A PRESCRIPTIVE MODEL FOR DECISION-MAKING IN THE SUPREME COURT OF CANADA**

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I. INTRODUCTION

Americans have long been Supreme Court watchers[1] but Canadians have only recently taken up this legal pastime.[2] Yet in order systematically and comparatively to criticize judgments of any court and, in particular, of a final court of appeal, a model for judicial decision-making is necessary.

To this end, the purpose here is to formulate a workable prescriptive model for decision-making in the Supreme Court of Canada, against which actual judgments of the Court may be assessed. The model is a functional one in that it is based on the fulfillment of the purposes of the substantive law. Its statement is relatively simple, but since the substantive law deals with an infinite variety of factual situations, when applied, the model can also take on a limitless number of precise forms. Its flexibility is the key to its utility.

To begin, the general statement of the model will be set out. Next, a number of particular manifestations of the model will be considered. Finally, two judgments of the Supreme Court — *Montreal Trust Co. v. Canadian Pacific Airlines Ltd.*[3] and *Ludecke v. Canadian Pacific*

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[1] Indeed, court watching in general was the central preoccupation of American realists. Some of the more extreme realist writers were of the opinion that the only source of law was the decisions of the courts. Typical of this point of view was the famous *dictum* of Oliver Wendell Holmes that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, at 461 (1897). J.C. Gray carried this predictive definition of law to the extreme and stated that "all law is judge-made law", maintaining that even statutes were not law until recognized by judges. *See* J. GRAY, THE NATURE AND SOURCES OF LAW 119 (1909).

[2] P. WEILER, IN THE LAST RESORT (1974) engendered this new focus of attention within the legal community and, in particular, the legal academic community. The publication of the inaugural volume of the SUPREME COURT LAW REVIEW in 1980 exemplified this continuing interest. The recent constitutional debate has dramatically increased public awareness of the Supreme Court and the very real importance of its decisions.

[3] [1977] 2 S.C.R. 793, 72 D.L.R. (3d) 257.

Airlines Ltd.[4] — will be assessed as examples of the way in which the model can be used in evaluating actual court decisions.[5]

II. General Statement of the Model

The model has been formulated with two requirements in mind. First, the model ought to work so as to enable one to read a judgment and decide, in a practicable way, whether it should or should not be followed. Second, it ought to provide a prescription for judicial decision-making which would ensure that litigants are treated fairly, that is, that justice is done. In this regard, Rawls's conception of "justice as fairness" is a useful standard.[6] Both are necessary in order for law to be accepted by the ordinary citizen.[7]

The model can be generally stated as follows. The primary objective of a judge should always be to do justice. The extent to which this has been achieved can be tested at two levels. At the level of the particular, did the judge do justice to the particular litigants before him, given the context of the particular fact situation? At the level of the general, did the judge positively contribute to the general development of the law and, more specifically, did the judge give guidance to lawyers and lay people as to how future similar cases will be decided? So far, the model is not yet workable. It is made so by requiring that the judge decide a case in a way which will best attain the purposes of the relevant substantive law. This statement is necessarily very general because the substantive law must deal with an infinite variety of factual situations. The requirement makes the model workable because real life factual situations are involved, something with which all judges and, indeed, all lay people, are familiar. The judge is most likely to do justice to the particular litigants and to contribute positively to the general development of the

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[4] [1979] 2 S.C.R. 63, 98 D.L.R. (3d) 52.

[5] In formulating the prescriptive model for decision-making in the Supreme Court of Canada, the question of whether the composition or jurisdiction of the Court should be changed will not be considered. Further, the fact that "certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument", that is, that are not appropriate for resolution by way of adjudication, will not be considered. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, at 371 (1978). *See also* Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406, at 420-26 (1968).

[6] J. RAWLS, A THEORY OF JUSTICE 11 (1971).

[7] In a public law context, Dworkin has said that government institutions will only be accepted by citizens if those institutions are designed and operated so as to minimize the risk of error and, therefore, minimize the risk of injustice. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). This will be achieved only if the government takes the rights of its citizens seriously. *Id.* at 186, 197, 205. Relating this public law perspective to the private law perspective of a litigant before a judge, it is clear that Dworkin's rights thesis, in essence, admonishes judges to take the rights of litigants seriously in order to minimize the risk of injustice.

law if he consciously identifies the purposes of the law and attempts to resolve the matter before him so as to best attain those purposes. The model is clearly derivative from the works of Llewellyn, Dworkin and Renner; the central requirement of justice derives from Llewellyn[8] and Dworkin,[9] the two "levels of testing" from Llewellyn,[10] and the identification of functions from Renner.[11]

It must be emphasized that, both in the formulation of a model for judicial decision-making and in its application, value judgments must be made. To require the doing of justice as the primary focus of the model is itself a value judgment. Further, what is "justice"? What is "fairness"? And what are the purposes of any part of the substantive law? It must be clearly recognized that "competing purposes"[12] or "competing in-

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[8] The goal of justice was a central theme of Llewellyn's writings. The following is typical of his forthright style: "[When confronted by the] man who does not see the drive for justice as a prime good in law . . . the only thing you can do is knock him down — and, you hope, out." *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24 n. 15 (1960) (attributed to Sumner).

[9] Dworkin insists that any prescription for judicial decision-making must "satisfy our sense of justice". *See supra* note 7, at 123.

[10] Llewellyn styled the requirement of doing justice to particular litigants as the "quest" for "decency", "justice" and "reason". *See supra* note 8 at, *e.g.*, 59, 67, n. 61, and 121. Llewellyn styled the requirement that judgments positively contribute to the general development of the law as the goal of "reckonability", that is, being able to predict decisions of appellate courts based on previous decisions. *See supra* note 8, at 19-61.

[11] The true functions of law were the central theme of K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1949). Although Renner did not admonish lawyers, explicitly or implicitly, to pay attention to the functions and purposes of law (if anything, his advice to lawyers was just the opposite!), the merit of his work is aptly described by Otto Kahn-Freund in his introduction to Renner's work: "It is as a guide to essential realities that Renner's book needs to be read, and that it teaches a permanent lesson." *Id.* at 43. Renner's analysis compels one to ask what the purposes of the substantive law are and whether a particular decision furthers those purposes. Going one step back, his analysis compels one to ask what the purposes of the substantive law *should* be. In both regards, Renner's lucid revelation of the discrepancies which can exist between reality and law, that is, between the real social functions of the law and its apparent functions as stated in the norms or rules of law, suggests that one should analyze decisions of judges to determine what the real effect thereof is, that is, what the real purposes being served are. Kahn-Freund, in a note to Renner's work, suggested that Renner's method can and should be usefully employed to analyze legal institutions in the context of the particular fact situation in which they are involved; the same legal norm can serve different social functions in different factual situations and the judge should specifically and explicitly determine those social functions in order to differentiate what in reality may be totally different situations involving the same norms. *Id.* at 193-94 n. 212. Lon Fuller also was very concerned with the functions of law although, unlike Renner, he thought that it was and ought to be the business of the lawyer to take account of those functions. *See* Fuller, *supra* note 5, *passim* but particularly at 372-81, 392.

