9 *Markhali*, *supra*, note 1, at para. 26. See also *Moriarity*, *supra*, note 3, at para. 27.
10 *Appulonappa*, *supra*, note 5, at para. 36.

A second preliminary instruction provided by the Rigorous Approach for identifying the right kind of legislative object targeted by the exercise is that it be cast at an appropriate level of generality. High level constructions in the form of an "animating social value" are to be avoided for they are substantively too diffuse to usefully explain the particularity of statutory provisions (think of "the general welfare" as perhaps an extreme example of a purpose cast at too high of a level of generality). By the same token, also to be resisted are ground level constructions that do little more than restate the provision in synonymous terms, precluding any possible inquiry into differences between legislative aspiration and instrument.[11] The proper pitch of the type of purpose sought is thus in between.

A third parameter prescribed by *Markhali* is that the articulated purpose be in terms "both precise and succinct".[12] The Court gave several examples in *Moriarity* of objectives so expressed: protecting children from becoming victims of sexual offences (*Heywood*[13]); prosecuting and preventing terrorism (*Khawaja*[14]); criminalizing the parasitic, exploitative conduct of pimps (*Bedford*[15]); and preventing vulnerable persons from being induced to commit suicide at a time of weakness (*Carter*[16]). These examples, it said, illustrate how the goal of the construction exercise is to arrive at an articulated statement of purpose that captures "the main thrust of the law".[17] It may be wondered what supports the guidance ensconced in this directive? For starters, the succinctness criterion obviously contrasts with a more elaborate statement of purpose. Overly detailed statements of purpose, in turn, would seem to harbour two opposite risks of distortion: On one hand, if the extra detail is incorporated from what the law actually does, error may occur as a result of treating nuances which rather reflect legislative drafting rationales, practical considerations, or disconnects between provision and purpose of the "lost in translation" kind as nuances internal

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[11] *Markhali*, *supra*, note 1, at para. 27. See also *Moriarity*, *supra*, note 3, at para. 28.

[12] *Markhali*, *supra*, note 1, at para. 28. See also *Moriarity*, *supra*, note 3, at para. 29.

[13] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.), affg [1992] B.C.J. No. 2596 (B.C.C.A.) [hereinafter "*Heywood*"].

[14] *R. v. Khawaja*, [2012] S.C.J. No. 69, 2012 SCC 69, [2012] 3 S.C.R. 555 (S.C.C.), affg [2010] O.J. No. 5471 (Ont. C.A.).

[15] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.), varg [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter "*Bedford*"].

[16] *Carter v. Canada (Attorney General*), [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), revg [2013] B.C.J. No. 2227 (B.C.C.A.) [hereinafter "*Carter*"].

[17] *Moriarity*, *supra*, note 3, at para. 26.

to the purpose when in fact they were not. On the other hand, if the extra detail is imported from other sources of kinds like Parliamentary debates, public consultations, or international *travaux préparatoires*, the danger is that statements made as part of such deliberative processes, but which did not reflect the overall focus or the final political consensus, may be improperly treated as if they did. Likewise, if too much detail is incorporated into the objective from exhaustive legislative preambles, the risk is that the object of the specific provision at issue may be misleadingly compounded by expressed objectives which in fact are focused on other provisions within the larger legislative scheme. Succinctness therefore guards against the twin risks of either too readily accepting a provision's terms as accurately reproducing the provision's purpose, or else of overriding the true purpose by over-preoccupation with statements made in connection with but not reflective of "the main thrust". An excessively detailed purpose of either kind could frustrate Charter analyses like overbreadth or the rational connection and minimal impairment branches of the *Oakes*[18] proportionality test, as these all compare in some way what a law was meant to do with what it does. What of the "precision" that the same directive from *Markhali* demands of the articulated purpose, besides succinctness? Just as laws must not be vague,[19] neither can the purpose be, when it is being construed in order to serve as an intelligible part of some larger legal analysis. And, if that analysis involves comparisons with what the law actually does, as the tests for the aforementioned Charter doctrines do, then all the more must the purpose be articulated precisely to allow for a comparison both full and fair.

A fourth general rule that *Markhali* specifies for properly determining a statutory purpose is that the construction exercise in no way entails judging the appropriateness of the objective; the objective must be taken "at face value".[20] This is not to say that statutory purposes are blindly accepted as being constitutionally appropriate. Indeed, a legislative object of infringing a Charter right renders the relevant law invalid.[21] However, even where the legal issue before the court is precisely that

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[18] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.), affg [1983] O.J. No. 2501 (Ont. C.A.) [hereinafter "*Oakes*"].

[19] *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.), affg [1991] N.S.J. No. 169 (N.S.C.A.).

[20] *Markhali*, *supra*, note 1, at para. 29. See also *Moriarity*, *supra*, note 3, at para. 30.

[21] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.), affg [1983] A.J. No. 766 (Alta. C.A.) [hereinafter "*Big M*"].

question of whether the legislative object violates the Charter, the purpose must first be construed such as it is, before its compliance with the Charter can secondarily be assessed.[22]

Markhali's Rigorous Approach reveals, besides the above four enumerated propositions which draw on *Moriarity*, two additional guidelines superintending the exercise of construing a statutory purpose. Both of these reprise features of *Appulonappa*.

These commence with the place, within the larger legal analysis for which the purpose is being construed, where the construction should properly be conducted. *Markhali* stipulates that it should be done "at the outset" of the analysis,[23] confirming the Court's earlier depiction of it in *Appulonappa* as "the first step".[24] If the larger Charter issue being analyzed is whether a rights limitation is proportionate, it is clear enough why construing the purpose must be done at the outset: The first leg of proportionality analysis asks whether the legislative objective is pressing and substantial. To answer whether it is pressing and substantial, the court must first have construed what the legislative objective is. It must likewise already have been construed to answer the second leg of the test, which queries whether the provision represents a rational means of achieving the determined objective. The same is once again true for the third leg of the test, which asks whether the provision limits the affected right as little as reasonably possible in pursuing its object. To take another example, if the legal issue at hand is assessing whether the purpose of a law is to infringe a Charter right, it will again be necessary to construe the purpose first. Meanwhile, for certain other Charter analyses, while it may not be strictly necessary to construe the purpose at the outset, there would seem strong rationales for doing so. To begin with, it is the most natural thing to do, since it mimics the legislative process being scrutinized — where the legislator starts with an objective, before translating that into legislation, and finally seeing its effects. In addition, it may help avoid the appearance that a desired outcome on the overall legal question may have steered the decision as to what the legislative object was. Consider overbreadth, for example. *Moriarity* notes that the means a law adopts "are usually easy to identify", whereas

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[22] *Id.*, at paras. 48-53, 72.

[23] *Markhali*, *supra*, note 1, at para. 24. *Moriarity*, *supra*, note 3, at para. 24, uses the phrase "at the outset," but does so in relation to both "purpose and effects." The point there is that the two aspects must be determined before they are compared, not that purpose should be construed before the scope or "effects" are.

[24] *Appulonappa*, *supra*, note 5, at para. 31.

