Human Rights and Contracts as Labour Governance:
A (Post-)Legal Realist Inquiry

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws

Faculty of Law
University of Toronto

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Abstract

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Law and development mainstream conceptions of labour market policies, while still marked by long-dominant views of contract law as economically superior to any labour “regulation”, have recently incorporated certain specific labour (human) rights. “Core labour rights” are thus accepted by global policy-makers, on the basis of their radical distinction from non-core labour standards and their rationalization according to certain foundational principles. This thesis criticizes the prevailing dichotomies between core labour rights and non-core standards, on the one hand, and contract law and “regulation”, on the other, bringing to bear the post-legal realist idea of legal indeterminacy. It argues that the organizing legal concepts that justify these dichotomies contain gaps and ambiguities that often lead to contradictory and indeterminate outcomes. It thus suggests that the core/non-core labour standards and contract/“regulation” distinctions are unproductive and should be rejected if a better conception of labour governance is to come to fruition.
Acknowledgements

I extend warm thanks to my co-supervisors, Kerry Rittich and Brenda Cossman, for their time, guidance and support. I also thank my SJD advisor, Joanna Langille, for her generous aid in framing my argument.

I am grateful for the financial support of the Social Sciences and Humanities Research Council of Canada (SSHRC) and the University of Toronto, Faculty of Law.

I thank my mother, my father, Ben, Joëlle, Olivier, Ariane, Manon and Raphaëlle for the love and support, as well as Claudio and Monica per la loro amicizia preziosa. I thank Pascale Fournier for our invaluable academic relationship and for generously guiding me through many episodes of existential angst. I thank Sophie Marcotte Chénard for characteristic support and intellectual engagement, Philippe Boisvert for reading parts of the manuscript and my mother for reading all of it on a nice summer day. Finally, I thank Lucia, di darmi ogni giorno la forza di crederci.

Errors are, needless to say, mine alone (Pascal.McDougall@mail.utoronto.ca).
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Introduction

Equality/non-discrimination rights and the right to bargain collectively as an exercise of freedom of association have been at the center of many policy debates in labour/employment law, both in domestic courts and international organizations. Scholars, lawyers and trade unions engaged in social justice campaigns have brought these constitutional rights to the forefront by using them to contest the insufficiencies of traditional legislative labour law regimes. For their part, governments and international financial institutions have not ignored these rights claims. On the contrary, both the right to non-discrimination and freedom of association have figured prominently in the analyses of powerful institutions that shape worldwide legal consciousness and policy agendas. The idea of international “core labour rights”, by virtue of which a minimum floor of labour entitlements is purportedly secured for all, has been promoted by the International Labour Organization (ILO) and accepted by international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF), as well as many academics. This has in turn profoundly affected the discursive field in which domestic litigation, government policy making and public debates are conducted.

This thesis will study the reception and incorporation of labour rights in the field of law and development and in the international economic order. Specifically, it will analyze the mainstream

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articulation of the conceptual relationship between “core labour rights” and the rest of the international labour standards, as well as with private law rules of contract. It will do so by focusing on a landmark moment, the adoption by the ILO of the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* (1998 Declaration), which purports to provide universal protection of four “core labour rights” made binding on all member states regardless of whether or not they have ratified the relevant pre-existing ILO conventions. The four core rights identified in the 1998 Declaration are the elimination of forced labour, the abolition of child labour, and most importantly for my present purposes, the elimination of employment discrimination and “freedom of association and the effective recognition of the right to collective bargaining”. The 1998 Declaration was a watershed moment for global legal consciousness, with consequences in international labour law, human rights law and international economic law. It was the product of far-reaching debates in the ILO and IFIs on the relationship between trade and state regulation of labour markets. The importance of the 1998 Declaration hinges on the fact that after its drafting, the conceptual distinction it put in place (between “core labour rights” and all other non-core international labour standards) was recreated in many other legal settings, from the normative framework of ILO conventions preceding the declaration to the IFIs’ analyses of domestic labour policies and the content of bilateral trade agreements. This distinction was superimposed to another dichotomy which had long been central to law and development mainstream approaches, that of individual contract (and property) law on the one hand and labour “regulation” (in the form of rights or standards) on the other.

Scholars and officials from international organizations have provided various justifications for the core labour rights/non-core labour standards and contract/regulation distinctions, which I will discuss at length in chapter 1. One of the oldest and most enduring validations of both distinctions is based on instrumental economic analyses of the “efficiency” of legal rules, understood as the capacity to generate economic growth. In the case of contract and regulation, this justification posits private law adjudication and contracts as reducible to the mere reflection of the will of individual bargaining parties. Under this view, it is possible for contract law to be rationalized in accordance with the ethos of individualism, by virtue of which contracting parties

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can simply be held to their freely consented contractual duties with no reference to the dilemmas of ethical, moral and redistributive justice that characterize labour “regulation”. The possibility of subsuming the rules of contract under the overarching concept of individualism (understood as respect for individual freedom and tailoring of the latter for other individuals to exercise their own freedom) is considered economically efficient because it allows contract law adjudication to merely reflect the labour supply and demand of wealth-maximizing actors. Thus, contract law can be clearly distinguished from and privileged over the redistributive labour “regulation” that is best exemplified by the fixing of minimum wages, maximum working hours, limits on the employer’s power to hire and fire “at will”, etc. Instrumental economic justifications have also been deployed to justify the distinction between core labour rights and non-core labour standards. Indeed, some scholars and organizations have argued that core labour rights are efficiency enhancing, unlike other international labour standards. However, these accounts have been quite contested, no doubt due to the enduring influence of the view of labour regulation (whether in the form of rights adjudication or employment standards) as inherently inefficient. This may explain why the validations of the core/non-core distinction have been overwhelmingly legal, rather than instrumentally economic. That is, scholars have posited core labour rights as driven by a normative backbone that differentiates them from non-core labour standards. These normative rationalizations have encompassed various concepts (e.g. “human dignity”, “freedom” and core labour rights’ status as procedural — and not substantive — guarantees) purported to provide the necessary coherence to core labour rights for their conceptual separation from other labour standards to be justified. At the heart of these accounts lies the idea that a foundational principle can normatively organize a given legal institution and grant it consistency and unity. Finally, other scholars have treaded a middle path between instrumental and legal validations, arguing that the selection of “market-friendly” organizing values can not only grant normative consistency to core labour rights, but can also reconcile them with prevailing ideas of economic efficiency. Thus, correct streamlining of core labour rights can render them efficiency neutral, if not efficiency enhancing.

My thesis offers a critique of the dichotomies that dominate the reception of core labour rights in law and development. I will provide analyses of actual instances of adjudication of the rights identified in the 1998 Declaration and of contract law in order to argue that the justifications of the contract/regulation and core/non-core dichotomies are misleading. My reasons for criticizing
these dichotomies revolve around the concern that they have the potential to unnecessarily shrink the policy agenda for labour market regulation. The contract/regulation dichotomy does this by marginalizing the (“regulatory”) legal mechanisms that have traditionally served to redistribute wealth and power between employees and employers. Insistence on the economic efficiency of individualist contract law has often led policy-makers to advocate the dismantling of legislative employment standards and employee entitlements in favour of some iteration of common law or civil code contract law.\(^4\) The core/non-core dichotomy, in turn, may have the effect of marginalizing non-core labour standards (e.g. standards that pertain to minimum wages, working hours and discretion in dismissal). This marginalization effect is less commonly acknowledged than in the case of the contract/regulation dichotomy. Indeed, if many scholars recognize that the 1998 Declaration has created a normative hierarchy between core and non-core labour standards,\(^5\) not everyone agrees that this inevitably leads to a marginalization of non-core entitlements.\(^6\) I take no position in this debate, because I am concerned with the conceptual soundness of the hierarchical distinction rather than its effects in concrete instances of policy making. However, I confess that I find the marginalization thesis quite compelling; this is part of what led me to submit the core/non-core distinction to critical scrutiny. Moreover, I have chosen to address the two dichotomies (contract/regulation and core/non-core) together because, as will become apparent in chapter 1, they strike me as mutually reinforcing. Thus, the view of labour regulation as inherently inefficient (contra private law) may reinforce the perceived necessity of devising a normative justification of the exclusion of non-core labour standards from the development mainstream. In turn, the strengthening of the core/non-core distinction may comfort

\(^4\) See infra note 28 and accompanying text.

\(^5\) See infra chapter 1.

\(^6\) Whether the core/non-core distinction has the potential to marginalize non-core labour standards has been the object of considerable academic debate. Philip Alston has forcefully argued that such a marginalization is rendered very probable by the core/non-core distinction, while Francis Maupain and Brian Langille have respectively argued that this marginalization has not occurred and that it is unlikely to occur given that privileging core labour rights reinforces non-core labour standards. See Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15 EJIL 457 at 488 et seq; Francis Maupain, “Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights” (2005) 16 EJIL 439 at 459 et seq [Maupain, “Revitalization”]; Brian Langille, “Core Labour Rights – The True Story (Reply to Alston)” (2005) 16:3 EJIL 409 at 434-435 [Langille, “The True Story”]. Kerry Rittich has argued that in particular contexts, non-core labour standards have been marginalized in ILO activities subsequent to the 1998 Declaration (Kerry Rittich, “Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work” in Judy Fudge & Rosemary Owens, eds, Precarious Work, Women, and the New Economy: The Challenge to Legal Norms (Oxford and Portland, OR: Hart Publishing, 2006) 31 at 43-44 [Rittich, “Rights, Risks and Reward”]).
those who view contract law as the only truly efficient labour regime, by exceptionalizing labour rights inside the field of law and development. Of course, these are my own impressions, and while they explain why I have chosen to address the core/non-core and contract/regulation dichotomies in the same thesis, I will not attempt to demonstrate their inevitability. Instead, I will focus on the conceptual soundness of the two dichotomies and argue that they should be abandoned.

In this thesis, I will argue that the distinctions between contract law/labour regulation and core labour rights/labour standards are misleading, in that they do not account for the indeterminacy of law. By that, I mean that a legal question often cannot be answered coherently through legal doctrinal tools alone (be they deductive or policy-based), because of the gaps and ambiguities that can be found in law and that make it open to conflicting interpretations of equal legal, normative and philosophical value. My claim throughout will be that it may often be impossible to work out a single coherent and explainable outcome in accordance either with a foundational concept or through a pragmatic exercise of balancing, because of the embeddedness of legal reasoning in irreducible normative conflicts. As a result, the outcome of particular disputes will sometimes have to be brought about not by legal rationalization but by an unexplainable choice that can perhaps best be described as ideological.

I will argue that legal indeterminacy casts doubt on the justifications of the distinctions between core labour rights and non-core labour standards on the one hand and contract law and labour “regulation” on the other, be they based on the instrumental economic efficiency a priori attributed to certain legal rules or on the postulate of a possible systematic legal rationalization. In particular, I will illustrate how these accounts are discredited by the demonstration that organizing principles do not consistently determine outcomes and that attempts to balance competing interests in a pragmatic manner leads to indeterminate results. I will claim that the adjudication of the rights identified in the 1998 Declaration and contract law has created many situations in which competing policies and principles do not provide a metric for objective, non-ideological decision-making. Specifically, I will illustrate how purported overarching concepts such as individualism in contract law, the procedure/substance distinction in the right to bargain collectively and “harm” to “human dignity” in equality rights are inextricably part of a complex policy argument repertoire that does not transparently determine legal outcomes. I will conclude by arguing that as a result of this state of affairs, the distinctions between contract, core labour
Rights and labour standards should be relativized, or even abandoned. I will suggest that a more sound analysis of labour market law should rely on an economic assessment of distributive impact that eschews the presuppositions and dichotomies that now weigh on our appreciation of the effects of labour/employment laws.

In order to demonstrate that core labour rights are indeterminate, I will present examples of Canadian adjudication of core labour rights at the domestic level. Specifically, I will address equality/non-discrimination rights (chapter 2) and freedom of association and the right to bargain collectively (chapter 3), two rights that have constitutional protection in Canadian domestic law.

My goal is not to argue that the Canadian legal developments mirror or were significantly influenced by the (semi-)legal machinery and conceptual apparatus put in place by the ILO 1998 Declaration. Nor will I claim that Canadian domestic developments parallel the portrayal of core

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7 The exclusive focus on domestic law is deliberate, as there is no international case law of core labour rights per se. Indeed, the Declaration only provides general guidelines (“principles”), which are to be “promoted” by member states. See Brian Langille, “Can We Rely on the ILO?” (2007) 13 CLELJ 363 at 375 [Langille, “Can We Rely?”]. A review of the reports and non-adjudicatory documents related to the 1998 Declaration, while valuable, would not provide as much insight into the doctrinal structure of core labour rights as an examination of domestic adjudication. While more has been written on the international conventions predating the 1998 Declaration, these conventions are not intended to be subject to binding “adjudication”, but are rather general guidelines to be implemented by domestic courts and legislation. It has also been noted that international labour conventions are drafted in very broad words and impose and forbid few concrete legal mechanisms to give effect to their legal guarantees (on freedom of association see Langille, ibid at 388-389). This generality of international labour law is reinforced by the fact that it provides little in the way of sanctions. ILO supervision of the implementation of labour conventions is carried out through a process whereby countries submit reports to the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEARC), which essentially issues non-binding comments to governments and reports to the annual International Labour Conference. This procedure is enshrined in s 22 of the ILO Constitution. For allegations of “violations” of freedom of association, it is the Committee on Freedom of Association (CFA) that receives complaints and issues “recommendations” to states. In both cases, Anne Trebilcock reports that the committees can supplement their comments/recommendations by “urg[ing] [governments] to accept ‘direct contacts’ missions, during which solutions can be sought in consultation with the government and workers’ and employers’ organizations in the country.” (Anne Trebilcock, “ILO Conventions-Enforcement Procedures” in Rachael F Taylor & Simon Pickvance, eds, Encyclopedia of Occupational Health and Safety: International, Governmental and Non-Governmental Safety and Health (Geneva: ILO, 2011) online: ILO Encyclopedia of Occupational Health and Safety <http://www.iolo.org/oshenc/>). This forms what Brian Langille has called the “‘supervisory system’—a system of reporting, monitoring [and] commenting” which is “not a detailed duty imposing system of legal enforcement [...] but an alternative and facilitative approach to law” (Brian Langille, “Imagining Post Geneva Consensus Labour Law for Post Washington Consensus Development” (2010) 31:3 Comp Lab L & Pol’y J 523 at 537 [Langille, “Post Geneva Consensus”]). There are formal enforcement mechanisms and sanctions in the ILO constitution, for instance in articles 24, 26 and 33 under which a complaint may eventually lead to adjudication by the International Court of Justice. However, Langille reports that these mechanisms “are, in the daily practice of ILO law, irrelevancies” (ibid), as opposed to the soft mechanism of reporting and commenting. This structure does not offer much opportunity to reflect on the doctrinal structure of core labour rights, a topic that is nevertheless crucial if the concept (and its attendant dichotomies) is to migrate to fora, such as the international financial institutions, where domestic labour policies are discussed.

8 They are enshrined respectively in ss 15 and 2(d) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
labour rights in law and development debates. Rather, I will use Canadian case law to illustrate the doctrinal constraints and indeterminacy that arise when the rights put forward in the 1998 ILO Declaration are adjudicated. Moreover, I will not be criticizing the content given to the 1998 Declaration, but the conceptual separation which it helped crystallize and spread to many other organizations and legal apparatuses, as I will describe in chapter 1. For both equality rights and freedom of association, I will start by arguing that “deductive” methods based on overarching concepts (“human dignity” and “harm” for equality rights and purely “procedural” rights for freedom of association) under-determine the content of the right, such that “policy analysis” is often inevitable. The second step of my demonstrations will be to argue that “policy analysis” itself is indeterminate, i.e. that there is often no principled way to “balance” competing rights, interests or principles. In order to do so, I will appropriate the literature that maps actually existing policy arguments in binaries (sometimes referred to as “arguments-bites” or “nested oppositions”) which respond to each other in a symmetrical and systematic fashion. The basic idea will be that it is very often possible to counter a given policy argument with its opposite “argument-bite”, and that there might be no principled way to determine which side should prevail. My analysis of policy argument will underline what Brenda Cossman calls the “fissures, frictions and contradictions” that accompany many invocations of legal doctrine.

After having undertaken this analysis with regards to equality rights (chapter 2) and collective bargaining rights (chapter 3), I will then turn in chapter 4 to contract law to criticize the

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9 Arguably, the recent Canadian case law on the right to bargain collectively is, as we will see, closer to international legal developments than is the case law on employment equality rights.

10 Even though I mostly deal with domestic law, the methodology I appropriate has often been applied to international law as well. For an analysis of the indeterminacy of international law, see David Kennedy, “The International Human Rights Movement: Part of the Problem?” (2002) 15 Harv Hum Rts J 101 at 116-117. For an analysis of the indeterminacy of the “translation [of law] from international to national”, see Karen Knop, “Here and There: International Law in Domestic Courts” (1999-2000) 32 NYUJ Int’l L & Pol 501 at 506.

11 As I will explain in more detail in chapter 2, “policy analysis” can be defined as the “balancing” of societal interests and considerations to back up a legal interpretation or a choice of legal rules. It can be opposed to deductive argument.


dichotomic view of the latter as an instrumentally efficient and normatively coherent body of individualist legal rules that should be systematically privileged over “regulation”. Chapter 4 will thus undertake a semiotic analysis of contract law policy arguments similar to that presented with regards to core labour rights, focusing on the specific institution of the right to interrupt performance following a breach of contract. I will again argue that what is posited as a foundational organizing concept (here, individualism) does not generate consistent or explainable outcomes in particular cases. Instead, the idea that individuals should be allowed to pursue their freedom but only insofar as compatible with that of others seems to constantly generate tensions between contradictory poles of individualist and altruist reasons to adopt legal rules. Given that contract law institutions are subject to very different legal rules and that individualist and altruist justifications for these diverging rules often seem equally compelling from the standpoint of the freedom of all individuals, I will argue that contract law is riven with contradictions and thus indeterminate. Given these possible contradictory decisions on the part of adjudicators, I will argue that no presumptive efficiency should be attributed to contract law over labour regulation. Indeed, the presence of contestable value choices inside the purported individualist core and the possibility of wildly differing economic outcomes from contract adjudication seem to invalidate the contract/regulation distinction (and hierarchy). Chapter 4 will draw on case law from five Western jurisdictions: common law Canadian provinces, civil law Quebec, France, the United States and the United Kingdom.

This thesis does not undertake a detailed analysis of the international “enforcement”/promotion of core labour rights. Instead, it assesses “core labour rights” as doctrine and rhetoric, based on the idea that it is on this level that the ILO Declaration has had the most profound impact. As a result, my thesis does not undertake the kind of broad contextual analysis that would be required to situate the law and development mainstream ideas in light of their social impact, whether at the level of international relations of economic power, migration flows and geopolitics for such analyses, see Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World” (2000) 32 NYUJ Int’l L & Pol 243; Adelle Blackett, “Trade, Labour Law and Development: A Contextualization” in Tzehaines Teklè, ed, Labour Law and Worker Protection in Developing Countries (Portland, OR: Hart Publishing, 2010) 121. or at the level of gendered and racial disadvantage in the workplace and the household. For example, see the contributions to the special issue of the Comparative Labour Law & Policy Journal (Adelle Blackett, ed, Labor Law and Development: Perspectives on Labor Regulation in Africa and the African Diaspora


15 For example, see the contributions to the special issue of the Comparative Labour Law & Policy Journal (Adelle Blackett, ed, Labor Law and Development: Perspectives on Labor Regulation in Africa and the African Diaspora
thesis situate core labour rights in light of the broader legal regulatory structure of labour market flexibility mechanisms in which they are embedded. I do believe that such contextualisation is necessary. Nevertheless, I have made the choice to suspend that inquiry in order to focus on the internal structure of legal reasoning used in legal disputes, because this subject has its own advantages. For instance, it will allow me to heed Brenda Cossman and Judy Fudge’s call to ascertain not only the “instrumental” role of law, but also the discursive and constitutive role it plays in (re)configuring foundational concepts used in philosophy, politics and social interactions. I will proceed on the assumption that this constitutive role of law can only be properly assessed from the “inside”, through doctrinal analysis. Moreover, considering the doctrinal structure of core labour rights has significant import for an eventual contextual sociological analysis, because legal doctrine is part of what employees and employers bargain in the shadow of. Finally, the internal perspective will allow me to situate my claims in the broader context of the forms of legal thought that have spread across the planet in different local manifestations but according to common modes of global legal consciousness, as argued by Duncan Kennedy. In so doing, I intend to suggest that the doctrinal indeterminacy I outline is symptomatic of broader developments in legal thought. I will situate the Canadian (and Western)


17 As put by Cossman & Fudge:

The law provides a template for resolving broader social conflicts by individualizing disputes. But law does not have only an instrumental value or effect; it has a broader normative import. Regardless of whether law is being used to repress or to foster specific institutional arrangements or social relations, it provides a justificatory framework, defining and redefining values such as equality, liberty, and the rule of law, for the invocation of state power. (Brenda Cossman & Judy Fudge, “Introduction: Privatization, Law and the Challenge to Feminism” in Cossman & Fudge, supra note 13, 3 at 5, references omitted)

18 I borrow this phrase from Mnookin and Kornhauser’s classical exposition of the relevance of legal rules in extra-judicial bargaining scenarios, even when adjudication is not engaged; Robert H Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale LJ 950.

doctrinal elaborations with regards to Duncan Kennedy’s three global modes of legal consciousness (“Classical Legal Thought” (CLT), defined by an insistence on interpretive formalism, individualism and the public/private distinction, “Social Legal Thought” (SLT), characterized by a functionalist critique of CLT, an emphasis on social interdependence and the mediation of social conflict in the name of the public interest, and what I will call the “Third Globalization”, which blends rights neoformalism and “policy analysis”). Specifically, I will argue that the indeterminacy of core labour rights and contract law often tracks these “three globalizations”, for instance by involving competing policies that represent rival globalizations (in particular, policies inspired by Social Legal Thought versus those inspired by Classical Legal Thought). This will allow me to claim that the conflicts, contradictions and indeterminacy I describe have resonance in other legal fields and countries. Indeed, it seems that all legal jurisdictions have been influenced firstly by Classical Legal Thought, secondly by Social Legal Thought and by the Third Globalization. I will thus take doctrinal elements of Canadian and Western legal systems and attempt to relate them to these global modes of legal consciousness, in the hope and with some confidence that they will be relevant in other countries and hemispheres.

My thesis may be open to the charge that it wrongly takes the legal doctrines of a few countries and treats them as potentially “universal”. However, I follow Duncan Kennedy in treating specific local doctrinal structures (in this case, Canadian labour/employment and Western contract law) as symptomatic of a broader legal consciousness that can accommodate iterations specific to other countries. Thus, the claim is not that the Western legal developments are “universal”, but rather that these iterations can be generalized to a level where they are analogous to the basic doctrinal structure that underlines the discourse of courts and lawyers in other specific settings. Moreover, I accept Kennedy’s claim that different modes of legal

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20 For a summary of these modes of legal consciousness, see ibid at 21. A significant literature has expanded upon Kennedy’s account to complement it. See the contributions to volume 3, issue 1 of the Comparative Law Review, dedicated to “The Third Globalization of Law and Legal Thought”; see especially Justin Desautels-Stein, “Experimental Pragmatism in the Third Globalization” (2012) 3:1 Comparative Law Review, online: Comparative Law Review <http://www.comparativelawreview.com>.

21 Kennedy, “Three Globalizations”, supra note 19 at 23.

22 I do not mean to imply that this exercise in comparative law would be easy; indeed, there are considerable methodological challenges inherent to it. Suffice it to mention that to engage in such a project, one would need to develop a methodological posture that acknowledges the socio-legal hybridity and the two-way processes of influence inherent to center/periphery dynamics, in order to avoid the trap of conceptualizing legal diffusion (and
consciousness globalized and were iterated locally through colonial violence, the exercise of economic and political power as well as prestige and persuasion. Thus, taking Canada as a case study may be wholly appropriate, as it has like so many other jurisdictions been subject to the German, French and American legal influences that have driven Kennedy’s “Three Globalizations”.

Some more disclaimers are in order before I begin my exploration of the indeterminacy of the right to non-discrimination (chapter 2) and collective bargaining rights (chapter 3). My choice of these two rights should not be interpreted as implying that they exhaust the possible policy approaches to labour market regulation. On the contrary, while these rights might be of some value, it is quite obvious that sound labour market governance must implicate many different strategies, be they rights-driven or not, legal or not. My goal in this thesis is not to devise a satisfying labour/employment policy approach. Rather, the idea is to debunk a particular vision of core labour rights and contract law that infuses the mainstream governance agenda. One conclusion I will draw from my demonstration is that we should go beyond the contract/regulation and core/non-core dichotomies and devise labour/employment laws according to an economic analysis of their distributive impact, irrespective of whether these laws fit the mould of labour rights as human rights and contract law as individualist background rules. Thus, the most important implication of my argument may be to open up the law reform agenda to possibilities that seemed precluded by the complex and potent dichotomies of mainstream law and development thinking. Only once that is done can we go beyond “core

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23 Kennedy, “Three Globalizations”, supra note 19 at 22.
24 Ibid at 23.
25 It should also be noted that even though I frame my argument around the classical delineations of the law of the market (“labour/employment law” and “contract law”), I acknowledge that these doctrinal categories are historical constructs that obscure the imbrications of household and non-market work with the market. In fact, I see this thesis as a first step towards the subversion of these legal categories. On the historical creation of the notion of “market” law (as opposed to “family law”) and for an alternative distributive methodology that recognizes the entanglement of various artificially segregated legal fields such as inter alia labour/employment and family law, see Janet Halley & Kerry Rittich, “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism” (2010) 58 Am J Comp L 753.
labour rights” and begin the difficult task of understanding the social stakes imbricated in various invocations of development, economics and legal structures.
Chapter 1 - The New Law and Development Mainstream: Core Labour Rights and the “Incorporation of the Social” into the Washington Consensus

This chapter describes the different rationales put forward to justify both the dichotomy between contract law and labour regulation and that between core labour rights and non-core labour standards. I classify the various justifications according to whether they rest on an instrumental economic analysis or on what I call a “legal formalist/pragmatic” approach. Instrumental economic analysis posits certain legal institutions as inherently favourable to economic growth and efficiency, while legal formalist/pragmatic analysis attempts to devise a coherent, non-economic and non-instrumental set of foundational principles and values that justify enhanced attention to certain legal institutions. In the latter case, the focus is not on the effects of legal norms but on their connection to fundamental values that distinguish them from other rules. The contract/regulation and core/non-core labour standards distinctions have each been defended on both instrumental economic and legal formalist/pragmatic grounds. I thus now explore these various accounts in order to contest them in subsequent chapters.

One of the defining features of the two decades leading up to the adoption of the ILO’s 1998 Declaration was “neoliberal” economic and legal thought, sometimes referred to as the “Washington Consensus” because of the role of US governments and the US-based World Bank and IMF in propagating this discourse. In essence, the Washington Consensus sought to eliminate “price distortion” and regulation in order to achieve maximum efficiency in an economy now conceived as a series of micro-economic markets rather than a macro-economic interrelated whole. The legal implications of this economic outlook have been summed up by David Kennedy as follows: “the private law regimes necessary to support market transactions should be strengthened, while the public law regulations and bureaucratic procedures that

impeded private exchange were dismantled.” Thus, contract and property law needed to be strictly distinguished from and privileged over “regulatory” laws such as employment standards. James Atleson et al described the Washington Consensus agenda of labour regulation as “‘flexibilizing’ labor laws to give employers more power to cut wages and dismiss employees, and to reduce workers’ bargaining strength.” The Organisation for Economic Co-Operation and Development (OECD) likewise made a mantra of the idea that states should “make wage and labour costs more flexible”.

The idea underlying the Washington Consensus was (and still is) that the role of the state in the economy should be constrained to that of “enforc[ing] contracts voluntarily entered into, thus giving substance to ‘private’.” The common law (and civil code) rules of contract were understood as a mechanism to hold individuals to their promises and realize their “wills”. Such an individualist conception of contract as the mere reflection of private will went hand in hand with a preference for “clear rules rather than vague standards” as a way to foster predictability and lessen judicial discretion inside the economic fabric of society. The link between such a rationalization and economic efficiency was made by reducing contract law to a clear expression of the parties’ welfare-maximizing preferences, for instance of employers’ ability to “bid wages to whatever level enables them to get an amount of labor that can be put to profitable use.” This view of contract law allowed the depiction of labour market institutions (e.g. employment

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27 Ibid at 132.
31 This conception of private law required a “formalization” of law around such concepts as “contractual simplicity and reliable enforcement”, with a key role to be played by courts: David Kennedy, “Development Common Sense”, *supra* note 26 at 143. This corresponds in many ways to the 19th century will theory of law. As put by Duncan Kennedy, “the will theory was that the private law rules of the ‘advanced’ Western nation states were well understood as a set of rational derivations from the notion that government should help individuals realize their wills, restrained only as necessary to permit others to do the same.” (Duncan Kennedy, “Legal Formalism” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 8634 at 8635 [Kennedy, “Legal Formalism”]).
32 David Kennedy, *ibid*.
standards and collective bargaining laws) as “distorting” of the free market equilibrium between labour supply and demand. This distortion is not only portrayed as inefficient, but also as unfair because creating a class of unemployed “outsiders” who would have been included in the labour market had it not been for the artificial modification of the terms of the employment contract and its attendant supplementary burden on employers. “Flexibility” thus became a key organizing concept of labour policy and lay at the core of instrumental economic justifications of the turn away from “regulation” towards a contract law driven by individual will.

This “neoliberal” approach, in which all labour regulation, whether in the form of rights or statutory standards, should be subordinated to the operation of “free” market contract law, was soon supplemented by a new approach, which incorporated law and legal rights as part of a vision that equates development with the “rule of law” and “good governance”. As a result, as put by economist Dani Rodrik, the dominant current shifted from “market fundamentalism” to “institutions fundamentalism”. As some scholars have noted, the new law and development mainstream incorporated into the Washington Consensus a view of good (legal) governance as an end in itself as well as an essential condition of economic growth. Kerry Rittich has identified inside this new vision a process she calls the “incorporation of the social”, whereby social concerns such as labour rights and gender equality are incorporated in the economic development agenda of the international financial institutions. One of the major intellectual architects of this shift was Nobel laureate Amartya Sen, who was adamant that we conceptualize “development as freedom”, and not just as an instrument of economic growth. As Rittich argues, the incorporation of social concerns into law and development doctrine often actually

34 Such a conception was at the core of the highly influential 1994 OECD Jobs Strategy, supra note 29; see Kerry Rittich, “Global Labour Policy as Global Social Policy” (2008) 14:2 CLEJ 227 at 244 et seq.
35 Ibid.
38 Rittich, ibid.
entails a modification, if not a chastening of social objectives. Moreover, as noted by several scholars, the view of contract law as a neutral, efficient, non-interventionist fundamental law of the market remains very much at the core of the new law and development mainstream. Indeed, (free market) contract law has been given added legitimacy by the shift of development from means to end, as scholars such as Amartya Sen have included a right to trade and entrepreneurship in their catalogue of human rights deserving protection, independently of all instrumental economic considerations.

A paradigmatic example of the “incorporation of the social” can be found in the global reception of the aforementioned ILO Declaration on Fundamental Principles and Rights at Work (1998 Declaration), as the latter has been widely endorsed by various IFIs. As the term “core labour rights” suggests, the 1998 Declaration has incorporated labour rights in the form of human rights rather than social regulation that purports to protect workers as a group. The 1998 Declaration was adopted in a specific context, as a direct result of the impasse in the early 1990s discussions on the so-called “trade-labour linkage” and the failure of attempts to incorporate a “social clause” in WTO instruments, a mechanism which would have allowed the imposition of trade sanctions on states not respecting international labour standards. These discussions on the trade-labour linkage took place inside and outside the WTO and culminated not only in the jettisoning of the social clause, but in the rejection of the very idea of a direct institutional link between

40 Rittich, “Incorporation of the Social”, supra note 37 at 231 et seq.
41 David Kennedy, “Development Common Sense”, supra note 26 at 150; Rittich, “Incorporation of the Social”, ibid at 213.
42 See Sen, supra note 39 at 112 et seq.
43 Supra note 2.
44 In addition to the World Bank and the OECD, the idea of core labour rights influenced broader international trade practices. For instance, reference to “core labour standards” and “basic rights of workers” were included in several trade agreements between the European Union (EU) and other non-European countries. As Bob Hepple notes, these treaties are “clearly influenced by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.” (Bob Hepple, “The WTO as a Mechanism for Labour Regulation” in Brian Bercusson & Cynthia Estlund, eds, Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions (Portland, OR: Hart Publishing, 2008) 161 at 168).
trade and labour concerns.47 The WTO Ministerial Conference issued a statement in its 1996 Singapore Declaration, endorsing and recognizing the importance of “core labour standards” (referring to the core labour rights later included in the 1998 Declaration) but rejecting any WTO involvement in promoting them, designating the ILO as the “competent body” for such promotion.48 In the immediate aftermath of this failed linkage, work that had been underway at the ILO culminated in the adoption of the 1998 Declaration.49 The Declaration granted “fundamental” status to four labour standards that were to become “rights” and given normative pre-eminence over the rest of the international labour standards.