[12] Fuller, *supra* note 5, at 381.

terests''[13] exist in life and that choices among them will always have to be made. The goal in making such choices must always be the ''goal of rightness''.[14] The necessity of making choices in the judicial process brings to mind the hackneyed debate between those advocating judicial activism and those advocating judicial restraint. These words can often have little meaning since the distinction between them is a matter of degree. In all cases, judges must exercise some creativity. It is too easy to say that judges should exercise restraint or activism without indicating in practical terms how they should do so. The questions to be answered, without the use of convenient but meaningless labels, are: how should judges perceive their role and how should they then fulfill that role? Another pitfall to be avoided, as identified by Dworkin from his observations of the United States Supreme Court, is the ''false choice between judicial activism as the program of moral crusade and judicial restraint as the program of legality''.[15] As Dworkin pointed out, it was activists on the Supreme Court who initially opposed the New Deal legislation of the 1930's. The distinction in the literature between judicial activism and judicial restraint is useful only to the extent that it focusses attention on what perception a court has of its role. This perception should be clearly defined if the court is to do its job well. Does the Supreme Court of Canada have a clear perception of its role? If it does, it is not always apparent. In some judgments the Court has seized opportunities to clarify and develop the law creatively. In other judgments it has taken a narrow approach in its reasoning, resulting in injustice to the particular litigants and an ossifying of its previous mistakes in interpreting the law.[16] Of extreme interest in this regard are the comments concerning the role of Judges of the Supreme Court made by Laskin C.J.C., dissenting, in *Harrison v. Carswell*.[17] Laskin C.J.C. stated, *inter alia*:

> The observations I am about to make about the *Peters* case carry into two areas of concern respecting the role of this Court as the final Court in this country in both civil and criminal causes. Those areas are, first, whether this Court must pay mechanical deference to *stare decisis* and, second, whether this Court has a balancing role to play, without yielding place to the Legislature, where an ancient doctrine, in this case trespass, is invoked in a new setting to suppress a lawful activity supported both by legislation and by a well-understood legislative policy.

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[13] Harrison v. Carswell, [1976] 2 S.C.R. 200, at 210, 62 D.L.R. (3d) 68, at 75 (Laskin C.J.C.). *See* text accompanying notes 17-23 *infra*.

[14] *Supra* note 8, at 41.

[15] *Supra* note 7, at 148.

[16] *E.g.*, Ludecke v. Canadian Pac. Airlines Ltd., [1979] 2 S.C.R. 63, 98 D.L.R. (3d) 52, considered in detail at text accompanying notes 73-98 *infra*. Examples of cases in which the Court's judgments have done justice to the particular litigants and positively contributed to the general development of the law are Asamera Oil Corp. v. Sea Oil & Gen. Corp., [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1 and A.V.G. Management Science Ltd. v. Barwell Devs. Ltd., [1979] 2 S.C.R. 43, 92 D.L.R. (3d) 289

[17] *Supra* note 13.

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> This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions.
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> I do not have to call upon pronouncements of members of this Court that we are free to depart from previous decisions in order to support the pressing need to examine the present case on its merits.[18]

The analysis of Laskin C.J.C. as to the applicability of the law of trespass to the public areas of shopping centres appears to spring from a general approach to precedent or to criteria for decision that entails asking whether the theory underlying the precedent or criterion "square[s] with [the] economic or social fact under the circumstances of the present case".[19] Laskin C.J.C. considered the second area of concern identified by him by recognizing that fact situations often involve "competing interests".[20] In such cases, the Court must necessarily undertake a "balancing of rights, a consideration of the relativity of rights involving advertence to social purpose".[21] Dickson J., for the majority, considered the role of the Court as follows:

> The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function? There are many and varied answers to this question. Holmes, J. said in *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205 at p. 221: "I recognize without hesitation that judges do and must legislate, but they can do it only interstitially; they are confined from molar to molecular actions". Cardozo, *The Nature of the Judicial Process* (1921), p. 141, recognized that the freedom of the Judge is not absolute in this expression of his view:
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> > This judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.[22]

While both Laskin C.J.C. and Dickson J. recognized the ability of the Supreme Court to act creatively, this agreement hides fundamental differences in their conceptions of the Court's role. Laskin C.J.C. seemed to suggest that the Court has a duty to act creatively whereas Dickson J. seemed to limit the Court's role by saying only that it has the

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[18] *Id.* at 202, 205, 62 D.L.R. (3d) at 69, 71, 72.
[19] *Id.* at 208, 62 D.L.R. (3d) at 73.
[20] *Id.* at 210, 62 D.L.R. (3d) at 75.
[21] *Id.* at 209, 62 D.L.R. (3d) at 75.
[22] *Id.* at 218, 62 D.L.R. (3d) at 82.

"power" to so act. Further, Laskin C.J.C. stated that the Court must consider what purposes or interests the law serves and, where those purposes or interests compete, make necessary choices among them. Dickson J. took a more conservative approach and said that the Court must adhere to "established concepts" and "consecrated principles". In short, while each advocated judicial creativity, the differences between them, which initially might be dismissed as no more than differences in degree, are significant.[23] Dickson J.'s more conservative, limited view of the role of the Supreme Court has been shaped largely by his historical perception of that role. Speaking extra-judicially, he recently said:

> Traditional perception of our Court conformed with unique features which circumscribed its role. First, as the Supreme Court does not draw its powers from within the four corners of the *British North America Act*, it is not a visible constitutional institution, possessed of independent and inherent authority. Second, in years prior to 1949, it was subordinate to the Judicial Committee of the Privy Council, the colonial supervisor and final appellate court for Canadians. It was not until 1949 that the Supreme Court became of age as Canada's court of last resort. Third, until recently, the Supreme Court adjudicated most frequently upon matters of private law. . . .
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> The Court's task brings with it the great responsibility of applying and developing the laws of Canada. The role of our judiciary and the attitudes

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[23] The problem of the judicial role has, alternatively, been characterized as a distinction between the judge exercising the role of a "political actor" on the one hand and the role of an "adjudicator" on the other hand. *See, e.g.*, Weiler, *supra* note 5. According to one commentator, the writings of Martin Shapiro epitomize the former "political jurisprudence". *See* MacGuigan, *Precedent and Policy in the Supreme Court*, 45 CAN. B. REV. 627, at 661 (1967). According to this model, the judge is an actor in a political process just the same as is, *inter alia*, a member of Parliament (Shapiro referred to a congressman) "who fulfill[s] [his] political functions by the creation, application and interpretation of law". *See* Shapiro, *Political Jurisprudence*, 52 KENTUCKY L.J. 294, at 297 (1964). The writings of Fuller are the major sources with respect to the adjudicative model of judicial decision-making. Under this model, the judge is seen essentially as a settler of disputes. However, this model does not suggest that the judge should exercise mechanical jurisprudence. On the contrary, the judge is to exercise a "limited, creative role" in the development of the law; there is to be no sharp dichotomy between law as it is and law as it should be, that is, policy. *See*, in particular, Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Fuller certainly did not subscribe to any view that judges only "find" the existing law and then mechanically apply it to fact situations. As one commentator has said concerning the adjudicative model:

> The "adjudication of disputes" model shares, to some extent, the assumption that judges have a distinctive and limited function. However, it emphatically denies the conclusion that it is *possible* for a judge to be purely passive, and *desirable* that he make decisions without a necessary exercise of his judgment about what the law ought to be.

Weiler, *supra* note 5, at 409. For the same reasons given with respect to the distinction between judicial activism and judicial restraint, the distinctions drawn in the literature between the political actor and the adjudicator of disputes models for judicial decision-making are not helpful in formulating a prescriptive model for judicial decision-making other than to indicate that an appellate court must have some perception of its role.