"[t]he objective of the challenged provision may be more difficult to identify and articulate."[25] Since the purpose is therefore the more contestable part, if it is construed after the means have already been articulated, the outcome will be immediately evident, so that the purpose construction risks being experienced by the reader like an exercise of justifying an outcome already in mind, rather than an open-minded and even-handed analysis. By contrast, if the purpose is construed first, during which the judgment has to that point been silent as to the scope of the provision, it tends to create the opposite effect — the iconography of law, after all, presents justice as blind.

The other, and final, overarching parameter set out by *Markhali*'s Rigorous Approach springs from recognition of the fact that complex legislation often has more than one objective. In *Appulonappa*, this point was emphasized on three occasions, and a directive added that in such case "the way forward lies in an interpretation which harmonizes" the multiple objectives, "that avoids conflict and gives expression to each... read together in this way".[26] *Markhali* does not expressly make the same point a fourth time, but unmistakably endorses this as an essential element of properly construing a purpose, as it carries out a lengthy harmonization process: This begins with acknowledging six isolable objectives of the legislation at issue in *Markhali*: public confidence in the justice system; public safety from chronic/violent offenders; increased rehabilitation, retribution, transparency in the pre-credit system; and avoiding manipulation of the system. Over the course of 11 paragraphs, these are then worked through, providing a concrete illustration of how the harmonization directive takes shape in a given case.[27] Thus, the public confidence objective is given expression as the animating social value, but is too general to be the purpose targeted by the construction. The next two from the above list are combined and together determined to be the main thrust sought by the construction exercise: "to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs." Conflict with the last three objectives is resolved by accepting them as valid but peripheral — outside the main thrust which the construction seeks, in other words. More specifically, it is noted that retribution occupies a minor role in the ministerial record,

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25 *Moriarity*, *supra*, note 3, at paras. 25-26.

26 *Appulonappa*, *supra*, note 5, at paras. 45, 51, 57.

27 *Markhali*, *supra*, note 1, at 37-47.

while transparency and avoiding manipulation seem more relevant to measures from the overall scheme other than those centrally at issue.[28]

Together, the above overarching guidelines provided by *Markhali*'s Rigorous Approach operate to help ensure that the often pivotal task of determining a legislative objective be done in an intensely self-conscious manner, with awareness of and instructions for avoiding potential pitfalls, and tips for finding the right kind of purpose that the construction exercise aims to identify. In all these ways, this general guidance contributes to a rigorous approach to construing the legislative object, in contrast to summary approaches used previously.

(d) Mechanics

Besides these overarching parameters, *Markhali* also gives us the actual mechanics it endorses for construing a purpose. This includes the sources to be looked to in determining the purpose, the method by which to examine them, and the thoroughness with which they should be investigated. In these respects, *Markhali*'s Rigorous Approach follows, formalizes, builds upon, and refines the construction found in *Appulonappa*.

(i) Accepted "Indicia of Purpose"[29]

Markhali expressly enumerates three sets of indicators to be considered in its Rigorous Approach to construing a statutory purpose: (i) statements of purpose in the legislation; (ii) the text, legislative context, and scheme of the legislation; and (iii) the legislative history, evolution, and other evidence extrinsic to the legislation itself.[30] These same sets of factors can be found in the judgments across the triad discussed.[31] Its earlier cases, *Moriarity* and *Appulonappa*, in turn cite as authority for use of these sources as evidence of legislative purpose Professor Ruth Sullivan's leading text on Statutory Interpretation in Canada, *Sullivan on the Construction of Statutes*.[32]

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[28] *Id*.

[29] *Appulonappa*, *supra*, note 5, at para., 34.

[30] *Markhali*, *supra*, note 1, at para. 31.

[31] See *Moriarity*, *supra*, note 3, at para. 31, and *Appulonappa*, *supra*, note 5, at para. 33.

[32] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) [hereinafter "Sullivan"]. See *Moriarity*, *id*.; *Appulonappa*, *id*.

Examining *Markhali*'s classification of the indicators to be considered by its Rigorous Approach, at least two rationales are immediately apparent. Highlighting them may help to make the analytical structure of the Approach conceptually more explicit and intelligible to parties to litigation, and thus easier to recall and adhere to in researching evidence and presenting arguments concerning the purpose in court. To begin with, the first two enumerated categories both consist of sources of evidence intrinsic to the legislation. Statements of objectives in the legislation comprise direct evidence of purpose intrinsic to the legislation.[33] The text, legislative context, and scheme of the legislation are forms of indirect evidence of purpose intrinsic to the legislation. The third category consists of all extrinsic evidence. The extrinsic sources given as examples and considered in *Markhali*, namely the history and evolution of the legislation,[34] will each be direct where they pertain to statements of purpose from the source in question, and indirect where they rely on other types of statements relevant to the purpose from the source in question.

As far as the order or logic of enumeration of these categories within *Markhali*'s Rigorous Approach, it seems reasonable to conclude based on ordinary principles of evidence that it reflects a hierarchy of general reliability: within intrinsic, direct before indirect; all types of intrinsic before extrinsic; and no need to separate out direct extrinsic from indirect extrinsic, because their comparative remoteness as extrinsic sources is their most salient characteristic, diminishing the relative significance of whether they are direct or indirect. These can only be generalizations, for in any given case, the reliability of a particular source or category may be frustrated or magnified. Indeed, in *Markhali*, although the Court notes that as a general matter, the sources it draws upon from the third category "may be rhetorical and imprecise", it is these sources that, given the concrete evidence available, become most decisive of the purpose construed in that particular matter.[35]

Where do prior case precedents fit amongst the categories? A precedent's role appears to vary according to where its relevance lies. If the precedent contains a conclusion potentially on the overall purpose, it is dealt with apart from any of the specific categories, so that the court

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33 *Markhali*, *supra*, note 1, at para. 32 uses the term "explicit" to similar effect.

34 *Id.*, at para. 31.

35 *Id.*, at para. 36.

can investigate whether the purpose is "settle[d]" by *stare decisis*.[36] If the precedent contains conclusions relevant to only one or more of the categories of evidence of purpose, it is considered within the examination of those, as for instance the *Summers* precedent is in *Markhali*.[37]

Elaborating in more detail, now, the content of each of the categories of the Rigorous Approach, the legislative statements of purpose that comprise the first category may be found at the beginning of a statute, in the section in which the provision in question is found, in sections containing interpretive guidelines, or in amendments to the statute.[38] This category has been called the first,[39] "most direct and authoritative evidence" of legislative purpose.[40] However, it does not always yield clear answers in practice. For example, in *Markhali*, the Court looked at this source, but found no statement of objectives in the legislation.[41] Meanwhile, in *Appulonappa*, the legislation contained multiple statements of purpose, which the Court sought to harmonize,[42] a difficult task which sometimes requires resort in turn to the other categories of sources for illumination.

The second category consists of the "contextual matrix"[43] of the purpose that is still intrinsic to the legislation. Under this rubric, *Markhali*, for instance, scrutinized the *Criminal Code* provision on endorsement where detainees are denied bail due to prior convictions (section 515(9.1)).[44] This endorsement provision was the key element of the legislative context of the impugned provision (section 719(3.1)) which capped credit for pre-sentence custody in the event of such an

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[36] See discussion in *Moriarity*, *supra*, note 3, at paras. 42-44, 47 of *R. v. Généreux*, [1992] S.C.J. No. 10, [1992] 1 S.C.R. 259 (S.C.C.), revg [1990] C.M.A.J. No. 1 (C.M.A.C.).

