This is Between You, Me, and Something Else

Defining Public Policy in Private Law Adjudication (2nd Ed Updated 2021)

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Introductory Abstract

I must be flowery for a moment, the term 'public policy' is like a cloud in an empty sky. From a distance and cast in all its light, the textures, colours, depths and dimensions of the cloud appear prominent and certain, and one or all may readily identify its shape at a distance. Yet the closer one gets to the cloud the harder it is to define the cloud's true or actual properties and the shape you see in the cloud apparently differs from the shape your friend sees. Just like with the properties of a cloud, the term 'public policy' is also similarly lacking in an ability to discern its close-quarters definition. Wandering through a dozen or so journal databases is enough to convince any seeker that public policy means merely the geist of whatever the 'public interest' focus happens to be for the author of the article being read. But must public policy be relegated to such an amorphous state or is there to be discerned a set of fundamental properties present in every public policy issue? The inspiration for this article has its genesis as a result of a 2018 article by Ross Grantham and Darryn Jensen titled *The Proper Role of Policy in Private Law Adjudication* (GJ Article).[2] In this article, I propose three criteria that must be present for any proposed application of public policy to qualify as an actual application of said public policy within the context of private law adjudication or disputes. The first criterion I call 'Factual Foreignness' requires the policy consideration to be ontologically separate from the facts governing the parties actually participating in the litigation where the public policy consideration is being invoked. The second criterion called the "Subject Foreignness" requires that the policy being considered must itself not at all be at play as between the parties in their dispute and this can take three forms. This second criterion of "Foreign Subject" is subdivided into these further three forms and I have identified them as the "Foreign Matter" the "Foreign Principle" and the "Foreign Party". The final criterion of 'Significance' is the concluding criterion that requires that the invocation of the now established factually foreign subject *actually* operated to determine a material decision in the dispute, this criterion operates solely in retrospect to identify after-the-fact that a public policy application "just happened". This brief article is a labour of my own thought and where I have found good references for the explanation of this thought, I provide them as footnoted, but otherwise this set of

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[2] Ross Grantham and Darryn Jensen, 'The Proper Role of Policy in Private Law Adjudication' (2018) (Spring) 68 *University of Toronto Law Journal* 187 ('*GJ Article*').

criteria are an original set that I am unaware has been presented elsewhere and what follows is mostly a pitch as much as an explanation.

A Need for Definition

Even when limiting our focus merely to the realm of the private law, public policy has been defined variously as "a broad generalisation of sets of rules",[3] as "everything past legal principle",[4] and akin merely to "reason and good sense".[5] These definitions leave too much to the imagination and as a result too much to presumption, with such descriptions we are two cloud gazers with different opinions on the same cloud. I argue that arguments from public policy should be considered as strictly extralegal in their qualities; they are based neither on precedent nor statute. Where an argument or issue from public policy arises, at its heart is an appeal to a greater rather than strictly legal good. In granting that an appeal to public policy is necessarily one of extralegal argumentation —as I presume fully— then identifying when a consideration qualifies as a public policy argument becomes an important tool for any adjudication. Where a party argues from a point of law, be it common law or statute, the presiding justice has all the tools of the trade on which to evaluate the correctness of those submissions. But where public policy intrudes the same adjudicator must now step from the firm ground of the law into the soft sand of policy.

Establishing a minimum set of criteria necessary for an issue to qualify as a true public policy application delineates the circumstances for when an adjudicator has or maybe ought to step from the legal argument to the policy issue. The importance of defining when public policy is *actually* being invoked in private litigation compared to a mere superficial and self-titled claim of invocation is important for a number of reasons, and I will state a few that I can immediately see. First, the idea of whether public policy should be applied can only be evaluated where one is certain it was or is being applied. Secondly, knowing that public policy has been applied may be pivotal to any appeal by a party and of tantamount interest to an appellate level tribunal. Thirdly, a party seeking to download a public policy

[3] James Plunkett, 'Principle & Policy in Private Law Reasoning' (July 2016) 75 *Cambridge Law Journal* 369.
[4] Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, Oxford and Portland, Oregon, 2007) p 51.
[5] Percy Henry Winfield, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, London, 16th ed, 2002) p 129.

defence or argument should be readily aware of the elements, benefits, and pitfalls of doing so before said party goes about using the dreaded "policy" words.