> towards decision-making held by our judges have been shaped by the political philosophy and legal tradition unique to Canada.
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> Over the years, the performance of our Court has been matched, albeit unfairly, against the two mighty legal traditions which surround it. Comparison is invited with the Supreme Court of the United States which has long weathered an undisputed reputation as a dynamic court. . . . The Court balances competing interests . . . as its member judges perceive justice.
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> At the other end of the spectrum, if you will, is found the British system of justice, formal and more reverent of judicial restraint. That is the system on which our own legal tradition is unarguably modelled. . . . In recent years, though, the formalism in which the House of Lords was steeped for almost one century has been cast aside. That final court is officially freed of the positivist tradition.
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> I refer to proximate legal traditions to emphasize the point that judicial attitude is shaped by the institutions and experience unique to each system of law, whether it be American, English or Canadian. But in any legal order founded upon the common law, a fundamental philosophic issue surfaces to require our scrutiny and careful reflection. The dilemma — that of mapping the bounds of judicial activity — is worthy of the attention of judges, students-at-law, and the public alike.
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> The challenge is to learn the limits of the judicial task. In relating this theme to the Supreme Court of Canada, it is wise to recall that we speak of a young court. Through the Court's history, British traditions served it well. We will continue to benefit from that influence, but henceforth Canada will chart its own course, cognizant of its manifold roles in the development of a distinctly Canadian jurisprudence.[24]

Leaving behind the labels of "judicial restraint" and "judicial activism", the important point is that the Supreme Court of Canada must have some clear conception of its role as Canada's final appellate court. It is submitted that the objective of determining that role is achieved by the proposed prescriptive model. It is such a role which Laskin C.J.C. has suggested. The formulation of a workable prescriptive model for judicial decision-making is only a "conundrum for legal philosophy"[25] if one remains entangled in jurisprudential jargon.

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[24] Dickson, *The Role and Function of Judges*, 14 L.S.U.C. GAZETTE 138, at 172-73, 176-77 (1980). *See* especially at 178-86, concerning the role of the judge.

[25] Weiler, *Legal Values and Judicial Decision-Making*, 48 CAN. B. REV. 1, at 3 (1970), in which Weiler presented the problem of deciding what standards or reasons can be used to justify a judicial decision as requiring a choice between the extremes of positivism and realism or "some *ad hoc* combination of the two". He said that he would not "try to formulate any full or definite answer to this conundrum for legal philosophy".

III. Particular Manifestations of the Model

Against these generalities, it now is useful to consider specific questions such as: how is the Court to interrelate the requirement that it do justice to particular litigants and also develop the law; how is the Court to make use of precedent, doctrine, and foreign law; and finally, what modes of reasoning should the Court use?[26]

A. *Doing Justice to the Particular Litigants*

Doing justice to the particular litigants has been emphasized previously as the primary objective of the judicial process. One must always ask whether a particular judgment, to borrow an earlier quoted phrase from Llewellyn, is "serving the right". Did the Court take into account the particular factual context involved? Or did the Court "objectively" or, pejoratively, mechanically apply legal "rules" to the case, resulting in injustice to the particular litigants?[27]

B. *Contributing Positively to the General Development of the Law*

This basic requirement of the prescriptive model is essentially an umbrella requirement, encompassing such questions as, amongst others to be considered, the Court's use of precedent, doctrine and foreign law, whether the Court reasoned at a sufficiently generalized level, whether the judgments of the Court were candid, consistent and rational, and whether the Court provided guidance as to the law. Suffice it here to recall Llewellyn's expression of the purpose of the judicial process as being the "constant questing for better and best law to guide the future" in order that the law "may yield not only solidity but comfort for the new day and for the morrow".[28]

C. *Interrelationship of the Particular and the General*

The two objectives, doing justice at the particular and general levels, are not in conflict and can both be achieved if the Court strives to fulfill the purposes of the relevant substantive law. *A fortiori*, either of these objectives can be achieved only if the other is also achieved, if one assumes that the purposes of the substantive law must be fair. This is an assumption made throughout this analysis. In considering a particular

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[26] Neither the specific content nor the number of these questions is intended to be exhaustive of the particular issues which may rise in the actual application of the model. As Llewellyn said, in a different context, "[t]here is neither magic nor any assumption of the absolute" in this analysis. *Supra* note 8, at 45 n. 41.

[27] K. Llewellyn, *id.* at 104.

[28] *Id.* at 36.

case, the Court must have a "sense" of the general "situation"[29] of which that case is an example and, while justly dealing with that particular case, deal with it in a way which establishes good guidance for the treatment of that general "situation". There is a very close relationship between the requirement that the particular case be dealt with in the context of the general situation of which it is an example and the requirement that the purposes of the substantive law be well served. As Fuller stated generally in the context of a consideration of the case-by-case development of the common law:

> The philosophy underlying the retrospective effect of the judicial decision can be stated somewhat as follows: It is not the function of [the] courts to create new aims for society or to impose on society new basic directives. . . . On the other hand, with respect to the generally shared aims and the authoritative directives of a society, the courts do have an important function to perform, that of developing (or even "discovering") case by case what these aims or directives demand for their realization in particular situations of fact.[30]

As earlier noted,[31] it is the real life context of particular fact situations which serves as the essential basis for any useful assessment of how well a judgment has contributed to the general development of the law.[32]

D. *Use of Precedent*

While *stare decisis* is no longer the subject of intense debate, given recent statements by the Supreme Court that it does not consider itself absolutely bound by any precedent,[33] the question nevertheless remains as to what test the Court should use in deciding whether or not a particular precedent should be applied to the case before it. Most commentators now take liberal approaches to precedent. Contrasting courts and legislators, it has been said that "legislators do not feel institutionally committed to the formulation of new legal rules only if they can be justified by a reasoned opinion relating the development to accepted doctrinal premises".[34] Similarly, it has been said, in the particular context of a consideration of judgments in the Supreme Court of Canada, that the Court should not show unnecessary adherence to precedent but rather should engage in "critical reappraisal of older

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[29] *See, e.g.*, K. LLEWELLYN, *id.* at 268.

[30] Fuller, *supra* note 5, at 392.

[31] *See* text accompanying notes 7-8 *supra*.

[32] With respect to the interrelationship of the particular and the general objectives, *see* the discussion of Llewellyn, *supra* note 8, at 268. *See also* Fuller, *supra* note 5, at 367 and B. REITER & J. SWAN, STUDIES IN CONTRACT LAW (1980), in the context of contractual fact situations.

[33] *See, e.g.*, McNamara Constr. (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273; Reference *re* Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

[34] Weiler, *supra* note 5, at 438.

authority".[35] It is submitted that the key to that "critical reappraisal" lies in the requirement that the Court consider the functions served by the relevant substantive law; once the Court has made any necessary choices among competing purposes, it must ask whether application of the precedent in question would assist fulfillment of the purposes chosen or not and, if it would, the precedent should be applied. If the purposes served by or the theory underlying a precedent are not those underlying the particular fact situation presently before the Court, it ought not to apply that precedent. This is the approach to precedent which follows from the general statement of the model and is, it is submitted, the approach suggested by Laskin C.J.C. in *Harrison v. Carswell*.[36]

E. *Use of Doctrine*

While the use of doctrine by courts as a criterion for decision has been rather neglected by the literature,[37] it has, nevertheless, been received or refused in judicial statements as varied and as confusing as those dealing with *stare decisis*.[38] The point here is that the test which the Supreme Court of Canada should use in deciding whether or not precedent, non-foreign case law, doctrine or foreign law ought to be applied to a case under its consideration is exactly the same test. In short, the test of applicability should be as follows: precedent, doctrine or foreign law should be referred to by the Court if it is relevant and helpful in considering the issues before it and should be applied if, in addition to being helpful and relevant, it contains approaches or results which would assist the Court in fulfilling the functions of the relevant substantive law. As earlier submitted, if the Court fulfills those functions, then it

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[35] Reiter & Swan, *Developments in Contract Law - The 1978-79 Term*, 1 SUP. CT L. REV. 137, at 168 (1980).

[36] *See* notes 17-24 and accompanying text *supra*. *See also* B. REITER & J. SWAN, *supra* note 32, at 18. The approaches which courts have taken to the use of precedent are numerous and often inconsistent. For a detailed analysis of the "leeways of precedent", *see* K. LLEWELLYN, *supra* note 8, at 62-99 where Llewellyn identified 64 techniques for dealing with precedent which had found acceptance in American appellate courts and concluded that these were often "divergent, mutually inconsistent" approaches.