[37] *Markhali*, *supra*, note 1, at para. 34. The statements from *R. v. Summers*, [2014] S.C.J. No. 26, 2016 SCC 26 (S.C.C.), are considered within the second category of indirect intrinsic evidence. Arguably, they should have been considered in the first category, since the statements in question are statements of purpose which the *Summers* Court imputed to the legislation. However, as the *Markhali* Court notes that the construction was part of an exercise of broader statutory interpretation, the *Markhali* Court may have had in mind *Summers* wider commentary on the scheme in placing it in that category.

[38] *Appulonappa*, *supra*, note 5, at paras. 49, 53-54.

[39] *Markhali*, *supra*, note 1, at paras. 31, 32.

[40] *Appulonappa*, *supra*, note 5, at para. 49, quoting Sullivan, *supra*, note 32, at 274-76.

[41] *Markhali*, *supra*, note 1, at para. 32. The case does make reference to the title of the Act, but without obtaining great illumination. The titles to certain statutes would seem to fall in between statements of purpose and legislative context, which may explain why this source is referred to where it is within *Markhali*'s analysis.

[42] *Appulonappa*, *supra*, note 5, at paras. 45, 49-57.

[43] *Markhali*, *supra*, note 1, at para. 33.

[44] *Id.*, at para. 35; *Criminal Code*, R.S.C. 1985, c. C-46.

endorsement. While it may seem puzzling that the Court also referred to its scrutiny of the endorsement provision rather than the cap provision as the "text" factor, the latter incorporated by reference the former, whose breadth was in question in its triggering the cap's effects, as the Court explained earlier.[45] Both prior cases of the triad also saw the text and legislative context considered (separately, in each case) within this category of sources recognized by the Rigorous Approach.[46]

The third category under the Rigorous Approach consists of evidence extrinsic to the actual and current legislation. This includes materials closely related to the legislation, such as prior versions of it, or minutes from the debates and committee meetings that led to it. Of the first of these, the Court in *Markhali* looked to but found little evidence of legislative evolution.[47] An example of such an analysis can be found, however, in *Appulonappa*, where the Court scrutinizes successive changes in the prohibitions on migrant smuggling dating back a century, and derives from this evolution an increasing desire by the legislator to distinguish between incidental or humanitarian forms of aid versus crime-related activities contributing to the entry of undocumented migrants.[48] Turning to the legislative history, it is this factor that *Markhali* considers at greatest length,[49] finding in the records of Parliamentary committee meetings evidence showing an objective of bolstering public safety by enhancing rehabilitation for violent and chronic offenders.[50] The Court had, as mentioned, acknowledged the perils of Hansard evidence, but these perils may have been partially muted by the Court's particular focus on explanations by the minister responsible, rather than other potentially less reliable comments from the Parliamentary record. In this respect, the Court said: "providing information and explanations of proposed legislation is an important ministerial responsibility, and courts rightly look to it in determining the purpose".[51] Both *Moriarity* and *Appulonappa* also examined the Parliamentary debate history.[52] Another extrinsic source is international

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[45] *Id.*, at paras. 10-11.

[46] *Moriarity*, *supra*, note 3, at para. 36 (text) and paras. 36-40 (legislative context); *Appulonappa*, *supra*, note 5, at paras. 35-39 (text) and paras. 46-48 (legislative context).

[47] *Markhali*, *supra*, note 1, at para. 36.

[48] *Appulonappa*, *supra*, note 5, at paras. 58-63. For another example, see *Big M*, *supra*, note 21, at paras. 48-53.

[49] *Markhali*, *supra*, note 1, at paras. 36-44.

[50] *Id.*, at para. 47.

[51] *Id.*, at para. 36.

[52] *Moriarity*, *supra*, note 3, at para. 45; *Appulonappa*, *supra*, note 5, at paras. 64-69.

law. The Court investigated this factor in *Appulonappa*, explaining that "[w]here legislation is enacted in the context of international commitments, international law may also be of assistance" in construing the legislative object.[53] In combination, these sources remain far from exhaustive of the category of extrinsic materials, as *Moriarity* noted, observing that "[c]ourts have used many sources to determine legislative purpose".[54] For instance, in *Chartrand*,[55] which *Appulonappa* cites, L'Heureux-Dubé J. looked at the social context in which the enactment was made, referencing, for example, academic texts and government-published relevant statistical evidence.[56] Whether the new Rigorous Approach inaugurated by *Markhali* will stretch far enough to encompass these forms of extrinsic sources or others is yet to be determined.

Beyond the above catalogue of sources, it is important to note that it is a holistic approach to the combined import of all the various sources that enables the purpose to emerge using the Rigorous Approach.[57] Alone, each source has its own frailties, as *Moriarity* points out, noting, for instance, that "as Prof. Sullivan wisely observes, legislative statements of purpose may be vague and incomplete, and inferences of legislative purpose [from indirect sources] may be subjective and prone to error".[58]

(ii) Manner in Which to Analyze the Sources

Markhali also reveals the manner in which the sources are to be analyzed under the Rigorous Approach. Here, *Markhali* departs from the analytical structure used earlier in *Moriarity*.

Moriarity employed an analytical structure of: (i) addressing the appellants' position on the purpose; (ii) addressing the respondents' position on the purpose; and lastly (iii) stating the Court's conclusion as to the purpose.[59] Within this structure, the sources are turned to and discussed in relation to the parties' contentions regarding them.[60] Where the court responds to both parties' contentions concerning the same

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[53] *Appulonappa*, *supra*, note 5, at paras. 33, 40-44.

[54] *Moriarity*, *supra*, note 3, at para. 31.

[55] *R. v. Chartrand*, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864, at 880-82 (S.C.C.) [hereinafter "*Chartrand*"].

[56] *Id.*

[57] See, for example, *Moriarity*, *supra*, note 3, at para. 32 referring to the "full context".

[58] *Id.*, at para. 31.

[59] *Id.*, at paras. 34-48.