The distinction between core labour rights and non-core labour standards has had lasting impacts beyond the 1998 Declaration, shaping the ILO agenda up to today. For instance, it has remained at the core of the “Decent Work Agenda” (DWA), a programmatic concept adopted by the ILO in 1999 as a way to integrate its various roles and areas of intervention.50 Indeed, the four-component DWA, while encompassing the three other goals of job-creation, “social protection” and “social dialogue”,51 still treats “rights at work”, referring to the content of the 1998 Declaration, as a distinct objective.52 This conceptual separation has resulted in, as put by former International Labour Office director Jean-Michel Servais, a “clear pre-eminence” of “fundamental labour rights” over the other components of the DWA.53 Building on the Decent Work Agenda, the ILO has recently adopted the 2008 ILO Declaration on Social Justice for a Fair Globalization,54 essentially formalizing and maintaining the four-component approach of the DWA, with the rights from the 1998 Declaration still conceptually distinguished and labelled

49 The 1998 declaration obviously has a more complex genealogy than what I can detail here. A more exhaustive history would need to address what Philip Alston called the “new voluntarism”, promoted by many actors inside the ILO advocating from the early 1990s onwards “soft” promotion of a restricted number of labour rights (see Alston, supra note 6 at 464), as well as the role of the United States’ push for a “universal” approach to labour rights that eschews existing ILO conventions (ibid at 466).
52 Ibid. See also Bob Hepple, Labour Laws and Global Trade (Portland, OR: Hart, 2005) at 63.
“fundamental.” Interestingly, this enduring division of core labour rights and non-core labour standards seems to have spread beyond the machinery put in place by the 1998 Declaration to reorganize the priority among the pre-existing labour conventions themselves; indeed, the ILO website now describes the eight predating conventions on the core labour rights (and not merely the 1998 Declaration) as “fundamental” to the international labour standards system.

The actors involved in the “incorporation” of core labour rights in the law and development mainstream have deployed various rationales (both instrumentally economic and legal) to legitimize them, in every instance as distinct from and as having prominence over conventional labour standards. In ILO quarters and among scholars close to the organization, the justification of core labour rights has been overwhelmingly driven by an approach I call “legal formalist/pragmatic”. That is, the distinction between core labour rights and other labour standards has been based on the formers’ distinctive legal, normative basis, quite apart from considerations of economic efficiency, which the legal formalist/pragmatic rationale brackets. Brian Langille, an independent scholar with long-lasting implication in ILO academic and legal affairs, thus defended the idea of process-oriented core labour rights as fundamental and as having normative precedence over substantive legal guarantees. Langille added that the “conceptual coherence” of core labour rights stems from their grounding in the notion of “freedom of contract and self-determination”, as opposed to labour standards, which are based on “strict paternalism.”

Francis Maupain, the ILO’s legal advisor during the drafting of the 1998 Declaration and long-time representative of the ILO in various capacities, has argued that


57 See Langille, “The True Story”, supra note 6 at 430. Philip Alston agrees that this should be considered the main rationale behind the 1998 Declaration: Philip Alston, supra note 6 at 487. Christina Kaufmann described the 1998 ILO Declaration’s conceptual foundation as follows:

[T]here were signs of a developing conception of these core issues as labour rights and not as labour standards. This development is important for several reasons. First, it shifts the emphasis from economic efficiency to fundamental human rights. Second, a rights-based approach underlines the importance of fair contracting process and does not attempt to define universal common outcomes, which would be impossible. Therefore, the focus is on process, rather than on results. (Christine Kaufmann, Globalization and Labour Rights: The Conflict between Core Labour Rights and International Economic Law (Portland, OR: Hart Publishing, 2007) at 70).

58 Langille, “The True Story”, supra note 6 at 429.
core labour rights distinguish themselves by a “Kantian thread” that centers on the individual “autonomy of the will” and its “extrapolation [...] to the collective level”. Maupain added that the distinction between core labour rights and labour standards accounts for the fact that social justice “cannot be defined so much in terms of a pre-defined product as in terms of fair processes which are themselves inseparable from its proclaimed values of human dignity, freedom and dialogue.” So, we see that the normative validation of the distinction of core labour rights and labour standards rests on various overarching principles: the procedure/substance distinction and the ideas of freedom, self-determination and human dignity are all invoked. As Janice Bellace has noted, the result of these legal normative justifications has been to extirpate core labour rights (but not non-core labour standards) from the “arena of national partisan politics” and the “miasma of debate on the universality of application of labor standards in the face of varying economic conditions.”

I label these legal justifications as “formalist/pragmatic”, because they often simultaneously appeal to a formalist view of founding concepts as providing the necessary coherence to apply the law to concrete cases in a consistent manner and to a pragmatic, “soft” enforcement approach that eschews concrete “binding” rules and privileges general guidelines that can be applied in a flexible way in different contexts. It seems to me that, paradoxically, the privileging of a “soft” contextual approach based on general principles instead of precise legal rules augments the legal validation's dependence on formalism, as the legitimacy of the articulation of core labour rights in particular contexts will heavily depend on the possibility of rationally deducing outcomes (or determining them through some form of principled interpretation) from the general principles (as varied as they may be). Moreover, as I will outline over the course of this thesis, legal formalism is often deployed in conjunction with purportedly

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59 Maupain, “Revitalization”, supra note 6 at 448.
60 Ibid.
62 I am guided by the following definition of one possible instantiation of legal formalism: “Conceptual interpretive formalism ‘constructs’ general principles thought necessary if the legal system is to be understood as coherent. It uses the principles to resolve uncertainty about the meaning of extant valid norms, and applies the principles according to their meaning to fill apparent gaps.” (Kennedy, “Legal Formalism”, supra note 31 at 8635 [references omitted]).
63 This is an important part of the justification of the articulation of the rights of the 1998 Declaration as “principles”, as well as of the privileging of “soft” promotional approaches over “hard” enforcement before ILO committees. For discussion see Rittelch, “Rights, Risks and Reward”, supra note 6 at 46; Langille, “The True Story”, supra note 6 at 424.
ad-hoc balancing, resulting in the implicit claim that while a given overarching principle needs to be adapted to each particular case (perhaps “balanced” against other rights, principles or interests), it can still be seen as coherently determining outcomes.

While the rationalization of the distinctiveness of core labour rights on purely legal grounds was quite influent, the instrumental effect of core labour rights on economic efficiency has also been hotly debated in many fora. The 1996 WTO Singapore Declaration has been an important phase of these discussions, inaugurating the troubled relationship between core labour rights and economic efficiency. Paragraph 4 of the Singapore Declaration read as follows:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.64

This statement is quite complex. On the one hand, we are instructed that trade liberalization in itself contributes to the promotion of core labour rights. However, the possibility of core labour rights impeding growth (specifically, the “comparative advantage” of a given country) is anticipated. Should this possibility materialize, the WTO Ministerial Conference would withdraw its support for core labour rights. Paragraph 5 of the ILO 1998 Declaration reproduced this selective acceptance of core labour rights, stating that “labour standards should not be used for protectionist trade purposes” and that “the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up”.65 This ambiguous acceptance of core labour rights has been further complexified when the ILO tried to reassert the importance of core labour rights by stating in its 2008 Declaration that “[t]he violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage”.66 These are two quite contradictory statements which illustrate the strength of the idea that core labour rights might impede economic efficiency in the country in which they are implemented, thus affecting its comparative advantage. There have been attempts at smoothing out this tension, not only from a legal normative perspective, but also from an

64 Singapore Declaration, supra note 48 at para 4.
65 1998 Declaration, supra note 2 at para 5.
instrumental, economic one. For instance, the ILO itself has asserted that certain core labour rights such as equality have a positive impact on economic efficiency. The OECD has also sought to demonstrate in two studies from 1996 and 2000 that not only is respect for core labour rights, including freedom of association and collective bargaining, unlikely to hamper economic efficiency, but that a correlation can be established between economic performance and respect for core labour rights. However, the instrumental economic case for core labour rights is highly contested and unstable. Indeed, several analysts have criticized the evidence put forward by the OECD. Moreover IFIs such as the IMF and the World Bank have been reluctant to go beyond merely acknowledging the importance of core labour rights in principle and have often failed to integrate them in their instrumental economic analyses.

Interestingly, other scholars have devised a justification for the distinctiveness of core labour rights that treads a middle ground between the instrumental and the legal. Such an account, while abandoning the idea of measuring the efficiency of core labour rights, nevertheless posits that the latter can be rendered efficiency neutral (if not efficiency enhancing) by being defined according to specific “market-friendly” legal concepts. As put by Christopher McCrudden and Anne Davies:

Claims that there is a positive synergy between trade and rights are, at best, unproven. But this leaves the more modest argument that some fundamental workers’ rights can be pursued without harming trade. To gain widespread acceptance, such rights must have a reasonable claim to universality, and must be free from the taint of protectionism. […] There is a clear attempt [in the 1998 Declaration] to lessen the accusation of protectionism and the erosion of comparative advantage in the choice of these “core” rights. None of the rights identified touch directly, for example, on the appropriate wage that should be paid, nor even on the need for minimum wage setting procedures. Perhaps more significantly, these rights may be seen as rights to a process, not rights to a particular outcome (however difficult that distinction is to draw in practice). They are linked, particularly, by an attempt to protect freedom of choice. Confining our list of labor rights to those that serve to increase freedom of choice, and freedom of contract, means that such labour rights would seem not only theoretically consistent with the ideology of free trade, but...
also required by it. If we select our labor rights carefully, it may thus be possible to avoid a theoretical conflict with trade liberalization.  

Influential mainstream law and development scholars such as Michael Trebilcock provided an exemplary instance of this approach by proposing that “core labour standards” be stripped of their conceptual ties to international trade and assimilated to “universal” human rights, as well as directed towards “freedom of choice” and “individual well-being”. While Trebilcock rejects any conceptualization of core labour rights in economic terms (especially to the extent that they entail an appreciation of comparative advantage or the idea of preventing a regulatory “race to the bottom”), he posits his own “universal” rationalization of core labour rights based on “promoting basic freedom of choice” as “consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location.”

Brian Langille has proposed a similar rationalization of the distinctiveness of core labour rights:

[T]he shift to a rights-based conception is [...] a “market friendly” approach which appeals to, and is grounded in, the fundamental virtues of market ordering - free, informed and uncoerced choice - which are at the normative foundation of markets. Thus, while grounding the debate in human rights terms at once liberates the discussion from familiar controversies couched in terms of economic efficiency, it does so by simultaneously appealing to non-instrumental values foundational to market theory.

This rationalization of the distinction between core labour rights and labour standards effectively combines an instrumental economic approach with a legal normative one. Under this view, provided that core labour rights are grounded in the right overarching concepts, their economic impact can be assumed to be either positive or neutral.

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73 Ibid at 173. This approval might have something to do with the fact that core labour rights are presented as first generation “civil and political rights” as opposed to second-generation “social and economic rights”. See Philip Alston & James Heenan, “ Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?” (2004) 36 NYU J Int’l L & Pol 221 at 254-255.
74 Ibid at 174.
The various rationales for the two organizing distinctions of current mainstream views on labour market regulation (contract law/labour “regulation” on the one hand and core labour rights/non-core labour standards on the other) can be summarized as follows:

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<th>Instrumental Economic Justifications</th>
<th>Formalist/Pragmatic Legal Justifications</th>
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<tbody>
<tr>
<td><strong>Contract (and Private) Law as Trumping Labour “Regulation”</strong></td>
<td>Contract law as governed by efficiency enhancing individualist logic (Washington Consensus)</td>
<td>Contract law as an exercise of fundamental freedoms &amp; as the expression of the rule of law (Amartya Sen)</td>
</tr>
<tr>
<td><strong>Core Labour Rights as Distinct From Non-Core Labour Standards</strong></td>
<td>Core labour rights as wholly compatible with efficiency (ILO) or Accepted only insofar as efficiency enhancing (WTO Singapore Declaration)</td>
<td>Core labour rights as universal ends, not means Rationalized by an overarching legal concept (e.g. procedure over substance, human freedom and dignity) (Maupain, Langille, Bellace)</td>
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If not efficiency enhancing, at least not “trade-harming” because can be defined by “values foundational to market theory” (“freedom of choice”, procedure over substance) (Trebilcock, Langille, McCruden & Davies)

The resulting picture of the law and development mainstream is a relatively stable set of views on the distinctions between contract law, core labour rights and non-core labour standards. The stability of the dichotomies is reinforced by the fact that they seem to be mutually reinforcing. For instance, when the instrumental view of individualist contract law as inherently efficient
clashes with economic justifications of core labour rights, the legal defences may provide a way to normalize the presence of core labour rights, as distinct from non-core labour standards. However, the various rationalizations’ ability to coexist does not mean that they are equally accepted. Indeed, it is my impression that the instrumentalist economic justification is the most influential for contract law, while the formalist/pragmatic legal justification is the strongest for core labour rights. Moreover, none of the explanations is hegemonic; some actors still refuse to recognize core labour rights, while the inherent efficiency of contract law has been called into question by recent developments in economic and legal theory. Nevertheless, all these accounts exert an important influence on current debates.

The Indeterminacy of Core Labour Rights and Contract Law: Remapping Market Regulation

In this thesis, I undertake to refute the various rationalizations, be they instrumental or legal, of the distinction between core labour rights and non-core labour standards, on the one hand, and contract law and labour “regulation”, on the other. I argue that the indeterminacy of law shatters the various above outlined explanations for these distinctions. Legal justifications that are based on the rationalization of certain legal institutions according to an overarching concept (such as “freedom”, “dignity” or “procedure (and not substance)”) are invalidated by the critique of the formalist idea that a general principle can determine outcomes in a coherent way. Moreover, these defences are not saved by the pragmatic idea that decisions can be made consistent through a “balancing” of competing interests, rights or principles, because it turns out that the balancing process is no more determinate than deduction from general concepts. If the exclusive acceptance of core labour rights is based on the fact that they, unlike employment standards and other labour regulations, can be shown to stem from common normative foundations, then evidence that these foundations systematically generate contradictory outcomes in individual cases may be fatal. Indeed, as I will explain, this demonstration evidences the contradictory nature of the principles themselves. Legal indeterminacy also affects the quasi-instrumental rationalization of core labour rights described above, whereby the choice of the right “market-friendly” organizing idea would guarantee at least the neutrality of core labour rights as to their

76 See David Kennedy, “Development Common Sense”, supra note 26 at 152-155.
economic impact on growth and efficiency. Here again, the impossibility of consistent application of general principles invalidates the justification.

Finally, the indeterminacy argument also disturbs purely instrumental economic accounts. As we have seen, the latter are based on the view of contract law as the instrument of economic and moral individualism. If it turns out that individualism does not coherently determine outcomes, but that contract law is rather riven by conflicts between vastly diverging rules and individualist as well as altruist justifications for these rules, then the association of contract law with the neutral articulation of self-interested supply and demand may be misleading. Admittedly, since I address the indeterminate structure of legal rules and not the whole range of economic methods for analyzing efficiency, my argument is more relevant to the “formalist/pragmatic legal” than to the “instrumental economic” rationales outlined above. Nevertheless, by questioning the legal presuppositions of instrumental economic analysis, I hope to bring a valuable contribution to this research agenda as well.
Chapter 2 - The Right to Equality at Work: Policy Argument and Indeterminacy

In this chapter, I deconstruct the doctrinal structure of the right to equality in the workplace, focusing on the tests and criteria devised by Canadian adjudicators with respect to statutory instruments. In section a, I assess the overarching principles put forward to generate outcomes in particular cases, i.e. the idea that an approach grounded in “substantive equality” can be governed by the notions of harm and exclusion in order to allow adjudicators to determine which workplace standards are prima facie discriminatory. I argue that these purported organizing concepts do not provide a metric to decide concrete cases. I then analyze the “balancing” framework used by adjudicators to pragmatically tailor their findings to the facts of each case. I focus this part of my analysis on the legal test used to determine whether a prima facie discriminatory standard is acceptable or whether it must be modified as a remedy for the claimant. I give particular attention to the criterion of “undue hardship”, because of its pivotal role in the assessment of the justifiability of a given standard. As we will see, disputes most often turn on whether the impugned workplace standard can give way to accommodation or whether this would result in “undue hardship” for the employer. I argue that this process cannot be rendered determinate by being formulated as a pragmatic reconciliation of private interests, because even the narrowest formulation of a private interest can be understood to involve societal, public policies and goals. In section b, I argue that policy analysis itself is indeterminate, i.e. that there is no principled way to decide which policy consideration will prevail and which outcome will be favoured. I wrap up this chapter by arguing that since equality rights rest on internally inconsistent concepts (harm and human dignity) and rely on an indeterminate “balancing” process to tailor outcomes to each particular case, justifications of their distinctiveness that rely on the formulation of a universal organizing principle (whether “market-friendly” or of autonomous normative value) should be reconsidered, and perhaps abandoned.

I now briefly outline recent developments in international labour law concerning equality rights. Even though the right to non-discrimination was included as one of the four “core labour rights”
in the 1998 Declaration, its protection in international law is long-standing.\textsuperscript{77} The ILO itself had two major conventions on equality at work that predated the 1998 Declaration: the \textit{Discrimination (Employment and Occupation) Convention, 1958} (No 111)\textsuperscript{78} and the \textit{Equal Remuneration Convention, 1951} (No 100).\textsuperscript{79} One of the most important transformations of the last decades in international labour law has been the shift from a formal conception of direct discrimination to a vision of equality rights that includes indirect, “effects-based” discrimination. Colleen Sheppard explains the distinction between these two conceptions as follows:

\begin{quote}
While non-discrimination was initially understood as a fairly limited legal principle that mandated equal treatment for similarly situated individuals, it subsequently expanded to embrace indirect or effects-based discrimination, resulting from the seemingly neutral rules, standards and practices at work. … This theoretical shift allowed … individuals to assert their entitlement to inclusion despite their differences from the dominant norm. In other words, assimilating into a dominant norm was no longer a prerequisite for inclusion.\textsuperscript{80}
\end{quote}

The ILO equality conventions, as well as all three “global reports” on equality following up on the 1998 Declaration, emphasize both direct and indirect discrimination.\textsuperscript{81} In addition to indirect discrimination, the idea of “systemic discrimination” has been put forward by the ILO as a lens through which equality rights could tackle more structural forms of exclusion, even some that may not be immediately traceable to individual acts of discrimination.\textsuperscript{82} However, it would appear that while this notion has been incorporated in some analyses, equality rights are still widely seen to concern individual relationships of “exclusion” from the workplace as distinct

\textsuperscript{78} \textit{Convention concerning Discrimination in Respect of Employment and Occupation}, 25 June 1958, 362 UNTS 31 [ILO Convention 111].
\textsuperscript{82} Systemic discrimination is defined by the ILO as “not an exceptional or aberrant occurrence, but a systemic phenomenon, frequently embedded in the way in which workplaces operate and rooted in prevalent cultural and social values and norms” (ILO Equality Report 2007, \textit{ibid} at 9).
from “the domain of the public regulation of labour standards and economic policy”, as put by Colleen Sheppard. Likewise, in various domestic jurisdictions, “systemic discrimination” has been wedded to prevailing effects-based conceptions of discrimination, resulting in more robust frameworks for inclusion in the workplace, which are nevertheless informed by the traditional view of equality as a human rights protection sharply distinguishable from social and economic policies.

Canadian law has seen a parallel shift from a focus on direct discrimination and formal equality first to indirect/effects-based discrimination and then to “systemic discrimination”. This approach was first elaborated by the Supreme Court of Canada in the Simpsons-Sears case, in which it was recognized that direct and indirect discrimination should both be addressed. In its seminal British Columbia v BCGSEU (Meiorin) case, the Court went further and redesigned equality rights to eliminate the distinction between direct and indirect discrimination, invoking the need for more probing analyses of workplace standards to challenge “systemic discrimination”. The majority of the Court thus stated that “[i]nterpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination”. Moreover, the Court proposed to go beyond the idea of “accommodation”, under which “the right to be free from discrimination is reduced to a question of whether the ‘mainstream’ can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard.” Instead, the goal of the new “unified approach” to discrimination devised in the Meiorin case is to “asse[ss] the legitimacy of the [workplace] standard itself”. Under the unified approach, for an employer to successfully argue that a prima facie discriminatory standard is justified on

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83 Sheppard, “Mapping Anti-Discrimination Law”, supra note 80 at 12.
87 British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union, [1999] 3 SCR 3 [Meiorin].
88 Ibid at para 41.
89 Ibid at para 42.
90 Ibid at para 41.
account of constituting a Bona Fide Occupational Requirement (BFOR), it must be demonstrated that the standard is (and that the employer subjectively believed it to be) “rationally necessary” for the accomplishment of a purpose that is itself “rationally connected to the performance of the job”.\textsuperscript{91} Moreover, for a standard to qualify as a BFOR, it must “accommodate individual differences to the point of undue hardship”.\textsuperscript{92} Meiorin collapsed the distinction between direct and indirect discrimination by making the BFOR/undue hardship test applicable to both whereas in the past it had only been applied to direct discrimination.\textsuperscript{93}

a. Contested Rationales of “Substantive Equality”

I now turn to the first part of my argument, which is that both the deductive view of equality rights as stemming from an overarching principle and the more pragmatic invocation of a private form of balancing cannot generate the coherence needed for core labour rights to be assessed as instantiations of foundational values. I begin by describing the rationales, based on the ideas of harm and inclusion, put forward to justify findings of prima facie discrimination, and argue that these frameworks are not sufficiently determinate for equality rights to stand as distinct legal institutions logically organized around them. I then go on to assess the legal test devised to determine whether a prima facie discriminatory standard is justified, or whether the employer must provide an accommodation to the complainant. Here, my argument is that there is no way to restore determinacy to equality rights by limiting the balancing exercise to “private” interests and rights. Rather, private rights can be recast as societal interests, and no clear distinction between private and public forms of balancing can be drawn. The next section builds on this last argument to present various clashes of societal values and policies that evidence the indeterminacy of equality rights adjudication.

In this thesis, I do not rehearse the criticism of formal equality as insufficient. It strikes me as quite clear (and consensual) that merely “treating likes alike” cannot be the sole guiding principle for anti-discrimination law, if only because so many distinctions between cross-cutting groups are drawn all over the legal system. Indeed, as the Supreme Court has reiterated time and time again in privileging “substantive equality” over formal equality, the question is always

\textsuperscript{91} Ibid at para 54. This reflects international labour law, which contains a defence of “inherent requirements of a particular job” that prevents a finding of discrimination (ILO Convention No 111, supra note 78 art 1(2)).

\textsuperscript{92} Ibid at para 55.

\textsuperscript{93} Ibid at para 19-22.
whether a given distinction is egregious in light of some other standard than the (dis)similarity between groups.\(^94\) Thus, I take it for granted that mere formal equality cannot stand as the basis for coherent decision-making.\(^95\) I focus instead on the rationale adopted by Canadian adjudicators to determine whether a given distinction is (prima facie) discriminatory as per the substantive equality/indirect discrimination approach. As put by Abella J. (dissenting on other grounds) in *McGill University Health Centre*:

> The central issue is whether [the complainant] has established prima facie discrimination, shifting the onus to the employer to justify its workplace standard or conduct. […] At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly. If such a link is made, a prima facie case of discrimination has been shown. It is at this stage that the *Meiorin* test is engaged and the onus shifts to the employer to justify the prima facie discriminatory conduct. If the conduct is justified, there is no discrimination.\(^96\)

This is just the first step of the analysis under the unified *Meiorin* approach; if a prima facie case is made, the focus shifts to the second step (analyzed below) of assessing whether the discriminatory standard constitutes a Bona Fide Occupational Requirement and whether sufficient accommodation has been provided. Nevertheless, the idea put forward by Abella J. in *McGill University Health Centre* is quite representative of the general tendency of articulating the first step of the substantive equality analysis around the ideas of harm and exclusion. This begs the question of whether tort law literature and concepts, which revolve precisely around the notion of private legal harm, can be used to make sense of the overarching principle put forward by Canadian courts to define substantive equality. Denise Réaume has developed such an analogy between anti-discrimination and tort law, arguing that indirect discrimination amounts to an objective standard of tort while direct discrimination involves something akin to the “malice”

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\(^{95}\) This is not to say that establishing a convincing standard to assess the substantive injustice of a particular distinction is easy. On the challenges inherent to the Supreme Court’s decision to articulate substantive equality around “human dignity” (and its implications in indirect discrimination cases) see Denise Réaume, “Discrimination and Dignity” (2003) 63 La L Rev 645 at 686-690.

\(^{96}\) McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l’Hôpital général de Montréal, [2007] 1 SCR 161 at paras 46, 49 & 50 [McGill University Health Centre], emphasis added.
tort law standard. Réaume closes her article by advocating, in response to criticisms of the indirect discrimination rationale as not providing a coherent basis for decision-making, in favour of the establishment of a policy analysis based on the mediating concept of “human dignity” that might strike a “fair balance between the competing interests at stake”. This mimics the test, long applicable to s. 15 Charter adjudication, of the impairment of “human dignity”. Even though this latter test is not directly applicable to statutory human rights adjudication, Réaume has noted that “sometimes s. 15 [of the Charter] is argued to be relevant [to statutory human rights] in its imposition of a requirement that there be some violation of human dignity in order to make out a complaint.” The resulting conception of harm, sometimes combined with overtones of human dignity, closely tracks some of the organizing principles put forward by proponents of the formalist/pragmatic justification of the distinctiveness of core labour rights. Specifically, it parallels Francis Maupain’s evocation of a “Kantian thread” that includes “values” such as “human dignity” and that justifies the pre-eminence given to core labour rights over other non-core labour standards. This is of course not to say that Canadian equality rights are given content analogous to that of the international core labour right to equality. On the contrary, it would appear that there are significant differences in the scope of the guarantees and the obligations they place on employers. Nevertheless, this similarity in the purported overarching principles does suggest that the inquiry into the contradictory and indeterminate nature of equality rights adjudication in Canada has significant import for analyzing the debates surrounding international core labour rights. It also suggests that both equality rights and debates on core labour rights are influenced by the same global legal consciousness of “public law

99 This test was adopted in Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 and reformulated (but not rejected) as “combating discrimination, defined in terms of perpetuating disadvantage and stereotyping” in R v Kapp, [2008] 2 SCR 483 at para 24.
100 Denise Réaume, Discrimination Law: Equality in the Private Sector (Faculty of Law, University of Toronto, 2010-2011) at 490 (“Réaume, Discrimination Law”).
101 Maupain, “Revitalization”, supra note 6 at 448.
102 Kerry Rittich has noted that some iterations of international employment equality rights provide a “formalistic definition of equality” that “leaves intact a raft of equality concerns that arise from the structure and organisation of work” (Rittich, “Rights, Risks and Reward”, supra note 6 at 47). Canadian equality rights may be less ambiguous and more expansive in this regard.
neoformalism”, in which harmed identities are a paradigmatic legal category that is seen to provide enough traction to be coherently applied to many legal fields.103

I now argue that despite their frequent invocation, the concepts of harm and exclusion do not form a determinate metric to decide what behaviour should be accommodated and which employer norms should be upheld. As argued by anti-discrimination scholar Richard T. Ford, equality-based accommodation in the workplace is best envisioned not as a situation of “victim-and-perpetrator” but as the distribution of “joint costs”:

We could think of civil rights law in terms of Coasian “joint costs.” In an employment dispute, the employer wants to implement a policy that would exclude the potential employee or wants the employee to conform to a particular workplace rule while the plaintiff wants the job without having to conform to the rule. It distorts our analysis to describe the situation in terms of victims and perpetrators or harm and injury (“the employer’s policy harms minority applicants.”) Instead, the clash of these conflicting desires gives rise to what Coase would call “joint costs.” Someone will suffer injury regardless of how the case is decided: if the employer prevails, she will be free to exclude the job applicant from a job the applicant wants. But if the applicant prevails, he will be able to force the employer to suspend a policy that the employer wants to implement. Either way someone suffers an “injury,” or, in Coase’s terms, is forced to bear the cost of the clash of incompatible activities.104

Let us take an example from the Ronald Coase article Ford refers to: that of a confectioner using machinery and making noise that disturbs a doctor working in the same building.105 Let us imagine the doctor sues the confectioner for damages, having suffered losses in his or her professional practice after being exposed to the noise. In that particular case, who is the perpetrator and to what extent can he or she be held liable? The intuitive response of a deductive reading of tort law would be to look for injury or harm, presumably perpetrated by the “active” party, the one who acted first and thus “provoked” the situation.106 The doctor v. confectioner example is more helpful, in my view, than the usual example of a corporation polluting a river (also used by Coase in his article)107 or that of equality rights in the workplace, because common sense does not dictate who, between a confectioner and a doctor, should be prevented from

103 See Kennedy, “Three Globalizations”, supra note 19 at 65.
106 For a presentation of a normative project articulated around a deductive reading of private law as the working out of the notion of “corrective justice”, based on the idea of an active party harming a victim in a way that can be measured, see Ernest J Weinrib, “Legal Formalism” in Denis Patterson, ed, A Companion to Philosophy of Law and Legal Theory, 2d ed (Malden, MA: Wiley Blackwell, 2010) 327.
107 Coase, supra note 105 at 2.
carrying on his or her activity (whereas many would find the pollution and workplace equality examples quite simple to understand in terms of active perpetrator/victim). Indeed, it illustrates that rather than a clear case of injurer and victim we have two incompatible activities. As put by Coase, “[t]o avoid harming the doctor would inflict harm on the confectioner.”

The question then becomes: to what extent do we allow the confectioner and the doctor to practise their respective trades? As Oliver Wendell Holmes argued, a normative policy choice thus has to be made in order to solve this tort law problem. In Holmes’ time, the notion of “privilege” was the main doctrine that determined liability for damages in tort law. Addressing the definition of this pivotal doctrine, Holmes noted:

[W]hether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions.

As Richard T. Ford emphasizes, applying Coase’s (and Holmes’) analyses to anti-discrimination law does not necessarily change the outcome of a given case of alleged discrimination. Under this view, oppression and bigotry can be seen as activities whose costs should be internalized, and cultural/gender identities can be accommodated on a number of grounds. For instance, one could take into account the value of the “integration” of denigrated groups into the economic mainstream. But since there are other possible countervailing policy considerations, the inquiry will likely not end there. For instance, one could invoke the societal benefits of economic competition and legal certainty that might be fostered by refusing a given accommodation. Or, more to the point, other discriminatory side effects and societal power relations may be raised to counter a simple view of the legal “harm” of excluded minority groups. Thus, the matter needs to be decided by measuring the substantive ends served by a given rule rather than by deduction from the general notions of fault or injury.

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109 Oliver Wendell Holmes, “Privilege, Malice and Intent” (1894) 3 Harv L Rev 1 at 3 [emphasis added] [Holmes, “Privilege”].
110 Ford, “Problem of Joint Costs”, supra note 104.
111 The classic example of such policy considerations would be the effect of religious/ethnic accommodation on the position of women. For a criticism of accommodationism grounded in these ideas, see Pascale Fournier, “Headscarf and Burqa Controversies at the Crossroad of Politics, Society and Law”, Social Identities: Journal for the Study of Race, Nation and Culture, [forthcoming in 2014].
The idea that balancing competing policies and interests is inevitable may not be so controversial, at least in the adjudication of equality rights. Indeed, the Canadian overarching concept of harm is superimposed with the idea that some prima facie discriminatory norms may be justified in light of an assessment of the effects of the rights claim on the employer. As put by Deschamps J., writing for the majority of the Supreme Court in McGill University Health Centre, “since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.”112 As outlined above, the test devised in Meiorin to justify a prima facie discriminatory workplace standard requires demonstration that the standard is “rationally necessary” for a purpose that is “rationally connected to the performance of the job.”113 This echoes the “balancing” analysis of s. 1 of the Charter, which applies in a “public law” framework of constitutional litigation.114 Yet, the “interests” of employees and (public or private) employers are often framed as particular constraints and needs, and not as societal or collective concerns. The Supreme Court’s oft-quoted definition of “undue hardship” in the seminal Central Alberta Dairy Pool case is a good example of this phenomenon:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar -- financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. [...] This list is not intended to be exhaustive and the results which will [sic] obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.115

Likewise, in Meiorin, the Supreme Court defined the “undue hardship” test in terms strikingly confined to the individual impact of eventual accommodations:

The employer’s third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. [...] Some of the important questions that may be asked in the course of the analysis include:

112 McGill University Health Centre, supra note 96 at para 15.
113 Meiorin, supra note 87 at para 54.
114 For discussion see infra note 134 and accompanying text.
(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?\(^{116}\)

We see that while the “undue hardship” legal test abandons purely deductive “formalist” conceptions of equality rights, it is not framed as an assessment of societal values, goals and policies. One foreseeable objection to my argument may thus be that there is a way to systematically arbitrate between competing (private) interests without engaging in the kind of social reasoning that I argue can always be introduced into a deductive framework. Indeed, Kerry Rittich has noted that the “balancing of rights and interests” has historically been used to restore determinacy to legal reasoning in the face of claims that judicial discretion in adjudication was far greater than acknowledged by legal theorists:

The claim that we operate within a legal system in which judges often possess considerable agency and room to maneuver, rather than within a regime of pure constraint and compulsion, is a plausible one for many legal scholars and practitioners. What jurists and theorists make of this margin, however, varies greatly. […] The import of [Duncan] Kennedy's analysis is that one of the great divides in legal practice and scholarship lies between those who recognize and embrace the instability of the process of adjudication and those who hope to contain it or make it go away by one or another technique. The latter category includes those who attempt to balance rights and interests, those who turn to process, and those who go "outside" law and self-consciously attempt to resolve legal dilemmas by resort to determinacy elsewhere. As Kennedy and others have long argued, rights balancing and procedural approaches are transparently inadequate devices by which to avoid or limit the entry of ideology and politics into adjudication.\(^{117}\)

Given the historical use of “balancing” tests to restore determinacy to legal institutions that were subject to critical inquiry, I now endeavour to argue that the “undue hardship” test does not render coherent the adjudication of equality rights. This is a critical part of my argument, because if there was indeed a way to arbitrate between competing rights and interests in a consistent and objective manner, equality rights adjudication could be seen as the pragmatic

\(^{116}\) Meiorin, supra note 87 at paras 62 & 65.

working out of the foundational principles discussed above. In other words, this could preserve the justifications of the core/non-core distinction.