I propose that an issue in a private law dispute will qualify as public policy only where the subject matter it is based upon is fully foreign to the disputing parties and sufficiently significant to inform a decision. I break this proposal down into three criteria, the criterion of factual foreignness, the criterion of subject foreignness, and the criterion of significance. Where an argument to public policy fails any of these three criteria the issue will fail to qualify as an issue of public policy, and therefore the adjudicator should be careful with her or his words when addressing the position or perhaps should elect not to step from the law down into policy at all.

Criterion I: Factual Foreignness

The words 'public' and 'private' are necessarily antonymic. For an issue to be public it must not possess the qualities of being private.[6] In proposing this factual foreign-ness criterion I define 'public' in a purely negative sense. Namely that which is not private is public. Fact foreignness presumes that an issue will be private unless it is foreign to the parties of the dispute. I propose the distinction between private and public is best addressed by a property of independence. In a private law context, where an issue is sufficiently independent of the actions or status of the parties of the dispute, it will be foreign, where an issue is dependent it will be native. An issue will be native to a party where it is connected or dependent on one or both of the parties, conversely, an issue will be foreign when it does not depend on the proceeding's parties pertinent to the dispute. Criterion two aids in explaining this distinction.

Dependence occurs where a proposed public policy issue may only have force on the establishment of some material fact. Take, for example, an equitable principle such as 'equity will not assist a volunteer'[7] while certainly motivated by a policy concern, the principle is only applicable where the facts bear out that the party in question was a volunteer. The issue becomes dependent; it can take no effect unless a fact intimate to the parties of the dispute invites it to do so. Because the policy undermining the issue in our equitable example is dependent on a fact to have an effect, the determination of the proceeding is very much still in the hands of the parties or resulting from the actions of the parties. In a dependent issue a party is not

[6] For a good example of this see Lord Blackstone's fourth book "On Public Wrongs".
[7] *Corin v Patton* (1990) 169 CLR 540.

arguing outward to a policy 'in the ether' but inviting it in on intimate and local grounds of the dispute. In such cases of dependence, it is not the public policy consideration that will decide the dispute but whether the actions of the parties have sufficiently triggered the policy laden issue as a conclusion between them. This criterion of factual foreignness seems largely in accordance with the position of Ross Grantham and Darryn Jensen in the *GJ Article* wherein it is put forward that most policy considerations in private law are not some overarching communitarian reasoning but rather the reflection of maintaining a system of inward cohering legal principles.[8] An example of what is identified as a public policy issue but is really a dependent issue is a contract void on public policy grounds or on illegality. Only where one party has actually established (or revealed) a fact in the dispute that can trigger this policy is the policy actually triggered and fits more as the application of a set of legal coherence dependent on the native facts of the parties.

I break for a moment to give a momentary comment on equity. Equity is its own creature and developed from the direct petition of the King's mercy and later executed through the chancery courts before being fused (noting the fusion argument is still alive in some common law jurisdictions) with the court of the King's bench by operation of the judicature acts. In the context of public policy in private law adjudication the application of equity should not be seen as a type of public policy *simplicitor*, while the maxims were developed from a policy position such maxims are still party dependent and factually native. How and why the parties behaved as they did with each other is determinative of the application of the equitable maxim. You will not have equity applied between Party A and B, due to the actual or theoretical actions of some unconnected, unaffected, and non-joinable distant Party C. Hence, I do not view equity as being a true application of public policy in a private law adjudicative setting as it fails to be both foreign and independent of the parties.