[60] *Id.*, at paras. 35-45.

source, this requires the court to return to the source a second time. Thus, for example, in *Moriarity*, the *Généreux* precedent is discussed under the section pertaining to the appellants and again that of the respondents.[61] In *Moriarity*, the lower court's assertions were also looked at — together with the appellants' because of similarity in their positions.[62] Had their positions been more different, or had interveners been present and taken again quite different positions, it is uncertain whether the analysis would have required sections for each, considering the same sources of indicators of purpose each time. At the end of the sections containing the expressions of and responses to the parties' positions and arguments regarding the sources, *Moriarity* then stated the Court's own view of the purpose in a concluding paragraph.[63]

By contrast, *Markhali* follows an analytical structure that corresponds to its enumerated categorization of the authoritative sources: (i) legislative statements of purpose; (ii) the text, legislative context and scheme; and (iii) extrinsic sources.[64] A single comprehensive analysis of each source is conducted, following the enumerated order, each in turn.[65] The central focus is simply on emergent implications for the purpose that the court must construe, rather than on seeking evidence from the sources that supports or refutes the parties' claims regarding it.[66] Nevertheless, inevitably, within the analysis of each source, the examination and discussion of the sources does implicitly (and sometimes quite directly, sometimes less directly) respond to the positions of the parties and lower courts. Occasionally the analysis may also do so explicitly, as we see in *Appulonappa*, which employed a similar analytical structure, but lacked the canonical formulation and adherence to the prescribed order of consideration of sources additionally incorporated into the Rigorous Approach set out in *Markhali*.[67]

The analytical structure in *Markhali* is rigorous in that the structure inherently concentrates attention on all sources, and on all evidence of purpose attainable from each source, diminishing the risk of overlooking some source or some relevant evidence from a source. This is particularly important given the parties' inherent interest in proposing self-serving

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61 *Id.*, at paras. 41-44, 47.
62 *Id.*, at paras. 34-46.
63 *Id.*, at para. 48.
64 *Markhali*, *supra*, note 1, at para. 31.
65 *Id.*, at paras. 32-44.
66 *Id.*
67 *Appulonappa*, *supra*, note 5, at paras. 36, 52-54.

positions, which may well turn out sometimes to be opposite extremes — as the Court indeed concluded the parties' positions were in *Moriarity*.[68] Further, from case to case, more consistent results are likely to be achieved through an analytical scheme focused on the authoritative sources rather than parties' arguments. The approach is also rigorous in discharging the court's obligation of justification: unlike the party-focused analytical scheme, where the discussion focuses on rejecting the parties' contentions, *Markhali*'s source-focused analytical scheme leads to and supports the Court's ultimate conclusion in which the analysis culminates. In all these respects, the analytical structure of *Markhali*'s approach to purpose construction parallels the accepted rigorous approaches to statutory interpretation.

(iii) Depth of Analysis

Markhali's Rigorous Approach is also marked by its consideration of the relevant indicators in a depth that befits the Supreme Court's recognition of the "critical importance" of purpose constructions in many cases. While in *Markhali* itself, few of the consulted sources in fact disclosed relevant evidence, this depth was demonstrated through the comprehensive and meticulous examination of the legislative history. The Court devoted 10 paragraphs to its scrutiny, quoting the record six times, harmonizing conflicting pieces of evidence, posing and answering questions about the best ways of interpreting that evidence.[69] Blessed with access to more types of relevant evidence, one finds in *Appulonappa* a fuller picture of the thoroughness that characterizes the Rigorous Approach endorsed in *Markhali*. The Court in that case having identified, as mentioned earlier, the purpose as the central legal issue to be analyzed, careful inquiry attends each source. Thus, for example, it provides an average of six paragraphs to each of the authoritative sources available: legislative statements of object, the text, the legislative context, legislative evolution, legislative history, and international law.[70]

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[68] *Moriarity*, *supra*, note 3, at paras. 20-21, 47.

[69] *Markhali*, *supra*, note 1, at paras. 36-44, 47.

[70] *Appulonappa*, *supra*, note 5, at paras. 49-57 (legislative statements of object), paras. 35-39 (text), paras. 46-48 (legislative context), paras. 58-63 (legislative evolution), paras. 64-69 (legislative history), and paras. 40-45 (international law).

2. The Summary Approach

(a) The Old Regime

The Rigorous Approach to purpose construction laid down in *Markhali* contrasts with the typical practice of Canadian courts prior to the *Markhali* triad. While one can find considerable variability in the specific analysis used in one or another of the older cases, generally-speaking — and beyond inevitable exceptions[71] — these share a number of common features which in combination describe a Summary Approach opposite of the Rigorous Approach. The diversity of these cases and contexts makes choosing a truly representative set impossible. Thus, in order to illustrate these points, I draw on three example cases — *Heywood*,[72] *Law*,[73] and *Lola*[74] — that at least exhibit different modes of analysis in construals used for different Charter doctrines, but in all of which, the construed purpose was pivotal to the outcome of the case.

(b) Three Examples

Heywood is the seminal case on overbreadth, whereby the constitutional validity of a law hangs on a comparison between legislative means and objective. The judgment was a 5:4 split, where the majority and the dissent disagreed on the object, and as a result, on whether the law was unconstitutional. Those implications riding on it, the majority's purpose analysis consisted of a conclusory statement and invocation of the text, articulated, in one instance, as follows:

> The purpose of s. 179(1)(b) is to protect children from becoming victims of sexual offences. This is apparent from the prohibition which applies to places where children are very likely to be found.[75]

A very similar, but slightly longer, passage listed the places in question.[76] The dissent's more substantial purpose analysis focused

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[71] See, for example, *Chartrand*, *supra*, note 55; *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at paras. 62-70 (S.C.C.), varg [1984] O.J. No. 3379 (Ont. C.A.).

[72] *Heywood*, *supra*, note 13.

[73] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.), affg [1996] F.C.J. No. 511 (F.C.A.) [hereinafter "*Law*"].

[74] *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, 2013 SCC 5, [2013] 1 S.C.R. 61 (S.C.C.), popularly better known as *Eric v. Lola* [hereinafter "*Lola*"].

[75] *Heywood*, *supra*, note 13, at 794.

[76] *Id.*, at 786.

predominantly on expert witness testimony,[77] a source whose status is uncertain as yet under the new regime introduced in *Markhali*.

Law, an important case in the development of the Supreme Court's equality jurisprudence, was notable in its repeated highlighting of the importance of the legislative objective to whether differential treatment is discriminatory.[78] The case made no mention, however, of the importance of how that purpose is construed. The outcome in *Law* in fact came down to the statutory purpose construed by the Court. Analysis of the purpose consisted of stating the positions of the claimant and the government, and then asserting the Court's conclusion.[79] Sources mentioned were Hansard proffered by the claimant,[80] the claimant's admission before the Court that she agreed with part of the Government's position,[81] and judicial notice taken by the Court, supported by precedents.[82] There were in fact two ways in which the object thus construed resulted in rejection of the claim in *Law*. One was that denying younger widow(er)s a survivor benefit available to older widow(er)s did not substantively discriminate against younger ones because they were better able to replace the income of a deceased spouse on their own over the long-term, and the statutory aim, as asserted by the Government and accepted by the Court, was long-term not immediate need.[83] The other was that the Court construed the legislation as having an objective of ameliorating the situation of older widow(er)s, a group which the Court concluded through judicial notice was in greater need than younger ones.[84] Under the test applied, such a purpose was a factor in whether legislation was discriminatory.[85]

Lola was a case concerning unmarried spouses' obligations, where the purpose was key not only to whether the scheme breached the right to non-discrimination, but also whether the infringement of that right was proportionate. The Court was split in four different opinions. Justice LeBel and McLachlin C.J.C. saw the objective as couples' autonomy to choose the regime of spousal obligations they prefer, while Abella J. concluded that the objective was protecting vulnerable spouses, and Deschamps J. construed some of the provisions as autonomist and some