The idea that the “undue hardship” analysis could be made to concern purely individual interests and rights strikes me as a good example of the use, described by Rittich, of balancing as a method to restore coherence and determinacy to rights adjudication. I now endeavour to refute such a conception of “private” balancing. This gives me an opportunity to better define the argumentative phenomenon I interchangeably refer to as “balancing”, “proportionality analysis” and “policy argument”. My definition encompasses two distinct but related historical instances of this argumentative mode: the mainly American private law balancing and the now globally diffused constitutional proportionality analysis. I start with the private law model, which has been quite marginal outside the United States, and then discuss public law balancing, which has much more directly influenced Canadian law. This superimposition of the two models allows me to claim that it is not plausible to define the “undue hardship” test as a form of private balancing or, for that matter, as an exercise mainly concerned with private rights and interests as opposed to collective social goals. For section b’s argument that policy analysis is indeterminate because it often consists of clashes of irreconcilable social values, such a view of balancing as a process that is as societal as it is private is crucial.

The historical development of policy argument in the United States is intimately tied to the success of the Social Legal Thought (SLT) critique of Classical Legal Thought (CLT) and of conceptualism. Proponents of SLT criticized CLT for relying excessively on the method of deduction from individualist principles,\(^\text{118}\) and put forward an alternative methodology of adjudication that was grounded in the social sciences.\(^\text{119}\) This corresponds to Duncan Kennedy’s second Globalization.\(^\text{120}\) But it took more than SLT, of which there was a variant in virtually every Western country, to create the peculiarly advanced American mode of balancing/policy analysis. Indeed, it took American legal realism, which critiqued SLT’s replacement of CLT conceptualism with a functionalist analysis based on a single social goal presented as

\(^\text{118}\) See Holmes, “Privilege”, \textit{supra} note 109 at 3; Roscoe Pound, “The End of Law as Developed in Juristic Thought II” (1917) 30 Harv L Rev 201.


\(^\text{120}\) See Kennedy, “Three Globalizations”, \textit{supra} note 19 at 37 et seq.
The legal realists proposed a brand of policy analysis that balanced competing values, interests and objectives, having a lasting impact on the legal mainstream, which has integrated the idea of a mode of legal reasoning that is policy-based but nevertheless “legal” and distinct from legislative “politics”. Mainstream legal scholars such as Ronald Dworkin further contributed to legitimizing non-deductive argument in American legal culture (Dworkin refused the term “policy” but defended his own peculiar brand of non-deductive legal reasoning) by positing it as “principled” and harnessed by the imperatives of “coherence”. Specifically, Dworkin argued that coherence can be found in elements of “political theory” (contrasted with “policy”, meaning collective goals) such as the right/policy distinction and the fact that the prevalence of the former over the latter are not contested. Thus, Dworkin argued, correctly interpreted “political theory” can generate predictable and coherent outcomes to adjudication, “as issues of principle and not political power alone.” As noted by Duncan Kennedy, Henry Hart and Albert Sacks’ proposition that policy be systematically guided by the goal of maximizing “the satisfaction of valid human wants” is an analogous attempt to bring coherence to policy analysis. These developments, combined with the incorporation of “institutional competence” arguments in balancing, consolidated the considerable legitimacy of policy argument in American legal culture.

In American law, private law balancing distinguishes itself from other types of legal argument. As put by Duncan Kennedy,

[Balancing is a technique of ‘last resort’. We balance when there is a gap, or conflict or ambiguity in the legal materials, so that it is at least arguable that there is neither a definitive ‘conceptual’ nor a definitive teleological nor a definitive precedential answer to the interpretive

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121 See Karl Llewellyn, “A Realistic Jurisprudence: The Next Step” (1930) 30 Colum L Rev 431 at 446; Wesley N Hohfeld, “Some Fundamental Legal Conceptions as Applied to Judicial Reasoning” (1913) 23 Yale LJ 16 at 36 (arguing that the existence of “rights” is not a question of deduction but “ultimately a question of justice and policy”).
124 Ibid at 70.
127 This was a contribution of Lon Fuller and of Henry Hart and Albert Sacks. See Kennedy, A Critique of Adjudication, supra note 125 at 35.
question posed. This may be because these ‘logical’ methods have ‘run out’ or because in the existing understanding it is permissible to disregard the outcome they require on the ground that the legal decision maker has a responsibility to substantive values as well as to positive law.\footnote{See Duncan Kennedy, “A Transnational Genealogy of Proportionality in Private Law” in Roger Brownsword et al, eds, The Foundations of European Private Law (Portland, OR: Hart Publishing, 2011) 185 at 189 [Kennedy, “Transnational Genealogy of Proportionality”].}

The actual content of policy analysis varies from “rights” proper to all sorts of principles and consequentialist considerations as to the effects of a given rule, in addition to institutional arguments related to the separation of powers. Duncan Kennedy describes the possible content of policy arguments as follows:

In balancing, we understand ourselves to be choosing a norm […] among a number of permissible alternatives on the ground that it best balances conflicting normative considerations. […] The considerations may be loosely ranked but there are no ontological priorities among them and in private law, they include not only the moral considerations often called principles, but also “policies,” “goals,” “values,” “rights” and even precedents conceived as having different “weight.” These are typically arrayed in formulaic pro/con “argument bites” that are used over and over again in legal argument.\footnote{Ibid at 190.}

In parallel with the development of the private law model of policy analysis, an analogous form of argument became standard practice in constitutional and public law. Constitutional balancing/policy analysis has been called the “postwar paradigm”,\footnote{Lorraine E Weinrib, “The Postwar Paradigm and American Exceptionalism” in Sujit Choudry, ed, The Migration of Constitutional Ideas (New York: Cambridge University Press, 2006) 84. Iddo Porat has likewise written about the advent of a “balancing consciousness” in constitutional law: Iddo Porat, “The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law” (2006) 27:3 Cardozo L Rev 1393 at 1398.} a testament to its global ubiquity. While the exercise of proportionality/balancing is given different formulations in various jurisdictions,\footnote{As argued by Jacco Bomhoff in “Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law” (2008) 31 Hastings LJ 555 at 557-558.} my analysis proceeds on the assumption that there exists a level of broader, global legal consciousness from which local practices can be seen to stem.\footnote{I am inspired in this by Duncan Kennedy’s application to law of the ideas of langue and parole, the latter representing one of the multiple possible iterations of the former: see Kennedy, “Three Globalizations”, supra note 19 at 23. For an application of this idea to balancing/proportionality analysis, see Kennedy, “Transnational Genealogy of Proportionality”, supra note 128 at 217-219.} At this general level, constitutional law balancing is generally defined by an assessment of the importance of the goal pursued by the institution which infringed the protected right, as well as by an assessment of the proportionality of the effects of the infringement (i.e., of the social gains...
versus the gravity of the infringement).\(^\text{133}\) This corresponds almost word for word to the test devised by the Supreme Court of Canada to assess the degree to which constitutional rights and freedoms may be infringed upon in application of section 1 of the Canadian Charter:

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\text{[T]he objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". [...] Once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test". Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. [...] There must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". [...] Even if an objective is of sufficient importance, [...] it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.}\(^\text{134}\)
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In addition to being similar in various countries, balancing is also analogous in private and constitutional law. As put by Duncan Kennedy:

It is an interesting and important question in what respects the balancing approach that characterises American and European sophisticated private law theory is the same as or different from the proportionality approach that characterises a very large part of European Union law, whether in the ECJ or in the ECHR, as well as the constitutional law of several member states. [...] Once abstracted and re-specified in these ways, my hypothesis is that there is a single evolving template, organised around conflict between rights and power, between powers, or between rights, involving in each case the same three questions: (a) Have the parties acted within, or been injured with respect to, their legally recognised powers or rights? (b) Has the injuror acted in a way that avoids unnecessary injury to the victims’ legally protected interest? (c) If so, is the injury acceptable given the relative importance of the rights or powers asserted by the injuror and the victim?\(^\text{135}\)

We thus see that policy analysis/balancing has developed in somewhat similar forms in private and constitutional law, in both cases amounting to an assessment of the relative weight of conflicting consideration stemming from the exercise of legal rights or state powers. This point is


\(^{134}\) R v Oakes [1986] 1 SCR 103 at para 69-71 [references omitted, emphasis in original].

crucial to the argument that follows, in that it allows me to claim that even in a purportedly “private” discrimination claim where the interests to be balanced are framed as individual, the analysis can still be understood in terms of broader, societal concerns and policies. As put by T. Alexander Aleinikoff in a classic account of the “age of balancing”: 136

Balancing opinions [in constitutional law] typically pit individual against governmental interests. This characterization, however, is arbitrary. Interests may be conceived of in both public and private terms. The *individual* interest in communicating one’s ideas to others may also be stated as a *societal* interest in a diverse marketplace of ideas. Time, place, and manner limitations on expressive behavior may be based on a *governmental* interest in public safety or a *private* interest in unencumbered access to public facilities.

Consider *Hudson v. Palmer*, in which the Court described a search of a prisoner’s cell as posing a conflict between the prisoner’s Fourth Amendment interest in privacy and the government’s interest in jail security. In that case, the prisoner’s interest could also have been stated as a public interest. Society has a general interest in preventing unwarranted governmental intrusions. Extending the Fourth Amendment’s protection of privacy in one context may contribute to, and reinforce, a social sense of personal freedom and liberty. As a collective body, we are in the cell with Palmer; the interests at stake are not his alone. Similarly, the government’s interest in prison security may also be stated as a private interest. Both prisoners and guards have an individualized interest in being free from assaults and in having a governmental authority protect them. Because public and private interests appear on both sides, there is little sense in seeing the balance in terms of individual versus governmental interests. 137

Applying Aleinikoff’s argument to the legal test related to indirect discrimination leads us to the conclusion that whether the policies involved are framed as individual or collective rights/interests, the analysis remains of a societal nature.

I now turn to some examples from the case law that illustrate the collective interests that lurk behind the invocation of particular “hardships”. My two examples concern private employers, whose interests and constraints were variously framed as individual and as socially embedded, collective and societal. They illustrate the progression of the same concept, the protection against excessive costs, from an individual formulation in the first case to progressively more societal iterations in the majority and dissent of the second case.

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In *Oak Bay Marina Ltd v British Columbia*, the British Columbia Court of Appeal dealt with an appeal of a decision by the BC Human Rights Tribunal holding that the claimant had been discriminated against on the basis of mental disability when he was suspended from work because of his psychological condition. In an appeal on the question of whether evidence on a particular series of events related to the mental disability was relevant, the Court of Appeal remanded the case to the Human Rights Tribunal in order for the presence of a Bona Fide Occupational Requirement to be assessed. In remanding the case, Newbury J. also voiced a policy argument in favour of allowing the defence in the case of a private employer such as Oak Bay Marina:

If, as McLachlin C.J.C. suggested in *Grismer* (at para 43) and *Meiorin* (at paras 35-36), the question of accommodation is to be approached with some “common sense”, it seems to me that the employer’s, as well as the complainant’s, circumstances would have to be considered carefully in imposing such an obligation. What is “possible” for one employer – e.g., a government with entire departments and volumes of information available to it – may not be possible for a private company that has to make a decision amid operational pressures posed by scheduling, customer relations, profitability and legal liability. Interestingly, the argument was framed as an individual interest of the employer not to be subjected to undue economic hardship, which is to be assessed with regards to the employer’s own peculiar circumstances and “operational pressures”. Added weight is given to this particularized and individual view of the undue hardship criterion through the invocation of “common sense”, an idea that carries overtones of equitable flexibility and case-by-case decision-making. Thus viewed, the balancing exercise does not seem to concern societal economic policies, but the constraints of the individual employer. Yet, as Aleinikoff argued, it is always possible to reframe an individual interest as a collective policy. To illustrate this, I now turn to another case in which the argument of “operational pressures” was framed as one of competitiveness and societal economic policy.

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138 *Oak Bay Marina Ltd v British Columbia (Human Rights Commission)*, 2002 BCCA 495 at para 34, Saunders J. [*Oak Bay Marina*], cited and summarized in Prof. Denise Réaume’s casebook *Discrimination Law*, supra note 100 at 204 et seq.


140 For discussion of this idea as a form of policy argument, see *infra* chapter 4.
In *Ontario Human Rights Commission v. Ford Motor Company*, the Ontario Divisional Court adjudicated an appeal from a decision of the Human Rights Tribunal (then called the Board of Inquiry) that declined to find discrimination in a termination based on religion-related absenteeism. The complainants, members of the “Worldwide Church of God”, claimed an authorization to be exempted of two night shifts per month in order to observe Sabbath from Friday to Saturday. The Board held inter alia that prima facie discrimination had not been proven, a ruling that was upheld by the Divisional Court. Dunnet J., writing for the majority of the Divisional Court, insisted on the argument of economic cost and competitiveness:

> Although there was some evidence that Ford was profitable between 1984 and 1988, that evidence does not detract from the findings made by the Board that within the highly competitive automobile industry the Oakville plant had a significantly high absenteeism rate and had fallen behind other plants producing the Ford Tempo/Topaz vehicle during the years when the complainants were working in the assembly plant. Auto industry competitiveness was only one of many factors that made the form of accommodation being sought by the complainants impossible for Ford to deliver without undue hardship.

This formulation shows that economic costs can hardly be sensibly assessed in isolation, i.e. independently of competition in a given market. Indeed, an employer’s mission is to remain competitive with other players in the market, not so much to avoid undue costs defined in the abstract. A balancing exercise that accounts for this reality thus decenters the focus on purely individual interests. But there is more; competitiveness arguments may in themselves necessitate an assessment of the economic structure of the market. In dissent, Lax J. of the Divisional Court reframed the competitiveness argument to situate it at an even more societal and economic level. Contradicting the majority as to the impact of an eventual accommodation on Ford Motor Company, Lax J. stated:

> Ford's business strategy was to produce a quality product at low cost and regain market share from Japanese competitors. The assessment of Ford's undue hardship defense required the Board to undertake some appraisal of its business strategies and decisions in order to determine if two incremental absences for twenty shifts a year would give rise to undue hardship. Instead, the Board proceeded on a plainly unreasonable premise when it stated:

> ... my role in determining whether the Company stands to suffer undue hardship through undue interference in the operation of its business does not extend to re-

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142 *Ibid* at para 112.
evaluating its legitimate business decisions and strategies.

The Board failed to consider that Ford's business strategy was no different than the business strategy of any Ontario manufacturer that competes globally. Industry competitiveness is the goal of any profit-making business. This cannot diminish the scope of the duty to accommodate. The Board found it "significant" that it was Ford Detroit that was responsible for budget and production standards at the Oakville plant and that Ford of Canada was "little more than a holding company". It noted that Ford Detroit provided no budget for "double backs" to cover Friday night absences. This cannot be relevant to a determination of an undue hardship claim in Ontario. Otherwise, no company owned by a foreign multi-national and operating in Ontario would need to meet its Code obligations so long as it showed that this would have budgetary implications for its corporate parent. On this reasoning, only monopolies or businesses owned and operated in Ontario could comply with human rights legislation in this province.143

We see that the adjudicator here assesses the relationship between the various holding companies of Ford Motors in light of the (judicial perceptions of the) similarities with other economic actors, as well as the potential policy consequences of accommodation in light of the interconnectedness of various market actors. These arguments suggest that Aleinikoff was right to argue that balancing can never concern only individual rights or interests, because the latter always carry implied collective policies, such that a curtailment of an individual interest is also a curtailment of its formulation as a collective policy. Thus, not only is a comparative assessment of costs necessary, but an adjudicator must also pronounce on the adequate level of competition to be allowed (or impeded) and on the social consequences of a given choice. The resulting picture is quite unsettling, I argue, for the idea of a purely “private” form of balancing that restores determinacy to a legal institution governed by a flawed deductive reasoning based on harm and inclusion; it is especially disquieting if, as I now argue, equality rights law does not provide doctrinal means to mediate competing policies and interests in a determinate manner.

b. The Indeterminacy of “Undue Hardship” Policies

I now turn to the second part of my argument, which is to claim that the policy analysis involved at the BFOR/“undue hardship” stage of the legal test is indeterminate. To make my argument, I draw on policy arguments from existing cases, in order to ground my claim in lines of reasoning that were not only formulated by lawyers and parties, but that were accepted as convincing and invoked by adjudicators to justify their rulings.

143 Ibid at paras 191-192 [emphasis added]
It now seems appropriate to briefly situate my vision of legal indeterminacy in light of legal debates on the question. The argument I put forward can be distinguished from claims that law is either *always* or *never* indeterminate. My argument thus contradicts Ronald Dworkin’s claim that non-deductive argument can always be done in a coherent way, inter alia by reference to the overarching concepts of “rights” and “principle”. I argue that often, perhaps most of the time, the choice between competing policies (or “political theories”, following Dworkin) can be profoundly puzzling, because of the possibility for legal actors to systematically invoke an argument contradicting a given policy. This being said, I do not claim that law is *always* indeterminate, as Roberto Unger has done. For Unger, “a coherent theory of adjudication or of legal justice is not possible on the premises of liberal thought”, whether in the realms of “formalism” (what I call deductive argument), “purposive adjudication” (what I call policy argument) or “substantive justice”. On the contrary, I acknowledge that some arguments (both deductive and policy based) are sometimes experienced as legally binding in ways that cannot be seriously contested. The model I put forward posits that there is often no way to know if a given question is *by its nature* determinate or not, because that depends on the work that is performed on the discursive field by legal actors. I claim that it is often possible to subvert an initial experience of determinacy through legal work, either by asserting a deductive argument that will lead to a particular outcome (e.g. “the complainant should be accommodated notwithstanding a

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144 See Ronald Dworkin’s work cited at notes 122-123, *supra*.
147 *Ibid* at 88-100.
148 For such a conception of legal indeterminacy, see Mark Tushnet, “Defending The Indeterminacy Thesis” (1996) 16 Quinnipiac L Rev 339 at 347. As put by Duncan Kennedy:

> The question “does this question of law have a determinate answer?” is therefore meaningless if it is a question about the question of law, rather than a question about the interaction between a particular, situated historical actor and this particular question of law situated in this particular field. Because determinacy is a complex function of work as well as of facts and materials, a function of an interaction, it makes no sense to predicate determinacy or indeterminacy of the question as it exists independently of the particular actor who is trying to answer it. (*A Critique of Adjudication*, *supra* note 125 at 170).

To my mind, this conception immunizes my model from some critics’ insistence that it provide either proof that *all* questions of law are indeterminate or, alternatively, a method to ascertain exactly to what extent an adjudicator is “constrained” by legal doctrine in all imaginable cases; see e.g. Lawrence B Solum, “On the Indeterminacy Crisis: Critiquing Critical Dogma” (1987) 54 U Chicago L Rev 462 at 482 & 494-495. The conception I put forward does not seem to be accounted for by critics such as Andrew Altman, who seems to reduce the indeterminacy critique to either a claim that “law has no objective structure” or that it stems from a “deficient ethical viewpoint”; see Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, NJ: Princeton University Press, 1990) at 20.
legal rule to the contrary because he/she has a right to equality”) or by brandishing policy arguments to disregard deduction altogether and/or counter other policy arguments (e.g., “notwithstanding the right to equality, the complainant should not be accommodated because of the chilling effect similar accommodations would have on the economy and on legal certainty”).

One important insight of this model is that the very place of policy argument in the legal system and its availability in a particular dispute are contested questions that can themselves be indeterminate. Indeed, the response to policy argument is often that balancing itself is illegitimate. This may for instance take the form of “institutional competence” arguments, or of claims that a given purposive argument exceeds the goal of the statute and is therefore inappropriate. My model thus also contradicts theories such as those of positivists H.L.A. Hart and Hans Kelsen, who usefully admit the existence of some legal indeterminacy and judicial discretion but claim that this phenomenon is confined to the margins of law, called the “penumbra” by Hart and opposed to the “core of certainty”, purported to represent a majority of the legal system. For Hart (and Kelsen, though he used a different terminology), the “penumbra” is composed of questions that can only be resolved through balancing, taken to be “indeterminate” and “legislative”, whereas the core corresponds to what I call deduction. By contrast with this view, I assert that assuming that a “majority” of the legal system is determinate is unconvincing, firstly because by disputing the availability of policy (the indeterminate component, for Hart and Kelsen), lawyers are incessantly repositioning questions as “determinate” or not, and secondly because I am quite unsure how any empirical assessment of what constitutes “the majority of the legal system” could be performed.

Because of these complexities, my analysis focuses on the subjective experience of indeterminacy in concrete cases rather than on broad debates on the “nature” of law. I strive to give a relentlessly concrete and applied account of legal indeterminacy. The goal is to illustrate indeterminacy by demonstrating how, in many legal fields that are relevant to core labour rights

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150 For discussion of these two types of argument, see respectively chapters 4 and 3.

151 For discussion, see Kennedy, “Left/Phenomenological Alternative”, supra note 149.

152 Ibid at 156-157.
(and contract law), it is possible to subvert the authority of a given policy argument by generating countervailing policies that seem equally compelling.\textsuperscript{153} My analysis reveals that policy argument-bites “get their meaning from one another”,\textsuperscript{154} as put by Duncan Kennedy, who draws on the structuralism of Ferdinand de Saussure.\textsuperscript{155} Given this binary structure, I argue that there may be many instances where policy analysis does not by itself impose one or provide means to choose among competing “right answers”.\textsuperscript{156} Instead, what we often have are lawyers endlessly rehearsing both sides of binary policy arguments until an adjudicator makes an unexplainable decision.\textsuperscript{157} The concept that best describes the phenomenon I am after is that of the “complexity” of a legal discourse where “competing and important loyalties come into conflict” and where we find that “no simple hierarchy or priority of values is self-evident”, as put by Brenda Cossman and David Schneiderman.\textsuperscript{158} One of the consequences of this complexity is the instability of the legal system, which forms a mass of chaotic rule choices that can be reconsidered and recast according to many conflicting normative projects.\textsuperscript{159} The dilemmas that are imposed on adjudicators may lead to indeterminacy in two ways: firstly, the inconclusiveness of legal argument may leave the door open to instrumentalization of its binary structure in order

\textsuperscript{153} See Balkin, “Crystalline Structure”, \textit{supra} note 12; Kennedy, “A Semiotics of Legal Argument”, \textit{supra} note 12 at 327.

\textsuperscript{154} Kennedy, “A Semiotics of Legal Argument”, \textit{supra} note 12 at 325.

\textsuperscript{155} Ferdinand de Saussure, \textit{Course in General Linguistics} (Peru, IL: Open Book, 1986 [1916]). For discussion see \textit{ibid} at 352-353.

\textsuperscript{156} As put by Kennedy:

\begin{quote}
Because it is structured in matched pairs of contradictory argument-bites, legal rhetoric is manipulable at retail, as well as at the wholesale, level of a theory, say, of why judicial activism is bad. Policy argument contains no powerful metatheories that tell us when the virtue of administrability trumps that of flexibility. Because of the “semioticization” of policy discourse, its reduction to a system of contradictory buzzwords that are always available and therefore never persuasive in and of themselves, it is always possible that the judge has “ulterior motives” for his choice of bites. (\textit{A Critique of Adjudication, supra} note 125 at 147)
\end{quote}

\textsuperscript{157} My analysis brackets the question of exactly how much “freedom” adjudicators have to make choices by reference to extra-legal considerations; however, my description of a binary structure suggests some form of constraint of these choices by the legal materials themselves, as the latter are already structured in certain ways by their judicial history. See Kennedy, \textit{ibid} at 158-161. I also bracket the question of the consciousness of adjudicators faced with these choices, though it seems plausible that at least some are in “denial” about their (constrained) agency in choosing among equally convincing competing policies; see Kennedy, \textit{ibid} at 202-205.


\textsuperscript{159} See Robert W Gordon, “Critical Legal Histories” (1984) 36:1 Stan L Rev 57 at 114-116. I do not mean to suggest, however, that the claim of legal indeterminacy necessarily depends on the unpredictable nature of legal choices. On the contrary, my claim is that a given rule choice often cannot be \textit{explained} by the mere legal materials, not that the decision could not otherwise have been predicted; see Charles M Yablon, “The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation” (1985) 6 Cardozo L Rev 917 at 919-910.
to justify an outcome chosen on non-legal, perhaps ideological, grounds;\textsuperscript{160} secondly, the binary structure of policy argument may impose ideology on even an unwilling adjudicator by forcing him or her to choose between equally compelling policies that are themselves legal “translations of ideology”.\textsuperscript{161}

I do not advance a theory of why many policies are experienced as equally convincing and thus as “indeterminate”. Rather, I have tried to consistently generate this sentiment by researching legal materials on a given question until I found policy arguments that to my eyes were similarly compelling. While my intuition is that a majority of the rules that form the “legal system” are subject to these complexities, I offer no way to quantify this phenomenon other than the simple accumulation of examples across different legal fields. This approach strikes me as the most convincing to argue for the indeterminacy of legal doctrine, even though I acknowledge that it is suggestive rather than conclusive. This methodology is directly inspired by the rhetorical move used by Karl Llewellyn in his classic article on the “canons” of statutory construction,\textsuperscript{162} which he grouped in pairs of “thrusts and parries” in order to demonstrate their inconclusiveness. Importantly, Llewellyn relied on concrete cases in which his thrusts and parries were brandished by judges. He concluded (devastatingly) that “the construction contended for must be sold, essentially, by means other than the use of the canon”.\textsuperscript{163} In many ways, I am merely generalizing this methodology to law in general, including policy argument.

The choice of focusing on policy argument is quite deliberate. Contrary to what the general definition of “balancing” offered above suggests, most legal argument today does not function in an either/or mode; it is neither pure deduction nor pure policy. Indeed, even though balancing has been squarely incorporated into rights reasoning, deduction from fundamental principles is alive and well. In fact, the doctrinal structures that surround equality rights can probably be best

\textsuperscript{160} Kennedy, A Critique of Adjudication, supra note 125 at 147-148. For instance, adjudicators might extol the virtues of judicial supremacy or brandish the opposing policy arguments in favour of judicial deference to the legislature when these arguments favour an outcome that they desire.

\textsuperscript{161} Ibid at 148-150. Indeed, many policy arguments can be seen as legal versions of the very principles that compose certain political ideologies. To give just one example, it is hard to see the policy arguments related to the economic and moral desirability of heightened economic competition and individual choice as anything else than a legal version of the political agenda of “neo-liberal” ideology (subsumed in the US under the political “conservative” label); see Brenda Cossman, “Contesting Conservatism, Family Feuds and the Privatization of Dependency” (2005) 13:3 Am U J Gender Soc Pol’y & L 415 at 416.


\textsuperscript{163} Ibid at 401.
described as “deduction guided by policy”.

The following remarks by Duncan Kennedy pertain to American legal culture, but I would argue that they also apply to Canadian law:

In American judicial opinions and in doctrinal writing, the most common mode is neither deduction nor policy but an intermediate mode, deductive argument supplemented or “guided” by policy argument. The argument has a deductive framework, but the participants understand that nothing like “necessity” or “logical entailment” has been generated by that framework. At each point, the judge or scholar supplements the apparently or weakly or falsely deductive steps in the argument with policy arguments that appeal to rights, morality, utility, or institutional considerations cast nondeductively.

This account closely resembles that of French legal culture given by Mitchell Lasser: that of an “unofficial” acceptance of policy analysis that intervenes in the shadow of an “officially” deductive or formalist portrayal of law. These accounts of hybrid modes of legal reasoning formed my hypothesis as to the role of policy in Canadian law. My indeterminacy argument thus draws on legal materials that blur the boundaries between deduction and policy. I focus on particular stages of a legal argument where policy is called in to reinforce particular deductive moves (or to replace the latter). Moreover, I offer instances where an argument originally presented as deductive is balanced against policy arguments, thus being downgraded from organizing principle to mere policy consideration. Of course, in the scope of this thesis, I cannot hope to assemble anything remotely close to a “representative” account of paired arguments used in anti-discrimination “balancing”. That is so in part because new arguments are often invented and gradually introduced into the case law and into common usage. Yet, the arguments presented below seem representative of some of the typical rhetorical moves employed to argue for and against a finding of undue hardship.

I have organized the policy arguments found in the cases in tables of initiatives and responses. I have grouped seven argument pairs where the initiative comes from the side arguing for broad interpretation (the claimant) and the response from the camp advocating narrow interpretation (the employer), as well as seven pairs where these roles are reversed.

164 Kennedy, A Critique of Adjudication, supra note 125 at 104.
165 Ibid [references omitted].
167 Many of the cases included in the ongoing analysis figure in Réaume, Discrimination Law, supra note 100.
<table>
<thead>
<tr>
<th>Arguments for a Broader Interpretation of Equality Rights</th>
<th>Arguments for a Narrower Interpretation of Equality Rights</th>
</tr>
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<tbody>
<tr>
<td>1. The <em>Meiorin</em> test imposes some form of accommodation “in all cases”.[^168]</td>
<td>a. There are cases in which no accommodation is possible because any change to the standard would undermine the essence of the service provided.[^169]</td>
</tr>
<tr>
<td>2. Capabilities of individual claimants “must be respected as much as possible.”[^170]</td>
<td>b. An accommodation may be refused in light of “common sense and intuitive reasoning”.[^171]</td>
</tr>
<tr>
<td>3. The broader interpretation provides a legal entitlement that is socially desirable.[^172]</td>
<td>c. The broader interpretation compromises the interests of other employees or stakeholders who could raise competing equality considerations.[^173]</td>
</tr>
<tr>
<td>4. Equality rights are “of fundamental importance to Canadian democracy”[^174] and should be given a broad interpretation.</td>
<td>d. The proposed broad interpretation does not account for the fact that even though equality rights are important, they are only one part of the “entire legal framework within which enterprises must function”.[^175]</td>
</tr>
<tr>
<td>5. Because equality rights are remedial, exceptions to accommodation must be interpreted restrictively.[^176]</td>
<td>e. Restrictive interpretation should be modulated according to the nature of the contested norm; for instance, “undue hardship” may be interpreted more restrictively in cases involving “job requirements” as opposed to “qualifying requirements”, as the latter are less important than the former.[^177]</td>
</tr>
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[^170]: *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1 at para 198, citing *Meiorin*, supra note 87 at 520-521 [Nixon].

[^171]: Grismer, supra note 168 at para 43.


[^175]: *Oak Bay Marina*, supra note 138 at para 34, Saunders J.


[^177]: *Pannu v Skeena Cellulose Inc*, 2000 BCHRT 56 at para 76 [Pannu].
6. Equality rights must be interpreted as imposing in every case the obligation to take some steps to accommodate; it is never acceptable to do nothing on the grounds that any accommodation causes undue hardship.  

f. The results of the “balancing of [the employer’s goals] against the right of the employee to be free from discrimination will necessarily vary from case to case.” Hence, there may be cases where no steps can be taken towards accommodation.

7. The fact that a possible accommodation results in breach of the collective agreement does not exempt an employer from implementing the accommodation.

g. Breaching collective agreement provisions related to seniority can be considered undue hardship in light of the safety concerns associated with letting less experienced employees do the job of more experienced employees.

<table>
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<tbody>
<tr>
<td>8. The broader interpretation would amount to extending human rights statutes to an economic regulation of “how the work [is] to be done”; such an interpretation would exceed the scope of the statute.</td>
<td>h. The broader interpretation accords with legislative intent and should be respected by the courts.</td>
</tr>
<tr>
<td>9. The broader interpretation would compel accommodations that hamper the “competitiveness” of the business.</td>
<td>i. The cost of the accommodation compelled by the broader interpretation is not excessive in light of the fact that the employer and/or the business already “perform many expensive services for the public that they serve”.</td>
</tr>
</tbody>
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178 Ford Motor Company, supra note 141 at para 211.
181 Pannu, supra note 177 at para 96.
183 Grismer, supra note 168 at para 43.
184 Ford Motor Company, supra note 141 at para 112, Dunnet J.
185 Grismer, supra note 168 at para 41; Walden v Canada (Social Development), [2007] CHRD No 54 (CHRT) at para 142.
10. Equality rights in the private sector should be interpreted more narrowly because of the “operational pressures” that private companies face and which are not present in the public sector.  

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j. Industry competitiveness cannot lessen the scope of equality rights, as it is the goal of all private businesses and it could thus always be raised to counter an equality claim.  

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11. The broader interpretation negatively impacts “worker morale” by creating a precedent of asking for differential treatment.  

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k. Defeating the broader interpretation in the name of “worker morale” would amount to assessing the other employees’ hardship and not the employer’s; that would be contrary to statutory intent.  

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12. Equality rights law does not force the creation of a new position in the business; accommodations within the existing jobs will be sufficient.  

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l. Accommodations within existing jobs may perpetuate discrimination by “limit[ing] the number of jobs available” to the targeted employees.  

191

13. “Undue hardship” should be interpreted as encompassing situations in which temporary help must be sought to compensate the accommodation and such help affects the quality of the service provided.  

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m. The proposed broader interpretation grants the employer (or the defendant union) the “right to determine when and if and to what extent accommodation is granted” by determining when help is needed to maintain “quality”.  

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14. The “safe and efficient performance of the job” is a consideration that weighs decisively against the broader interpretation; this factor will very often be important as it is an “essential elemen[t] of all occupations”.  

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n. No single factor should be decisive on its own.  

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186 Oak Bay Marina, supra note 138 at para 26, Newbury J.