[37] *But see* Newland, *Legal Periodicals and the United States Supreme Court*, 3 MIDWEST J. OF POLITICAL SCI. 58 (1959); Nicholls, *Legal Periodicals and the Supreme Court of Canada*, 28 CAN. B. REV. 422 (1950). These articles contain numerous references to other literature on the use of legal periodicals as criteria for decisions; most of that literature is American.

[38] Among the fine distinctions which different courts have made at different times concerning the use of doctrine are the following: a text may be cited in court but a periodical may not; works of authors who have died may be cited in court but works by living authors may not; works of authors who subsequently become judges may be cited in court but works of authors who never became judges may not; what counsel may cite in court need not be what judges may refer to in judgments. The case decisions giving rise to these often hoary rules are collected in Nicholls, *id.* As that commentator pointed out, at 425, the common law position was unclear and was a matter of practice, not law, since the decided cases are often patently inconsistent.

necessarily fulfills its two primary objectives of doing justice to the particular litigants before it and contributing positively to the general development of the law. As one commentator has said with respect to the citation of doctrine in court:

> [I]n any court in Canada it should be permissible either to quote a legal writer, citing his name, the title of his work and the place where it is to be found, or merely to give the citation, leaving the court to go to the original if it wishes. Counsel's justification for citing an extra-judicial source is that he believes it to be in point, reasonable and in accord with the law. . . .The weight to be given a citation from a legal writer . . . will be tested by the cogency of the argument, the honesty of the scholarship and, let us be realistic, the reputation of the author.[39]

Dickson J., speaking extra-judicially, adopted this approach with respect to the reliance by Judges of the Supreme Court on doctrine in arriving at their judgments. Referring to the old rules largely against the use of doctrine by courts, Dickson J. stated:

> There is another matter of undoubted interest to the students and teachers of law that is worthy of note: the use made by appellate courts of legal periodicals, non-Canadian authorities, and materials pertaining to the legislative history of a statute.
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> A change in attitude on the part of the courts has occurred with respect to the use of periodicals. It was not so very long ago that courts prohibited the use of periodicals altogether; only texts could be cited in court. In 1950, in the Supreme Court of Canada, the Chief Justice refused to allow counsel to refer to an article in the Canadian Bar Review on the ground that "the Canadian Bar Review is not an authority in this court". Elsewhere, courts applied a rule that only writers who had held, or currently held, judicial office could be cited. Alternatively, it was held that living authors could not be cited. The rationale for the latter rule escapes me. Presumably, the court could be sure that a deceased writer's opinion was final. As far as living judges were concerned, I presume the assumption was that an opinion once expressed was engraved in stone and could never be recanted.
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> Happily, those days are behind us, and these rules are only of interest to legal historians. The British tradition of resistance to juristic writings (a consequence of the fact that there were no teachers of English law at the universities until fairly recently) has been swept aside. Judges do read and use legal periodicals, both Canadian and non-Canadian. The weight to be given a citation depends upon the cogency of the argument, the intellectual honesty of the scholarship, the thoroughness of the research and, yes, the reputation of the author. Non-Canadian material may undergo more rigorous scrutiny because of the different social and economic conditions prevailing elsewhere.
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> There is no longer any resistance to recent works. On the contrary, reviews that canvass recent decisions of the courts, examining their correctness and predicting, or suggesting, new avenues of thought, may be invaluable to judges. The volume of litigation facing the courts today puts increasing pressure on judges, robbing them of time for thorough research

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[39] Nicholls, *supra* note 37, at 424 (footnote omitted). For extra-judicial statements by judges as to the usefulness of doctrine and, in particular, legal periodicals, *see* Crane, *Law School Reviews and the Courts*, 4 FORDHAM L. REV. 1 (1935); Hughes, *Foreword*, 50 YALE L.J. 737 (1941).

> and meditation. It forces them to be more dependent on the research of others. The proliferation of new statutes, new regulations, and of tribunals and boards, forces judges to reach out to the legal periodical literature in order to keep abreast of developments.[40]

F. *Use of Foreign Law*

As with the use of precedent or doctrine as criteria for decision, different courts have taken different and often completely inconsistent approaches to the use of foreign law as a criterion for decision. Recent usage of foreign law in the Supreme Court, although not stated as being used along the explicit lines of the proposed test, indicates, however, that the approach of the Court to this criterion for decision is to refer to it if "helpful".[41] Given the statements of Laskin C.J.C. in *Harrison v. Carswell* concerning the approach to be taken to the use of precedent and the need to examine competing purposes,[42] it is likely that at least his approach to other criteria for decision, namely, doctrine and foreign law, would be along the lines of the proposed test. Keith J. of the Ontario Supreme Court recently commented on the use of foreign law as follows: "[T]his is the approach of reason. In the absence of binding authority in one's own jurisdiction, assistance should be sought where it can be found, whether from the Courts of other Provinces of Canada or from the Courts of other countries."[43] It has been submitted herein that foreign law, as any other criterion for decision, is "helpful" if used according to the test proposed.

G. *Sufficient Generalization*

Following from the requirement that the Court contribute positively to the general development of the law is the requirement that the Court should take into account the broad, general issues raised in an appeal and should deal fully with those issues rather than disposing of the appeal on the narrowest grounds possible.[44] Sufficient generalization by the Court

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[40] Dickson, *supra* note 24, at 163-65. It is interesting to bear in mind that judges did not always labour under an assumption that a judicial "opinion once expressed was engraved in stone and could never be recanted". Speaking before the entrenchment of *stare decisis* in London St. Tramways Co. v. London County Council, [1898] A.C. 375 (H.L.), Bramwell B. said in Andrews v. Styrap, 26 L.T. 704, at 706 (Ex. 1872): "The matter does not appear to me now as it appears to have appeared to me then."

[41] *Harrison*, *supra* note 13, at 210, 62 D.L.R. (3d) at 75 (Laskin C.J.C.).

[42] *See* notes 17-21 and accompanying text *supra*. Similarly, de Grandpré J. in Commonwealth Constr. Co. v. Imperial Oil Ltd., [1978] 1 S.C.R. 317, at 325, 69 D.L.R. (3d) 558, at 564 indicated that decisions of foreign courts may be "of interest".

[43] Clarkson Co. v. Canadian Indem. Co., 25 O.R. (2d) 281, at 299, 101 D.L.R. (3d) 146, at 164 (H.C. 1979). Keith J. relied heavily on American case decisions in his reasons.

[44] Reiter & Swan, *supra* note 35, at 163-65.

will increase the guidance given to lawyers and lay people concerning the law, a manifestation of the model to be considered later. Not every appeal affords the Court an opportunity to deal with broad issues of law; however, they should be sought out and resolved whenever possible. Commenting on this question, Dickson J., speaking extra-judicially, came to a similar conclusion:

> This relates to another criticism frequently levelled at the judiciary by legal scholars: that the *ratio* is too narrow and the court failed to address itself to issues ancillary to the main issue of the case. There are often valid reasons why a court would deliberately refrain from determining more than is necessary for a disposition of the case at bar. In the first place, there may not have been any argument by counsel with respect to the related issues. Without such aid, a court would rightly feel uneasy in laying down broad rules. In the second place, there may be no consensus in the court as to what the rules should be. In such a case, wisdom may dictate that a comprehensive formulation of the rules governing that branch of the law be left for another day. In the third place, even where there is agreement amongst the members of the court as to the direction that ought to be taken, it may be felt that the particular case at bar is not the best vehicle for bold new initiatives.
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> . . . .
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> One question on which there is much debate is whether judges in their pronouncements ought to confine themselves strictly to the case at hand, or whether they may legitimately take the opportunity, when it arises, of laying down general principles of law. There are two schools of thought. The restrictive approach is to say only what is necessary to decide the instant case, the argument being that anything gratuitously added will only lead to future embarrassment. I confess that I am not of that school. I think it is within the province of the judge to seek to clarify the law and assist in its development by the formulation of legal doctrine. This is particularly true of courts of final appeal. There are so many unanswered questions in the law. The number of cases coming before the Court are few in number. They come because they raise a point or points of general public importance. It seems to me legitimate to seek to resolve the issues which may properly be said to arise out of the litigation. There may be reason, as I indicated . . . why some issue must be left unresolved but, generally speaking, I think it is wrong to leave uncertainties, to be debated later, perhaps for years. That is costly in time and money.[45]

H. *Preservation of Human Dignity and Freedom*

The requirement that justice be done to the particular litigants before the Court requires that the Court strive always to preserve the human dignity and freedom of individual citizens. In this context, Dworkin's concern with the all-important rights of individuals should be borne in mind.[46] While this manifestation of the model is most likely to be useful in considering judgments in public law cases in which the claims of

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[45] Dickson, *supra* note 24, at 167, 190.