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77 *Id.*, at 808-11.
78 *Law*, *supra*, note 73.
79 *Id.*, at paras. 96-104.
80 *Id.*, at para. 97.
81 *Id.*, at para. 100.
82 *Id.*, at para. 101.
83 *Id.*, at para. 98.
84 *Id.*, at paras. 101-104.
85 *Id.*, at paras. 72-73, 88.

protective.[86] Justice LeBel's discussion did not clearly distinguish its analysis of purpose versus content versus effects; as regards the purpose, it was also preoccupied with whether the purpose was discriminatory, without independently construing the purpose.[87] The evidence most related to the objective comprised a case precedent and the legislative history.[88] While Abella J.'s opinion had recourse to numerous sources (the legislative context, academic commentaries, law commission reports, precedents, law and jurisprudence from other jurisdictions, legislative history, social history), the analytical structure governing its examination of them was unclear as it moved back and forth among them. Also unknown was what relative authority or weight the analysis gave to the different categories of sources, although law commission reports and cases from outside jurisdictions figured prominently.[89] The case outcome came down to the opinion of McLachlin C.J.C., whose conclusion that the scheme was discriminatory in effect though not in purpose created a 5:4 majority that found a *prima facie* infringement, but whose conclusion that the infringement was proportionate produced a 5:4 majority upholding the legislation. At the pivotal minimal impairment step of proportionality analysis, a subtle difference in construed purpose was decisive: While Abella and Deschamps JJ. pointed to ways one could preserve autonomy while impairing the section 15(1) right less, the Chief Justice noted that these didn't satisfy the test, for they distorted the statutory objective, being to provide couples not merely some measure of autonomy but maximizing their autonomy.[90]

(c) Common Features

Common to these three example cases are features of the Summary Approach that dominated purpose construction in the jurisprudence prior to the *Markhali* triad.

For starters, they lack a robust self-consciousness about the construction exercise and its importance. Even when the importance of

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[86] *Lola*, *supra*, note 74, at paras. 254-257 (LeBel J.), paras. 413, 435-436, 442 (McLachlin C.J.C.), *e.g.*, paras. 283-284, 294*ff.* (Abella J.), paras. 386-392 (Deschamps J.).

[87] *Id.*: see reasons of LeBel J. generally (paras. 1-282); see also para. 424.

[88] *Id.*, at paras. 207-226, 256 (*Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, 2002 SCC 83 (S.C.C.) precedent) and paras. 105-110 (legislative history).

[89] *Id.*: see reasons of Abella J. generally, at paras. 283-381. The opinions in the two remaining sets of reasons rely significantly on the analyses in the two aforementioned ones, and do not otherwise differ sharply in their approach to construing the legislative objective.

[90] *Id.*, at paras. 442-447.

the purpose is recognized, as it is implicitly by the dissent in *Heywood*, and explicitly by all in both *Law* and *Lola*, no similar recognition is apparent as regards the construction.

The overarching parameters of the Rigorous Approach, designed to focus attention on the theoretical rationales of the construction exercise while keeping a wary eye out for practical pitfalls, are therefore notably absent from the Summary Approach. Hence, in *Lola*, the legislative object and effects are regularly conflated by three of the four opinions, even while a conclusion by the fourth opinion that the legislation is discriminatory in effect but not in purpose is what decides the case outcome. In *Law*, we see the two aspects of the construed purpose cast in too general terms — older versus younger widow(er)s, ameliorative purpose versus lessening dignity — to actually rule out the nuance suggested by the claimant: that the statutory aim was to ameliorate the situation of those widow(er)s most in need[91] (including long-term), and that this would include not just older widow(er)s but also a subclass of younger widow(er)s not far from the age threshold and having other characteristics pushing them into the group most necessitous whose situation the aim was to ameliorate. The legislation's distinction by age would thus discriminate in effect, though not purpose, in the same way McLachlin C.J.C. concluded that the claimant suffered discrimination in *Lola*. If this is so, *Law* should have instead been resolved at the proportionality stage, the infringement justified on the basis that a too complicated system of determining need would make the whole ameliorative scheme unworkable. Returning to *Lola*, the dissenting opinions' insufficient appreciation of the need for precision regarding the purpose led them at the minimal impairment stage to rest their position on the possibility of alternate schemes that would lessen the infringement but also lessen autonomy, thus posing no challenge to a majority that had concluded that the legislative objective was to maximize autonomy. Again in *Lola*, the abiding preoccupation in LeBel J.'s reasons with judging the purpose as innocent of any discriminatory intent overlooked, even as it provided a voluminous and expert survey of the legislative background, the possibility that an objectively-presented clear construction of the purpose may have done more to persuade, and resulted in a less fractured Court. In *Heywood*, the cursory manner in which the majority addressed the critical question of the purpose was likely in part because it was done in the middle of, and as part of,

[91] *Law*, *supra*, note 73, at para. 96.

interpreting the statute, rather than construing the objective first, whereby its importance to analyzing and justifying a conclusion on overbreadth would presumably have encouraged a more substantial analysis. Lastly, the potential flaw in *Law* alluded to earlier could likely have been avoided had the Court tasked itself with harmonizing long-term need as an aspect of the purpose with the aspect of intending to help those most in need, a more nuanced group than just older versus younger, being the kind of generalization on an enumerated ground (age) that one expects should only be upheld where justified via section 1 of the Charter (or, where applicable, the affirmative action provision, section 15(2)).

The example cases also illustrate how the mechanics of the Summary Approach diverge from those of *Markhali*'s Rigorous Approach. As detailed, the opinions examined few sources of evidence of purpose. The exception to that was Abella J.'s reasons in *Lola*. Those reasons considered some of the indicia of purpose recognized as authoritative by the *Markhali* triad, but also some factors (law commission reports, law and jurisprudence from outside the jurisdiction, academic commentaries, social history) not yet considered under the *Markhali* regime. Likewise uncertain is what recourse the Rigorous Approach may or may not permit to expert witness testimony, a focus of the *Heywood* dissent. What these preceding comments further reveal is the disparity and unpredictability of which factors, besides the number of factors, the Summary Approach might call upon in purpose constructions. Beyond the sources, the example cases illustrate how the Summary Approach eschews analytical structure in the purpose construction — including where the same cases *do* strongly adhere to that characteristic in interpreting the statute itself. Further, the Summary Approach is widely inconsistent, but typically incomplete, in its commitment to examining any particular source. Overall the analysis is often cursory. Where it is not, its length frequently comprises long descriptive passages on, for instance the legislative history, rarely interrupted by analysis, which is instead left to a summary statement at the end of it.

In sum, the qualities that define the Rigorous Approach — reflective, cautious, comprehensive, disciplined, and analytically deep — are absent from the Summary Approach. The latter's opposite qualities could be cast in virtuous terms — simple, quick, free, flexible, and efficient. But they could also be seen, in comparison both to the Rigorous Approach to purpose construction, and to the much longer-endorsed rigorous approaches to statutory interpretation, as far too "fast and loose".