188 Ibid at para 127, Dunnet J.

189 Metcalfe Grievance, supra note 180 at para 219.

190 Ibid at para 222.


192 Ford Motor Company, supra note 141 at para 120-122, Dunnet J.

193 Bubb-Clarke, supra note 191 at para 45.

194 Nixon, supra note 170 at para 188.

195 Pannu, supra note 177 at para 105.
The initiatives and responses interact in many different ways. There are cases, such as arguments 3 and c, in which initiative and response oppose each other and stem from the points of view of complainant and defendant. Duncan Kennedy calls this latter operation “symmetrical opposition”. Other pairs of arguments are in direct opposition, without appealing to different points of view. In other cases such as arguments 5 and e, the response accepts and offers a compromise that maintains the initiative’s policy argument, yet modifies it. There are cases, such as arguments 1 and a, in which the response proposes an exception to the rule put forward by the initiative. Finally, there are cases such as 12 and L where the response “flips” the initiative’s argument and claims that the proposed rule will lead to a result opposite to what was intended.

The policy arguments presented above also differ in their substantive content. Some arguments, such as 1 and 2, invoke legal “rights”; others, such as arguments a, g and m, pertain to the societal consequences of a given legal rule; other arguments, such as 8 and h, pertain to institutional competence and the separation of powers. Finally, some arguments are presented as deductive propositions, yet are easily integrated into a balancing framework. This is the case of arguments 1, 2 and 6, which all purport to deduce an absolute rule from a theory of necessary accommodation. As the table evidences, they are not necessarily conclusive on their own, and can instead be met with opposing policy considerations.

I hope the above, if it does not “prove” the indeterminacy of legal doctrine, is at least suggestive of a slippery, malleable nature of legal argument. I make no claim to having exhausted the possibilities of policy argument, quite the contrary. In fact, I would argue that an exhaustive account of legal argument is impossible to marshal, because new practices are constantly invented and modified by judges, lawyers and other legal subjects. That being said, this also

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196 Kennedy, “A Semiotics of Legal Argument”, supra note 12 at 331.
197 Kennedy calls this “Counter-Theory” (ibid at 332).
198 Kennedy calls this “Mediation” (ibid at 333).
199 Kennedy calls this “Refocusing on Opponent’s Conduct” (ibid at 334).
200 Kennedy calls this “Flipping” (ibid at 335).
201 As Duncan Kennedy argued was the case with the “will theory”, a notion that was once held to be an overarching organizing principle of a given field can become a de facto policy argument that is balanced against other policies and is no longer portrayed as being by itself determinative. See Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration and Form” (2000) 100 Colum L Rev 94 at 160-162 [Duncan Kennedy, “Consideration and Form”].
makes claims to the absolute determinacy of law\textsuperscript{202} suspect, as many present no account of actual argumentative practices. Moreover, my analysis covers significant territory and aligns with work by other scholars that also suggests that policy argument is indeterminate.\textsuperscript{203} If the indeterminacy I have outlined is indeed characteristic of equality rights doctrine,\textsuperscript{204} it becomes much harder to argue for the distinctiveness of equality rights from other labour standards on the basis of their normative foundation grounded in either a formalist application of an overarching principle or a pragmatic balancing of competing interests and policies.

\textsuperscript{202} One can think of Ronald Dworkin’s defence of non-deductive reasoning under the guise of “principle” (Dworkin, \textit{A Matter of Principle}, supra note 123 at 70) or of HLA Hart’s claim that many legal questions can be adjudicated with mere deductive methods (Hart, supra note 149 123).

\textsuperscript{203} See the work cited at notes 148-162, supra.

\textsuperscript{204} This thesis does not explore the indeterminacy of (equality) rights at the level of political and social thought, that is, outside or beyond policy analysis (which is itself a confrontation between “legalized” philosophical concepts). However, the indeterminacy of equality rights has been described on that level as well, in the wake of Judith Butler’s seminal “performatory” theory of gender and subjectivity. According to that theory, identities are neither natural nor the product of agency, but are rather created through social interactions and relations of power. Thus, there is no “determinate” political theory that can discern which identities can be considered “true” or “natural”. For an example of legal scholarship applying this theory to gender identities in the context of international human rights law, see Brenda Cossman, “Gender Performance, Sexual Subjects and International Law” (2002) 15 Can JL & Jur 281. For an analysis that relates Butler’s performativity theory to the legal indeterminacy argument, see Duncan Kennedy, \textit{Sexy Dressing, Violences sexuelles et érotisation de la domination} (Paris: Flammarion, 2008) at 45-47 [interview by Mikhail Xifaras].
Chapter 3 - The Right to Bargain Collectively and Successor Rights:
Indeterminacy from Rights Neoformalism to the “Social”

Just like the right to equality, the right to bargain collectively as an exercise of freedom of association had been protected at international labour law long before the adoption of the 1998 Declaration. Indeed, it was included in the ILO Constitution through the 1944 Declaration of Philadelphia. Detailed protections of collective bargaining also appear in the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No 98), the two main specific ILO conventions on freedom of association. Collective bargaining principles are also enshrined in article 23(4) of the Universal Declaration of Human Rights, article 22 of the International Covenant on Civil and Political Rights and article 8 of the International Covenant on Economic, Social and Cultural Rights. It has thus always been clear that freedom of association includes protection of the right to bargain collectively in international labour law.

Canadian courts have elaborated extensively on freedom of association recently, in the wake of the Supreme Court’s ruling in Dunmore that s 2(d) of the Charter includes the right to join a union, and even more importantly, after the Court’s 2007 holding in BC Health that it includes a protection of collective bargaining. Before these two rulings, the domestic protection

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206 Declaration concerning the aims and purposes of the International Labour Organization, 1 UNTS 35 [Declaration of Philadelphia], online : ILO http://www.ilo.org.
208 Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 8 June 1949, 96 UNTS 257.
209 Supra note 77.
210 Supra note 77.
212 Dunmore v Ontario (AG), [2001] 3 SCR 1016 [Dunmore].
214 The decision has spurred a wealth of scholarly comment from Canadian labour lawyers, of which I can only mention a small part. Many labour activists and scholars have expressed reservation with respect to the judicial acceptance of some form of positive right to collective bargaining, arguing that this could lead to a chastening of labour struggles and a demobilization caused by the individualistic bias of (constitutio...
afforded to freedom of association in Canada had been out of touch with international law, as s. 2(d) of the Charter had for long been held to exclude collective bargaining.215

This chapter explores how content is being given to the right to bargain collectively in Canadian law. I argue that even though courts have attempted to ground the applicable test in a foundational view of the right as a purely procedural guarantee (a principle that is in turn often put forward to justify the distinctiveness of international core labour rights, both on normative and instrumental “market-friendly” grounds),216 these attempts have created contradictory outcomes that render the idea of merely procedural rights inconclusive. Since the inclusion of a full-fledged right to bargain collectively is fairly recent and the number of cases interpreting it is quite low, my discussion is not as extended as that of equality rights in chapter 2. After having addressed the constitutional right to bargain collectively/freedom of association, I turn to the statutory regulation of successor rights, a non-constitutional scheme that purports to protect the integrity of bargaining rights in the face of changes in the structure of the business. I address

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215 This position was taken by the Supreme Court in the so-called 1987 “trilogy”, composed of the following cases: Reference re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313; PSAC v Canada, [1987] 1 SCR 424; RWDSD v Saskatchewan, [1987] 1 SCR 460. The exclusion of collective bargaining was maintained by the Supreme Court in Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner), [1990] 2 SCR 367. Interestingly, the Court relied in large part on international law to justify overturning the trilogy in BC Health. For discussion see Adelle Blackett, ibid.

216 See supra notes 71-75 and accompanying text. On a related note, it has been suggested that the adoption of the ILO 1998 Declaration was among the factors having influenced the Court to include collective bargaining as part of s 2(d) protection; see Roy J Adams, “Bewilderness and Beyond: A Comment on the Fraser Case” (2011) 16:2 CLEIJ 313 at 328.
these provisions because even though they are not formally included in the international right to bargain collectively, they have a tremendous impact on the very availability of collective bargaining. I focus specifically on provisions from Ontario and Quebec\(^ {217} \) that allow labour boards to find that certain subcontracting arrangements or corporate transfers amount to a “sale of a business”. This finding triggers a transfer of the union certification to the successor employer, thereby preserving bargaining rights that would otherwise have been instinct. Here again, we will see that while labour boards have attempted to provide a determinate unifying concept by adopting the “instrumental approach” to determine when to transfer bargaining rights, the reproduction of indeterminate policy conflicts inside sub-questions created by the application of the instrumental approach demonstrates that this purported organizing principle is not capable of coherently generating outcomes.

a. The Right to Bargain Collectively in Canadian Constitutional Law

Despite its judicial overhaul in 2007’s \textit{BC Health} of previous refusals to protect collective bargaining as part of s. 2(d), the Supreme Court has been very cautious in defining the scope of the constitutional protection of collective bargaining, holding that the latter forms a “limited right”\(^ {218} \) in several regards. Firstly, the interference with the right to bargain collectively must be “substantial” to trigger \textit{Charter} scrutiny.\(^ {219} \) Secondly, “the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method.”\(^ {220} \) Thirdly, “as the right is to a process, it does not guarantee a certain substantive or economic outcome.”\(^ {221} \) These two last points have been at the heart of heated judicial debates in \textit{Ontario v Fraser}, \(^ {222} \) a recent Supreme Court case dealing with the constitutional validity of the exclusion of agricultural workers from the regular collective bargaining regime. Indeed, not only did Rothstein J. (with the agreement of Charron J.) focus on these two grounds to argue in his concurrent opinion for a reversal of \textit{BC Health}, but the \textit{Fraser} majority also relied extensively on them to defend its own decision against both Rothstein J’s criticism and the farm workers’

\(^ {218} \) \textit{BC Health, supra} note 213 at para 91.
\(^ {219} \) \textit{Ibid.}
\(^ {220} \) \textit{Ibid.}
\(^ {221} \) \textit{Ibid.} This point is again reiterated at paras 89 and 68.
\(^ {222} \) \textit{Ontario (AG) v Fraser}, [2011] 2 SCR 3 \{\textit{Ontario v Fraser}\].
claim, which was rejected. These two dichotomies (process/substance and general process/particular regime) echo the rationales put forward to justify the exceptional status conferred on the rights included in the 1998 ILO Declaration. Unsurprisingly, their effect in Fraser has been to dramatically shrink the doctrinal scope of the constitutional protection of collective bargaining.\textsuperscript{223} I focus my exploration of the indeterminacy of s. 2(d) law on these two dichotomies. The fact that they very often do not lead to coherent outcomes allows me to illustrate the myriad contradictions and ambiguities contained in these principles.\textsuperscript{224}

In this section, I argue that the content of the right to bargain collectively is indeterminate. I start by outlining in sub-section i that the process/substance distinction is strikingly incoherent, as is the related distinction between a “general” process of bargaining and a “particular” legislative scheme. Indeed, certain legislative provisions and/or collective agreement clauses that were considered “substantive” could also have been considered procedural. Moreover, in order to ascertain whether a given nullification of purportedly procedural guarantees constitutes a violation of s. 2(d), courts must and do consider the substantive importance of the provisions that are the object of the claim. In sub-section ii, I portray how substantive policy concerns intervene at the doctrinal stage of deciding whether the impugned statute or state action amounts to a “substantial interference” with freedom of association. The claim that a given legal interpretation is “substantive” does not seem to be determinative but to become a policy argument that is itself balanced against other considerations. I argue that this intervention of policy has an indeterminate character that evidences the failure of extant attempts to rationalize the content of


\textsuperscript{224} There are obviously other, often related, purported organizing principles that are put forward in s 2(d) adjudication. In addition to the process/substance and general/particular binaries, Canadian case law has emphasized the dichotomy, distinct from but related to that of procedure and substance, between economic/social concerns and law. This idea closely tracks that of the separation of powers and the distinction between the roles of the legislature and the judiciary. Rothstein J. illustrated well this idea in his concurrent reasons in Ontario v Fraser, in which he stated that “the judiciary is ill-equipped to engage in fine adjustments to the balance of power between labour and management.” (supra note 222 at para 223) This suggests that collective labour relations, because of their utter particularity, presumably linked to their sensitive economic content, are more ill suited for judicial review than other fields of the law. For a similar criticism of the Ontario Court of Appeal judgement in Fraser, by the General Counsel of the Constitutional Law Branch of the Ministry of Justice of Ontario, see Robert E Charney, “Freedom of Majoritarian Exclusivity and Why Ms. Clitheroe Should Have Joined a Union: A Comment on Fraser and Clitheroe” (2009) 27 NJCL 45.
the s. 2(d) rights. I then close sub-section ii by connecting these Canadian doctrinal elaborations to developments in global legal consciousness.

i. Disentangling “Process” and “Substance”

This sub-section criticizes the procedural rationale adopted by the Supreme Court, arguing that it is incoherent and that it cannot serve as an overarching concept that guides adjudication. I claim that there exists considerable ambiguity as to what may be considered purely procedural, as opposed to substantive. For instance, in BC Health, it was held on the one hand that the government’s invalidation of collective agreement provisions restricting the right to contract out work and the preclusion of such clauses from being included in future collective agreements constituted an interference with collective bargaining. On the other hand, the Court found no interference with collective bargaining in the fact that statutory provisions on successor rights were modified by the government so as to facilitate contracting out and hamper the transferring of bargaining rights to employers on the receiving end of the contracting out. This distinction was made on the basis that successor rights provisions “simply modify the protections available under the Labour Relations Code and do not deal with entitlements of employees based on collective bargaining” and thus that their cancellation “do[es] not interfere with collective bargaining.” However, it could very well be argued that the statutory protection of successor rights is itself a procedural guarantee that merits some form of constitutional protection. Successor rights legislative provisions, which exist in every Canadian labour jurisdiction, allow bargaining rights to be transferred to a buyer who receives in whole or in part the business of the employer originally bound by the bargaining rights. Successor rights have been legislatively adopted to set aside the common law doctrine of “privity of contract”, by virtue of which it was once held that bilateral agreements such as collective agreements cannot bind a third party (e.g. the buyer of the business). In one of the most famous cases on successor rights, Vice-Chairman of the Ontario Labour Relations Board (OLRB) Richard O. MacDowell summarized the policy rationale behind successor rights provisions:

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225 BC Health, supra note 213 at para 121.
226 Ibid at para 122.
227 Ibid at para 123. For discussion see Judy Fudge, “Implications of Health Services”, supra note 214 at 40.
In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in partnership, would all effect a change in “the employer” even where the plant equipment, products and work force remain substantially the same. […] Section 55 avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining status quo […].

We see that successor rights provisions are concerned with the integrity of the procedure of collective bargaining, that is, with the very possibility of bargaining collectively. Yet, the Supreme Court in BC Health held that since they were legislative in nature, governments could nullify them without infringing s. 2(d). I fail to see how the court’s decision to impose obligations of consultation limiting the ways in which collective agreements can be modified or nullified could not apply as well to statutory successor rights, especially since they can convincingly be argued to be wholly procedural guarantees that protect the integrity of the collective bargaining process. This reveals a fundamental ambiguity in the idea of protecting only procedure, which can either refer to the procedural or substantive “nature” of the entitlement concerned or to its origins (part of a collective agreement vs. legislative in nature).

There are yet other ambiguities as to how we define “substance” and “procedure”. For instance, Rothstein J. has suggested in his concurring reasons in Fraser that protecting collective bargaining under s. 2(d) amounted to granting constitutional protection to collective agreements, and thus to substantive outcomes, whereas the majority responded by asserting that collective agreements can in fact be nullified, but through an appropriate procedure only, and that such a rule does not grant “substantive” protection to collective agreements. The disagreement seems to stem from the fact that it is plausible, as put by commentators of the Fraser judgement, to define “the process of collective bargaining as the ultimate goal of trade unions, rather than the very process or means through which employees seek to achieve their collective goals, that is, arriving at a collective agreement, including attempting to negotiate particular terms and

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229 Canadian Union of Public Employees v Metropolitan Parking Inc, [1980] 1 CLRBR 197 (OLRB) at para 19 [Metro-Parking] cited in Richard J Charney & Tim Gleason, Advanced Labour Law (Faculty of Law, University of Toronto, 2013) at 140 et seq.

230 Ontario v Fraser, supra note 222 at para 264 [Rothstein J].

231 Ibid at para 76.
conditions of employment to be included in a collective agreement.”232 If one accepts that collective bargaining itself is the goal of trade unions, then direct protection of this activity might be considered “substantive”. If one posits the conclusion of an agreement as the goal, then collective bargaining can be considered as the means to achieve that goal, and can thus be given a more extensive protection. Even though it has been asserted (contra Rothstein J.) that the conclusion of a collective agreement is indeed the ultimate goal of trade union activity,233 I note that this view could be subject to contestation. For instance, industrial democracy beyond the collective bargaining process could replace the mere conclusion of a collective agreement as the “goal” of trade union activity.234 Hence, there is considerable ambiguity as to what the goal (substance) of trade union activity is and what the means of attaining that goal (process) are. This ambiguity makes qualifications of matters as purely “procedural” or “substantive” quite tricky and lets us foresee ever more disagreement on the extent of the protection granted by the right to bargain collectively and on the direction in which purported founding principles can steer it.

There is yet another equivocality in the procedure/substance dichotomy: the fact of having to ascertain “substance” in order to find a violation of “procedure”. In the context of constitutional freedom of association, this will lead courts to, for example, consider the substantive importance of provisions nullified by a government in order to determine whether the procedural right to bargain collectively has been infringed upon. This often takes place under the rubric of the “substantial interference” test laid out in *BC Health*. As put by the Supreme Court:

233 Ibid at 208. The ILO Committee on Freedom of Association also held, in one of its recommendations pertaining to the *Fraser* case, that the objective of collective bargaining is the conclusion of an agreement:

> The Committee, observing in particular that neither the Government nor the complainant have referred to any successfully negotiated agreement since the Act’s adoption in 2002, nor even to any good faith negotiations engaged in, continues to consider that the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee to freedom of association – the forming of independent organizations explicitly capable of concluding collective agreements. (Case No 2704 (Canada) Report No 358, (2010) at para 358, emphasis added (ILO Committee on Freedom of Association) online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911888>)

[S]ubstantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals by working in concert. This suggests an inquiry into the nature of the affected right.235

Thus, in BC Health, a distinction was drawn between the nullified provisions that pertained to contracting out, layoffs and “bumping”, on the one hand, and the provisions that pertained to transfers and reassignments, on the other. Only nullification of the former gave rise to “substantial interference” with the right to bargain collectively, as the entitlements concerned were “essential rights in the context of the case as a whole.”236 Conversely, “on balance”, the transfers and reassignments provisions were “relatively minor”.237 Thus, they did not give rise to sufficient impairment to warrant constitutional remedy. It seems that this assessment of substance is inevitable; unless any and all procedural interference, however minimal, violates s. 2(d), the interferences have to be sorted out according to whether or not they are substantively significant. It is hard to imagine determining the required degree of impairment according to strictly procedural criteria.

ii. The Indeterminacy of “Substantial Interference” Policies

This sub-section explores how purported overarching principles such as the process/substance distinction are set aside by indeterminate conflicts of policy considerations that seem to inevitably intervene in s. 2(d) decision-making. As a result, not only is the claim that a particular outcome is “substantive” inconclusive, but there are multiple other considerations that can be invoked to support a given legal interpretation. Specifically, socio-economic desiderata often come into play at the stage of deciding whether the impugned state action or statute constitutes a “substantial interference” with freedom of association. I thus focus my argument on that particular step of the s. 2(d) analysis. One classic example of such an inquiry into socio-economic realities is the Supreme Court’s discussion in Dunmore of the effects of the exclusion of agricultural workers from collective bargaining under the Ontario Labour Relations Act. As put by Bastarache J., the exclusion’s “most palpable” impact is to create a “chilling effect on

235 BC Health, supra note 213 at para 129.
236 Ibid at para 130.
237 Ibid at para 131.
non-statutory union activity”.

Bastarache J. went on to assess the effects of a potential inclusion of agricultural workers in collective bargaining legislation:

Conversely, the didactic effects of labour relations legislation on employers must not be underestimated. It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. [...] The exclusion suggests that workplace democracy has no place in the agricultural sector and, moreover, that agricultural workers’ efforts to associate are illegitimate. As surely as LRA protection would foster the “rule of law” in a unionized workplace, exclusion from that protection privileges the will of management over that of the worker.

In this passage, we see the Supreme Court basing its judgement on the foreseen impact of a given rule on the socio-economic distribution of power in the workplace. Indeed, these considerations play a key role in determining the very scope of the constitutional protection afforded by s. 2(d).

The Ontario Court of Appeal recently revisited the Dunmore ruling in Mounted Police Association of Ontario v Canada, a case involving a challenge to the exclusion of employees of the Royal Canadian Mounted Police (RCMP) from the regular collective bargaining regime granted to other federal public servants. Juriansz J.A., writing for a unanimous court, relied precisely on the socio-economic position of the parties involved to resolve the issue of whether the scope of s. 2(d) protection covers the case of the claimants, holding that this element “is enough to dispose of this issue”. Quoting Bastarache J. in Dunmore, Juriansz J.A. thus held that the exclusion of RCMP employees from the collective bargaining scheme did not prevent them from associating, “in light of their relative status, their financial resources and their access to constitutional protection”.

Abella J. relied on a similar argument in her dissent in Fraser on the constitutionality of the exclusion of agricultural workers from collective bargaining, emphasizing the effect not on the employees but on the employers’ behaviour. She declared that “a lack of exclusivity allows an employer to promote rivalry and discord among multiple employee representatives in order to

238 Dunmore, supra note 212 at para 45.
239 Ibid at para 46.
240 2012 ONCA 363 [Mounted Police].
241 Ibid at para. 127.
242 Dunmore, supra note 212 at para 45, quoted in Mounted Police, ibid at para 126.
‘divide and rule the workforce’ [...]” Some might dispute the empirical soundness of this assertion, but the point is that Justice Abella is defining the scope of s. 2(d) according to the foreseen impact of the rule on employer economic conduct, and not according to procedural considerations.

In *CSN c. Québec*, Grenier J. of the Quebec Superior Court relied in part on the “notion of social protection” and on the “history of our collective bargaining regime” to strike down the legislative withdrawal of various home care workers’ right to organize under the Quebec Labour Code. The question Grenier J. faced was whether, as the government was arguing, the claimants were in fact demanding access to a “particular” collective bargaining scheme, a claim that would exceed the scope of s. 2(d). Here are excerpts from Grenier J.’s reasoning:

The claimants are not asking for access to a particular regime. … They rightly assert that the right to organize supposes more than mere membership in a trade union. In order to exist, representation must be real. … It was stated in the Health Services case that a trade union and a reading group should not be treated in the same way. Trade unions have a history. Their recognition was the product of incessant struggles and hopes too often deceived. They have had to face repression before conquering the right to exist and to represent the interests of their members. … Moreover, the notion of social protection implies the right to minimal decent working conditions, up to and including the right to effective collective representation. It is the “employee” status that, in our society, grants access to social protection. … Given the history of our collective bargaining regime and the traditions it has created, Laws 7 and 8 lead to the negation of widespread practices related to the right to organize.

This excerpt reveals that “the notion of social protection”, along with the concept of the “history of our collective bargaining regime”, serves to mediate between the ideas that, on the one hand, “no particular regime is protected” and that, on the other hand, the protection of some aspects of a given regime is necessary to guarantee the “right to a general process of collective bargaining”. It seems to me that it will often be possible to argue that whatever given s. 2(d) claim amounts to asking for protection of a particular statutory scheme, and that it will also often be possible to respond that, on the contrary, in light of the socio-economic context, the particular legal entitlement which is claimed is in fact essential to the enjoyment of a general

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243 *Ontario v Fraser*, supra note 222 at para 346.
244 *Confédération des syndicats nationaux c Québec (PG)*, 2008 QCCS 5076 [*CSN c Québec*].
245 *Ibid* at para 271 [translated by author].
246 *Ibid* at para 272 [translated by author].
247 *Ibid* at paras 266, 267, 269, 271 & 272 [references omitted, translated by author].
248 *BC Health*, supra note 213 at para 91.
process of bargaining, as Grenier J. ruled in *CSN c. Québec*. I note in passing that the Ontario Court of Appeal in *Fraser* responded in the exact same manner to the Ontario government’s claim that exclusivity in representation is merely a feature of a particular regime and is hence excluded from s. 2(d) protection. Thus, there might be something in the legal test devised under s. 2(d) that makes appeal to social context and policy necessary in order to arbitrate between the protection of a “general” right and the potentially contradictory exclusion of “particular” regimes.

As a final example, in *BC Health*, the Court went beyond assessing the effect on the parties and directly balanced the governmental objective against the effects of the measures adopted, noting that concerns such as the “spiralling cost of healthcare” and the “laudable desire to provide quality health services” “must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(d) obligation to preserve the processes of good faith negotiation and consultation with unions.” It bears notice that this policy analysis is not made under s. 1 of the *Charter*; rather, it is an integral part of deciding whether there is an infringement to freedom of association in the first place. This is so because *BC Health* introduced in s. 2(d) a so-called “internal limit”.

In any case, the result is striking: it seems that no pronouncement can be made

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249 Chief Justice Winkler responded by holding, among other things, that exclusivity is “key to mitigating the historical inequality between employers and employees” (*Fraser v Ontario (AG)*, 2008 ONCA 760 at para 90 [*Fraser v Ontario]*). There might however be other ways to mediate this tension. For an argument on the mediation of “general protection” and “particular regime” that calls upon notions of institutional competence and the separation of powers, see Kevin Banks, “The Role and Promise of International Law in Canada’s New Labour Law Constitutionalism” (2011) 16 CLEJ 233 at 234. For a critique of the Supreme Court’s take on that distinction, see Alison Braley, “‘I Will Not Give You a Penny More Than You Deserve: *Ontario v Fraser* and the (Uncertain) Right to Collectively Bargain in Canada” (2010) 57:2 McGill LJ 351 at 362-365. Some scholars have posited the existence of a “natural” and “pre-existing” (originel) principle of “collective autonomy” that could provide a metric to assess which positive legal institutions are protected under s 2(d) of the *Charter*. See Pierre Verge, “L'affirmation constitutionnelle de la liberté d’association: une nouvelle vie pour l’autonomie collective ?” (2010) 51:2 C de D 353.

250 *BC Health, supra* note 213 at para 134.

251 In the framework put forward in *BC Health*, this exercise of considering social and economic concerns is often carried out in the second step of the “substantial interference” s 2(d) test, summarized by the *BC Health* majority as an inquiry as to “whether [the nullified legislative or agreement provisions] preserve the processes of collective bargaining.” (*BC Health*, *ibid* at para 131).

252 That being said, whether this “balancing” is internal or external to the definition of the right may not make much difference to my argument. When matters of economic policy are confined to s 1 analysis, the Court is still conditioning the remedy and the outcome of the case on its evaluation of economic and social concerns. As put by constitutional legal scholar Peter W Hogg, it “makes little difference in result whether the courts opt for a stringent standard of justification coupled with a purposive interpretation of rights, or for a relaxed justification coupled with a broad interpretation of rights.” (*Peter W Hogg, Constitutional Law of Canada* (Toronto: Thomson Reuters, 2007) at 38-7) Thus, I could have discussed cases such as *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 [*Saskatchewan FOL*], in which the balancing was mostly done as part of s 1 analysis. In that case, the Court of Queen’s Bench for Saskatchewan was faced with a challenge to the validity of the newly adopted essential
on the scope of freedom of association without some assessment of governmental policies and socio-economic context. Moreover, as I now argue, the structure of policy argument does not allow for coherent mediation between competing policies and desiderata.\textsuperscript{253}

I now present a brief summative assessment of the various policy arguments I have outlined thus far. Here again, I have coupled them in pairs in order to illustrate how seemingly isolated argument-bites can in fact convincingly counter each other and lead to indeterminate results.

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services regime, which provided among other things that, failing agreement between government and unions as to which services were to be considered essential, the government could dictate what work was to be performed. The Court carried out most of its balancing as part of the s 1 Oakes test, stating that the impugned legislation created an “unnecessary power imbalance” by conferring unilateral power on the employer to designate which worker should be obliged to carry on working during a strike to maintain essential services (ibid at para. 193).

\textsuperscript{253} This paragraph and the four preceding it are loosely based on parts of a paper written in satisfaction of the requirements of “Labour and Employment Law”, a course taught at the University of Toronto, Faculty of Law by Pamela Chapman.

\textsuperscript{254} CSN v Québec, supra note 244 at para 271.

\textsuperscript{255} Ontario v Fraser, supra note 222 at para 177 et seq.

\textsuperscript{256} Dunmore, supra note 212 at para 45.

\textsuperscript{257} Fraser v Ontario (AG), 2006 CanLII 121 (ON SC) at para 25 [Fraser, Superior Court].

\textsuperscript{258} CSN v Québec, supra note 244 at para 272 [translated by author].

\textsuperscript{259} Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia, 2004 BCCA 377 at para 94 [BC Health, Court of Appeal] (discussing expectations that collective bargaining be protected under s 2(d) in the absence of a ruling by the Supreme Court to that effect).
4. The broader interpretation is preferable because a narrower interpretation would “privilege the will of management over that of the worker.”

d. On the contrary, the narrower interpretation does not create an imbalance, as the workers concerned can still exercise their freedom of association “in light of their relative status, their financial resources and their access to constitutional protection.”

Arguments for a Narrower Interpretation of “Substantial Interference”

5. The broader interpretation amounts to protecting a particular legislative scheme.

6. The broader interpretation is too expansive and grants too much bargaining power to employees; this can create “unwieldy labour relations.”

7. The narrower interpretation has pressing beneficial effects on economically vulnerable constituencies (e.g. taxpayers, family farms, etc.).

8. The broader interpretation amounts to a substantive protection; it constitutionalizes collective agreements.

Arguments for a Broader Interpretation of “Substantial Interference”

e. On the contrary, the broader interpretation concerns a legal entitlement that is essential to the enjoyment of a general process of collective bargaining.

f. The narrower interpretation “allows an employer to promote rivalry and discord” in the workplace.

g. The narrower interpretation creates a “chilling effect” on union activity that is not proportional with its beneficial effects.

h. On the contrary, the broader interpretation merely provides procedural protection as to how the state can proceed to validly nullify existing collective agreements.

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260 Dunmore, supra note 212 at para 45.
261 Mounted Police, supra note 240 at para 126, quoting Dunmore, supra note 212 at para 45.
262 Mounted Police, ibid at para 128.
263 CSN c Québec, supra note 244 at paras 266 & 272.
264 Mounted Police, supra note 240 at para 116.
265 Ontario v Fraser, supra note 222 at para 346 [Abella J].
266 Fraser, Superior Court, supra note 257 at para 24; BC Health, supra note 213 at para 251.
267 Dunmore, supra note 212 at para 45.
268 Ontario v Fraser, supra note 222 at para 264 [Rothstein J].
269 Saskatchewan FOL, supra note 252 at para 172.
The above suggests that there is a binary structure to the policy arguments invoked in support of a particular interpretation of the “substantial interference” criterion. As was the case in chapter 2 with regards to equality rights, I am not presenting the only possible configuration of argument-bites. This is but a tiny sample of potential arrangements, and the argument-bites I present could have been paired differently. Not to mention that many, many other arguments could have been extracted from other fields of (labour) law where policy is present. However, my particular arrangement suggests that arguments that are presented by advocates and judges as isolated and tailored to the facts of the case could in fact be paired with an opposite that might be (and often is) as convincing.

This section suggests that we should qualify the notion that freedom of association can be defined by reference to the idea that it should be procedural in nature or concerned with “general” process as opposed to “particular” legislative schemes. As we have seen, there seems to be an inherent ambiguity in the idea of a strictly procedural right; that notion can refer either to the nature of the affected entitlement (i.e. is it a collective agreement provision?) or to the nature of the effects of the alleged infringement (does it affect the means by which negotiation is carried out or the result of the negotiations?). Moreover, we have seen that since not every interference with collective bargaining gives access to constitutional remedy, courts must and do assess the substance of the rights affected by the alleged violation. Finally, we have seen that policy arguments that pertain to everything from economic incentives to institutional competence and societal expectations are constantly brought into legal reasoning to decide what constitutes “substantial interference”. My pairings have in fact suggested that the ideas that s. 2(d) should protect only procedure and not substance, as well as a general process and not a particular regime, become themselves policy arguments with their own paired opposites (see arguments 5-e and 8-h above). Rather than being determinative, I would argue that they merely become part of the “list” of policy arguments marshalled to support a particular rule or interpretation. They may carry more or less weight depending on the context, and may be countered by other argument-bites.