[46] *See* generally R. DWORKIN, *supra* note 7, at 184-205. However, even Dworkin admitted, at 194-97, that in very exceptional circumstances the rights of individuals might have to give way to the collective goals of the community.

citizens confront the state, it is relevant in considering any judgment. Dickson J. referred to this central requirement of law and admonished lawyers to keep it constantly before the courts:

> I conclude by reminding you that the law has two faces. It is, firstly, a practical craft and one whose texture is highly technical and precise. It is, secondly, a human process whose polar star is the protection and development of human dignity. . . .
>
> The success of the court in fashioning legal rules depends very much, of course, on the calibre of its judges, but it depends also on the legal culture of the country and the way in which that legal culture informs and develops the materials available to the court. This legal culture continually leaks into the court's work through the briefs and argument of counsel, the legal periodicals, the awareness and assimilation of foreign jurisprudence, the use of law clerks and informal interchange with law schools, such as the present gathering.
>
> As I noted, the law has two faces. As well as being a practical craft, the law is a human process concerned with the development of human dignity. The law must pursue the idea of human dignity and incorporate this into its legal structure. It must teach and produce categories of thought and analysis which recognize and encourage human dignity. It is no longer good enough to think of law, as did Austin, as merely a repressive institution which discourages certain kinds of conduct. Ways must be found to create an institutional infrastructure in which the civilizing and individualizing processes can bud and bloom. The legal culture must comprehend and express ideas of human dignity. This was once a question of minimum wage and working conditions, of collective bargaining rights, and the right to strike. It perhaps still is — but it is also much more. It is the right to protection from big government, the right to privacy and the right to think and express freely ideas which, subject to limitations imposed by the laws as to sedition and defamation, question accepted dogma and institutions. It is the profoundest realization of justice and conscience in the human community which is the pre-condition of the growth of civilization.[47]

I. *Take Account of Real Life*

To state that judicial judgments must take account of real life is not a mere platitude. Baron Parke, for example, reputedly held the view that a "strong opinion was one in which by the employment of pure legal reasoning one arrived inescapably at a conclusion which no layman could possibly have foreseen!"[48] As Fuller noted, the relationship between law and life is symbiotic.[49] Similarly, Professor Laskin, as he then was, once stated that we must "adopt a simple rule of adult behaviour and

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[47] Dickson, *supra* note 24, at 154-55. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452, 560 (1978), where it is stated that judicial decisions must be "supportive of human freedom" and must tend to the preservation of "personal dignity and autonomy" and "the minimization of subservience and helplessness".

[48] K. LLEWELLYN, *supra* note 8, at 39 n. 31.

[49] Fuller, *American Legal Realism*, 82 U. PENNSYLVANIA L. REV. 429, at 448-53 (1934).

recognize that law must pay tribute to life''.[50] It was submitted earlier that this model is workable because, and only because, the purposes of the substantive law and their attainment are to be assessed in the context of particular fact situations, that is, in the context of real life. In order to take account of life, a judge must look to whatever source of information is available which will assist him in assessing the particular fact situation before him and, therefore, in properly determining the context surrounding the general ''situation'' involved. As Cardozo J., speaking extra-judicially, stated:

> The modern outlook is levelling these barriers to a freer and larger vision. It is bringing us to a recognition of the truth that an opinion derives its authority, just as law derives its existence, from all the facts of life. The judge is free to draw upon these facts wherever he can find them, if only they are helpful. No longer is his material confined to precedents in sheepskin. ''His decision,'' says Mr. Allen in his book, *Law in the Making*, ''is given in the form of a structure of logic, in which he may use *any* material which he considers *ad rem*.'' He may look to law or to literature, to economics or to philosophy, to saints or to sinners, to workers or to drones. If his seigniory extends to fiefs not marked as legal, the impulse becomes stronger to exert it in regions where the denizens are near of kin.[51]

J. *Rationality*

The requirement of rationality in judicial decisions flows directly from the requirement that judgments contribute positively to the development of the law; rationality increases their acceptability. As one commentator has put it, ''reasoned decisions [must] be the *ideal* towards which the institution tends. . . . Judges [must] accept the demand that their subjective, idiosyncratic preferences be overcome''.[52] By ''subjective'' one should read ''personal''[53] or ''whimsical or capricious''[54] or ''arbitrary'';[55] ''objective'' preferences still leave room for judicial creativity.[56] What is ''objective'' depends on the prescriptive model for judicial decision-making chosen; in the model proposed here, any criterion for decision is ''objective'' if it assists the judge in determining the purposes of the relevant substantive law, making any necessary choices among competing purposes and then fulfilling the prevailing purposes. As Fuller stated:

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[50] Laskin, *The Supreme Court of Canada*, 29 CAN. B. REV. 1038, at 1073 (1951).

[51] Cardozo, *Introduction*, in SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS vii (Committee of the Association of American Law Schools ed. 1931).

[52] Weiler, *supra* note 5, at 432.

[53] MacGuigan, *supra* note 23, at 660-65.

[54] J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 21-25 (J. Burns & H. Hart eds. 1970).

[55] J. AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 314-44 (1909), wherein Austin referred to ''the judges *arbitrium*''.

[56] *See* Fuller, *supra* note 23 and R. DWORKIN, *supra* note 7, at 105.

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.[57]

The requirement of rationality is closely interrelated with the requirements that judicial decisions provide guidance to counsel and lay people concerning the development of the law and that judicial decisions be consistent.

K. *Providing Guidance*

Judicial decisions must provide guidance to lawyers and lay people as to the law. Fuller identified the characteristic feature of adjudication as the "mode of participation by the affected parties", namely, "the presentation of proofs and reasoned arguments", when he stated that "whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself."[58] Relying on the work of Fuller, Weiler stated:

> [T]o the extent that adjudication entails adversary participation, and the presentation of proofs and arguments to the arbiter, the process is meaningless unless the parties can know before their preparation and presentation of the case the principles and standards which the arbiter is likely to find relevant to his disposition of the dispute. It is impossible to make an intelligent argument "in the air" and without any idea of which factors are considered relevant by the person whom one's argument is attempting to persuade. If a relatively passive attitude is necessarily conducive to impartiality (although this does not exclude some reciprocal clarification of views), and a high degree of rationality in result thus depends directly on the quality of the preparations and representations by each side, then a consensus of standards is needed in order that intelligent alternative positions are established and that an adequate "joinder of issue" results.[59]

L. *Candour*

Judgments must be stated with candour.[60] In particular, judges must explicitly identify the purposes of the relevant substantive law and must

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[57] Fuller, *supra* note 5, at 366-67.

[58] Fuller, *id.* at 363-65.

[59] Weiler, *supra* note 5, at 420.

[60] *See* Joanes, *Stare Decisis in the Supreme Court of Canada*, 36 CAN. B. REV. 175, at 198-99 (1958) concerning candour in contemporary judgments, albeit in the context of a consideration of *stare decisis*.

candidly make choices among competing purposes. Necessary value judgments must be clearly stated.