III. Implications of the New Rigorous Approach to Purpose Construction for Future Charter Jurisprudence

1. Some Notable Charter Analyses Potentially Impacted by the New Approach

The advent of a new approach to purpose construction may impact a number of legal analyses prescribed by Canadian Charter jurisprudence within which statutory purpose plays an important role. The following are a few noteworthy examples.

(a) Overbreadth

Overbreadth directly compares the scope of a law with its object, so that any law the doctrine is applicable to will be declared unconstitutional if that "law goes too far and interferes with some conduct that bears no connection to its objective."[92] A principle of fundamental justice under section 7 of the Charter, it applies to any law which may impinge on an individual's life, liberty or security interests.

Though its early career was relatively inauspicious, overbreadth has emerged in recent years as one of the most potent bases for challenging legislation under the Charter. Some prominent examples of its successful invocation by claimants in recent years include *Bedford* (prostitution), *Carter*[93] (assisted suicide), *Appulonappa* (human smuggling), and *Markhali* (sentencing). Since it is unlikely that a law which fails section 7 can be saved under section 1,[94] a successful claim need only show the said disparity between the object and scope of the relevant legislation. As *Markhali* and *Moriarity* noted, the construed purpose then becomes critically important to the subtle comparison that answers the question of the legislation's validity, while the analysis that led to it becomes equally important to a court's justification of that conclusion. It is surely no coincidence, therefore, that it was within a line of cases concerning overbreadth that the Rigorous Approach emerged, with the careful attention and systematic investigation the

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92 *Bedford*, *supra*, note 15, at para. 101.
93 *Carter*, *supra*, note 16.
94 *Markhali*, *supra*, note 1, at para. 57.

Approach brings to the question of the statutory objective. Notably, this Rigorous Approach does not appear to have altered in any way the substantive threshold that must be met. Both *Markhali* and *Appulonappa* saw laws declared overbroad, while in *Moriarity* the law was upheld. Rather, as with the similar rigour that guides accepted approaches to statutory interpretation, what *Markhali*'s approach offers is greater confidence — both at the stage of investigation, and at the stage of justification — that whatever conclusion is reached on the purpose is correct.

(b) Discrimination

Whether differential treatment prescribed by law is discriminatory under the Charter's section 15(1) right to equality depends, besides effects, on the objective of the law. The *Law* and *Lola* cases discussed earlier were both examples where the legislative object played a pivotal role in the resolution of the overall discrimination claim at bar. Another prominent example was *Children's Foundation*,[95] where the majority deemed that exempting the use of corrective force on children from assault laws was not discriminatory, because it was for the purpose of the guidance, discipline, and education of children.[96] Meanwhile, the dissenting opinions viewed the objective as instead relating to relieving the liability of the adults who may be called upon to use such force.[97]

Under the current test for discrimination, the second step asks whether the differential treatment perpetuates prejudice or disadvantage, whether by effect or purpose.[98] In cases where it is the purpose that is impugned, it is therefore crucial, in answering whether it perpetuates prejudice or disadvantage, how the purpose is construed. Hard cases, like those mentioned, magnify the importance of that construal. In such cases, the Rigorous Approach introduced by *Markhali* provides greater security that the purpose will be accurately determined and thoroughly justified.

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[95] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General*), [2004] S.C.J. No. 6, 2004 SCC 4, [2004] 1 S.C.R. 76 (S.C.C.), affg [2002] O.J. No. 61 (Ont. C.A.).

[96] *Id.*, at para. 59.

[97] *Id.*, *e.g.*, at para. 102 (Binnie J., dissenting in part) and paras. 228-232 (Deschamps J., dissenting).

[98] *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17 (S.C.C.), affg [2006] B.C.J. No. 1273 (B.C.C.A.); *Withler v. Canada (Attorney General*), [2011] S.C.J. No. 12, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 20 (S.C.C.), affg [2008] B.C.J. No. 2507 (B.C.C.A.).

(c) Proportionality

The most far-reaching section of the Charter is section 1, by which limitations of the other rights may be justified and thus upheld, failing which the law creating the limitation is otherwise unconstitutional. The justifiability of such limitations is determined by the proportionality analysis ordained in *Oakes*.[99] The first three of the *Oakes* test's four steps all depend on the statutory objective: The first inquires whether that objective is pressing and substantial. The second queries whether it is rationally connected to the legislative means supposed to give it effect. The third step, long the lynchpin of justification under *Oakes*, asks whether the limit is a minimal impairment of the right, given the legislative purpose. In practice, the question there is whether the measure falls "within a range of reasonable alternatives" for attaining the purpose,[100] in consideration of the extent of its collateral impairment of the right. To answer any of these questions, the legislative object must be construed. A sound and defensible purpose construal is thus essential to all three of these steps of proportionality analysis. And it is of maximal importance at the pivotal stage of minimal impairment, where the outcome turns on an often subtle judgment of whether a given limitation puts a scheme on this or that side of the outer bound of reasonable alternatives for attaining the object. This was evident in the deciding of the *Lola* case, described earlier. The thoroughness of the Rigorous Approach offers perhaps its greatest promise in proportionality analysis, where a fair and accurate account of the objective undergirds what will inescapably require a difficult and delicate balancing of individual and communal interests, comparing at the pivotal step the interests sacrificed as part of the limitation on the individual's right with the societal interests that it is the purpose of the legislation to advance.

It should be noted that in claims of types where the objective has already had to be construed before reaching the justification stage, it can then be reused, without the exercise needing to be repeated. This is evident from *Markhali* where the Court seized the opportunity at the justification stage to rely on the object it had construed earlier using the Rigorous Approach at the overbreadth stage.[101]

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[99] *Oakes*, *supra*, note 18.

[100] *Lola*, *supra*, note 74, at para. 439; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 37 (S.C.C.), revg [2007] A.J. No. 518 (Alta. C.A.).

[101] *Markhali*, *supra*, note 1, at para. 59.

(d) Other Charter Analyses

The preceding serve only as a few examples of how often questions of statutory purpose are central in Charter jurisprudence. This in turn suggests the need to adhere to a *Markhali*-style Rigorous Approach in these purpose constructions, much as similarly-rigorous approaches to statutory interpretation are invariably followed where the meaning of legislation is at issue.

Additional examples of such issues can be provided. For example, some Charter claims involve an allegation that the object of a law is to infringe a right — such as freedom of religion or expression.[102] It is then essential to accurately construe the legislation in order to answer whether such was or was not the intent. Also, analysis governing the section 8 right to be free from unreasonable search and seizure requires, at the second step, that the authorizing law be reasonable. This in turn prescribes a balancing of the societal objectives of the law with the intrusion on the privacy interests of the individual affected.[103] An accurate and reliable construal of the legislative objectives behind the search or seizure is thus again invaluable. In the Charter jurisprudence on freedom of expression, the threshold for a *prima facie* infringement is, apart from violence, so low that almost invariably the question immediately turns to proportionality. As a result, most of the Charter doctrine proprietary to the speech right is in fact analyzed as a matter of adjusting the threshold for justification. An aspect of this doctrine is the type of speech at issue: the justification threshold is lower for speech at the periphery of the right such as hate speech versus speech near the core of the right such as political speech.[104] Accordingly, it is important to carefully identify and characterize the type of speech that the legislation targets for restriction, in the service of whatever larger purpose the legislation serves. The line can be subtle, as cases involving political advertising,[105] pornography,[106] and the propagation

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[102] See, *e.g.*, *Big M*, *supra*, note 21 (religion); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.), revg [1990] O.J. No. 122 (Ont. C.A.) (expression).