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270 See e.g. *CSN c Québec*, supra note 244, which addresses the question of particular regime protection (at para 266) and supplements it with other policy arguments related to, inter alia, purpose and societal expectations (at para 271-272). This mirrors the developments observed in chapter 2 with respect to accommodationism and Duncan Kennedy’s description of the role of the “will theory”, which has become a mere policy argument (“private autonomy”) in contract law. See Duncan Kennedy, “Consideration and Form”, *supra* note 201 at 160-162.
The courts’ insistence on reducing the right to bargain collectively to a “procedural” and “general” protection can perhaps be seen as a manifestation of the tensions between the classical legal thought revived in public law neoformalism and the peculiar North American Wagner Act model. Building on Duncan Kennedy’s “Three Globalizations” thesis, Alvaro Santos has argued that we can distinguish three contemporary discourses of labour law: neoliberal, social and rights-based. Rights-based discourse has been at the center of an important shift in labour law, coinciding in part with the adoption of the ILO 1998 Declaration, but also with a broader shift in domestic labour laws worldwide towards negative conceptions of freedom of association as well as more “individualist” interpretations of labour legislative schemes. Since freedom of association, and specifically its Canadian manifestation in which negative freedom of association is not valued as much as in other jurisdictions, is conceptually at the margins of the global neoformalist legal consciousness that drives rights-based labour discourses, the push to make positive freedom of association more procedural and “general” may in part be understood as an attempt to reduce its scope to lessen its perceived incompatibility with libertarian negative

271 Alvaro Santos, “Three Transnational Discourses of Labor Law in Domestic Reforms” (2010) 32 U Pa J Int’l L 123 [Santos, “Three Discourses”]. Santos’ three discourses do not correspond exactly to Kennedy’s “Three Globalizations”. The neoliberal discourse, in particular, with its instrumentalist vision of efficiency in law, does not fit squarely into Kennedy’s Globalizations. However, the “social” discourse of labour law corresponds exactly to the second Globalization described by Kennedy. The rights-based discourse corresponds to the “public law neoformalism” component of Kennedy’s third Globalization; Duncan Kennedy, “Three Globalizations”, supra note 19 at 20-22.

272 See Santos, ibid, at 142-147.

273 The Canadian model may be quite peculiar in this regard, in that it combines a North American embrace of majoritarian exclusivity with a relatively low influence of libertarian conceptions of negative freedom of association. Exclusive representation, union security clauses and compelled union membership were scrutinized under the negative component of freedom of association, and unions successfully preserved the “social” Wagner Act inspired model from these libertarian challenges. For high-profile Supreme Court cases in which unions were able to preserve majoritarian exclusivity and compulsory union membership, see R v Advance Cutting & Coring Ltd, [2001] 3 SCR 209 and Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211. For an account of the political motives that have led courts to preserve majoritarianism in the face of individualist challenges, see Debra Parkes, “The Rand Formula Revisited: Union Security in the Charter Era” (2010) 61 UNBLJ 223. There may be in the near future new challenges to some of these majoritarian prerogatives of unions. For an account of rising hostility towards forms of union majoritarianism, see Richard Charney, “Tug of War Developing Around Worker Choice, Union Transparency” (2013) 26:2 Can HR Reporter 31. For a suggestion that Canadian union majoritarianism runs counter to international (and an international law-infused Canadian constitutional) law, see Brian Langille & Benjamin Oliphant, “From the Frying Pan into the Fire: Fraser and the Shift from International Law to International ‘Thought’ in Charter cases” (2012) 16:2 CLELJ 181 at 196 et seq.

274 Freedom of association, because of its “collective” nature, may not fit comfortably within a legal consciousness that values human rights as a “pre-institutional conception of the obligations we owe each other by virtue of being human”, as put by Patrick Macklem in “Global Poverty and the Right to Development in International Law” at 8 online: SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271686]. On global rights neoformalism see Duncan Kennedy, “Three Globalizations”, supra note 19 at 65.
conceptions of freedom of association. But, as the procedural and general nature of collective bargaining slide from organizing concepts to mere policy arguments, the right to bargain collectively reveals its indeterminacy. The claim that a particular outcome amounts to “substantive” protection is not determinative, and the ritual of policy argument and balancing takes over. This process sheds light on a gaping contradiction that runs through contemporary legal consciousness: that of a rights neoformalism on the one hand and of the recurrence of balancing as a legal practice that impedes any integration of rights adjudication under a compelling overarching logic, on the other. On this discursive terrain, the plastic substance of legal argument is deployed in manifold ways to support conflicting outcomes and results. This seems to belie the justifications put forward to distinguish core labour rights from other labour standards on the basis of their conceptual filiation with general principles such as, inter alia, the procedure/substance distinction.

b. Successor Rights Statutory Protection

I now turn to successor rights provisions in Canadian labour law. As mentioned in sub-section a-i, successor rights are legislative provisions that allow labour boards to designate an entity as a successor employer to which a union certification may be transferred. This might apply when a business is sold, as well as in more complex cases of subcontracting or transfers of parts of a business. There are several good reasons to address Canadian successor rights provisions along with the constitutional protection of freedom of association. Even though successor rights provisions are not per se covered by the international (or Canadian constitutional) protection of freedom of association, their importance has been acknowledged in the ILO Committee on Freedom of Association (CFA)’s decision in the Health Services case:

The Committee also recalls that while a contraction of the public sector and/or greater employment flexibility (for example in the present case, through increased recourse to subcontracting) do not in themselves constitute violations of freedom of association, there is no

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275 I do note that in addition to the notion of the procedural/general nature of the right, Rothstein J. (and Charron J.) raised an individualist rights-based objection to the protection of collective bargaining by s 2(d). According to this argument, freedom of association is a collective right only to the extent that it protects collective activities that can also be carried out by individuals on their own. Hence, including a duty to bargain in good faith in the scope of s 2(d) amounts to affording greater protection to groups than to individuals. See Ontario v Fraser, supra note 22 at paras 178-187.

276 Duncan Kennedy, “Three Globalizations”, supra note 19 at 65.

277 The Ontario successor rights provision, s 69(1) of the OLRA, supra note 217, defines “sale of business” as broadly including “leases, transfers and any other manner of disposition.”
doubt that these changes have significant consequences in the social and trade union spheres, particularly in view of the increased job insecurity to which they can give rise; workers’ organizations should therefore be consulted as to the scope and form of the measures adopted by the authorities.\footnote{278}{Case No 2324 (Canada), Report No 336 (2005) at para 278 (ILO Committee on Freedom of Association) online: ILO<http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908513 > [references omitted].}

Moreover, while successor rights provisions are not directly protected by international law, one could make a convincing case that there are several indirect protections which make them relevant to freedom of association. The CFA has often noted the relevance of successor rights in interpreting the freedom of association conventions. For instance, it has held that nothing in international labour law authorizes the exclusion of “contract employees” from collective bargaining,\footnote{279}{International Labour Office, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 4th ed (Geneva: International Labour Organization, 1996) at 163.} for instance in cases of subcontracting where contract employees take the place of bargaining unit employees. In many cases, in order for the contract employees to be granted bargaining rights, successor rights provisions would have to apply. The CFA has also held that “sub-contracting accompanied by dismissals of union leaders” can be a violation of freedom of association.\footnote{280}{Ibid at 143.} Finally, the CFA has indicated that “legislation which obliges the parties to renegotiate acquired trade union rights is contrary to the principles of collective bargaining.”\footnote{281}{Ibid at 177.} Thus, while successor rights provisions have sometimes been said to lie beyond the scope of the international right to bargain collectively, they have relevance to many aspects of it.

A second relevance of successor rights legislation to freedom of association is that it addresses mounting pressures on collective bargaining related to new forms of social relations of production (and the regulatory frameworks that facilitate these socio-economic changes), often referred to as the “new economy”.\footnote{282}{E.g. Langille, “New Economy”, supra note 75.} This phenomenon has brought about the shrinking of the welfare state and the need for private sector workers to absorb considerable economic fluctuations, leading to the spread of non-standard, part-time and/or precarious work. The “new economy” has also led to deep reconfigurations in the very notion of the “workplace”. As put by Kerry Rittich, “corporations have undergone a process of vertical disintegration, morphing into networks of firms and contractors whose constituent parts change as frequently as do the workers
that they employ.”283 The disintegration of the traditional concept of the integrated workplace associated with the Fordist, post-war economy has had devastating effects on the North American Wagner Act collective labour relations model, the latter being based on local, single plant organization.284 Thus, practices such as subcontracting and corporate restructuring can compromise the integrity of existing bargaining units and exclude many workers from union representation altogether. Given the paramount importance of state regulation of successor rights in determining the consequences of business transformations and in constituting the “new economy” in myriad specific contexts,285 a strong case could be made for the inclusion of successor rights provisions in the fundamental protections of the possibility to bargain collectively. Thus, discussing successor rights allows me to implicitly criticize their exclusion from direct international (and domestic constitutional) protection. It also allows me to take my indeterminacy argument beyond mere constitutional law into “social” legislative labour laws and to make a more thorough case for the pervasiveness of indeterminacy in the law related to the labour market.

I focus my exploration of successor rights on the definition by courts and labour boards of the legal requirements for there to be a “sale” of a “business”, leading to the preservation of bargaining rights. Specifically, I chronicle the evolution of the case law starting with the attempt, in both Ontario and Quebec, to subsume the law under the general principle of an “instrumental” approach to the definition of a “business”. As I explain below, the instrumental approach is defined in opposition to the “functional approach”, which sees the business as essentially synonymous with the work (the “functions”) of the employees. By contrast, the instrumental approach defines the business as an organic whole that cannot be reduced to mere functions or work. The instrumental approach is thus more demanding for claimants than the functional approach, and has been put forward by labour boards as a principled approach that limits

successorship findings to cases of true economic continuity. I start by briefly summarizing in sub-section i some of the leading successor rights cases from Ontario and Quebec. This analysis is comparative and tracks similar dynamics in both provinces as to the evolution of policy argument in successor rights cases. In sub-section ii, I make the argument that these various cases can be best analyzed as interlocking legal questions answered by the labour boards as they work out the implications of the foundational “instrumental” approach. I argue that adjudicators have not merely “applied” the instrumental approach to new factual cases, but have been confronted with doctrinal gaps and ambiguities that could not be resolved merely by appealing to the instrumental definition of the business. I then present the policy arguments that adjudicators have used to justify their decisions. I present summative tables of indeterminate pairs of policy arguments drawn from all the cases covered, in order to show that the various legal questions involved are closely related. I argue that these various cases can be conceived as instances of “nested” sub-questions, in which the application of an initial legal test reproduces in subsequent disputes the doctrinal conflicts that led to the adoption of the test in the first place. With a view to emphasizing that the policy arguments from the various cases can be intermingled, I present pairs of initiatives and responses, drawing on different cases for each argument. This allows me to argue that a given normative and doctrinal conflict which labour boards purport to resolve by reference to an overarching principle such as the “instrumental approach” often creates further indeterminacy by reproducing itself in ensuing sub-questions.

i. Ontario and Quebec Case Law: The Unravelling of the “Instrumental” and “Organic” Approaches

This sub-section endeavours to trace the evolution of Ontario and Quebec case law related to successor rights, focusing on leading cases. I start with Ontario and its foundational Metro-
Parking case, as well as the subsequent Accomodex and Ajax cases. I present the cases in chronological order to give a sense of how Ontario labour boards have elaborated the implications of the instrumental approach adopted in Metro-Parking and never since repudiated.

Metro-Parking involved two successive subcontractors of the federal government: Metropolitan Parking Inc. (Metropolitan) and Toronto Auto Parks Ltd (TAP). The complainant union had obtained certification for the employees of TAP, but had no certification binding the federal government. As TAP’s contract with the government expired, Metropolitan was chosen to replace TAP as the new subcontractor in the course of a competitive bidding process, which prompted the union to file a motion demanding a finding of successorship. Metropolitan ended up recruiting a “substantial number of TAP’s bargaining unit employees” as well as much of TAP’s management. However, there was “no corporate relationship” between Metropolitan and TAP at any time. Against this factual background, the OLRB held that there was no “sale of business” as per s. 69 (then 55) of the Ontario Labour Relations Act. In essence, the Board held that as a matter of law, “there must be more than the performance of like functions by another business entity” for there to be a sale of business under the successor rights provisions (and thus a transfer of bargaining rights). In addition to this instrumental definition of the business, Metro-Parking introduced a second requirement that was also to become central to ulterior case law: that of a “sale”, later referred to as the need for a “nexus” between the alleged successor and transferor. By rejecting the argument that the loss of TAP’s contract and the simultaneous hiring of some of TAP’s employees constituted a “sale”, the OLRB made a finding that was to be very influential.

289 Supra note 229.
290 Hotel Employees Restaurant Employees Union, Local 75 v Accomodex Franchise Management Inc, [1993] OLRB Rep April 281, 1993 CanLII 8023 (OLRB) [Accomodex].
291 Ajax (Town) v CAW, Local 222, [2000] 1 SCR 538 [Ajax, Supreme Court].
292 Metro-Parking, supra note 229 at para 2. This will become very important for subsequent discussion of the application of the test devised in Metro-Parking.
293 Ibid at para 14.
294 Ibid at para 3.
295 This will be important in my discussion of subsequent cases.
296 Ibid at para 44.
297 While this finding was foundational, it would appear that the “instrumental approach” label was coined retrospectively. For an explicit mention of the OLRB’s penchant for an “instrumental” definition, see Accomodex, supra note 290 at paras 54-55.
298 See infra note 316 and accompanying text.
299 Metro-Parking, supra note 229 at para 45.
Some 14 years after *Metro-Parking*, the *Accomodex* case was one occasion for the OLRB to clarify some of the implications of the instrumental approach. *Accomodex* involved Skyline Triumph Hotel (Triumph), a business that had closed because of financial difficulties. The employees of the hotel had been represented by a trade union. 18 months after the closing, Kelloryn Consulting Inc. (Kelloryn) acquired “the lands, buildings and virtually all of the other tangible assets formerly used by the Triumph in its hotel operation.” Kelloryn entered into an agreement with Accomodex Franchise Management Inc. (Accomodex) to manage the hotel according to a franchise agreement under the Howard Johnson brand. Accomodex was considered by the OLRB to be the employer of the employees now working in the business.

The Board noted that there was no significant continuity in the workforce, since Accomodex hired only 10 out of the 150 ex-employees of Triumph and there were no particular efforts made to recruit ex-employees. The Board, however, did note that the functions, that is, the work performed by the new employees, were essentially the same as those performed by the former employees of Triumph. The fundamental question that the OLRB faced in *Accomodex* was whether a transaction involving only a transfer of assets, with no significant transfer of employees (but with similarity of functions), should automatically be considered insufficient as per the instrumental approach to successor rights. A second, related question was whether a hiatus between the operations of alleged successive businesses is determinative and must lead to the rejection of a successorship claim. Before answering these questions, the OLRB reiterated that the applicable test was the instrumental definition of the business, i.e. a view of the business as an integrated whole which goes beyond mere similarity of work. The Board also quoted and reiterated its finding in *Gordons Markets* that a change of employees is not determinative of the successor rights claim. Having made these remarks, the OLRB found that, on the one hand, a hiatus will not be determinative where the assets remain intact and continue to be of “core” importance for the business. On the other hand, it found that the transfer of assets might suffice,

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300 *Accomodex*, *supra* note 290 at para 15.
301 *Ibid* at para 18.
302 *Ibid* at para 32.
303 *Ibid* at para 37.
304 *Ibid* at para 40.
305 *Ibid* at paras 54-55.
if such assets are fundamental to the business. It is not entirely clear whether there also needs to be continuity in the functions performed for assets to suffice, as was indeed the case in *Accomodex*. Nevertheless, this adds considerable precisions to the legal framing of the instrumental approach in Ontario.

The OLRB dealt with another high-profile successorship question in the 1994 case of *Ajax*. In this case, the Town of Ajax was faced with a successor rights claim related to employees it had recently hired in an effort to reassume control over the operation of its transit system. The complainant union had obtained certification for the employees of Charterways, the company that had ensured the operation of the Ajax transit system from its creation. The Town of Ajax had always been the owner of the assets related to the transit system (buses, buildings, payment systems, etc.), while Charterways “provided and coordinated a complement of trained drivers to operate the buses, and a group of mechanics and cleaners to maintain and repair the fleet.”

When Charterways’ contract with the Town of Ajax expired in 1992, however, it was decided that the Town would assume the entire operation of the transit system. Charterways thus terminated the employees formerly involved in the operation of the transit system. The Town of Ajax then launched a recruitment campaign, and the OLRB found that it had given “special advance notice” to the drivers formerly employed by Charterways. After this process, a “substantial majority” of the new employees of Ajax were former employees of Charterways. The complainant union thus alleged that the circumstances should lead to a finding that Ajax was the successor of Charterways. The OLRB ruled in the union’s favour, relying on some policy arguments that I outline below, as well as on some key findings. The OLRB held that the workforce taken back by Ajax was Charterways’ “most valuable asset”, one that was “essential to the continued operation of the transit system.” The Board also emphasized that Ajax

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310 *Ibid* at para 23.
312 *Ibid* at para 41.
313 *Ibid* at para 42.
actively solicited the application of the employees, and that as a consequence it “took back more than it initially contracted out”.\textsuperscript{314} 

The Board’s decision was quashed by the Divisional Court, mainly on the basis that “there was no ‘nexus’, ‘legal act’ or ‘legal relation’\textsuperscript{315} between Ajax and Charterways. While it would seem that the OLRB did not mention the matter in its own decision, the Court of Appeal nevertheless restored the Board’s ruling on that point, finding that the “nexus between Charterways and the Town is the commercial history without which the Town’s acquisition of the work force would not have occurred.”\textsuperscript{316} The Court of Appeal also agreed with the Board as to the finding that a “business” had indeed been transferred through the hiring of the employees.\textsuperscript{317} The Supreme Court maintained the Court of Appeal’s decision, noting that the “historical and functional connection between Charterways and the Town of Ajax”\textsuperscript{318} was not a patently unreasonable basis for a finding of successorship.

The Quebec case law seems to have followed a similar course to that of Ontario, in that it has passed from the forceful affirmation of an “organic”/instrumental approach to successor rights in \textit{Bibeault}\textsuperscript{319} to some qualifications in \textit{Ivanhoe} as to what that test entails. I only discuss these two leading decisions in depth because they were rendered by the Supreme Court of Canada and as a result their relevance is not entirely confined to Quebec.

\textit{Bibeault} involved three subcontractors performing janitorial work for a school board. Two of these subcontractors, BDM and Netco, originally had contracts with the school board, and their employees were the objects of a certification granted to the CSN union federation. Of note is the fact that the employees of the school board per se were never unionized. Not only that, but the unanimous Supreme Court found that the school board had never even been the employer of the janitors, who were from the start recruited by the subcontractors.\textsuperscript{320} As a consequence of the initiation of a strike by the employees of the two subcontractors, the school board terminated

\begin{itemize}
\item \textsuperscript{314}Ibid.
\item \textsuperscript{315}Ajax (Town) v National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 222 (1995), 84 OAC 281 at para 39, 21 BLR (2d) 196 (Ont Div Court) [\textit{Ajax}, Div Court].
\item \textsuperscript{316}Ajax (Town) v National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 222 (1998), 41 OR (3d) 426 at para 25, 166 DLR (4th) 516 (ONCA) [\textit{Ajax}, OCA].
\item \textsuperscript{317}Ibid at paras 26-27.
\item \textsuperscript{318}Ajax, Supreme Court, supra note 291 at para 2.
\item \textsuperscript{319}UES, local 298 v \textit{Bibeault}, [1988] 2 SCR 1048 [\textit{Bibeault}].
\item \textsuperscript{320}Ibid at para 122.
\end{itemize}
their contracts and called in a new subcontractor, Services ménagers Roy Ltée (Roy). The union initiated procedures under the Quebec successor rights provisions to be declared the bargaining agent for the Roy employees. Concurrently, the FTQ, a rival union federation representing the employees of Roy in other businesses of the region, initiated procedures to obtain certification to represent the employees carrying out work for the school board. The question was thus whether Roy was the successor of the previous subcontractors, which would make the CSN the bargaining agent and invalidate the FTQ’s procedures.

Beetz J., writing for a unanimous Supreme Court, undertook to put an end to a division in Quebec labour law between advocates of “functional” and “organic” definitions of the business. The Court unequivocally rejected the functional definition, stressing that bargaining rights cannot be “transferred from one employer to another solely because each of them hires employees engaged in similar activities.” Instead, Beetz J. adopted the “organic” definition put forward by judge Lesage of the Quebec Labour Court, a definition that is strikingly similar to Metro-Parking’s instrumental approach. According to that definition, “[i]nstead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain his objective.”

Beetz J. also held that one of the corollaries of the organic approach is the need for a “legal relation” between successive employers. Indeed, he stated that this was “probably the chief point in dispute”. This is roughly the equivalent of the “nexus” in Ontario law, the second requirement the OLRB had established in Metro-Parking. Beetz J. also held that this “legal relation” between the two alleged successive employers needs to be direct. This essentially doomed the CSN’s claim, which relied in part on the idea that the relationship between Roy and the school board created a sufficient nexus with the previous subcontractors. Since the school board had never been the employer of the janitors, it did not transfer anything to Roy. Moreover,

321 I am using the words “business” and “sale” instead of “undertaking” and “alienation or operation by another”, used in s 45 of the Quebec Labour Code, supra note 217. I do so because the latter expressions strike me as clumsy translations of entreprise and aliénation, two French words roughly equivalent to “business” and “sale”, the words used in Ontario law.
322 Bibeault, supra note 319 at para 217.
323 Ibid at para 67.
324 Ibid at paras 171-172.
325 Ibid at para 185.
326 Ibid at para 49.
327 Ibid at para 205.
the three subcontractors had never planned any transfer of business; the replacement of BDM and Netco by Roy was the effect of competition for contracts alone.\textsuperscript{328} Therefore, the Supreme Court dismissed the CSN’s claim.

The Supreme Court of Canada was faced in 2001 with \textit{Ivanhoe}, an appeal related to the framework laid out in \textit{Bibeault}. Ivanhoe Inc. owned and managed a shopping centre and had subcontracted its janitorial services to Moderne. Significantly, prior to this subcontracting, Ivanhoe had managed for 15 years its maintenance service with its own employees, who were unionized.\textsuperscript{329} As we will see, the Court used this fact to distinguish \textit{Bibeault}. The union that had represented the Ivanhoe janitorial employees applied for a declaration of successorship to continue to represent these employees, who had all been transferred to Moderne, the subcontractor. The successorship declaration was indeed issued by a labour commissioner. Ivanhoe called for bids after the end of its contract with Moderne, which did not participate in the bidding. Ivanhoe thus entered into contracts with four companies that were to take Moderne’s place. Moderne’s workers from the Ivanhoe mall were all terminated and none of them were hired by its alleged successors. The work executed by the latter was identical to that which Moderne had performed.\textsuperscript{330} The union that had represented the janitors employed first by Ivanhoe and then by Moderne filed a claim under the Quebec successor rights provisions in order to be declared the bargaining agent of the new janitors working on the premises of the shopping center.

In \textit{Ivanhoe}, the Supreme Court validated two doctrines relied upon by the Quebec Labour Court: the “theory of retrocession” and what I call the doctrine of the right to operate. These doctrines respectively correspond to the two requirements outlined in \textit{Bibeault} (and \textit{Metro-Parking}): the need for a “legal relation” and the need for a transfer of a business (defined in an organic/instrumental manner). On the first element, the Court accepted as reasonable the theory of retrocession, which had been elaborated by the Quebec Labour Court long before \textit{Bibeault}.\textsuperscript{331} It seems consensual that successor rights provisions do not apply when the work is transferred from a subcontractor in respect of which the certification was originally issued to a second

\textsuperscript{328} Ibid at paras 214-215.
\textsuperscript{329} Ivanhoe inc v UFCW, Local 500, [2001] 2 SCR 565 at para 3 [Ivanhoe].
\textsuperscript{330} Ibid at para 6.
\textsuperscript{331} Ibid at para 83.
subcontractor (as was the case in *Bibeault* and, incidentally, in *Metro-Parking*). The theory of retrocession, however, allows a finding of successorship in a situation where the entity that is subcontracting the work was itself originally covered by a certification. Provided that sufficiently important elements of the business are transmitted, the subcontracting employer is held to have transferred the business to the first subcontractor, taken it back and then passed it on to the second subcontractor.332 On the second element, the Court held that a “right to operate”, defined as the “right to perform specific duties at a specific location for a specific purpose”,333 could suffice to trigger the application of successor rights provisions if it is combined with the “transfer of functions”,334 meaning a transfer of jobs and not necessarily of employees per se.

ii. Mapping Indeterminacy Across Provincial Borders and Legal Questions

In this sub-section, I argue that the law has taken quite similar trajectories in Ontario and Quebec. Indeed, both provinces have seen foundational cases in which there was a consensus in favour of an instrumental/“organic” approach to successor rights, as well as subsequent high profile labour disputes on what exactly the instrumental approach entails in specific cases. These legal debates are best described as involving “nested sub-questions” through which a new rule is chosen to fill gaps in the instrumental approach, as opposed to cases whereby the instrumental approach is simply “applied” as an overarching principle that can guide adjudication in the direction of coherent outcomes. Duncan Kennedy describes this phenomenon, taking the tort law example of deciding whether to allow a defence of mistake in certain circumstances and, supposing such a defence is allowed, subsequently deciding whether to impose an objective standard to the mistake:

‘Nesting’ is my name for the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle. […] ‘Nesting’ is the reappearance of the inventory when we have to resolve gaps, conflicts or ambiguities that emerge when we try to put our initial solution to a doctrinal problem into practice. In this case, we first deploy the pro and con argument-bites in deciding whether or not to permit a defence of mistake. We then redeploy them in order to decide whether to require that the mistake be made reasonable.335

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333 *Ibid* at para 51.
335 Kennedy, “A Semiotics of Legal Argument”, *supra* note 12 at 344 & 346.
The idea is thus that the conflicting arguments invoked to resolve the initial question can be redeployed in a nested sub-question. I present below pairs of policy arguments drawn from cases on all the nested sub-questions. In order to render this superimposition of arguments intelligible, I now make the relationship between the various sub-questions clearer and try to convey the sense that the choice of the instrumental approach is not determinative of the other “nested” sub-questions that accompany it. Indeed, the instrumental approach was essentially defined negatively; successorship findings must be based on more than mere similarity of functions. It is thus not surprising that disputes as to what that legal test requires as a matter of law have surfaced in both provinces. The following diagram illustrates the relationship between these disputes:

“Nested” Sub-Questions in Successor Rights Cases

As can be seen in the diagram, the cases summarized above all dealt with the question of whether or not a certain transferred element can suffice at all for a finding of successorship. So, for

336 This diagram and the paragraph that follows it are based on parts of a paper written in satisfaction of the requirements of “Advanced Labour: Bargaining Rights”, a course taught at the University of Toronto, Faculty of Law by Richard Charney and Tim Gleason.
instance, the question of whether the failure to hire employees from the alleged predecessor always dooms a successor rights claim was answered in the *Gordons Markets* case,\(^\text{337}\) where it was held that failure to hire is not per se determinative. Once this question was answered, it was open to unions to make claims in cases where some other element of the business was transferred, but not the employees. In those cases as well, the employer could raise the question of whether the particular element should systematically be considered insufficient.\(^\text{338}\) For instance, in *Accomodex*, it was argued that a mere transfer of assets, combined with a hiatus between the alleged successors’ operation of their businesses, should be held insufficient. Likewise, in *Ivanhoe*, the question was whether a “right to operate” (defined in relation to a specific location and tasks) that is retroceded by a subcontracting employer originally bound by the certification can be sufficient as per the instrumental approach. Finally, in *Ajax*, the issue was whether a unilateral decision to hire employees could be considered a sufficient “nexus”, and whether employees can sometimes be sufficiently important elements of the business to warrant a finding of successorship.\(^\text{339}\) In deciding on these matters, adjudicators cannot merely “apply” the instrumental approach, as the questions go beyond what was settled in *Metro-Parking* and *Bibeault*, i.e. the rejection of a test that hinges on similarity of functions.\(^\text{340}\) However, that is not

\(^{337}\) *Supra* note 306.

\(^{338}\) The cases from my diagram all involve choices of legal rules that can be best characterized as questions of law, as defined by the Supreme Court:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. […] I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa. (Canada (Director of Investigation and Research) v Southam Inc, [1997] 1 SCR 748 at para 35, Iacobucci J., for a unanimous court)

\(^{339}\) As put by Bastarache J. in his dissent in the Supreme Court *Ajax* judgement, one of the questions was whether “commercial history on its own can constitute a sufficient nexus.” (*Ajax*, Supreme Court, *supra* note 291 at para 9 [emphasis added].)

\(^{340}\) I do note that *Metro-Parking*’s definition is more ambiguous than that of *Bibeault* in this regard. *Bibeault* is quite clear that it is only rejecting a test that hinges on the similarity of the work performed. *Metro-Parking* rejects such a test as well (*supra* note 229 at para 36). *Metro-Parking* goes on to say, however, that it would be wrong to root bargaining rights “in the location, the employees or the work, rather than ‘the business’.” (*ibid* at para 46) This passage seems to indicate that *Metro-Parking*’s functional approach goes beyond merely rejecting the similarity of the work as a valid criterion. But, at paragraph 37, *Metro-Parking* leaves the door open to the application of successor rights when there is a “transfer of capital, assets, equipment, managerial skills, employees or know how” (emphasis added). The use of the alternative conjunction seems to indicate that these factors (notably employees) might suffice on their own, depending on the facts. It thus seems to me that the lowest common denominator of the *Metro-Parking* and *Bibeault* decisions remains the rejection of the similarity of functions as a potentially sufficient criterion.
to say that these legal issues are wholly independent of the initial choice of an instrumental approach; as I outline below, the policy arguments invoked for and against the instrumental approach have been subsequently invoked with regards to various rules as to what the instrumental approach entails.

I now offer a catalogue of various policy arguments that have been used by adjudicators pronouncing on successor rights claims. While “balancing” acquired an important role in constitutional law, as outlined in chapter 2, it never really migrated to labour law as a fully articulated and acknowledged practice. Labour law has instead been marked by an ad-hoc style of policy analysis based on the purpose(s) of equalizing bargaining power, protecting bargaining rights and attaining “industrial peace”. Nevertheless, one of the claims that I make in this section is that purposive arguments are only rarely conclusive by themselves. Rather, purposive arguments are often balanced against competing considerations, or even against competing interpretations of the purpose. For instance, it may not amount to much to argue that a given legal rule “gives effect to the purpose of protecting bargaining rights”, because the opponent can often answer that “this legal rule amounts to extending, not protecting existing bargaining rights”. In other words, purposive argument itself becomes a terrain of struggle. Thus, while “balancing” is officially not part of the range of labour law arguments, my analysis reveals that a similar but less structured rhetorical process can be unearthed from the mass of policies invoked by labour lawyers and adjudicators.

I have regrouped the policy arguments according to whether they advocate broader or narrower legal rules. While these arguments were formulated with respect to the particular question at hand (e.g. whether unilateral hiring can be sufficient “nexus”), they can also be invoked to support the choice of other legal rules that are on the same “side” (i.e. favouring narrower or broader interpretations). I have grouped the arguments in pairs of initiatives and responses, with seven pairs where the initiative comes from the party advocating broader successorship rules (the

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342 This development mirrors the demise of the “will theory” associated with the first Globalization and its downgrading to a mere policy argument (“private autonomy”) in contemporary legal consciousness: see Duncan Kennedy, “Consideration and Form”, supra note 201 at 160-162.
union) and another seven pairs where the initiative comes from the party advocating narrower rules (management).\textsuperscript{343}

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<thead>
<tr>
<th>Arguments for a Broader Interpretation of Successor Rights Provisions</th>
<th>Arguments for a N narrower Interpretation of Successor Rights Provisions</th>
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<tbody>
<tr>
<td>1. The broader rule is appropriate, because it gives effect to the remedial purpose of successor rights provisions.\textsuperscript{344}</td>
<td>a. The purpose of the provisions would be defeated by a broad rule that expands instead of merely protecting bargaining rights.\textsuperscript{345}</td>
</tr>
<tr>
<td>2. Marking certain elements as \textit{a priori} determinative amounts to reading in restrictions on the scope of successor rights provisions and subverting legislative intent.\textsuperscript{346}</td>
<td>b. The narrower rule that marks certain elements as fatal to a successorship claim is “not excluded” by the wordings of successor rights provisions and may thus be implied through purposive interpretation.\textsuperscript{347}</td>
</tr>
<tr>
<td>3. Employees “naturally expect” that their bargaining rights will not be nullified because of commercial activities; the broader rule responds to the employees’ expectations.\textsuperscript{348}</td>
<td>c. It is unreasonable to expect a rule to protect jobs instead of merely protecting bargaining rights, because that exceeds the purpose of successor rights provisions.\textsuperscript{349}</td>
</tr>
<tr>
<td>4. A stringent standard for successorship in subcontracting creates inequality between employees working in core sectors of the business and employees working in peripheral sectors, as the transfer of the latter</td>
<td>d. Unions can minimize the “damage” done by the narrower rule in cases of subcontracting by seeking region-wide instead of single workplace bargaining units.\textsuperscript{351}</td>
</tr>
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\textsuperscript{343} The following tables and the subsequent two paragraphs are partly derived from a paper written in satisfaction of the requirements of “Advanced Labour: Bargaining Rights”, a course taught at the University of Toronto, Faculty of Law by Richard Charney and Tim Gleason.

\textsuperscript{344} Metro-Parking, supra note 229 at para 27; Ivanhoe, supra note 329 at para 94, quoting Ajax, OCA, supra note 316 at para 24; Canada Post Corporation and Nieman's Pharmacy (1989), 4 CLRBR (2d) 161 (QL) [Nieman’s Pharmacy]. I am including the Nieman’s Pharmacy case even though I have not summarized it above, because I have found some interesting arguments that could be transposed to other legal nested sub-questions.

\textsuperscript{345} Accomodex, supra note 290 at para 64; Nieman’s Pharmacy, ibid.

\textsuperscript{346} Accomodex, supra note 290 at para 73.

\textsuperscript{347} Bibeault, supra note 319 at para 160.


\textsuperscript{349} Nieman’s Pharmacy, supra note 344.
will not give rise to a finding of successorship under a narrower rule.  

5. The broader rule pays special attention to continued employment and similarity of functions, and rightly so, because the relevance of the business to the employees stems from the work it provides.

   e. If too much importance is attached to work as a criterion for successorship findings, it will grant unions an “absolute right of property in the work performed by [their] members”.