M. *Consistency*

Different judgments dealing with one given issue or with similar albeit non-identical issues must be consistent. While judgments from different courts are inevitably inconsistent, it should be possible for judgments from one court, in particular, the Supreme Court of Canada, to be consistent. This consistency is required if the Court is to provide proper guidance as to the development of the law since it is on the basis of judgments of the Court that counsel prepare their presentation of cases at all levels of the judicial hierarchy.[61]

IV. Summary of the Model

The primary objective of judicial decision-making is that justice be attained. The extent to which this objective has been achieved in a particular judgment can be tested by considering whether justice was done to the particular litigants and to what degree the judgment contributed to the general development of the law. Both levels of testing are most likely to show affirmative results if the judge focussed on fulfillment of the purposes of the relevant substantive law. Two points are essential. First, attaining justice at the two levels identified and fulfillment of the purposes of the law are inextricably interrelated and, therefore, all tend to be achieved together or missed together. Second, in identifying the purposes of the law and in striving for justice, the judge will constantly have to make value judgments. Finally, although the essential content of the prescriptive model remains unchanged regardless of the particular type or context of case to which it is applied, its detail must be adjusted appropriately to make assessment of particular cases more meaningful.

V. Excursus into the Purposes of the Law of Contract

Since fulfillment of the purposes of the substantive law is a major component of the prescriptive model for decision-making and since the judgments of the Supreme Court in *Montreal Trust Co. v. Canadian Pacific Airlines Ltd.*[62] and *Ludecke v. Canadian Pacific Airlines Ltd.*,[63]

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[61] In the context of an examination of contractual cases in the Supreme Court, *see* Reiter & Swan, *supra* note 35, at 176-82.

[62] *Supra* note 3.

[63] *Supra* note 4.

the two cases which will be qualitatively analyzed, involved contractual fact situations, it is necessary to make a brief excursus into the purposes of the substantive law of contract.

There have been countless formulations of the purposes of the law of contract such as, for example, the facilitation of commercial dealings, the recognition of generally accepted business practices and the prevention of unjust enrichment. Some formulations have focussed on fact situations involving business entities while others have focussed on fact situations involving individuals, either in their dealings with each other or with business entities. It is submitted that these formulations can each be reformulated as being implicitly within a "recognition of reasonable expectations" formulation, and it is this formulation of the central purpose of the law of contract which will be used here. The requirement that the Court recognize the reasonable expectations of the parties to a contract may have many particular manifestations depending on the context raised by the particular fact situation involved. Therefore, in qualitatively analyzing a judgment in a contract law case, this general statement of the purposes of the law of contract will require "fine-tuning". However, the essential content of the statement of the purpose of the law of contract remains unchanged, just as the essential content of the model itself remains unchanged.

VI. Example of Application of the Model to the Assessment of Judgments

The cases of *Montreal Trust* and *Ludecke* were chosen for analysis since the issues considered in each are essentially the same and since such an analysis provides an opportunity to consider what use the Supreme Court makes of precedent and also whether the Court treats similar cases consistently. Although Judson J. delivered a dissenting judgment in *Montreal Trust*,[64] comparison will be made of the judgment of Ritchie J. for the majority and the judgment of McIntyre J. for the court in *Ludecke*.

For convenience, the provisions of two relevant international treaties and the reasoning of three American cases referred to will be considered at the outset. The two treaties relevant to the *Montreal Trust* and *Ludecke* cases are the Convention for the Unification of Certain Rules Relating to International Carriage by Air,[65] herein referred to as "the Warsaw Convention" and the Protocol to Amend the Warsaw Convention herein referred to as "the Hague Protocol".[66] Both have the

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[64] *Supra* note 3, at 803, 72 D.L.R. (3d) at 258. Judson J. stated that he agreed with the reasons for judgment of the Quebec Court of Appeal and would have dismissed the appeal.

[65] Signed at Warsaw on 12 Oct. 1929.

[66] Signed at The Hague on 28 Sep. 1955

force of law in Canada.[67] Both the Warsaw Convention and the Hague Protocol contain provisions affording strong limitation of liability protection to international air carriers.[68] Articles 3 and 4 of the Warsaw Convention and Articles 3 and 4 of the Hague Protocol provide that protection may be lost in certain circumstances relevant to the claims in *Montreal Trust* and *Ludecke*.[69]

The three American case decisions referred to in the *Montreal Trust* and *Ludecke* cases were two decisions of the Second Circuit of the United States Court of Appeals, *Lisi v. Alitalia-Linee Aeree Italiane*[70] and *Mertens v. Flying Tiger Line, Inc.*,[71] and a decision of the Ninth Circuit of the United States Court of Appeals, *Warren v. Flying Tiger Line, Inc.*[72] The fact situation in each of these cases involved the death of a passenger in a plane crash in circumstances to which the Warsaw Convention was applicable. In each case the air carrier attempted to limit its liability by relying on the limitation of liability provisions contained in that Convention. The American courts considered the provisions of the Convention in the context of the typical situation in which an air passenger receives his air ticket and baggage check, both in very small print, and sometimes shortly before boarding the plane. They held that "delivery" as used in Article 3(2) of the Warsaw Convention does not refer merely to physical delivery of a ticket but rather requires in law a delivery sufficient to allow the passenger to take self-protective measures if he wishes,[73] sufficient to allow him to read reasonably easily the terms contained in the ticket and sufficient to allow him to understand those terms.[74] The opinion of Judge Kaufman, for the majority in *Lisi*, summarizes the reasoning by which American courts have so construed the limitation of liability provisions of the Warsaw Convention. Referring to the earlier decisions in *Mertens* and *Warren*, he stated:

> In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the enquiry that must be made if the Convention's Articles are to be given meaning, is "[w]hether the ticket was delivered to the passenger in

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[67] The Warsaw Convention has the force of law in Canada pursuant to the Carriage by Air Act, R.S.C. 1970, c. C-14, s. 2(1); The Hague Protocol has the force of law pursuant to s. 2(2) of that Act.

[68] Articles 17 to 30 of the Warsaw Convention deal with the liability of international air carriers and contain, *inter alia*, strong limitation of liability provisions. The Hague Protocol, by Articles 10 to 15 thereof, amended the liability provisions of the Warsaw Convention, but the liability of the air carrier remained extremely limited.

[69] The liability of the air carrier to a passenger in situations in which the passenger has died is enforceable by specified members of the passenger's family pursuant to Schedule II of the Carriage by Air Act, R.S.C. 1970, c. C-14. Both the *Montreal Trust* and *Ludecke* cases involved such claims.

[70] 370 F. 2d 508 (2nd Cir. 1966).

[71] 341 F. 2d 851 (2nd Cir. 1965).

[72] 352 F. 2d 494 (9th Cir. 1965).

[73] *Mertens*, *supra* note 71, at 856-57; *Warren*, *supra* note 72, at 498.

[74] *Lisi*, *supra* note 70, at 511-14 and also notes 75, 77 and 79, and accompanying text *infra*.