[103] See, *e.g.*, *R. v. Saeed*, [2016] S.C.J. No. 24, 2016 SCC 24, at paras. 5, 93 (S.C.C.), affg [2014] A.J. No. 739 (Alta. C.A.); *R. v. Fearon*, [2014] S.C.J. No. 77, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 44-45 (S.C.C.), affg [2013] O.J. No. 704 (Ont. C.A.).

[104] See, *e.g.*, *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 112-120 (S.C.C.), varg [2010] S.J. No. 108 (Sask. C.A.) [hereinafter "*Whatcott*"].

[105] See, *e.g.*, *Harper v. Canada (Attorney General*), [2004] S.C.J. No. 28, 2004 SCC 33, [2004] 1 S.C.R. 827 (S.C.C.), revg [2002] A.J. No. 1542 (Alta. C.A.).

[106] See, *e.g.*, *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2, [2001] 1 S.C.R. 45 (S.C.C.), revg [1999] B.C.J. No. 1555 (B.C.C.A.).

of discriminatory ideologies,[107] for example, have demonstrated. The Rigorous Approach to legislative purpose construction introduced by *Markhali* may aid these Charter analyses as well.

2. Implications of the New Rigorous Approach

The new Rigorous Approach to purpose construction may bring a number of important benefits to the adjudication of Charter cases where the statutory purpose is a significant issue.

(a) Accuracy and Reliability

Markhali's Rigorous Approach may be expected to reduce the chance of error by courts charged with construing a purpose. Several facets of the Approach contribute to this likelihood. To begin with, the Approach's express recognition of the "critical importance" of the construction encourages a court to discharge the obligation implicit in that importance by demonstrating a high quality construal. Further, the Approach's overarching parameters anchor attention on the theoretical rationales guiding a proper construal, and point out specific common pitfalls that may ensnare less-than-careful efforts. Moreover, the mechanics of the construction — including a categorized set of authoritative sources, a structure that seeks each source's available evidence rather than reproducing each party's arguments, a prescribed order of analysis tied to general principles of evidential reliability, and an analytical depth in considering the evidence from each source — together produce a comprehensive, systematic, and thorough construction. A construal with these features is far less likely to overlook a source or available evidence from the source, to be led off course by self-serving party positions, or to provide only a superficial examination of the evidence, leading to error. This is at the core of what marks the approach as "rigorous".

(b) Consistency

Because the Rigorous Approach sets out the authoritative sources and the prescribed steps to follow in construing a purpose from them, it should produce more consistent results than the pre-*Markhali* regime

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[107] *Whatcott*, *supra*, note 104.

where the sources consulted and process followed radically varied court to court and case to case. This in turn should decrease the need for appellate courts to revisit and revise lower courts' purpose constructions, and therefore also the burden on them of doing so.

(c) Transparency and Predictability for Parties to Disputes

Since the Rigorous Approach employs a prescribed format explicitly laid out in *Markhali*, it offers greater transparency regarding the process used to construe a purpose. This also makes the basis upon which it can be expected to decide a statutory objective more predictable. Meanwhile, the greater consistency of results also makes results more predictable. Together, these facets of greater predictability should enable parties to assess their prospects in advance of going to court or even of commencing litigation, and to plan accordingly. Even a slight decrease in trials of these typically quite "heavy" cases might be welcome, as far as doing its share, given an overburdened court system and its consequent costs in access to justice for parties. Where a judgment has been rendered, the same qualities of predictability and transparency apply to what the judgment can be expected to provide by way of justification, diminishing the likelihood of surprise and any resulting sense of unfairness. Again, this in turn may somewhat reduce the frequency of appeal from the class of relevant cases.

(d) Better Adversarial Debate Regarding the Purpose

In our party-driven legal system, court judgments are generally as good as the adversarial debate that informs them. In this regard, the Rigorous Approach to purpose construction should guide and discipline the evidence and arguments that litigants bring to court to support their position on the legislative object. It won't do for a party to cherry-pick one self-serving statement from the legislative history, and ignore other authoritative sources. Over time, the iterative sequence of litigants responding to the feedback of courts' future applications of the Rigorous Approach is likely to lead to case records boasting progressively better and more complete evidence of purpose, and sounder argumentation and counter-argumentation regarding it. This will facilitate the best possible adjudication by courts of claims involving statutory objective.

(e) Clearer Guidance to Legislatures

In our system of government with its separation of powers and judicial review checking unconstitutional action by the state's democratic organs, *Markhali*'s Rigorous Approach to purpose construction may significantly improve "communications" between legislatures and courts. Because the Rigorous Approach is both transparent and consistent, legislatures should generally be better-equipped to appreciate what makes laws unconstitutionally overbroad, discriminatory in purpose, unjustifiable in their rights limitations *etc*. This will encourage legislatures to be much more clear about the legislative object, within the authoritative sources that courts look to as indicia under the Rigorous Approach. This in turn would alleviate courts being so often in situations like that of *Markhali*: having to construe the purpose — with the constitutionality of the law riding on it — with useful evidence absent from most of the sources, and the legislative history containing a diversity of conflicting statements related to objectives which the court must harmonize. The clearer "feedback" that the Rigorous Approach provides legislatures about what makes laws overbroad, discriminatory in object, disproportionate limitations of rights *etc*. should equally help legislatures tailor the end opposite the purpose in such comparisons (*e.g.*, the legislation itself, the limit it effects on a right, *etc*.). There are two reasons for this. The first is that, because the legislature, as mentioned, will strive to make the objective itself clearer, it will therefore have a clearer benchmark to keep the legislation and its effects in correspondence with it as it goes through the drafting process. Second, if draft legislation or its effects start to lose that correspondence as the drafting process progresses, it will be more clearly and immediately apparent to legal counsel advising on the drafting process, thus making it easier for corrective action to be taken by the legislature before enactment, litigation, judicial review, and invalidation (at such great cost in resources) ultimately provide the same feedback.

(f) Public Confidence in the Rule of Law and the Integrity of Courts

Because the Rigorous Approach offers more thorough analysis and justification, greater transparency and consistency, improved communications and diminished conflict between legislatures as democratic organs and courts as guardians of the Constitution, it consequently contributes to enhancing public confidence in the integrity

of the justice system. Conclusory purpose constructions inevitably give the impression of being arbitrary and lacking in legal justification. Meanwhile, *ad hoc* purpose constructions at the centre of judgments upholding or striking down legislation respecting controversial matters have at times even led to inflammatory accusations of either legislative apology-making, on the one hand, or activism on the other.[108] The Rigorous Approach, because it prescribes in advance the manner in which it will construe the objective, focuses in so doing on the sources rather than the parties, and is comprehensive and thorough, produces an opposite impression: that of an exercise based profoundly in law at every step, and applied with mechanistic impartiality. It is useful once again, to look by analogy at the closely related matter of statutory interpretation. In substance, it is an exercise that could generate constant controversy, undermining the integrity and function of courts, on grounds of alleged legislative re-drafting. Instead, the rigour that has long characterized any of the generally accepted approaches to statutory interpretation — which, as mentioned, are analogous to and intersect the Rigorous Approach to purpose construction — results in statutory interpretation being perceived by outsiders as the epitome of a "dry" exercise in neutral application of legal technique by specially-trained experts. So too may *Markhali*'s Rigorous Approach do for purpose construction, where the charge sometimes otherwise levelled is one of revisionist policy-making. For these reasons, *Markhali*'s Rigorous Approach to purpose construction strengthens the Rule of Law and helps shelter courts from allegations of overreaching.