6. The narrower rule put forward by management is bad for employers, because the elimination of bargaining rights provokes new organizing campaigns and potential labour conflicts.

   f. The broader rule put forward by the union, in turn, hurts the employees by unduly extending bargaining rights and circumventing the certification process, thus preventing employees from expressing their wishes in a vote.

7. The broader rule accounts for the fact that the mischief addressed by successor rights (the undermining of bargaining rights) is present even when there is no strong “nexus” or “legal relation”.

   g. The broader rule wrongly allows successorship findings to be made in the absence of a strong “nexus” or “legal relation” between alleged successors; thus, under the broader rule, normal commercial activities such as losing a contract to a competitor might lead to an undue finding of successorship.

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350 Bibeault, supra note 319 at para 222.
351 Ivanhoe inc c Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500 [1999] RJQ 32 at para 138 (QL), LeBel J., for the Quebec Court of Appeal [Ivanhoe, QCCA].
352 Accomodex, supra note 290 at para 59.
354 Bibeault, supra note 319 at para 145; Metro-Parking, supra note 229 at para 46.
355 Nieman’s Pharmacy, supra note 344.
356 Metro-Parking, supra note 229 at para 46.
<table>
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<tr>
<th>Arguments for a Narrower Interpretation of Successor Rights Provisions</th>
<th>Arguments for a Broader Interpretation of Successor Rights Provisions</th>
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| 8. The broader rule goes against legislative intention that certification attach to a single employer.  
\[358\] | h. On the contrary, the broader rule accounts for the fact that the legislature intended that the instrumental test be adapted to “the reality of the business practices it is addressing”.  
\[359\] |
| 9. The narrower rule preserves the employer’s “legal freedom to dispose of its business”.  
\[360\] | i. In light of the purpose of successorship provisions, “[o]ne should not expect commercial law considerations to be paramount” in the interpretation of the provisions.  
\[361\] |
| 10. The broader rule leads to unpredictable results, creating legal (and economic) uncertainty.  
\[362\] | j. On the contrary, the broader rule contributes to legal (and economic) certainty by ensuring the “stability of certifications”.  
\[363\] |
| 11. The broader rule is overbroad and leads to unwarranted findings of successorship in situations where there is no continuity of the business.  
\[364\] | k. On the contrary, the broader rule is “flexible” and allows labour boards to consider the facts of each given case.  
\[365\] |
| 12. The broader rule extends successor rights to cases where it would be unfair or unpractical to transfer the collective agreement as well as the certification; thus it extends beyond “real” cases of successorship.  
\[366\] | l. Labour boards always struggle with the transfer/modification of an existing collective agreement when making a finding of successorship; the broader rule is not unique in this regard.  
\[367\] |
| 13. The broader rule creates a perverse incentive not to engage in a given economic activity (e.g. hiring employees or buying assets from the alleged predecessor) in order to avoid | m. The narrower rule encourages employer schemes to undermine bargaining rights.  
\[369\] |

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358 *Bibeault*, *supra* note 319 at paras 158-161.
359 *Ivanhoe*, *supra* note 329 at para 92.
360 *Metro-Parking*, *supra* note 229 at para 20.
361 *Accomodex*, *supra* note 290 at para 52.
362 *Bibeault*, *supra* note 319 at para 218.
364 *Bibeault*, *supra* note 319 at para 166.
365 *Ivanhoe*, *supra* note 329 at para 94.
367 *Ibid* at para 11, Arbour J., for the majority.
I trust the above makes apparent the potential interchangeability of policy arguments across many nested sub-questions. For a given choice between a broader and a narrower rule, for instance between the validity and non-validity of the theory of retrocession, lawyers could possibly rely on all the arguments presented above. Thus, one could argue that the theory of retrocession should be rejected because it leads to legal uncertainty (argument n. 10), is overbroad (argument n. 11) and does not account for the interdependence of the various parts of the business (argument n. 14), etc. And these arguments could be met with their opposites, i.e. that a broader rule such as the theory of retrocession contributes to legal certainty and the stability of certifications (argument j), is flexible (argument k) and accounts for the realities of the new economy (argument n). Here again, though I do not claim to have presented exhaustive proof of the indeterminacy of legal doctrine, the latter is strongly suggested by the material I have collected. At the very least, I hope my analysis can unsettle the solemn certainty in which policy argument is often made, in a piecemeal, purportedly ad-hoc and contextual fashion.

Labour law policy argument, while not part of an exercise of formal “balancing”, can nevertheless be analyzed as part of a complex repertoire that seems quite malleable and plastic.

The tables above evidence that purposive arguments are also susceptible to many conflicting interpretations which undermine their legal determinacy. As mentioned earlier, an invocation of the purpose of “protecting bargaining rights” (argument n. 1) can be met with the response that

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368 *Metro-Parking*, *supra* note 229 at para 36, quoting *NABET*, *supra* note 357.
370 *Nieman’s Pharmacy*, *supra* note 344.
371 *Ajax*, OLRB, *supra* note 308 at paras 31-33; *Accomodex*, *supra* note 290 at para 75.
the given rule “expands instead of protecting” (argument a) these rights. As evidenced by the arguments 2 and b, purposive arguments related to considerations of institutional competence are no more conclusive. Claims that adopting a restrictive rule amounts to exercising legislative functions (argument 2) can be met with the contrary argument that a broad reading of the provision amounts to judicial usurpation of the legislative role (argument b). Likewise, the claim that the legislature intended to attach bargaining rights to one employer (argument 8) can be met with the response that the legislature also intended that the notion of employer be contextualized in light of the facts of each case and in light of economic context (argument h); to which one can answer that the facts of the case are clear as to who is the one employer to which bargaining rights should attach, etc. It thus seems that purposive arguments are unlikely to be conclusive on their own. Instead, they will probably be accompanied by other policy arguments pertaining to the separation of powers, the substantive effects of the proposed rule on economic activity and/or legal certainty, the expectations and legal rights of the parties, etc. This critical insight can be thought of as a contribution to a long line of criticism of the conceptual and institutional apparatus of “Social Legal Thought”, the second Globalization described by Duncan Kennedy.372 The purportedly “objective” nature of bureaucratic rule based on legislative purpose and social functionalism has long been attacked by critical scholars.373 In the context of labour law, this legal consciousness, which Karl Klare labeled “social conceptualism” to underline its indeterminacy and liken it to the discredited 19th century conceptualism,374 has been under severe critique for its lack of internal coherence.375 I have attempted to contribute to this critical tradition by underlining the indeterminacy of general policy argument as well as the internal incoherence of purposive social argument.

Conclusion: Bargaining Rights in Law and Development

The present chapter has described the doctrinal structure of the right to bargain collectively at constitutional law and statutory successor rights provisions. It has criticized the view, held by many mainstream law and development institutions and scholars, of the right to bargain

collectively as a legal institution that can be rationalized and systematized according to a foundational principle. Likewise, it has extended that critique to legislative successor rights, which lie beyond the scope of constitutional freedom of association but which nevertheless have much relevance to the protection of bargaining rights. Successor rights are also purportedly defined by reference to an overarching principle, that of protecting (and not extending) bargaining rights in accordance with the instrumental approach. Yet, it turns out that a similar indeterminate rhetorical structure of policy argument as that which we saw in freedom of association can be found in successor rights. This structure of policy argument incorporates societal policy concerns related to social desiderata, economic policies, legal rights and institutional concerns, but seems to fail to provide a determinate method for mediating these various conflicting desiderata. Not only that, but it seems that the indeterminacy of one legal question reappears in subsequent “nested” sub-questions, such that ideological choice has to be made constantly as adjudicators face new cases. The idea of “nesting” has two important implications for my analysis; firstly, it suggests that indeterminacy is quite pervasive, as it runs across potentially infinite series of legal questions; secondly, it contradicts the idea that indeterminacy lessens as a given legal inquiry focuses on ever “narrower” legal questions.\footnote{376 See Kennedy, \textit{A Critique of Adjudication}, supra note 125 at 175.}

Because of the reproduction of argument patterns across series of sub-questions, it appears that indeterminacy can flourish in many different legal contexts. For the law and development project of subsuming collective bargaining and/or successor rights under overarching principles that distinguish them from other labour standards, this analysis is unsettling. It would appear that whatever concept is introduced as an organizing category succumbs to indeterminate policy argument in questions nested inside the concept itself, producing unexpected outcomes that shape the bargaining power of stakeholders in dramatically unpredictable ways. Given that the most important justifications for the distinctiveness of core labour rights, that of a formalist/pragmatic rationalization under foundational principles and that of a semi-instrumentalist subsuming under “market-friendly” values, rely on the possibility of coherent generation of outcomes from these foundations, the present chapter casts severe doubt on the soundness of the distinction of collective bargaining rights from non-core labour standards.
Chapter 4 - Contract Law as Individualism? Tracing Policy Conflicts Inside the “Core”

This chapter takes up the second dichotomy described in the introduction to this thesis - that between individual contract law and labour “regulation”. It starts by offering some complementary remarks on this dichotomy’s reliance on the formalist view of contract law as possessing an individualist logic that allows it to coherently govern the meeting of the minds of two utility maximizing parties (supply and demand, in economic terms). It then proceeds to demonstrate that contract law is in fact not consistently driven by a single individualist logic, but is rather constituted of multiple alternative legal rules that are often equally doctrinally compelling but that can have the most varied effects as to the economic costs a given party is allowed to impose on others. It closes by arguing that this indeterminacy shatters any clear separation of contract and “regulation” on the basis that the former is presumptively efficient. While there may be circumstances where some iteration of common law/civil code rules of contract is the most efficient, there is no reason to presuppose the superiority of contract law at an abstract, general level.

The persistence of the dichotomy between contract law and “regulation” is no doubt maintained by the twofold legal consciousness of formalism and functionalism, which according to Kerry Rittich prevails among IFIs. On the one hand, functionalism appears in law and development as the instrumentalization of law for economic efficiency. On the other hand, the formalism that is blended with neoliberal functionalism is in part linked to the idea of self-defining property and contract law institutions. As put by Kerry Rittich:

What is fascinating is that reforms are justified not simply in practical and economic terms but also in legal terms. As a field, law and development is marked by a resurgent neo-formalism. Arguments for institutional reform are as often abstract and deracinated as they are contextual and consequentialist. Quite specific legal arrangements are connected to the rule of law;

377 For fuller discussion, see supra chapter 1.
specific legal entitlements are defended in strikingly conceptual ways. As a result, contemporary law and development discourse ends up being an amalgam of functionalism and formalism. […] Whether as an approach to the adjudication of legal rights or as a justification for the design of regulatory structures and administrative regimes, functionalism now seems perfectly capable of co-existing with the very formalism that it was originally imagined to discredit and displace. 380

In accordance with this legal consciousness, IFIs have persistently coupled their call for an evaluation of law’s efficiency with claims related to the neutrality, predictability and rules-based nature of the legal system, and specifically of property and contract law. The following excerpt from the World Bank’s recent Doing Business 2012 report illustrates this matching of a functional parti pris in favour of contract and property law with a formalist view of law as possessing a knowable, individualist essence:

A fundamental premise of Doing Business is that economic activity requires good rules—rules that establish and clarify property rights and reduce the cost of resolving disputes; rules that increase the predictability of economic interactions and provide contractual partners with certainty and protection against abuse. The objective is regulations designed to be efficient, accessible to all and simple in their implementation. In some areas Doing Business gives higher scores for regulation providing stronger protection of investor rights, such as stricter disclosure requirements in related-party transactions. 381

Moreover, as illustrated by the following quote from a report by the Legal Vice Presidency of the World Bank, the view of private law as susceptible to subsuming under the idea of protecting individual freedom is married to a vision of such legal rules as certainty-enhancing, resulting in economic efficiency:

A key goal of deregulation and privatization was to open up the economies to new investors and combinations of investors to promote increased competition and an environment based on rules. […] Given the kind of evolution described here, it is relatively easy to see that law facilitates economic activity in large part because the law is general and neutral. It is also not enough to have state-of-the-art legal rules or other norms on paper. For an effective market-based economy in particular, there must be legal systems and processes that protect property rights and economic opportunities on behalf of individuals who lack traditional political and economic power. A key principle is to provide equality and predictability under the law. […] Economic theory has moved toward a position consistent with a generalized account of the impact of liberalization. Explicit attention to the operation of the legal system is essential to

380 Rittich, “Functionalism” supra note 378 at 863.
development and poverty reduction through liberalization and the market economy. Economic literature increasingly recognizes the importance of the rule of law and legal systems in the promotion of market-based economic growth and poverty reduction.\textsuperscript{382}

We see that the efficiency and certainty of a legal system based on determinate (private law) rules is central to the law and development mainstream’s post-Washington Consensus policy agenda. That is so notwithstanding the “incorporation of the social”,\textsuperscript{383} which did not displace the instrumentalist idea that law should be at the service of economic efficiency.\textsuperscript{384} In fact, the preceding two quotations, both from policy documents firmly anchored in the “good governance” social-infused approach, illustrate just how comfortably the new law and development mainstream can coexist with the earlier neoliberal view of contract law as inherently efficient and individualist.\textsuperscript{385}

\begin{flushright}
\textsuperscript{383} Rittich, “Incorporation of the Social”, supra note 37.
\textsuperscript{384} Ibid at 213. See supra note 41 and accompanying text.
\textsuperscript{385} In fact, several developments coinciding with the “incorporation of the social”, such as the global diffusion of constitutionalism and rights neoformalism, seem to have the effect of reinforcing ideas associated with the Washington Consensus. (Ran Hirschl, \textit{Towards Juristocracy: The Origins and Consequences of the New Constitutionalism} (Cambridge, MA: Harvard University Press, 2004) at 44 (noting that the spread of domestic constitutionalism often satisfies those pursuing an “agenda of relative cosmopolitanism, open markets, formal equality, and Lockean-style individual autonomy”). Upendra Baxi also wrote about the rise of “market-friendly human rights” (Upendra Baxi, \textit{The Future of Human Rights}, 2d ed (New Delhi: Oxford University Press, 2006) at 252 et seq) David Schneiderman has pushed this scholarly agenda further, noting that international investment treaties often act as constitution-like constraints on state regulatory powers and that such constraints are often specifically modelled after constitutional protection of private property rights. As put by Schneiderman:
\end{flushright}

\begin{quote}
Investment treaties guarantee a variety of substantive rights to investors that are analogous to those found in national constitutional systems, among them non-discrimination rights (or national treatment) and prohibitions against takings (nationalization and expropriation or equivalent measures). A “fair and equitable treatment” standard has been interpreted in ways analogous to a due process clause and to clauses guaranteeing the enforceability of contracts. Each of these standards of protection has their counterpart in the national constitutional systems of capital-exporting states, principally norms associated with rights to property and to contract. (David Schneiderman, “A New Global Constitutional Order?” in Tom Ginsburg & Rosalind Dixon, eds, \textit{Comparative Constitutional Law} (Northampton, MA: Edward Elgar, 2011) 189 at 193 [references omitted])
\end{quote}

This phenomenon tracks the transition in international economic law documented by Yves Dezalay and Bryant G Garth, who have reported that there has been a shift from a flexible, case by case mode of international arbitration to a model of rule-based, formalist adjudication of disputes involving inter alia the property rights of transnational economic actors. (Yves Dezalay & Bryant G Garth, \textit{Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order} (Chicago: University of Chicago Press, 1996) at 63 et seq) Thus, it would appear that the instrumentalism of the early Washington Consensus has aligned itself with various forms of
This chapter contests the validity of the association of contract law with an individualist, market logic that can be held as presumptively efficient. My argument rests on the demonstration that for a given contract institution, various perfectly valid alternative legal rules can be adopted to make one actor more or less responsible for the impact of its actions on others. Moreover, the choice between these possible legal rules is often made by an appeal to policy considerations that are indeterminate. Thus, the ad-hoc and unexplainable choice between various rules that can constitute the “free market” in dramatically different ways cannot be considered as part of a coherent, individualist logic. Rather, the repertoire of policy analysis that is deployed can broadly be characterized as a mix of individualist and altruist impulses and values, which offer no coherent metric to choose between the various possible rules that give substance to what exact obligations flow from “free market” rules of contract.

In this chapter, I discuss the rules surrounding the specific institution of the right to interrupt performance of a contract following a breach, as a case study of the indeterminacy of the background rules of contract law that structure the “free market”. I analyze how this institution operates in five legal systems: civil law-Quebec, common law-Canadian provinces, the United Kingdom, the United States and France. Performance interruption exists in a relatively similar form in all these jurisdictions, and the analytical insights drawn from it can potentially be generalized to other contract law questions, as I further explain in concluding this chapter. I discuss interruption of performance not in the particular context of the employment contract, but as a general rule of contract law that is rationalized in a “merely technical” way. I do so in order to situate my analysis in the individualist “core” of contract law, that is, the doctrinal domain which has been the least affected by processes of socialization that have taken place in various fields formerly covered by contract law and that have been extracted from its logic. Thus, this chapter does not deal with legal frameworks such as employment standards,

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occupational health and safety legislation, housing law, consumer protection law, etc.\textsuperscript{388} I also ignore factors potentially considered “political”, such as inequality of bargaining power, which could lead to the application of one or many of the exceptions to the core of private law – e.g. the civil law institutions of “good faith”, \textit{abus de droit}, \textit{lésion} and abusive clauses \textit{(clauses abusives)},\textsuperscript{389} as well as their common law equivalents: reasonableness tests, malice rules\textsuperscript{390} and rules against onerous and unconscionable clauses.\textsuperscript{391} I have abstracted from these factors specifically to locate my analysis in the core of contract law, which is understood to be coherent, individualist and certainty-promoting. My goal in zoning in on the core is to unsettle the narrative of the “will theory”, which was displaced neither by socialisation on its margins in domestic law\textsuperscript{392} nor by the law and development “incorporation of the social”.\textsuperscript{393}

I have chosen to address the specific question of interruption of performance not because it is particularly important for the shape of the economy,\textsuperscript{394} or even because it is quantitatively representative of the most litigated aspects of contract law. Rather, I have chosen that question because it strikes me as quite emblematic of what is meant by “technical”, will-driven contract law. Indeed, performance interruption affects the very bindingness of contracts, which creates concern for “legal certainty”, as well as acute questions of reciprocity and moral and legal duty.

\textsuperscript{388} On the conceptual split between the new administrative regimes of the second Globalization and contract law, see Robert W Gordon, “Willis’s American Counterparts: The Legal Realists’ Defence of Administration” (2005) 55 UTLJ 405; Santos, “Three Discourses”, \textit{supra} note 271 at 133-138 (describing the creation of “social” labour law in Mexico and the United States). For a global take on this phenomenon, see Kennedy, “Three Globalizations”, \textit{supra} note 19 at 42-46.

\textsuperscript{389} These various doctrines have in common that they were all the result of Social Legal Thought’s efforts to create, as part of the second Globalization, exceptions to the reign of the individualist first Globalization (see \textit{supra} note 19). On the rise of \textit{abus de droit} in this context, see Anna di Robilant, “Abuse of Rights: The Continental Drug and the Common Law” (2010) 61 Hastings LJ 687 at 689-692. For analyses linking abusive clauses to principles of “good faith” and \textit{abus de droit}, see Sébastien Grammond, “La règle sur les clauses abusives sous l’éclairage du droit comparé” (2010) 51 C de D 83; Abbas Karimi, \textit{Les clauses abusives et la théorie de l’abus de droit} (Paris: Librairie générale de droit et de jurisprudence, 2001).

\textsuperscript{390} Anna di Robilant has argued that the malice and reasonableness tests deployed by American courts in the late 19\textsuperscript{th} century were “functional” equivalents of the Continental \textit{abus de droit} doctrine (di Robilant, \textit{ibid}).

\textsuperscript{391} Sébastien Grammond has suggested that unconscionability and onerous clauses are analogous to \textit{clauses abusives} rules in that they also aim to address “contractual injustice and abusive clauses” (\textit{supra} note 389 at 87).

\textsuperscript{392} See di Robilant, \textit{supra} note 389 at 747; Kennedy, “Three Globalizations”, \textit{supra} note 19 at 46.

\textsuperscript{393} See Rittich “Incorporation of the Social”, \textit{supra} note 37 at 236-237; Rittich, “Two Paths Entwined”, \textit{supra} note 16 at 161-162.

\textsuperscript{394} It could probably be argued to be quite important for the economy, but that was not relevant to my choice. For an exploration of the practical socio-economic stakes of performance interruption in the context of the employment contract, see Robert W Gordon, “Using History in Teaching Contracts: The Case of Britton v Turner” (2004) 26 U Haw L Rev 423. For a panorama of the uses of performance interruption in international commercial arbitration, see Joshua Karton, “Contract Law in International Commercial Arbitration: The Case of Suspension of Performance” (2009) 58 ICLQ 863.
to the other. These are symbolically charged questions that touch on the core of the conception of contract law as the mere reflection of the will of the parties. I follow Peter Gabel and Jay Feinman in assessing the “ideological” impact of contract law beyond litigation and in spite of the fact that much contractual intercourse is never the object of adjudication. I am also guided by an imposing literature that questions the ideological impact of the alleged neutrality of contract law. My conception of the ideological role of contract law is Gramscian, in that it treats contract law doctrine (and its articulation with its domestic “social” periphery as well as with labour “regulation” and standards) as itself a terrain of ideological struggle, and not just a medium for the advancement of economic and political interests.

My demonstration puts considerable emphasis on contract law policy arguments. Some scholars have noted the presence of policy arguments inside the core of contract law in the UK and Canada, where, unlike in the US, balancing has not been generally accepted as an official, legitimate practice in private law adjudication. This is hardly surprising, given my analysis in chapter 2 of the seminal private law concept of “fault” and of its circularity and openness to policy/balancing. This chapter endeavours to track the presence of policy arguments in the core of contract law and argues that they are indeterminate. In so doing, I describe how policy arguments attempt and often fail to mediate between the competing possible legal rules and societal justifications contained in contract law doctrine. One of the basic ideas underlying my discussion is that we can identify two argumentative tendencies as to how much duty to impose on one person towards others; two argument repertoires that are broadly speaking individualist and altruist/communalist. As put by Jack Balkin:

The debate about the proper scope of individual responsibility to others appears throughout the whole of the law. It is the reverse side of the problem of the proper scope of individual freedom.

396 The literature is far too vast to make any summary bibliography conceivable. Suffice it for me to mention that this project has been at the core of American legal realism and of its heirs; see Joseph Singer, “Review Essay: Legal Realism Now” (1988) 76 Cal L Rev 465.
397 As put by Antonio Gramsci: “To the extent that ideologies are historically necessary they have a validity which is ‘psychological’; they organize human masses, they form the terrain on which men move, acquire consciousness of their position, struggle, etc.” (“Prison Writings 1929-1935: Hegemony, Relations of Force, Historical Bloc” in David Forgacs, ed, The Antonio Gramsci Reader: Selected Writings, 1916-1935 (New York: Schocken Books, 1988) 189 at 199)
399 See supra notes 104-109 and accompanying text.
in society. The debate is recapitulated in rule choices at every doctrinal level. There are two polar positions or directions of emphasis one can take in this debate. What I shall term the Individualist position seeks to de-emphasize or minimize the responsibilities and duties of individuals to others in society. The Communalist position seeks to emphasize and extend the responsibilities and duties individuals owe to others.400

Following Balkin, I argue that the question of how much duty to impose on a given individual is a useful lens through which to characterize two elements: the nature of the legal rules involved and the normative justification for these rules. However, it is not applied to these two objects in an identical manner. In the first use, the description of a legal rule as “individualist” is wholly relative, in the sense that it is only more “individualist” than another rule that would impose more duty towards others. Kennedy explains this use of individualism/altruism as a continuum to describe legal rules:

[I]t is important to distinguish the use of the concept of altruism as a direction in an altruism-individualism continuum from its use as an absolute standard for judging a situation. The way I am using the term, we can say that even a very minimal legal regime, one that permitted outcomes extremely shocking to our moral sense, would impose more altruistic duty than a regime still closer to the state of nature.401

In order to avoid creating the impression that an “individualist” rule descends from a coherent individualist philosophy and to emphasize that the level of duty imposed by a rule is always and only a question of degree, I use the terms “externalizing” and “internalizing” to describe the position of the legal rules on a continuum. These terms also strike me as more illustrative of the idea that a rule’s “individualism” depends on the point of view one adopts. Indeed, a given rule will be (more) individualist/externalizing for the party it discharges from a given duty (say, the party who is allowed to interrupt performance following any breach, however trivial), but it will be (more) altruist/internalizing for the other party402 (say, the breaching party who must suffer interruption of performance following a trivial breach).

The second use of the concepts of individualism and altruism/communalism is that of describing the content of the policy arguments invoked to justify a given (externalizing or internalizing) legal rule. Here, I retain the expressions “individualism” and “altruism”, but stress that both

401 Duncan Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89 Harv L Rev 1685 at 1719 [emphasis added] [Kennedy, “Form and Substance”].
402 For discussion see Kennedy, “Merely Technical Issues”, supra note 386 at 14.
philosophies are so deeply entangled that they are always both at play in producing an outcome. Kennedy attributes this to both legal philosophies’ “sticking points”, i.e. “the moments at which the individualist, in his movement towards the state of nature, suddenly reverses himself and becomes an altruist, and the symmetrical moment at which the altruist becomes an advocate of rules and self-reliance rather than slide all the way to total collectivism or anarchism.”

As Kennedy explains:

The explanation of the sticking points of the modern individualist and altruist is that both believe quite firmly in both of these sets of premises, in spite of the fact that they are radically contradictory. The altruist critique of liberalism rings true for the individualist who no longer believes in the possibility of generating concepts that will in turn generate rules defining a just social order. The liberal critique of anarchy or collectivism rings true for the altruist, who acknowledges that after all we have not overcome the fundamental dichotomy of subject and object. So long as others are, to some degree, independent and unknowable beings, the slogan of shared values carries a real threat of a tyranny more oppressive than alienation in an at least somewhat altruistic liberal state.

My objective in this chapter is not to describe the ideological conflict between individualist and altruist arguments at the level of philosophy. This being said, ongoing remarks on the ontological status of altruism and individualism are necessary in order to support my view that even in the core of private law, we find not a coherent individualist legal order but a hodgepodge of conflicting individualist and altruist arguments in support of various possible (relatively) externalizing or internalizing legal rules. That is the general model which I hope to validate by

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404 Kennedy, ibid at 1774-1775.

405 I do note however, that such a philosophical discussion underpins much of what counts as “legal” policy analysis in contract law. As such, policy analysis of the kind described in this chapter is itself already a form of philosophical dispute. For an interesting (but in my view unsuccessful) attempt to reconcile the philosophical premises of individualism and altruism, see Jennifer Nedelsky, Law’s Relations: A Relational Theory of Self, Autonomy, and Law (New York: Oxford University Press, 2012), especially ch 3, “Reconceiving Autonomy”. 
looking at the specific legal materials on the interruption of performance in cases of breach of contract.

I acknowledge at the outset tremendous intellectual debt to two analyses that led me to focus on the particular institution of interruption of performance. Firstly, there is Duncan Kennedy’s analysis of performance interruption as a “merely technical issue of contract law” in which Kennedy essentially lays the blueprint for my argument by explaining that this particular legal question can be governed by many alternative externalizing and internalizing rules which are often chosen by appeal to policy considerations. Secondly, I am indebted to an article by Damien Nyer, a practising lawyer who produced a fascinating policy-driven attack on certain rules related to interruption of performance that were ill-advised from his centre-right, somewhat neoliberal perspective. More specifically, Nyer focuses his criticism on the two requirements of seriousness of breach and proportionality of the response with regards to the breach. This centre-right attack on “internalizing” rules of performance interruption, as well as Nyer’s comparative analysis of several jurisdictions, provided a great deal of inspiration for this chapter.

Unlike in previous chapters, I take my analysis of policy argument beyond Canadian law and draw on legal sources from American, British and French law, in addition to contract law sources from civil law Quebec on the one hand and Canadian common law provinces on the other. This decision in part reflects the fact that the contract law of the two historical colonial metropoles of Canada has maintained a relevance that wasn’t as clear in the legal fields covered in chapters 1 and 2. It also reflects an attempt on my part to suggest that the indeterminate policy rationales I assert are present in Canadian law can also be found in other countries. I devise one unified classification of policy arguments that draws on all five legal systems. Applying the concept of

407 Ibid at 11-12 & 15-16.
409 Ibid at 36-43.
410 By securing jurisdiction (along with all other Canadian provinces) over “property and civil rights in the province” as per s 92(13) of the Constitution Act 1867, the French majority-province of Quebec preserved civilian French law in matters such as torts, contract law, property, family law, wills and estates, etc. See Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92(13). For a testament to (and apology of) the importance of french doctrine in Quebec private law see Adrian Popovici, “Repenser le droit civil : un nouveau défi pour la doctrine québécoise” (1995) 29 RJT 545 at 558; see also Pierre J Dalphond, “La doctrine a-t-elle un avenir au Québec ?” (2008) 53 McGill LJ 517 at 527 et seq. For an account of the importance of British common law in the development of Canadian law (albeit in response to local social dynamics), see H Patrick Glenn, “The Common Law in Canada” (1995) 74:2 Can Bar Rev 261 at 267-268.
“nested” legal questions explored in chapter 3, I present a series of problems that were resolved in more than one legal system and intertwine arguments across interpretive questions. My comparative analysis should not be assessed as an exhaustive description of each national system, but rather as a suggestion that there is a common general repertoire of policy arguments that informs contract law argument in the systems explored. This chapter proceeds as follows: it first describes the different forms taken by the right to interrupt performance in the legal systems covered; it then outlines a series of nested questions of law related to the scope of the right to interrupt performance which have been discussed in the countries covered; finally, it presents various policy arguments used to support one legal version of the right to interrupt performance over another. I then wrap up the chapter by attempting to generalize my analysis to other questions of contract law, in order to suggest that many other private law institutions are indeterminate and require that unexplainable, perhaps ideological choice be made in the design of what exact form the “free market” takes.

a. Conditions/Warranties, Constructive Conditions of Exchange and

*Exceptio Non Adimpleti Contractus*: Towards a Common Policy Analytic

The right to interrupt performance has taken different forms in civil and common law jurisdictions. One of the basic assumptions of this chapter is that we can find a functionally equivalent rhetorical activity at play in each country covered, even though the relevant national rules vary in their content. Before I describe the policy arguments that form my repertoire, I now endeavour to trace the similarities among the various countries studied, in order to make my cross-Atlantic policy analysis intelligible.

In the civil law world, of which France and Quebec (as far as private law is concerned) are part, the existence of some right to interrupt performance has never been seriously contested. Called the *exceptio non adimpleti contractus* (*exceptio*), the right to interrupt performance stems from

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411 I acknowledge that although present in all legal systems covered, policy analysis may have a qualitatively lesser importance in some legal systems. This does not affect the substance of my claim, which is not that policy arguments represent (as opposed to, say, deductive arguments) the most important rhetorical practice in the jurisdiction concerned. In fact, as I have argued in chapter 2, even in one given legal system (or on a specific question of law for that matter), the importance of policy argument is shifting and malleable; indeed, a frequent object of dispute is *whether it is even legitimate* to engage in policy analysis. In other words, there is the real possibility that the availability of policy argument itself may be indeterminate; see Kennedy, “Left/Phenomenological”, *supra* note 149 at 157. In light of this, my modest (though not negligible) aim is to show that policy argument has at least a significant importance in all the legal systems covered.
16th century canon law$^{412}$ and can be found in France, Germany, Switzerland and Austria, among other countries.$^{413}$ It also exists in Quebec law, where it has been codified in 1994 at s. 1591 of the Civil Code of Quebec (CCQ).$^{414}$ In France and Quebec, the legal rules that condition the availability of performance interruption are very similar. S. 1591 of the CCQ states the following conditions for interruption of performance: the synallagmatic (bilateral) nature of the contract, performance being due, the breaching party being bound to perform first, the occurrence of a “substantial” breach, the correlative nature of the unperformed and breached duties and finally the proportionality of the interruption with the breach (“may refuse to perform … to a corresponding degree”).$^{415}$ As with all CCQ remedies, performance interruption is not allowed when the interrupting party is held to have acted in “bad faith”.$^{416}$ The same basic conditions can be found in French contract law,$^{417}$ even though the exceptio is not codified per se, but was rather extended to general contract law from specific exceptio code provisions applicable to certain types of contracts.$^{418}$

While the modern civil law exceptio descends from a clearly articulated legal doctrine, the common law right to interrupt performance has had a considerably more tortuous genesis. In the UK, when actions of assumpsit were created, it was thought that breach by a party did not give the other party the right to suspend performance.$^{419}$ This state of affairs was quite abruptly set

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$^{412}$ Gérard Légier, Droit civil : Les obligations, 14th ed (Paris: Dalloz, 1993) at 84.
$^{414}$ It existed before 1994 as a creation of the case law, which generalized to all bilateral contracts the few legislative provisions applying the exceptio non adimpleti contractus to certain contracts. See Vincent Karim, Les obligations 3d ed (Montreal: Wilson & Lafleur, 2009) at 485-486.
$^{415}$ S 1591 of the Civil Code of Quebec (CCQ) reads as follows:

Where the obligations arising from a synallagmatic contract are exigible and one of the parties fails to perform his obligation to a substantial degree or does not offer to perform it, the other party may refuse to perform his correlative obligation to a corresponding degree, unless he is bound by law, the will of the parties or usage to perform first.