> such a manner as to afford him a reasonable opportunity to take self-protective measures. . . .[75]

The Court in *Mertens* had stated that "[s]uch self-protective measures, could consist of, for example, deciding not to take the flight, entering a special contract with the carrier or taking out additional insurance for the flight."[76] Judge Kaufman referred to Alitalia's primary submission as follows:

> All that is required, urges Alitalia, for [it to have the benefit of the limitation of liability provisions of the Warsaw Convention], is that a ticket be delivered to the passengers.
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> It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretaton it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a "verbal prison". . . . The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, "words are such temperamental beings that the surest way to lose their essence is to take them at their face". . . . Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention.[77]

He concluded that for there to be delivery in law of a ticket as required by Article 3 of the Warsaw Convention, the ticket must contain adequate notice of the limitation of liability afforded to the air carrier. Frankly indicating that his opinion was strongly influenced by policy considerations,[78] he stated:

> We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: "Each passenger should carefully examine this ticket, particularly the Conditions on page 4." And, at this point, we note that one of our reasons in Mertens . . . for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket "was printed in such a manner as to virtually be unnoticeable and unreadable. . . ."
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> [The Judge in the Court below on the motion of the plaintiff for partial judgment on the pleadings] appropriately characterized the "notice" to the passengers in his pithy conclusion as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized and unemphasized by boldface type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."[79]

Both *Montreal Trust* and *Ludecke* involved claims by relatives of a passenger who was killed in the crash of a Canadian Pacific Airlines

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[75] *Lisi*, *supra* note 70, at 513.
[76] *Mertens*, *supra* note 71, at 856-57.
[77] *Lisi*, *supra* note 70, at 511-12.
[78] *Id.* at 513 n. 7.
[79] *Id.* at 513-14.

plane at Tokyo. In each case, there was a claim for damages for the death of the passenger and a claim in respect of the loss of the passenger's baggage. The deceased in the *Montreal Trust* case had purchased a ticket taking him from Montreal to Vancouver to Hong Kong to Tokyo and then back to Montreal. The deceased in the *Ludecke* case had purchased a ticket in London to take him from London to Delhi to Hong Kong and then to Tokyo. Each passenger had received the standard multi-coupon airline ticket containing small print referring to the possible applicability of the provisions of the Warsaw Convention and the possible limitation of liability of the air carrier thereunder. At the time of the crash, Canada was a signatory to the Hague Protocol but neither Japan nor the United Kingdom was a signatory thereto, although each was a signatory to the Warsaw Convention. Therefore, the *Montreal Trust* case was governed by the provisions of the Hague Protocol whereas the *Ludecke* case was governed by the provisions of the Warsaw Convention. The Supreme Court considered this to be crucial and, relying heavily on the differences in wording between those two treaties, arrived at different and, it will be submitted, inconsistent results therein.

The essential aspects of Ritchie J.'s reasoning in *Montreal Trust* are contained in the following passage from his judgment:

> The Hague amendments, insofar as they affect the present issue, are notable for the fact that (1) the Convention simply required the inclusion in the ticket of "a statement" relating to the limitation of the liability of the carrier as established by the Convention, whereas the amendment provided that such a statement should take the form of a "notice" and (2) that the amendment provided that in the absence of a "notice" the carrier is not entitled to avail himself of the limitation provisions in respect either of death or loss of baggage, whereas the Convention contains no such sanction with respect to claims for loss of life except in the case of no passenger ticket "having been delivered" to the claimant.
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> . . . .
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> [The trial judge] in the *Ludecke* case . . . relied heavily on a number of American authorities to the effect that the "statement" in the ticket required by the Convention must be in such form as to afford the passenger "a reasonable opportunity to take self-protective" measures to compensate himself for the limitation on his rights which [the] Art. [limiting the liability of the carrier] creates.
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> . . . .
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> The cases of *Mertens v. The Flying Tiger Line Inc.*, and *Lisi v. Alitalia-Linee Aeree Italiene* [*sic*] are cited with approval by [the trial judge in *Ludecke*]. In the latter case, McMahon D.J., speaking of a ticket containing the required "statement" in the same print as that in the present case, described it as "virtually invisible" and also as "diminutively sized and unemphasized by boldface type, contrasting colour, or anything else".
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> . . .
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> *I think it must be understood that limitation on the liability of the carrier created by . . . the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of [the Convention] have been exactly complied with.*
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> The effect of Art. 3(2) of the Convention was to empower carriers to limit their liability to passengers by the simple process of delivering a ticket

> containing a "statement that the carriage is subject to the rules relating to liability established by the Convention" and the Court of Appeal has held in the *Ludecke* case that this requirement is met even when the "statement" is inconspicuously placed and in four and a half point type. When the amendments were made by the Hague Protocol of 1955, an entirely new Art 3(2) was promulgated in which the requirement of a mere "statement" was deleted and the more elaborate provisions of the Protocol were substituted therefor. Under the amended Art. 3(1)(c), the carrier is not only required to insert a "notice" but the terms of the notice are expressly provided for
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> I do not think it can be assumed that the draftsmen of the Hague Protocol made the extensive changes which they did in Art 3 without weighing the words which they employed with some care and I cannot accept the suggestion that the substitution of the word "notice" for "statement" in Arts. 3 and 4 was meaningless or ineffective. . .
>
> As I have indicated, I am of the opinion that the four and one half point type reproduction of the material required to be inscribed by Art. 3(1)(c) of the Protocol was not a "notice" within the meaning of the Article and accordingly the carrier is not entitled to avail itself of the provisions [limiting its liability].[80]

In the result, Ritchie J. allowed the plaintiff's claims. McIntyre J. in *Ludecke*, on the other hand, construed the relevant provisions of the Warsaw Convention so as to allow the defendant air carrier to limit its liability with respect to each of the plaintiff's claims. Taking a narrow approach to the construction of Articles 3 and 4 of the Convention, he stated:

> In my opinion, the words of Art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity, or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above [namely, *Mertens*, *Warren* and *Lisi*] which hold that delivery of a ticket with an irregularity, that is, a statement as required by Art. 1(*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation .
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> An examination of the ticket satisfies me that the print was of such type and arrangement as to be legible by the ordinary person using ordinary diligence and the content of the ticket was adequate to meet the requirements of the Convention. I consider the ticket complied with Art. 4. . .[81]

Assessing these judgments against the requirements of the prescriptive model, it is submitted that the judgment of Ritchie J. in *Montreal Trust* was a good one or, perhaps more precisely in view of the comments to be made concerning that judgment, a satisfactory one, whereas the judgment of McIntyre J. in *Ludecke* was a bad one. Further, it is submitted that the attainment of a good judgment in *Montreal Trust* was directly correlated to the reference to the American case decisions and

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[80] *Supra* note 3, at 800-03, 72 D.L.R. (3d) at 262-64 (emphasis added)

[81] *Supra* note 4, at 70-71, 98 D.L.R. (3d) at 57-58.

that the poor judgment in *Ludecke* was due to the refusal to apply the reasoning contained in those American cases.

First, it should be pointed out that the reference to *Mertens* and *Lisi* by Ritchie J. was significant to his judgment. As the quoted passage clearly indicates, he was strongly influenced by the real life focus which those cases had put on the ineffectiveness of warnings contained in "diminutively sized" print. Further, he realized that the limitations on liability afforded by the Convention and the Protocol "encroached" on the reasonable expectations of air passengers since those provisions would surprise most people if they knew and understood them. Ritchie J. was right to "strictly construe" those provisions. On the other hand, McIntyre J. specifically refused to apply the reasoning in *Mertens*, *Lisi* and *Warren* in interpreting the relevant provisions of the Warsaw Convention. In addition, he refused to apply the arguments contained in Georgette Miller's textbook, *Liability in International Air Transport*,[82] which summarized the American cases referred to and which also submitted that common law courts should apply the same strict limiting approach to the provisions of the Warsaw Convention and the Hague Protocol as they do to exculpatory clauses in contracts in general.[83]

In addition to the general statement of the model, certain particular manifestations thereof are of assistance in assessing the judgments in *Montreal Trust* and *Ludecke*. These are the Court's use of precedent, doctrine and foreign law, whether the Court expresses its judgments with candour, whether the Court takes account of real life and whether judgments of the Court are consistent.