IV. Some Remaining Issues to be Resolved Regarding the New Rigorous Approach to Purpose Construction

1. When to Use the Rigorous Approach versus the Summary Approach

Not surprisingly given the newness of the Rigorous Approach, some issues around it remain to be worked out over future cases.

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[108] For the latter, see, *e.g.*, "Judicial Activism in Canada: Charter Fights", *The Economist* (July 7, 2014). For the former, see, *e.g.*, George Jonas, "Supreme Court puts the final nail in the coffin of religious freedom", *National Post* (February 28, 2012).

One of these is the question of when the Rigorous Approach is called for, versus when the Summary Approach might be adequate or appropriate. In addressing it, the Supreme Court will first have to decide whether it prefers to take an anticipatory approach to that question and answer it expressly, or to let actions speak for themselves in resolving the question implicitly and incrementally. As I see it, the first approach would be better in this instance in order to support the rationales served by the promulgation of a Rigorous Approach in the first place. Specifically, in the absence of a rule for when the Rigorous Approach applies, its *ad hoc* use and non-use will appear arbitrary, undermining the Rule of Law and leading to complaints about equal (procedural) justice. By contrast, if a rule is presented, it can always be revised as new insights gradually emerge. This refinement is our court system's very stock-in-trade.

Regarding the rule itself, like any rule of law, it should embody a rationality that explains the effects it produces, and must be adhered to consistently. A sensible and flexible startpoint might be a rule that the Rigorous Approach is required wherever the purpose is a significant issue before the court, whether on its own (such as where it is alleged that the object is to infringe a Charter right), or else as part of a larger legal issue before the court (such as in the examples given in Part III). By contrast, if the purpose is only to be cited as background or context, as relevant but not significant evidence, or as an element of a larger claim the whole of which the court does not consider to merit full consideration, then the Summary Approach may be more appropriate in such cases for reasons of expediency. As to whether a standard based on the significance of the objective to the outcome is capable of consistent adjudication, it seems to be that it is the kind of decision courts must constantly and inevitably decide in weighing evidence, arguments, the merit of claims, competing interests or considerations, *etc*.

2. Scope of Application Outside of Charter Jurisprudence

Another question remaining to be resolved is, whether the Rigorous Approach has a scope of application that reaches beyond Charter analyses? Having recourse again, by analogy, to statutory interpretation, a task much akin to and related to purpose construction, one observes that similar approaches to statutory interpretation are used very broadly, without the declaration of pre-determined restrictions in potential applicability. As noted earlier, the Rigorous Approach to purpose construction has much

in common, at the level of rationales for its use, governing principles, and concrete sources of evidence, with the general accepted approaches to statutory interpretation.[109] Thus, it seems to me, there is no evident reason why *Markhali*'s scope of application need be limited to Charter issues.

Elsewhere in constitutional law, the purpose of a law is an important factor in determining its pith and substance within division of powers cases. Arguably, a significantly more rigorous approach to consideration of the legislative object has already long been used in these division of powers cases than in Charter cases.[110] Nevertheless, the systematic aspect, analytical structure, and thoroughness of *Markhali*'s Rigorous Approach to purpose construction seem capable of enhancing that part of pith and substance analysis. Doctrines specific to certain powers also sometimes mandate construal of the statutory purpose. For example, valid criminal law is said to require a criminal purpose besides a prohibition and a penalty.[111] The latter two questions are of form, often easily answered, leaving the purpose as the more difficult question. *Markhali*'s Rigorous Approach would seem well matched with the needs in that context.

Beyond constitutional law, a question often confronted in administrative law is whether a state body or official has exceeded the discretion conferred by law. An important factor in determining this is the statutory purpose underlying the discretion. As Rand J. famously said in *Roncarelli v. Duplessis*:

> 'Good faith' in this context … means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose....[112]

Subtler cases would particularly benefit from the kind of accurate and reliable construal of the purpose that *Markhali*'s Rigorous Approach offers.

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[109] *Appulonappa*, *supra*, note 5, at para. 33. On statutory interpretation, see more generally Sullivan, *supra*, note 32.

[110] See, *e.g.*, *Hodge v. The Queen (Canada*), [1883] UKPC 59, [1883] 9 A.C. 117 (J.C.P.C.); *CIGOL v. Saskatchewan*, [1977] S.C.J. No. 124, [1978] 2 S.C.R. 545 (S.C.C.), revg [1975] S.J. No. 445 (Sask. C.A.); *R. v. Morgentaler*, [1993] S.C.J. No. 95, [1993] 3 S.C.R. 463 (S.C.C.), affg [1991] N.S.J. No. 312 (N.S.C.A.).

[111] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1948] S.C.J. No. 42, [1949] S.C.R. 1 (S.C.C.), affd [1951] A.C. 179 (U.K.P.C.).

[112] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121, at 143 (S.C.C.), revg [1956] J.Q. no 27 (Que. Q.B.).

Many other possibilities throughout the law could be mentioned. It will be for future jurisprudence to determine whether *Markhali*'s Rigorous Approach is — like similar approaches to the related legal task of statutory interpretation — of potentially broad application across diverse areas of law wherever a spotlight is placed on the statutory objective, or whether it is to be restrictively applied only to Charter claims.

V. CONCLUSION

The Rigorous Approach to purpose construction introduced in *Markhali* heralds an important advance in Charter jurisprudence, with potentially far-reaching future implications across Canadian law. Long the "soft underbelly"[113] of the Charter, questions of legislative objective are now, post-*Markhali*, slated to be put to the rigours of a comprehensive, systematic, in-depth analysis before they are permitted to decide, through their key role in doctrines like overbreadth, discrimination, and proportionality, whether laws are to be upheld or struck down. Beyond the gains in accuracy, reliability, clarity, and consistency entailed by the Rigorous Approach, the advance may yield benefits for all legal actors in the adjudicative process: parties may rely on greater predictability to plan; courts might see more complete and robust adversarial debate; legislatures may gain clarity allowing them to correct constitutional defects at the point of origin; the justice system may enjoy enhanced public confidence in the very contexts where it has sometimes been most questioned. While the applicability outside the Charter of *Markhali*'s Rigorous Approach to statutory purpose construction is not yet known, conceptually it would seem capable — analogously to similar approaches to statutory interpretation — of broad application across Canadian law, with similar salutary effects.

[113] Attributed to British Prime Minister Winston Churchill.