$^{416}$ “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.” (art 7 CCQ)
$^{417}$ For the bilateral nature of the contract and the exigibility of performance, see Laurent Aynès, Philippe Malaurie & Philippe Stoffel-Munck, Droit civil : les obligations, 5th ed (Paris: Defrenois, 2011) at 449; for the seriousness of the breach and the proportionality requirement, see ibid at 450; for the good faith requirement, see ibid at 451.
$^{419}$ On this history see John E Murray, Contracts: Cases and Materials, 6th ed (Newark, NJ: Lexis Nexis, 2006) at 538.
aside by Lord Mansfield in *Kingston v Preston*, a 1773 Court of the King’s Bench decision that effectively introduced in the common law the right to interrupt performance following breach. However, interruption was not considered to be available in all cases of non-performance, and it would thus become the duty of the judge to elucidate whether the case at hand allows for interruption or not. The applicable legal terminology became that of “independent promises”, which do not allow for any interruption of performance, and “dependent promises”, which allow for interruption in cases of breach. Parties could themselves designate certain promises as independent, thereby easing the judge’s job. However, absent contractual designation, English courts have traditionally found promises to be dependent when the breached promise was of sufficient importance to the parties. In the UK, dependent and independent promises eventually came to be known respectively as “conditions” and “warranties”.

The traditional British approach was modified in Canada, the US and the UK itself, taking different doctrinal trajectories which I now briefly describe. In the United States, the dependent/independent distinction was abandoned and replaced by the doctrine of “constructive conditions of exchange”, whereby all bilateral promises are construed as dependent. As a corollary, American courts have imposed the requirement that the breach be “material” in order to warrant suspension of performance. Damien Nyer has referred to this test as a “direct

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420 *Kingston v Preston* (1773), 99 ER 606 at 608 (KB), Lord Mansfield. (Another version of this case is reported in 99 ER 437.) I describe more thoroughly this development in subsequent sections.


422 Mansfield used the terms “covenants independent” and “covenants reciprocal” (*Kingston v Preston*, supra note 420 at 608).


424 Nyer, *supra* note 408 at 56.


427 S 237 of the *Restatement (Second) of Contracts* (1981) provides as follows: “Except as stated in §240, it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.” [emphasis added] For discussion see Christina L Kunz & Carol L Chomsky, *Contracts: A Contemporary Approach* (St-Paul, MN: Thomson Reuters, 2010) at 793.
approach”, whereby every term of a bilateral contract is construed as dependent upon its correlate and the seriousness of the breach is used to determine what non-performance gives right to interruption. Nyer contrasts this with an “indirect approach” such as that of the UK, whereby courts determine whether a given term is dependent by assessing its substantive importance (in the eyes of the parties). 428 Interestingly, this “indirect approach” was eventually contested in the UK as well and was rejected by the English Court of Appeal in the 1962 *Hong Kong Fir Shipping* case. 429 In that case, it was held that the distinction between dependent/independent promises (and conditions/warranties) is not conclusive, and that the existence of a right to interruption “depends entirely on the nature of the breach and its foreseeable consequences”. 430 It would appear that English law is still torn between a test that hinges on the qualification of the terms involved and one that amounts to an assessment of the seriousness of the breach. 431 This legal dispute has migrated to Canadian law, where it is still unclear which legal test will prevail. For instance, the Alberta Court of Appeal held in 2003 that the proper approach was that of classifying the terms as conditions or warranties. 432 I do note that since the “indirect” approach of qualifying terms involves an assessment of their substantive importance, it is not completely alien to a test that turns on the “materiality” of the breach. The similarity between the two approaches is even more striking when, as is sometimes the case, courts interpret the “indirect” term-classifying approach as requiring an assessment of the “consequences” of the breach instead of the importance of the terms. 433 Nevertheless, the dispute over the applicable legal test has often been conflated with the heated debate over whether the seriousness of the breach should be assessed at all by courts as they determine whether a right to interrupt performance exists. It thus forms an important part of my discussion of the legal framing of the right to interrupt performance. Finally, it bears notice that unlike civil law systems, common law Canada, the US and the UK impose no requirements of “proportionality” of the interruption with the breach. 434

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428 Nyer, *supra* note 408 at 56.
429 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [1961] EWCA Civ 7 (App Ct) [*Hong Kong Fir*].
430 *Ibid* (Lord Justice Upjohn).
431 See Nyer, *supra* note 408 at 59.
432 *Herron v Hunting Chase Inc*, 2003 ABCA 219 at para 26 [*Hunting Chase*].
433 Such seems to be the case in Canada: see *Hunting Chase*, *ibid*.
434 Nyer, *supra* note 408 at 60.
Having briefly outlined the doctrinal development of the right to interrupt performance in the civilian and common law jurisdictions under consideration here, I am now in a position to begin my comparative account of the indeterminate practice of contract law policy argument. I start by describing a series of nested legal questions that have been discussed in all jurisdictions. I then draw from materials discussing these questions a series of policy arguments in favour of externalizing and internalizing rules of interruption of performance. My goal in fusing arguments from civil law and common law jurisdictions is not to suggest that the debates play themselves out identically in the jurisdictions under study; such is not the case. My goal is rather to show that there exists a common repertoire of policy arguments used to justify legal rules, even if the latter differ somewhat in their formulation. This is so despite the almost complete absence of an officially recognized practice of policy/balancing argument in non-American private law and of the alleged “formalism” of non-American legal cultures. Moreover, my claim is not that the whole policy repertoire can be found as is in any of the legal systems covered by my analysis (although I suspect that if one looks hard enough, most of my policy arguments will be found). Rather, I argue that many policy arguments of the repertoire can be found in a piecemeal, ad-hoc usage, whereby single policy arguments are marshalled to support a given legal rule often otherwise presented in a “deductive” fashion. Thus, seemingly disparate arguments in different jurisdictions can be seen to stem from the same semiotic system in which one can muster the opposite of a given policy argument and thus undermine the latter’s convincingness. This chapter takes the analysis conducted in the previous chapters further by showing that this exercise can not only be carried out across a set of nested sub-questions, but across jurisdictions as well.

My categorization of policy arguments is slightly more ambitious than it has been so far, in that I classify the arguments according to their subject matter. Following the typologies devised by

436 On French legal formalism, defined as a longing for internal doctrinal consistency and scientificity, see Christophe Jamin, “L’enseignement du droit à Sciences Po : autour de la polémique suscitée par l’arrêté du 21 mars 2007” (2010) Jurisprudence : revue critique 125 at 132-133. On the formalism of Quebec private law, alleged to be reinforced by the historical choice of Quebec elites to acquire jurisdiction (along with the other provinces) essentially over private law, which further marked the latter as apolitical and legislative to distinguish it from Anglo-Canadian judge-made private law, see Marie-Claire Belleau, “La dichotomie droit privé/droit public dans le contexte québécois et canadien et l’intersectionalité identitaire” (1998) 39:1 C de D 177 at 183-184.
437 On this peculiar form of policy argument, see supra notes 164-166 and accompanying text.
such path-breaking legal semiotics scholars as Jack Balkin and Duncan Kennedy, I have regrouped my policy arguments under the following rubrics:

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<th>1. Morals</th>
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<td>2. Rights</td>
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<td>3. Expectations</td>
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<td>4. Social Utility</td>
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<td>5. Administrability</td>
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<td>6. Institutional Competence</td>
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I follow Jack Balkin in treating arguments based on “rights”, be they moral, legal or political, as distinct from a direct discussion of the requirements of “morality”. Indeed, rights arguments are often formulated as positivised and self-justificatory whereas morality arguments tend to invoke “individualist” and “communalist” rationales to support a particular rule. It is important to note that individualism and communalism, as put by Balkin, are used here as justificatory moral systems and do not designate the individualist/altruist continuum of legal rules that I described above. It is in part to better mark this distinction that I refer to the continuum as one of “externalizing/internalizing” rules instead of “individualism/altruism”.

Expectations arguments are more elusive, because their legal status is quite contentious; indeed, one frequent response to this type of argument is that expectations should not be given any legal weight. Nevertheless, I have found that expectations arguments can be found in legal materials and are often accepted as authoritative. Social utility arguments, as put by Balkin, “concern the practical consequences of a particular rule choice” and “are often expressed in terms of broad social policies that their advocates believe the law should foster.”

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438 The two essays by these scholars that have influenced me the most are Balkin, “Crystalline Structure”, *supra* note 12; Kennedy, “A Semiotics of Legal Argument”, *supra* note 12.
439 Balkin, *ibid* at 28.
440 *Ibid* at 21.
441 On this point, see Kennedy, “Merely Technical Issues”, *supra* note 386 at 16.
442 Kennedy, “A Semiotics of Legal Argument”, *supra* note 12 at 332.
443 Balkin, “Crystalline Structure”, *supra* note 12 at 32.
concern the definition of legal norms either as rigid rules or as flexible standards, with the purported virtues and vices that come with each. Finally, as mentioned in chapter 2, institutional competence arguments concern the separation of powers between courts and legislatures, as well as more general debates about the most competent forum (including individuals) for a given decision.

In the discussion that follows, I include many arguments from scholarly texts, in part because of the importance both in France and Quebec of la doctrine, a style of legal commentary whose main characteristic is the goal of systematizing legal doctrine and justifying or criticizing interpretations adopted by the courts. This being said, I also cite scholars and treatise writers from common law jurisdictions who, while not engaging in the kind of concerted collective activity of their civil law counterparts, have nevertheless exerted considerable influence on the shaping of the law as individual scholars and experts. I also provide some examples of case law where policy arguments were formulated on a given question. As mentioned in previous chapters, the claim is not at all to have mustered a “representative” list of sources; other cases and treatises may be more important than the ones I have collected. Instead, my (more modest) claim is that the policy arguments (and their opposites) can systematically be found in some legal materials in the countries covered, and that their role in legal reasoning is significant.

I now turn to the nested sub-questions I propose to explore. The first question is whether to allow interruption of performance at all, an issue that was starkly posed in all legal systems under

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444 Obviously, a rule is “rigid” only in a relative manner, by reference to another rule that is more “open-ended” and thus more akin to a standard. Such a definition is not without its conceptual ambiguities and contradictions; see Pierre Schlag, “Rules and Standards” (1985) 33 UCLA L Rev 379 at 383.

445 Kennedy claimed in “Form and Substance”, supra note 401, that arguments invoked in favour of rigid rules or flexible standards (“form”) respectively track the arguments invoked in favour of “individualist” or “altruist” rules (substance). For a criticism of this alleged correlation, see Schlag, ibid, at 418-422 (arguing that standards and rules can both support individualist and altruist substantive outcomes). I take no position in this debate, except to note that the very few administrability arguments I discuss seem to confirm the thesis of the correspondence between rules and individualism on the one hand and standards and altruism on the other. Of course, this does not conclusively demonstrate a correlation, far from it.

446 See supra note 127 and accompanying text.


scrutiny, as I explain below. The second question is whether to require, as a condition for the interruption of performance, that the breach be material or serious. The alternatives would be to allow interruption for all types of breach, or, more likely, for all breaches that are not “trivial”, a minimal requirement that is applied in Germany, Austria and Switzerland. By contrast, all the jurisdictions under study here require a “serious” breach for the interruption of performance to be legitimate (even though this rule remains controversial and contested in Canada and the UK, as outlined above). The third question is whether to require that the interruption itself be proportionate with the breach. This requirement exists in France and Quebec, but not in common law jurisdictions. The fourth and final question may be somewhat of a Canadian innovation; it is the question of whether interruption of performance may be carried out for distinct but related contracts. I now outline the policy arguments raised before arranging them in two tables of initiatives and responses, to illustrate how arguments from each of the sub-questions can be used to defend one “side” of the externalizing/internalizing conflict for all the nested questions.

1st Question: Whether to Allow Interruption at All

The first issue judges and legal scholars were faced with was whether to allow for interruption of performance at all. In the common law world this took the form of a clear dilemma of whether to create a doctrine of dependent promises or not. In France and Quebec, where the exceptio existed as part of the transnational body of law created by the medieval canonists, there was nevertheless the issue of whether to import that doctrine and make it a fixture of positive, domestic law for each and every contract. Indeed, the problem stemmed from the fact that in the modern era the exceptio had only been allowed in the French and Quebec civil codes for certain specific contracts, e.g. for sales and leases. So, it was up to la doctrine and the case law to generalize the availability of the exceptio to all bilateral contracts. French authors such as Raymond Saleilles and René Cassin played an instrumental role in justifying this extension, as did French doctrine generally, both in France and in Quebec.

450 Treitel, Remedies for Breach, supra note 413 at 302-304.
451 For France, see Aynès, Malaurie & Stoffel-Munck, supra note 417 at 448; for Quebec, see Karim, supra note 414 at 485-486.
452 Ibid.
In the common law world, the right to interrupt performance was introduced by Lord Mansfield in *Kingston v Preston*, as mentioned above. However, it would appear that this decision from 1773 did not have an immediate impact, as it remained unreported for almost a decade after being rendered.\footnote{Stephen Waddams describes how the case was at first unreported and then misreported, such that the case was virtually unknown until 10 years after it was rendered: Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (New York: Cambridge University Press, 2011) at 4 [Waddams, *Principle and Policy*].} It was only reported indirectly as described in counsel argument in the case of *Jones v Barkeley*.\footnote{(1781), 2 Doug 684, 99 ER 434.} Thus, in order for *Kingston v Preston* to become the seminal case it was to be, its acceptance by English judges had to be secured. As reported by Canadian scholar Stephen Waddams, the 1792 case *Goodisson v Nunn*\footnote{(1792), 4 TR 761, 100 ER 1288 [*Goodisson*].} was instrumental in solidifying the acceptance of the right to interrupt performance by the British judiciary.\footnote{Waddams, *Principle and Policy*, supra note 454 at 3.} In *Goodisson*, Lord Kenyon wrote that “[t]he old cases [according to which there can never be interruption of performance], cited by the plaintiff’s counsel, have been accurately stated; but the determinations in them outrage common sense.”\footnote{*Goodisson*, supra note 456 at 764.} Lord Kenyon also invoked “common justice” (as opposed to “strict law”)\footnote{Ibid.} and “principle” (as opposed to “precedent”)\footnote{Ibid at 765.} to justify disregarding what he called the “old cases”. He thus marshalled a policy argument of “institutional competence”, according to which valid legal rules may be adapted to changing social perceptions of fairness and “principle”. Another argument invoked to justify the right to interrupt performance pertains to morality and asserts that retaliation to breach is morally just. Lord Mansfield thus declared in *Kingston v Preston* that not allowing interruption of performance would be “monstrous”.\footnote{*Kingston v Preston*, supra note 420 at 608.} As put by Hugh Beale, this argument portrays retaliation by performance interruption as a form of “self-protection” that is “elementary”.\footnote{Hugh Beale, *Remedies for Breach of Contract* (London: Sweet & Maxwell, 1980) at 27.} It is interesting to note that some authors have voiced arguments countering this moral justification, to the effect that “real” morality would entail not to cede to vengeful instincts and instead continue performance while bringing a claim to a court.\footnote{Aynès, Malaurie & Stoffel-Munck, supra note 417 at 448.}
As for arguments rooted in expectations, E Allan Farnsworth provided a basic template for this claim by asserting that allowing interruption satisfies the interrupting party’s “justified expectations”. French courts have provided an interesting counter-argument by holding that the *exceptio* is not applicable where it would threaten the survival of a business involved. French law professor Jacques Mestres argued that this evidences that the expectations of the interrupting party must yield to societal expectations and to the principle of “prudence” that is dictated by conditions of economic interdependence. American jurist Edwin Patterson provided a similar argument to the effect that society expects contracts not to be unilaterally interrupted, as the latter are part of the economic fabric of an interdependent society.

On the front of “social utility”, Patterson voiced an important policy argument in favour of allowing interruption of performance. According to Patterson, interruption helps avoid the “economic waste” that would be caused by a decision to compel performance of a contract that is no longer seen by the parties as mutually beneficial. This argument obviously presumes that mutually agreed contracts are efficient because desired by utility-maximizing parties. For a counter-argument, we can look to French scholar Catherine Malecki, who argued that interruption often itself acts as an incentive to rescind the contract and not perform. Thus, the economic waste might come from the fact that interruption creates artificial incentives on both sides to abandon the contract and ask for rescission.

Still on the front of social utility arguments justifying performance interruption, French scholar Jean-François Pillebout has advanced in a classic *doctrine* treatise a strong justification for the *exceptio*, arguing that it is a “private enforcement mechanism” that usefully supersedes “heavy and often inefficient public enforcement mechanisms”. French *doctrine* writers Malecki, Ghestin, Jamin and Billiau provided countervailing arguments to the effect that the intervention

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466 *Ibid* at 592.
467 Edwin Patterson, “Constructive Conditions in Contracts” (1942) 42 Colum L Rev 903 at 928.
468 *Ibid* at 925 (noting, discussing interruption in cases of prospective non-performance, that “the policy of avoiding economic waste requires that [the interrupting party] should not continue a performance which the other party, by his repudiation, has shown that he no longer wants”).
of a court is almost always inevitable, if only to police the behaviour of the interrupting party. According to this argument, the purported benefits of the *exceptio* as a purely “private” self-help remedy must be relativized.

**2nd Question: Whether to Require Seriousness of Breach**

The second legal question I address is whether to require a certain degree of seriousness of breach before allowing interruption of performance. As mentioned above, France, Quebec and the United States require that a breach be serious for an interruption of performance to be legitimate. Anglo-Canadian and British law are less firmly settled on that question however. Indeed, the debate in the UK and Canada as to what form the legal test will take (i.e. a qualification of dependent/independent promises versus a “constructive conditions of exchange” model where the seriousness assessment is more openly performed) has often acted as a substitute for the debate of whether to restrict the interruption to cases of serious breach or not. I thus chronicle some of the arguments raised in this context and then go on to assess arguments more openly questioning the very fact of limiting interruption to cases of serious breach.

Canadian and British law are still oscillating between a legal test consisting of qualifying the contract in light of the importance of the terms to the parties and one in which the seriousness of the breach determines the availability of interruption. As noted above, the English Court of Appeal *Hong Kong Fir* case signalled the shift to a test that eschews term qualification and focuses on the seriousness of the breach. However, the House of Lords subsequently questioned the soundness of this shift by emphasizing in *Bunge Corporation* that a frank assessment of the seriousness of the breach could be “commercially most undesirable” and could “remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts”. Canadian contract scholar John Swan criticized the House of Lords’ reasoning in the *Bunge* case, arguing that the classification approach advocated was prone

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473 *Supra* note 429 and accompanying text.

474 *Bunge Corporation (New York) v Tradex Export SA (Panama)*, [1981] UKHL 11, 2 All ER 513 at 541 [*Bunge Corp*], quoted in John Swan, *Canadian Contract Law* (Markham, ON: LexisNexis Butterworths, 2006) at 471 note 69 (noting that assessing the gravity of the breach would be a nuisance to legal certainty).
to causing more uncertainty than one that centers on the seriousness of the breach, “because the courts have little to guide them”\textsuperscript{475} when applying the term-classification test. This is a typical example of administrability argument, whereby policy arguments are formulated over whether to cast a given norm as a rigid rule or as a more open-ended standard.\textsuperscript{476}

The Alberta Court of Appeal recently echoed the House of Lords, quoting \textit{Bunge Corporation} and holding that the applicable test was one of term qualification (as condition or warranty):

\begin{quote}
A judge must first examine the contract in light of the surrounding circumstances to ascertain whether the parties intended the breached term to be treated as a condition or a warranty. The contract is the starting point; a court is to determine the importance the parties expressly ascribed to the consequence of a breach, and in the absence of an expressed agreement, to consider what consequences ought to be attached to the breach, having regard to the contract as a whole. See Bunge Corporation v. Tradax S.A., [1981] 2 All E.R. 513.\textsuperscript{477}
\end{quote}

The Alberta Court of Appeal thus rejected the approach of the trial judge that hinged on “the effect of the breach on Hunting and the commercial setting in which the covenant arose”.\textsuperscript{478} The Court notably relied on the idea of the institutional competence of courts in order to reject the test devised by the trial court, noting that the test “permit[ted] a court to override the intention of the parties as expressed in their written contract”.\textsuperscript{479} Balancing contracting parties’ prerogatives with those of the courts, the court held that evaluating the seriousness of the breach would lead the court to usurp the parties’ right to determine which terms should be treated as conditions.

Beyond the debate in common law jurisdictions as to the exact formulation of the applicable legal test, there have been other attacks on the requirement of seriousness, which is unambiguously part of the law in the US, France and Quebec. For instance, Damien Nyer, in the aforementioned article,\textsuperscript{480} mounted an attack on the requirement of seriousness rooted in the policy argument of enhancing economic efficiency by using interruption of performance to pressure breaching parties into performing their contractual duties. As put by Nyer, “rather than restricting the availability of suspension to cases of serious or material breach out of concerns as to its potentially disruptive effect, a principled system should seek to promote suspension as a

\textsuperscript{475} Swan, \textit{ibid} at 472 note 69.
\textsuperscript{476} Specifically, this is an instance of the classic argument that a given rule, because of its over or under-inclusiveness, does not lead to the certainty that its advocates invoke. See Schlag, \textit{supra} note 444 at 385.
\textsuperscript{477} \textit{Hunting Chase}, \textit{supra} note 432 at para 26.
\textsuperscript{478} Quoted in \textit{ibid} at para 30.
\textsuperscript{479} \textit{Ibid} at para 31.
\textsuperscript{480} \textit{Supra} note 408.
The policy of preserving the coercive effect of interruptions has been acknowledged by Beale and Patterson, two contract law scholars respectively from the UK and the US. Nyer continued his relentless attack on the seriousness requirement by arguing that not only is the latter ineffective, but that it contradicts societal expectations, specifically those of the business community. British private law scholar Tony Weir has also voiced criticism of the requirement of seriousness from a moral perspective, arguing that this requirement is ill-advised as it “rewards incompetence” by leaving minor non-performances unsanctioned in the short term (pending redress by a court).

Some contract law scholars have provided countervailing policy arguments and have defended the requirement of seriousness. For instance, Farnsworth has done so on the ground that “it is not in society’s interest to permit a party to abuse this protection by using an insignificant breach as a pretext for evading its contractual obligations.” This argument has strong moral overtones and also deals with something akin to the idea of “abuse of right”, thereby making it an argument rooted in legal as well as moral rights. Echoing John Swan’s above-mentioned administrability argument, British contract law scholar Hugh Beale has defended the seriousness requirement as an equitable standard that allows courts to tailor their findings to the particular facts of each case.

3rd Question: Whether to Require Proportionality in Response

Damien Nyer, in the aforementioned article, took his assault against restriction on interruption of performance further by contesting the policy rationale for limiting the scope of the interruption permitted to acts “proportional” with the breach. Nyer relied on a number of arguments, one being the “coercive function” idea just described with regards to the seriousness requirement. Nyer also argued that the proportionality requirement supresses the interrupting party’s rights by allowing the breaching party to unilaterally modify the contract. Indeed, Nyer argued, if the

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481 Ibid at 39.
482 Beale, supra note 462 at 27; Patterson, supra note 467 at 925.
483 Nyer, supra note 408 at 66-68.
485 Farnsworth, supra note 464 at 562.
486 On the history of this concept see di Robilant, supra note 389.
487 Supra note 474 and accompanying text.
488 Beale, supra note 462 at 40-41.
489 As noted above, this requirement exists in France and Quebec, but not in common law Canada, the US or the UK.
490 Nyer, supra note 408 at 41.
breaching party performs only 75% of the contract (say, of goods delivered in a sale) and the interrupting party can only retain the equivalent of 25% of his or her obligations (say, of the price paid for the goods), then the new de facto deal will often prevail because of the absence of incentives to cure.\textsuperscript{491} Finally, Nyer also formulated an administrability argument to the effect that “proportionality” is a standard that is vague and that “do[es] not provide parties and adjudicators with much guidance.”\textsuperscript{492}

Quebec private law scholars Baudouin and Jobin have provided countervailing arguments to the effect that the proportionality requirement is justified on moral grounds because it prevents abuse in the form of interruptions that are overbroad and exaggerated.\textsuperscript{493} Baudouin and Jobin also seem to rely on the idea that leaving to individual parties unfettered discretion as to the extent to which performance is interrupted is in itself institutionally unwarranted.\textsuperscript{494} Underscoring this is the idea that occasions in which individuals are allowed to take the law in their own hands should be limited, as a matter of institutional distribution of powers between courts and individuals. \textit{Nul ne peut se faire justice à soi-même}\textsuperscript{495} is thus not only a popular saying, but something like a policy maxim, often quoted by doctrine authors as they comment on the scope to be given to the \textit{exceptio}.\textsuperscript{496}

\textbf{4\textsuperscript{th} Question: Whether to Allow Interruption in Multiple Distinct but Related Contracts}

Another legal question that might confront courts is whether to allow interruption of performance for one contract when the breach concerns an altogether different (but perhaps related) contract. The Supreme Court of Canada has recently allowed this in the case of \textit{Glykis v Hydro-Québec},\textsuperscript{497} in the context of electricity contracts entered into in Quebec by the state electricity provider, Hydro-Québec. It bears notice that such a solution is precluded in France,

\begin{itemize}
\item \textsuperscript{491}\textit{Ibid} at 40.
\item \textsuperscript{492}\textit{Ibid} at 33.
\item \textsuperscript{494}Jobin and Baudouin argue that the proportionality requirement “prevents the creditor from bringing justice to himself to his discretion” (\textit{ibid} at 601 [translated by author]).
\item \textsuperscript{495}“No one shall bring justice to oneself” would be my best attempt at a translation.
\item \textsuperscript{496}See e.g. Ghestin, Jamin & Billiau, \textit{supra} note 453 at 424; Jobin & Baudouin, \textit{supra} note 493 at 601; Karim, \textit{supra} note 414 at 489. For a (French) depiction of the maxim as a “general rule” of “substantive law”, see “L’adage ‘Nul ne peut se faire justice à soi-même’ et les Journées de l’Association Henri Capitant des amis de la culture juridique française (Lyon, Grenoble, Aix-en-Provence, 24-28 novembre 1966)” (1967) 19:4 RIDC 938 at 939.
\item \textsuperscript{497}\textit{Glykis v Hydro-Québec}, [2004] 3 SCR 285 [\textit{Glykis SCC}].
\end{itemize}
where courts hold that in general interruption must concern the same contract as the alleged breach.\textsuperscript{498} Moreover, interruption of performance for separate contracts does not seem to have been accepted at all in common law jurisdictions. As put by Farnsworth with regards to repudiation in US law, “if there are two separate contracts, repudiation of one has no direct effect on the rights and duties under the other.”\textsuperscript{499} Indeed, the idea of a right to interrupt performance for distinct contracts is further rendered implausible by the doctrine of “divisible obligations”, which allows courts to limit the right to interrupt performance to certain specific terms and not to the contract as a whole.\textsuperscript{500} However, one could imagine the emergence in common law countries of claims to a right to interrupt performance in related contracts in the context of a specific regime (e.g. contracts of sale), as opposed to all bilateral contracts. After all, the \textit{Glykis} case concerned the particular regulatory framework applicable to Hydro-Quebec and not general contract law.

The judgements rendered in the \textit{Glykis} case, both at the level of the Quebec Court of Appeal and the Supreme Court of Canada, contain interesting policy arguments that are transposable to my other nested sub-questions. I thus catalogue some of the policy arguments brandished by judges from both courts in \textit{Glykis}. The facts of the case are quite simple. Mr. Glykis was the owner of a residential unit, which he leased to tenants. He had entered into a contract with Hydro-Quebec for his building to be supplied with electrical power. Invoking a series of unpaid bills from the tenants, Hydro-Quebec proceeded to shut down the electric power in a separate building where Mr. Glykis and his partner had their personal residence. The question was thus whether Hydro-Quebec was entitled to suspend performance under its contract regarding Mr. Glykis’ personal home because of a breach pertaining to the contract for the other building.

In the Court of Appeal, the dissenting judge Mailhot JCA held that interruption should be allowed for distinct contracts because it gives effect to the interrupting party’s \textit{right} to obtain performance.\textsuperscript{501} The majority judges responded by conceding that this \textit{right} exists and by asserting that performance interruption does not concern the right to receive payment, but is

\begin{itemize}
\item[\textsuperscript{498}] Ghestin, Jamin & Billiau, \textit{supra} note 453 at 426.
\item[\textsuperscript{499}] Farnsworth, \textit{supra} note 464 at 556, notes omitted.
\item[\textsuperscript{501}] \textit{Glykis c Hydro-Québec}, [2003] RJQ 36, 2002 CanLII 23618 (QC CA) at para 20, Mailhot JCA, dissenting [\textit{Glykis}, QCCA].
\end{itemize}
rather a conservatory measure. The real, “direct” means to receive payment, the majority wrote, is “legal proceedings”. Thus, there are no policy grounds that oppose restricting interruption to a single contract, which the majority judges of the Court of Appeal did.

The majority went on to argue that a 19th century Privy Council judgement, which allowed a gas company to interrupt service to multiple locations in case of default concerning only one set of premises, should not be followed blindly, but adapted to contemporary social context. Specifically, the majority judges held that one of the most salient changes in social context since the 19th century was the fact that “the ‘laissez-faire’ school of political economy” is no longer “dominant”. Mailhot JCA, in dissent, contested this assertion by quoting the trial judge to the effect that absent clear legislative indications, courts should not adapt the law and should instead stick to precedent, which does not limit the right to interrupt performance to the very contract that is breached. This is quite clearly a policy argument related to the institutional competence of the courts and to whether the latter can legitimately adapt legal rules to changing social context.

On appeal, the majority of the Supreme Court reversed the Court of Appeal judgement, relying on a series of arguments that includes the following. The Court held that the rule choice of allowing interruption in distinct but related contracts “not only places limits on debts, but also offers an effective means of putting pressure on defaulting customers and inciting them to pay what they owe.” This directly echoes social utility arguments as to the desirability of the coercive function of interruption. On a more basic level, the Court’s judgement also seems to have turned on the simple assertion that the interrupting party has a right to withhold performance. The two dissenting judges, LeBel and Fish JJ, replied with a number of policy arguments, including a response to the rights argument to the effect that forbidding interruption

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502 Nuss JCA wrote:

Hydro-Québec can take any of the measures which the Law provides for collecting the amount due to it. Legal proceedings effect such a purpose. The interruption of the supply of electricity prevents an increase in the amount of the debt, it does not directly provide for the payment of what is already owing. ([Ibid at para 76](#))

503 Ibid at para 73, Nuss JCA, for the majority.
504 Ibid at para 19, Mailhot JCA, dissenting, quoting the trial judgement.
505 Glykis SCC, supra note 497 at para 18, Deschamps J., for the majority.
506 As put by Deschamps J., “the obligation to provide the service to the public ceases to apply where a customer fails to pay his or her bill.” ([Ibid at para 18](#)).
in related contracts does not affect the right of the interrupting party to recover its due, because it can still do so “in the ordinary manner”, presumably through actions for damages and/or specific performance.\textsuperscript{507} The dissenting judges also provided a direct response to Deschamps J’s invocation of the efficiency of coercion through interruption, to the effect that such a consideration cannot inform the judgement of the courts, as a matter of institutional competence.\textsuperscript{508} Thus, courts must consider \textit{law}, not \textit{policy}.

b. The Indeterminacy of Performance Interruption Policies

Having outlined a series of policy arguments invoked to support rule choices on various questions related to the right to interrupt performance, I am now in a position to present a general typology of possible arguments that run through my nested questions. The following diagram illustrates how the nested sub-questions relate to each other:\textsuperscript{509}

The following tables present the various policy arguments in pairs representing argumentative initiatives and responses. The first seven pairs give the initiative to advocates of a (relatively) externalizing rule, while the subsequent seven pairs give the initiative to advocates of a (relatively) internalizing rule.