It is submitted that McIntyre J. in *Ludecke* should have applied the reasoning contained in the American cases before him; he took too narrow a view of the holdings and reasoning in those cases, as is evidenced by his reference to those cases as being, in effect, limited to situations in which there has been "delivery of a ticket with an irregularity".[84] He should have taken from Ritchie J.'s judgment in *Montreal Trust* the emphasis therein on the strict construction of the limitation of liability provisions of the Warsaw Convention and the Hague Protocol. Such an approach would have been consistent with the aims of contract law in general and would have enabled him to recognize the reasonable expectations of air passengers, namely, that their rights against negligent air carriers ought not be unusually limited because of what is contained in the fine print on their tickets. The result in *Ludecke*, however, was spawned in Ritchie J.'s judgment in *Montreal Trust*: while he did refer to the strict construction to be given to exculpatory clauses, he nevertheless narrowed his reasons by also emphasizing the differences between the provisions of the Warsaw Convention and the Hague Protocol. As the quoted passage clearly indicates, he was very concerned

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[82] At 85 (1977).

[83] *Supra* note 4, at 68-70, 98 D.L.R. (3d) at 56-57.

[84] *Id.* at 70, 98 D.L.R. (3d) at 57.

with distinguishing the decision of the Quebec Court of Appeal in *Ludecke*, which had refused to apply the reasoning of the American cases to a situation governed by the provisions of the Warsaw Convention. While Ritchie J. clearly wanted to apply the reasoning of the American cases to the fact situation in *Montreal Trust* in order to allow the claims of the plaintiffs, he was obviously reluctant to say that the Quebec Court of Appeal decision in *Ludecke* was wrong. In the result, he arrived at a convenient compromise by basing his reasons on a narrow distinction between the wording of the Warsaw Convention and that of the Hague Protocol. While he was clearly concerned with the real life context of *Montreal Trust* and clearly wanted to do justice to the particular litigants involved, his judgment is faulty because of the narrow basis upon which he proceeded. It would have been preferable to have explicitly emphasized the obvious realities surrounding present day air travel. Further, he should not have hesitated to say that the Court of Appeal had been wrong in its reasoning in *Ludecke*. When *Ludecke* arrived on appeal to the Supreme Court of Canada, McIntyre J. was faced with a similar but even more difficult decision: was he to take *Montreal Trust* on the basis of its narrow approach, that is, distinguishing the wording contained in the Warsaw Convention from that of the Hague Protocol, or on the basis of the broader approach also contained therein, namely, strictly construing exculpatory clauses and obviously relying on the reasoning in the American case decisions to which Ritchie J. had referred? The latter approach would have come very close to suggesting that Ritchie J. had been wrong in *Montreal Trust* to put such emphasis on the differences between the Warsaw Convention and the Hague Protocol. In the result, McIntyre J. chose the former approach, saying that the ratio in *Montreal Trust* was based on the differences in language between the Warsaw Convention and the Hague Protocol,[85] and that, despite the fact that the limitation was "harsh and unreasonable", he would continue that distinction. With respect, Ritchie J. in *Montreal Trust* should have reasoned along more general lines. McIntyre J. in *Ludecke*, even in view of Ritchie J.'s judgment in *Montreal Trust*, could have reasoned along general lines in order to achieve a just result, taking from *Montreal Trust* what it did contain at the general level rather than what it contained at the narrow level.

In order to take account of reality and to do justice to air passengers, the Court should have applied the approach of the American cases and Miller's textbook to the similar fact situations in *Montreal Trust* and *Ludecke*. Further, it is submitted that the relevant provisions of the Warsaw Convention and the Hague Protocol are in substance the same; for example, what is the difference between a "notice" and a "statement"? Surely the court in considering such distinctions is showing a preference for semantics over common sense. What good is a statement if not brought to the notice of the passenger? *A fortiori*, even if

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[85] *Id.* at 72, 98 D.L.R. (3d) at 59.

some distinction could be defended between a "notice" and a "statement", is it reasonable to expect that an air passenger will be aware of that distinction? Under Article 3 of the Warsaw Convention, a ticket must contain "a statement that the carriage is subject to the rules relating to liability established by this Convention" and that ticket must be "delivered" to the passenger; if not, the carrier "shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability". Under Article 3 of the Hague Protocol, a ticket must contain

> a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage

and must be "delivered" to the passenger; if the ticket is not delivered or if, in addition, "the ticket does not include the notice required . . . the carrier shall not be entitled to avail himself of the provisions of [the] Article [limiting its liability]". While it is admittedly clear that the provisions of the Hague Protocol are more onerous on air carriers than are those of the Warsaw Convention, it is submitted that the reasoning of the American cases is equally applicable to either; in this context, it is useful to bear in mind that those cases all involved construction of the less onerous Warsaw Convention.

In summary, then, Ritchie J.'s use of foreign law contributed directly to the doing of justice to the particular litigants in *Montreal Trust*. However, the narrow focus of his reasoning laid, as indicated, the basis for McIntyre J.'s poor judgment in *Ludecke*. That latter judgment was unsatisfactory in large measure due to McIntyre J.'s explicit refusal to apply the general realistic reasoning contained in the doctrine and foreign law to which he referred. Further, the judgments in each of *Montreal Trust* and *Ludecke* exemplify an unsatisfactory approach to the use of precedent. The Quebec Court of Appeal's refusal to apply the reasoning of the American cases to *Ludecke*, essentially because the print contained in the airline ticket was legible,[86] should not have been so carefully respected, albeit distinguished, by Ritchie J. in *Montreal Trust*. In turn, Ritchie J.'s narrow reasoning in *Montreal Trust* should not have been perpetuated by McIntyre J. in *Ludecke*. In each case the reasoning of the Quebec Court of Appeal in *Ludecke* was not in accord with the reality of the fact situation before the Supreme Court and the application of that reasoning did not contribute to the recognition of the reasonable expectations of the litigants. Instead, the Court should have openly and explicitly applied the general reasoning of the American cases. Ritchie J.'s "distinguishing" of the Quebec Court of Appeal decision in *Ludecke* indicated an undue reluctance to state frankly that a previous precedent

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[86] *Id.* at 69-71, 98 D.L.R. (3d) at 57-58.

was wrong. Third, the decisions of the Supreme Court are not consistent; virtually identical fact situations governed by provisions which are essentially the same were treated in the result entirely differently. Finally, the Court did not state its reasoning with the greatest candour; behind all the verbal gymnastics concerning the detailed wording of the Warsaw Convention and the Hague Protocol, is not the real question or, at least, should not the real question be, whether the Court is treating the parties to air passenger contracts fairly? It is difficult to imagine that McIntyre J. could totally have lost sight of this fundamental concern while considering the fact situation in *Ludecke*. On the contrary, he expressly acknowledged that the result of his reasoning would be "harsh and unreasonable". Such reasoning in the Supreme Court is not satisfactory, particularly when the reasoning of the American cases and the broader aspects of Ritchie J.'s judgment in *Montreal Trust* afforded a clear alternative to that unjust result.

VII. Conclusion

Criticism of Supreme Court judgments need not be unstructured. In this regard the model proposed herein might be helpful. Specifically, the criteria for good judicial decision-making can be used as a convenient checklist in assessing judgments. Such a model may be particularly useful in making comparisons between judgments or in analyzing a series of judgments.

In the assessment of any given judgment the purposes of the substantive law relevant to that judgment must first be identified, in order to make workable the prescriptive model formulated. This necessarily involves making value judgments. Since different users of the model analyzing the same judgment may have different values and may therefore identify different purposes of the relevant substantive law, different conclusions with respect to whether the judgment is good or bad may be arrived at even though each analysis follows the structure suggested by the model. This should not be surprising in view of the central importance of value judgments in legal analysis. The possible value of the model is that it provides a structure for the evaluation of judgments and, in particular, judgments of the Supreme Court. It also facilitates both comparison of opinion among numerous commentators on the same judgment, and comparison of several judgments by a single commentator.

Certainly there are other useful models. However, it is suggested that any such model should be functional, that is, related in a central way to the purposes of the substantive law and capable of reduction to a checklist of criteria for good judgments so as to lend itself readily to the actual task of judgment evaluation.