\textsuperscript{507} Ibid at para 46, LeBel and Fish JJ, dissenting.
\textsuperscript{508} Ibid at para 38.
\textsuperscript{509} For a definition of nesting, see \textit{supra} note 335 and accompanying text.
<table>
<thead>
<tr>
<th>Types of Arguments</th>
<th>Arguments in Favour of Externalizing Rules</th>
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<tbody>
<tr>
<td>Morals</td>
<td>1. The externalizing rule accounts for the fact that withholding performance is morally just;⁵¹⁰ eye for an eye, tooth for a tooth.</td>
<td>a. The truly moral conduct is to continue performance and trust the courts for remedies when faced with a breach;⁵¹¹ the internalizing rule thus rightly limits recourse to interruption of performance.</td>
</tr>
<tr>
<td>Rights</td>
<td>2. The externalizing rule accounts for the fact that the interrupting party has a right to obtain performance.⁵¹²</td>
<td>b. This right exists, but the internalizing rule does not affect it, as interruption is not a “direct” means to recover but only a conservatory measure.⁵¹³</td>
</tr>
<tr>
<td>Expectations</td>
<td>3. The externalizing rule honours the interrupting party’s “justified expectations” of being allowed to retaliate to breach with non-performance.⁵¹⁴</td>
<td>c. The interrupting party should not expect his/her right to interrupt to be absolute; instead the party should expect that the right will be set aside in a number of circumstances, including when the survival of the business operated by the breaching party would be put at risk by the interruption.⁵¹⁵</td>
</tr>
<tr>
<td>Social Utility</td>
<td>4. The externalizing rule rightly favours efficient “private enforcement mechanisms” over “public enforcement mechanisms” which are “heavy and often inefficient”.⁵¹⁶</td>
<td>d. The externalizing rule is not per se efficient, as the intervention of courts is often necessary because of the temporary nature of the exceptio.⁵¹⁷</td>
</tr>
</tbody>
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⁵¹⁰ Beale, supra note 462 at 27; Kingston v Preston, supra note 420 at 608 (stating that not allowing the interruption of performance would make that case “the most monstrous case in the world”).
⁵¹¹ Aynès, Malaurie & Stoffel-Munck, supra note 417 at 448.
⁵¹² Glykis, QCCA, supra note 501 at para 20, Mailhot JCA, dissenting.
⁵¹³ Ibid at para 76, Nuss JCA, for the majority.
⁵¹⁴ Farnsworth, supra note 464 at 562.
⁵¹⁵ See Mestres, supra note 465 at 591-592. For further commentary see Malecki, supra note 469 at 286-287.
⁵¹⁶ Pillebout, supra note 470 at 224.
<table>
<thead>
<tr>
<th>Social Utility</th>
<th>5. The internalizing rule creates “economic waste” by compelling performance that is no longer economically desirable to the other party.</th>
<th>e. Interruption can act on both parties as an incentive to rescind the contract and not perform; it is the externalizing rule that produces economic waste by creating this artificial incentive.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrability</td>
<td>6. The internalizing rule uses a general standard (e.g. “material” or “proportionate”) that is arbitrary, because its meaning cannot be predicted by the parties.</td>
<td>f. On the contrary, it is the externalizing rule that is arbitrary and unpredictable, as it is over/under-inclusive.</td>
</tr>
<tr>
<td>Institutional Competence</td>
<td>7. Valid and binding legal rules can be set aside to conform to changing conceptions of justice.</td>
<td>g. Courts must apply the law, not change or adapt it.</td>
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</tbody>
</table>

<table>
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</tr>
</thead>
<tbody>
<tr>
<td>Morals</td>
<td>8. The externalizing rule is immoral as it allows for interruptions that are overbroad and abusive.</td>
<td>h. The internalizing rule is immoral as it “rewards incompetence” by leaving some forms of breach unsanctioned (in the short term).</td>
</tr>
</tbody>
</table>

517 Malecki, supra note 469 at 299; Ghestin, Jamin & Billiau, supra note 453 at 449.
519 Malecki, supra note 469 at 314-315.
520 Bunge Corp, supra note 474 at 541, quoted in Swan, supra note 474 at 471 note 69 (noting that assessing the gravity of the breach would be a nuisance to legal certainty); Nyer, supra note 408 at 33 (noting that the standards of “seriousness” and “proportionality” “do not provide parties and adjudicators with much guidance”).
521 Swan, supra note 474 at 471 note 69 (arguing that the rule of “classification of terms” is “more likely to lead to uncertainty than certainty”); Beale, supra note 462 at 40-41 (arguing that requiring seriousness of breach is an equitable and flexible way to discern when interruption should be permitted).
522 Goodisson, supra note 456 at 764.
523 Glykis SCC, supra note 497 at para 38, LeBel and Fish JJ, dissenting.
524 Jobin & Baudouin, supra note 493 at 601.
525 Weir, supra note 484 at 35.
| Rights | 9. The externalizing rule allows the interrupting party to use an insignificant event as a pretext to evade his/her obligations and disregard the rights of the breaching party. | i. The internalizing rule allows the breaching party to unilaterally modify the contract, thereby compromising the rights of the interrupting party. |
| Rights | 10. The internalizing rule respects the rights of the non-breaching party, who has other recourses besides interrupting performance (e.g. damages). | j. Often damages do not adequately compensate the breach, e.g. when the damage is “subjective” or “impossible to assess accurately”, the externalizing rule is thus necessary to protect the rights of the non-breaching party. |
| Expectations | 11. The internalizing rule accounts for the fact that society expects that contracts will not be easily disrupted. | k. The internalizing rule contradicts commercial expectations and industry practices. |
| Social Utility | 12. The externalizing rule encourages escaping one’s own obligations and thus hampers legal certainty. | l. It is the internalizing rule that hampers legal certainty by eliminating the “coercive effect” of the interruption. |
| Institutional Competence | 13. Nul ne peut se faire justice à soi-même; interruption of performance must remain an | m. Private parties are in a better position than courts to choose between externalizing and internalizing rules; |

526 Farnsworth, *supra* note 464 at 562.
527 Nyer, *supra* note 408 at 40.
528 Glykis SCC, *supra* note 497 at para 46, LeBel and Fish JJ, dissenting.
529 Beale, *supra* note 462 at 47.
530 Patterson, *supra* note 467 at 928 (“Thus a social interest in having the job done, and done well, is a part of the policy of the law of contracts.”).
531 Nyer, *supra* note 408 at 65-67 (arguing that a high threshold for interruption of performance based on the idea of seriousness of breach is “at odds with industry practices and basic commercial expectations”).
532 Nyer, *supra* note 408 at 38 (with regards to termination, Nyer argues that failure to require seriousness of breach before allowing termination would “frustrate the role of contracts as instruments of certainty and rational planning in commercial transactions”). In all fairness, Nyer makes this argument specifically to distinguish cases of termination and suspension and to argue against requiring seriousness of breach in the latter case. However, I quote his article because I find that it brilliantly formulates the kind of argument that could be mustered to argue in favour of requiring seriousness of breach before allowing interruption of performance.
533 Glykis SCC, *supra* note 497 at para 18, Deschamps J, for the majority; Nyer, *supra* note 408 at 38-39; Beale, *supra* note 462 at 27; Patterson, *supra* note 467 at 925.
<table>
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<tr>
<th>Exceptional Occurrence</th>
<th>Exceptional occurrence, and courts should have precedence over individual action.\textsuperscript{534}</th>
<th>Courts should abstain from imposing their choices on parties as they determine the availability of interruption.\textsuperscript{535}</th>
</tr>
</thead>
</table>

**Institutional Competence**

14. Externalizing rules must be adapted to new social contexts, e.g. the social importance of solidarism and welfarism.\textsuperscript{536}  

n. Courts must apply the law, not change or adapt it.\textsuperscript{537}

As in chapter 3, the resulting picture is that of a series of arguments which can be transferred to other questions in order to argue for a rule that is on the same “side”, i.e. an internalizing or externalizing rule. For example, the (hypothetical) introduction of a proportionality requirement in common law jurisdictions might be defended inter alia with arguments a, b, f, 11 and 14, even though none of these arguments was formulated with regards to the specific issue of proportionality requirements. Here again there seems to be an interchangeability of the arguments across nested sub-questions.

As already mentioned in previous chapters, my point is not that these are the only, or even the most qualitatively important arguments in a given legal culture. Rather, I claim that this represents a somewhat important, yet very tentative, typology of rhetorical moves used to justify rule choices. However, it is very much my impression that when these policy arguments are systematically matched with possible counter-arguments, the impression of closure and rightness that they usually provoke is diminished. The sentiment I wish to communicate to the reader is that it is very often, perhaps most of the time, possible to gather some counter-arguments for a given set of policy claims and undermine the feeling of determinacy that they produce. And when it turns out that this move is impossible, it does not necessarily mean that law is “determinate”, in the sense that the outcome of a case is explainable or coherent. Indeed, while one side of a given individualist/altruist policy battle may be experienced as more convincing, the explanation of why to draw the line in one place and not in another still remains quite

\textsuperscript{534} Jobin & Baudouin, supra note 493 at 601, Ghestin, Jamin & Billiau, supra note 453 at 424.  
\textsuperscript{535} Hunting Chase, supra note 432 at para 31.  
\textsuperscript{536} Glykis QCCA, supra note 501 at para 73, Nuss JCA, for the majority.  
\textsuperscript{537} Ibid at para 19, Mailhot JCA, dissenting, quoting the trial judgement.
elusive, given the availability of policy arguments all along the line of nested sub-questions. As put by Duncan Kennedy:

   [F]or each pro argument there is a con twin. Like Llewellyn's famous set of contradictory “canons on statutes,” the opposing positions seem to cancel each other out. Yet somehow this is not always the case in practice. Although each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much more plausible than the other. The difficulty, the mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution. And there are many, many cases in which confidence in intuition turns out to be misplaced.538

I hope I have been successful not in demonstrating that arguments from the two sides are always equally convincing (which does not seem to be the case), but in generating the impression that the experience of convincingness is highly obscure and can be affected by the manipulation of opposing policy argument-bites across a series of legal questions.

The indeterminacy model I have developed, I suggest, can be generalized beyond the mere issue of interruption of performance, to many other questions of contract law and indeed of (private) law more generally. For instance, my model can be used to manipulate the rule structure concerning the liability of a mistaken party in a contractual relationship.539 Indeed, the spectrum of policy arguments I have described can be used to support any one of the following rules over another, more or less “externalizing”: “no relief for unilateral mistake” (damages are always available from the mistaken party, unless the other party was cognizant of the mistake or was otherwise at fault, etc.); making the mistaken party liable for reliance only, even if non-negligent (a strict liability regime); making the mistaken party liable for reliance only if he/she was negligent; finally, a tailoring of liability according to “the circumstances”.540 Duncan Kennedy also suggests that operations similar to the ones I performed in this chapter might be extended to a wealth of other contract law questions, such as the “doctrines about excuses for hardship of the contract (impossibility, frustration)”, “doctrines about the consequences of failure to comply with formalities”, etc.541 Jack Balkin’s extension of this model to choices between liability regimes in tort law (strict liability, objective and subjective standards of negligence) suggests an

538 Kennedy, “Form and Substance”, supra note 401 at 1723-1724 (references omitted).
540 Ibid.
541 Ibid at 15. For an application of the model to the law of promissory estoppel, see Jay M Feinman, “Promissory Estoppel and Judicial Method” (1984) 97 Harv L Rev 678.
even broader application.\textsuperscript{542} Balkin also illustrates how each regime choice creates a long list of nested sub-questions as to the scope of that particular regime and the presence of exceptions to its application (e.g. whether to apply the chosen tort law standard to children, and if not, whether to apply the chosen standard to “children engaging in adult activities”, etc.).\textsuperscript{543} On the basis of these examples, I am ready to suggest that my model of policy argument can be generalized to all the legal questions that concern the level of duty to be imposed on a given legal actor. This seems quite considerable, potentially encompassing vast fields of the law.

**Conclusion: the Implications of Indeterminacy for Economic Analysis**

In this chapter, I have argued that many questions of contract law do not obey a coherent individualist logic, taking the example of the right to interrupt performance in Canada, France, the UK and the US. In chronicling arguments deployed in favour of various more or less externalizing rules that give content to the right to interrupt performance, I have elaborated a vision of contract law as torn between contradictory values marshalled to support a given rule over another. According to this model, there is no unique way to give effect to an individualist logic of contract law as the mediation of the welfare-maximizing behaviour of the parties, but many different possible rules that can all be justified by appeal to various values, rights and policies. The trick is that, as in previous chapters, we find that for every given policy that is invoked to support a rule, a contrary policy can be found to support an opposing rule. In this policy repertoire, individualist arguments have their corollary altruist arguments, and it is seldom clear which should prevail. Indeed, any approach that purports to privilege individualist policies is confronted to the fact that altruist policies are also foundational to liberalism’s insistence that the freedom of individuals be limited so that it doesn’t harm other individuals’ pursuit of their own freedom. Systematically privileging individualist policies might lead liberalism into anarchy.\textsuperscript{544} Hence, the dilemma of when to privilege individualist and altruist policies constantly haunts contract law adjudication. The possibility of generating contrary argument-bites to what is

\textsuperscript{542} Balkin, “Crystalline Structure”, supra note 12 at 9. A historical example of such a (dramatic) legal choice would be the adoption of strict liability regimes for product liability law. At a turning point in the development of this law, Traynor J. of the Supreme Court of California stated, suggesting that a strict liability regime be adopted for product liability and paving the way to its eventual adoption in California and across the United States, that “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health” (Escola v Coca-Cola Bottling Co, 24 Cal (2d) 453 at 462 (1944), Traynor J.). This is a striking evidence of policy argument being marshalled to justify a choice of liability regime.

\textsuperscript{543} Balkin, ibid at 11.

\textsuperscript{544} For discussion see supra notes 403-404 and accompanying text.
being proposed thus seems to evidence pervasive legal indeterminacy, even in the purported individualist core of contract law.

The present chapter has built on American legal realism’s critique of the private law will theory. According to the realists, questions of contract law involved not mechanical deduction from an individualist logic but a process of choosing between competing social goals and interests.\(^{545}\) Given the policy nature of the judicial enforcement of contracts, leading legal realists such as Robert Hale have sought to re-conceptualize private law adjudication as itself a form of government “intervention” (or “regulation”, in the terminology of this thesis):

> We shall have governmental intervention anyway, even if unplanned, in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government. It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present.\(^{546}\)

This thesis has deepened the American legal realist critique levelled at classical and social legal thought by not only arguing, as the realists did, that policy can and does intervene in purportedly deductive legal thought, but that policy reasoning itself is indeterminate, such that something else, outside of policy analysis, must dictate legal outcomes when the law “runs out”. In this regard, I have appropriated and built on the literature associated with the Critical Legal Studies school of thought, which asserts that policy does not insulate law from ideology.\(^{547}\) At first, this move did not seem necessary. The omnipresence (and inevitability) of policy argument seemed to suffice to cast doubt on the instrumental justification of the pre-eminence of contract law over any labour “regulation”. However, going beyond the realist critique began to seem necessary in light of attempts by scholars to counter the realist argument by acknowledging the presence of policy and trying to rationalize and legitimize its place in legal discourse. For instance, Stephen

\(^{545}\) As put by legal realist Morris Cohen:

> [I]n enforcing contracts, the government does not merely allow two individuals to do what they have pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy. (Morris Cohen, “The Basis of Contract” (1933) 46 Harv L Rev 553 at 562)

\(^{546}\) Robert Hale, “Bargaining, Duress, and Economic Liberty” (1943) 43 Colum L Rev 603 at 628. A contemporary version of this argument has been put forward by Brenda Cossman and Judy Fudge, who used the neologism “reregulation” to describe the process of “privatization”, i.e. of rolling back “regulatory” statutes and administrative agencies in favour of the common law and civil codes applied by the judiciary. See Cossman & Fudge, supra note 17 at 19-20.

\(^{547}\) See supra note 148-162 and accompanying text.
Waddams has argued explicitly that in order to “prevent” the success of the critical legal studies approach, legal scholars should recognize that “policy has played an important part”\textsuperscript{548} in the development of private law and should carefully delineate the adequate (limited) role of policy, in light of the fact that “considerations of principle and utility have […] also been important.”\textsuperscript{549} This parallels efforts at reconstruction of classical legal thought in contract law, described by Jay Feinman as “neoclassical contract law”, a pragmatic mode of theorizing that leaves the individualist ethos intact and attempts to “balance” it against “communal standards”.\textsuperscript{550} My thesis has sought to anticipate these efforts of reconstruction by arguing that policy argument is itself indeterminate, both internally and (importantly) in its relation to other modes of argument, which Stephen Waddams calls “principle” and which I have called “deduction”. By situating my analysis of policy in the purported individualist “core” of contract law and by deepening the realist critique of formalism to extend it to policy itself, I hope to have demonstrated that attempts at conceptual reconstruction are futile. This is a crucial point, as the possibility of reconstructing doctrinal coherence in contract law would have opened up the possibility of restoring some of its presumptive efficiency, which as we have seen is based on the idea of contract law as coherently infused by an individualist logic that differentiates it from political, ideological and redistributive “regulation”.

The deepening of the realist critique of contract in the face of attempts to reconstruct classical contract law individualism does not tell us which particular legal regime is efficient. It is not in itself a satisfying method for instrumental economic analysis. Yet, it goes a long way towards the elaboration of such a method by ridding development thinking of the misleading presumptive efficiency attributed to adjudication of private law rules by courts and the correlative evidentiary burden placed on government “regulation” through administrative agencies and legislation. As put by Duncan Kennedy:

> The judge-made private law rules that define the market are really just the common law as it stood at some hypothetical moment in the nineteenth century. But these rules have a peculiar, almost sacred status as symbols of “the efficient market solution.” Most economists don't seem to have or to feel the need for any knowledge of their content, or of the reality of their supposed inner responsiveness to the ideas of property and contract. They appear as a neutral background in everyone's interest (efficiency), that is constantly threatened by the more partial, political,

\textsuperscript{548} Waddams, \textit{Principle and Policy}, supra note 454 at 205.
\textsuperscript{549} \textit{Ibid.}
interest-group based or ideologically based initiatives of legislatures. [...] Because of the indeterminacy of the concepts of property and free exchange, we cannot say that the private law regime that nineteenth century judges adopted was peculiarly faithful to those concepts. Many regimes could have been plausibly described as based on property and contract. We cannot say, a priori, that the outcomes under these alternative regimes would have been less efficient than the outcomes that occurred under the peculiar set of specifications of those concepts that prevailed in fact. We could only answer the question of comparative efficiency of background rules through an empirical inquiry of staggering complexity, an inquiry that would not, in any case, yield a result we could extrapolate to the present. [...] A successful demonstration of the impossibility of generating the efficient common law background regime for a free market economy would have two effects. First, it would discourage the "privileging" of market solutions in general over regulatory solutions in general. There is no rational "burden" on regulation, because regulation is no more and no less presumptively efficient than a common law regime. Second, it would open our imaginations to devising "market" solutions with radically different distributive consequences than those we are familiar with. 551

Admittedly, I am only providing the starting point for a deeper analysis of economic consequences of contract legal rules and labour “regulation”. Yet, the analytical insight of the indeterminacy of the purported individualist logic of contract law helps us rid the policy agenda of the dichotomy, put forward in law and development mainstream discourse, between contract law and regulation. This leaves the field open for scholars to devise creative, fresh ideas for a true post-Washington Consensus law reform agenda.

Conclusion: Towards a Distributive Model of Labour Policy

In this thesis, I have criticized two dichotomies that structure mainstream legal consciousness in law and development policy debates. The first dichotomy, that between core labour rights and non-core labour standards (such as inter alia minimum wage and working hours-related protections), was addressed through an analysis of Canadian adjudication of two of the four core labour rights identified by the ILO (equality and collective bargaining rights, respectively examined in chapters 2 and 3). The second dichotomy, that between contract law and labour “regulatory” schemes, was criticized in chapter 4 on the basis of a comparative analysis of contract legal doctrine that spanned several countries (Canada, France, the UK and the US). As explained in chapter 1, both dichotomies are supported and justified by two distinct rationales: an instrumental economic justification, according to which it is possible to measure the efficiency of a given legal institution in order to privilege efficient over inefficient bodies of law, and a legal formalist/pragmatic approach, according to which some sets of legal rules can be separated from others on the basis of a normative foundation that distinguishes them. There is significant overlap and interaction between the two rationales; indeed, the instrumental case for contract law is infused with a formalist view of the latter as driven by a coherent individualist logic, and the instrumental distinction of core labour rights from non-core labour standards has sometimes been tied to the formalist idea that their content can be constrained and rationalized according to a select set of “market-friendly” general concepts.

In chapter 2, I have taken up the first dichotomy, that between core labour rights and non-core labour standards, and I have criticized its justifications on the basis of a study of the doctrinal structure of workplace equality/non-discrimination rights in Canada. I have challenged the idea of a universal, normatively consistent basis for equality rights, which is central to both the “legal formalist/pragmatic” and semi-instrumentalist views of core labour rights as coherently built around market-friendly principles. To do so, I have outlined in section a how attempts to subsume Canadian equality rights under the ideas of “harm” and “human dignity” fail, because the notion of harm presupposes a flawed analytical framework based on the identification of a “victim” and “perpetrator”. Drawing on the work of Richard T. Ford, Ronald Coase and Oliver Wendell Holmes, I have argued that this analytic is indeterminate, because anti-discrimination law should be envisioned as the attribution of “joint costs” arising from the incompatible activities of both the victim and the perpetrator. Thus, a legal actor can always resort to policy
argument to call for a different attribution of liability according to the policy stakes involved in a given situation. While this argument casts considerable doubt on the possibility of justifying the distinction of equality rights from non-core labour standards based on a normatively coherent principle such as “harm” of “human dignity”, it is not necessarily fatal to such an endeavour. Indeed, Canadian equality rights adjudication (and many justifications of the core/non-core distinction) accepts that this analysis is incomplete and attempts to restore determinacy and convincingness by supplementing it with an exercise of balancing competing (private) interests. This test, organized in Canada around the concepts of Bona Fide Occupational Requirement and “undue hardship”, purports to provide a coherent and legally justifiable weighing of the effects of an accommodation on the employer and of the rights violation on the claimant. Moreover, this test is often framed as a simple exercise of comparison of private interests, and not as a full-fledged assessment of the social stakes involved in a given accommodation. I have undertaken to refute the idea that it is possible to provide determinacy by this legal method. I have started by arguing that the “undue hardship” test can never be confined to purely private interests, and that it is always possible to bring in societal policies by reformulating the private interests as public concerns. Building on this idea, I have argued in section b that the (social) policies invoked in “undue hardship” argument are indeterminate, in the sense that they often do not provide any coherent way to determine which policy should prevail. Devising tables of pairs of policy arguments that seem to nullify each other, I have developed a method to convey the sense that many value clashes are not solvable through mere legal analysis. The presentation of my methodology of classifying arguments in tables of binary pairs has allowed me to explain my use of the notion of indeterminacy. I have emphasized that I contest both the jurisprudential affirmations that law is always or never determinate. Indeed, I wholly admit that sometimes, a given legal justification, whether deductive or policy-based, seems to be incontestable. However, I reject any conceptualization of a given legal question as in itself determinate. Instead, I have portrayed doctrinal frameworks as open to constant contestation. Thus, a deductive argument may be countered by invocations of policies, and a canonical precedent or legal rule may be set aside by invocations of other rules that subvert an initial feeling of determinacy. By presenting many cases in which purported organizing principles themselves become policy arguments and are destabilized by being integrated in the “undue hardship” test, I have tried to demonstrate that it is very often possible to produce indeterminacy in equality rights adjudication. I have closed this chapter by reiterating that the fact that overarching concepts (such as “harm” and “human
dignity”) are inconclusive and that the “undue hardship” balancing process may be indeterminate is destabilizing for the dichotomy between core and non-core labour rights. Indeed, the prospect of devising a coherent rationale to render core labour rights universal, normatively autonomous and/or “market-friendly” is greatly hampered by the idea of legal indeterminacy.

In chapter 3, I have taken up the right to bargain collectively at Canadian constitutional law and the preservation of bargaining rights in successor rights legislative provisions in Ontario and Quebec. I have argued that the principles designed to give systematicity to these two legal institutions are indeterminate and do not present any coherence, either as foundations for deductive adjudication or as policy arguments which are balanced against competing considerations, interests and principles. Specifically, the process/substance distinction and the instrumental definition of the business, respectively central to adjudication of the right to bargain collectively and successor rights, are incessantly displaced and countered by policy arguments. In the case of the process/substance distinction, we have seen that the distinction between general procedure and specific legislative regime, debates over social expectations and considerations of harmonious labour relations can all intervene when a litigant or adjudicator decides to exploit the gaps, conflicts and ambiguities of the process/substance distinction. As for successor rights provisions, various concerns can be invoked to trouble a purported deductive application of the instrumental definition of the business (legal administrability, economic effects, contextualization in light of the economic reality underlying the legal rules, etc.). In the case of successor rights, I have added the complexity of “nesting”,552 whereby legal actors discover and create new disputed legal questions that are intrinsic to the application of a pre-chosen legal rule (here, the instrumental approach). The phenomenon of “nesting” lets us foresee that many legal rules can be seen not as a definitive choice that settles a legal question, but as the beginning (or continuation) of an infinite chain of successive legal dilemmas. For the project of separating the right to bargain collectively on the basis of a foundational principle that distinguishes it from labour standards and grants it internal coherence, my exploration of the contradictory nature of a number of purported overarching notions (such as inter alia the process/substance distinction) is unsettling. It suggests that a given concept is often inconclusive, as it can lead to several different outcomes. Moreover, what is presented as an organizing

552 On “nesting” see supra note 335 and accompanying text.
principle may be subjected to a series of countervailing policy arguments, a process that does not provide a determinate route to an outcome but a series of possible rhetorical moves to justify divergent outcomes. This reveals much about the purported unifying principles themselves and their contradictory nature. Hoping to provide an economically neutral and/or normatively consistent basis for the separation of core labour rights from other labour standards may be impossible, in light of the indeterminacy of law.

Chapter 4 has turned to a second dichotomy, that of contract law and labour “regulation”. It has contradicted the view, maintained by much of the post-Washington Consensus law and development mainstream, of contract (and property) law as a legal field animated by an individualist logic that is sufficiently coherent to sharply distinguish private law from other redistributive interventions by the state. This distinction leads to a presumption of efficiency attributed to contract law over state regulation. Against this vision, I have put forward a methodology which reveals that contract law is in fact not driven by a consistent, determinate individualist logic but by rival individualist and altruist rhetorical repertoires. Moreover, I have argued that these competing sets of arguments often seem equally compelling from the point of view of liberalism’s twin commitments of allowing individuals to act “freely”, but only to the extent that they do not hamper the freedom of others. To make my point even clearer, I have situated my analysis in the “core” of contract law, abstracting from social legal institutions (e.g. unconscionability and abus de droit doctrines) meant to countervail the purported coherent individualist legal rules of contract formation and enforcement. I have taken as a case study such a “core” legal rule, that of allowing performance interruption in cases of breach of contract. I have presented the legal frameworks applicable to that question in Canada, France, the US and the UK, arguing that they all function in an equivalent way and incorporate along with deductive argument a series of policy arguments that can be marshalled to support rules that are relatively individualist and altruist. I have argued that these policy arguments can destabilize deductive reasoning and have the same indeterminate quality as the arguments presented in chapters 2 and 3. The indeterminacy of contract law policies seems to stem, here again, from the irreducible value clashes that undergird the law. These normative conflicts require adjudicators to make choices that are not purely legal, and that can probably be described as moral, ethical, political and distributive. The basis for distinguishing private law adjudication from redistributive labour regulation thus seems to vanish. Given that these altruist and individualist policies intervene in
support of many vastly divergent legal rules that have the most diverse economic effects, one cannot presume that the results of private law adjudication will always be economically efficient. Each possible legal rule will have a different economic impact. Moreover, as legal rules often seem to contain an infinite series of nested sub-questions, the economic impact of a given rule is unlikely to become more predictable when it is adopted and subsequently “applied”. It would appear that moral and ideological choices must be made continuously as adjudicators face new cases. Thus, the justification of the prevalence of contract law over regulation, based as it is on the efficiency attributed to coherent individualist, will-based adjudication, does not withstand the indeterminacy critique.

Having cast significant doubt on the instrumental economic and legal validations of the contract/regulation and core/non-core labour rights distinctions, I am now in a position to suggest some lineaments of an alternative policy framework to select and apply legal institutions in the labour market. The full elaboration of satisfying policy guidelines obviously lies beyond the scope of this thesis. Yet, some general propositions can be put forward for future work. One of the building blocks of the framework I have in mind is the inclusion of distributive economic consequences as primordial concerns. Considerations of (re)distribution are to an important extent elided by current rationalizations of contract/regulation and core/non-core distinctions. For instance, the instrumental economic justifications quite openly refuse to consider distributional consequences of legal rules, focusing on economic efficiency as the goal of labour market law and limiting the intervention of distribution to an after-the-fact adjustment of an efficient, neutral legal regime. This confining of distribution to an ethical afterthought that is subordinated to the imperatives of efficiency may often unduly reduce the scope of redistributive interventions in the labour market. As for the legal formalist/pragmatic justifications described in chapter 1, distributive impacts, while not always completely excluded, are certainly marginalized by the normative and moral content attributed to certain core labour rights. While some policies invoked in the adjudication of the core rights may concern distribution, this intervention is at best tangential, as the goal of legal formalist/pragmatic defences of core labour rights is precisely to bracket the question of economic impact to foster broad acceptance of core labour rights as

553 See Kennedy, “Fetishism of Commodities”, supra note 551.
universal, moral matters.\textsuperscript{554} Moreover, the potential marginalization of non-core labour standards,\textsuperscript{555} which are often more directly preoccupied with distributive justice, also obscures the economic distributive effect of legal rules. Yet, the indeterminacy of law shatters any claim that it can be neutral from a distributive point of view.\textsuperscript{556} The analysis carried out in this thesis thus paves the way for the elaboration of a policy framework built around economic distribution.

A policy model that focuses on distribution should have several essential characteristics, of which I outline four. Firstly, a model that rejects any sharp dichotomy between rights and labour standards and which takes distribution seriously should question the boundaries of the “market” and its imbrication with the sphere of the family and of unpaid, reproductive care work.\textsuperscript{557} Once we shift the focus from doctrinal coherence to distributive effects on various groups (including men and women), the law of the market can more easily be assessed in light of its effects on non-market legal settings,\textsuperscript{558} leading to a fuller account of the social impact of labour governance.


\textsuperscript{555} See note 6 and accompanying text.

\textsuperscript{556} As put by Duncan Kennedy:

Probably the most important objection to the claim that law is pervasively important in distribution is that law is simply the medium for popular consensus worked out within a set of democratic procedures. […] We can therefore dismiss the distributive impact of background rules by referring it to the combination of consensus in legislative lawmaking (subject to constitutional constraints) and judicial adherence to the constraints implicit in the role of adjudicator. […] The case for the distributive significance of law turns out to be linked to the realist critique of adjudication. […] Against this background, it should be clearer why so much depends on the notion that judges have a well-defined role in settling disputes “according to law.” If, but only if, that is the case, we can concede that judges play a major role in setting ground rules and could change the distribution of income dramatically by changing those rules, but still deny that either the judges or the ground rules are “really” that important. (“The Stakes of Law, or Hale and Foucault!” in Sexy Dressing Etc (Cambridge, MA: Harvard University Press, 1993) at 108, 109 & 111)

\textsuperscript{557} For an analysis of the causes and consequences of the family/market distinction, see Halley & Rittich, supra note 25.

\textsuperscript{558} Kerry Rittich has articulated the link between a distributive conception of law and the market/family distinction as follows:

It might be easier to make the stakes clear if the issue [of the work/family dichotomy] were characterized as an economic conflict and the case for labour market regulation to compensate unpaid domestic work articulated expressly in distributive terms. […] Neither traditional arguments about women and work, which are essentially conducted in the language of protection, nor contemporary equality arguments, which are usually framed in terms of enhancing women’s choices, make reference to the distributive function that such regulations perform. […] What the traditional discourses largely fail to convey is that labour market regulations allocate resources and
Secondly, a distributive policy framework should abandon its exclusive focus on individual and moral injury and be attentive to the collective and political dimensions of distribution. Such a model might allow policy-makers to heed anti-discrimination scholars like Richard T. Ford and Kendall Thomas’ respective calls to “suspend a once-appropriate emphasis on individual injury in favor of a renewed focus on collective injustice” and to replace an “obsessive focus on the morality of race [with an account of] the distinctively political dimensions of racial claims-making.” By collapsing the distinction between moral rights and redistributive social justice policies, the framework I have in mind would broaden the scope of social phenomena relevant to the inquiry.

Thirdly, a distributive policy framework would not marginalize the question of efficiency completely, but would attempt to assess how various legal rules and their attendant distributive consequences can influence economic efficiency in specific contexts. In such a framework, economic efficiency is understood as only one of the possible goals, with no particular prominence. Moreover, efficiency, divorced as it is from the conception of private law as an individualist, flexible and efficient regime, is no longer systematically pit against distributional interventions. One can and should pursue both at the same time, making the inevitable trade-offs when they are required in particular contexts.

Finally, a policy model based on distribution should acknowledge the indeterminacy of law and the ideological, contestable nature of the policy goals it puts forward. Given that the legal vernacular will often provide no convincing cloak for ideological predispositions, and given the frequent normative conflicts and clashes between irreconcilable values and distributive commitments, this suggests humility on the part of the policy-maker. This might lead one to power to women, and thus can be usefully approached as both mechanisms of (re)distribution and sets of economic incentives. (Kerry Rittich, “Feminization and Contingency: Regulating the Stakes of Work for Women” in Joanne Conaghan, Richard M Fischl & Karl Klare, eds, Labour Law in an Era of Globalization: Transformative Practices and Possibilities (New York: Oxford University Press, 2002) 117 at 132-133)

561 For such an articulation of a deconstructed conception of efficiency with distributive concerns in labour market regulation, see Santos, “Labor Flexibility”, supra note 70.
formulate policy proposal bearing in mind the foreseeable contradictory uses of the legal rules at a local level by social justice activists, adjudicators and other stakeholders. Thus, it might involve a significant decentralization of policy making.\textsuperscript{562} A humble attitude would also entail acknowledging the eventual costs and perverse effects inherent to given policy proposals, which might stem from competing distributive commitments that cannot be reconciled.\textsuperscript{563}

While these are only starting points, I hope the arguments presented in this thesis make them seem compelling. Labour market policies have been at the center of law and development debates, no doubt because of the role of work in driving economies, shaping social relations and distributing relational entitlements and power. Given this importance, it is critical for lawyers to engage in these debates, bringing to bear their own expertise in unveiling the complex doctrinal bifurcations that are ignored by many development policy makers. This legal knowledge can be put to good use in deconstructing unwarranted restrictions of the range of legally and scientifically accepted regulatory approaches. Perhaps this can help us start law and development debates afresh, and make policies that appeared precluded seem worth considering again.

\textsuperscript{562} For an exploration of this idea see Kennedy, \textit{A Critique of Adjudication}, supra note 125 at 262-263.

\textsuperscript{563} Libby Adler has described such a posture as “decisionist”, which she defines as “making difficult choices about which law reform initiatives to undertake based on broadly informed distributional hypothesis and cost-benefit calculations and then acting on the best information one can get with the best judgment one can muster, always prepared to bear the cost of one’s choices.” (Libby Adler, “Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform” (2011) 46 Harv CR-CLL Rev 1 at 2)
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