The criterion of foreignness is not capable of full expression alone but rather operates as an initial door-check to ensure that what was applied was not merely some application of legally coherent principles or maxims. In order to know if an issue is foreign to the parties, the issue must have a subject. As such, the second criterion operates to complete the first by giving content for evaluation. In the following criterion, appropriately called the subject criterion, I propose that for an

[8] *GJ Article*, 208.

issue to qualify as an actual application of public policy it must consist of one of three subject types.

Criterion II: Subject Foreignness

An example. A simple trespass to property dispute may have party A proving that party B is liable to party A in trespass by party B building a fence on property legally belonging to party A. In this example the issue concerns a fence constructed by B on land owned by A, the facts and issue are local rather than foreign, and the subject of the native issue is the property rights of A. What is meant by subject then, is that were it not for the fence there would be no trespass against the property rights of A. In this case if A can prove the trespass by B's fence the native subject is established and the tort is satisfied. Where an issue is native the subject matter will be at the heart of the dispute, but where an issue is foreign —as our prior criterion demands— the subject matter must be distant and independent from any native subject of the dispute. While the fence illustration composes the elements of the tort itself, the point of the subject foreignness criterion is that when invoked it will have no nexus to the tort or cause of action as between the parties but intervene to have an effect therein. I have identified three classes of subjects capable of forming independent, foreign subjects: a foreign matter, a foreign principle, and a foreign party. As with the native subjects, the importance must be the same, were it not for this foreign matter, principle, or party the outcome of the dispute must be decided differently.

Subject Type I: Foreign Matter

The first subject type is the foreign matter. A foreign matter is a subject wherein there is reliance on the merits or outcome of, or pending outcome of, a separate foreign proceeding a.k.a. a foreign matter. The matter must be one with no *legal* connection to the parties in the proceeding. An example of a foreign matter subject can be found in the shadow of the Australian High Court case of *CSR Ltd v Cigna Insurance Australia Ltd* (Cigna).[9] In the case of *Cigna*, the appellant CSR had instituted proceedings in the USA state of New Jersey seeking declarations of an entitlement to indemnity from Cigna Insurance with respect to asbestos claims

[9] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 146 ALR 402 ('*Cigna*').

which were located solely in the jurisdiction of the USA.[10] Cigna sought to prevent this action by bringing an anti-suit injunction against CSR in the state of New South Wales, Australia rather than in New Jersey or some other overlapping jurisdiction in the USA and for which they were initially successful.[11] In allowing CSR's appeal the High Court looked extensively at both the claims and the relief sought by CSR in the New Jersey proceedings.[12] The majority held that in light of the New Jersey proceedings the anti-suit injunction was vexatious and ought to be "stayed pending the outcome of the US proceedings".[13] Effectively, the outcome of Cigna's anti-suit injunction was determined not on any native legal subjects of the parties that were put forward to the Australian courts in the Australian jurisdictions, but by a specific and extra-jurisdictional consideration on the strength of a pending proceeding between the functionally same but legally distinct parties in another foreign and discrete jurisdiction. Plainly speaking, the Australian jurisdiction of the High Court heard CSR in its Australian capacity and Cigna in its Australian capacity. Then the High Court made a ruling not based on the native subject matter nor submissions of Australian CSR or Australian Cigna but by reliance on the merits of the foreign subject matter of the USA CSR and USA Cigna, which was a pending foreign proceeding. The legally distinct Australian counterparts had their legally distinct case dismissed on the grounds of a pending proceeding of their American counter parts legally distinct proceeding. I take no position on the propriety of Cigna using the Australian court in this matter, but it is immaterial whether it was unlawful for any other reasons when it was dismissed as a material result of a foreign matter occurring in New Jersey.

Foreign matter subjects by their very origination as separate pending proceedings are not a common occurrence. Still, where one proceeding's outcome is determined by the actions of legally distinct parties in a legally distinct dispute, the conclusion must be that something not private, but public has been invoked. Parties foreign and elsewhere are the reasons that parties native and local can or cannot be successful.

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[10] Ibid at 405–406,429. *Note while this is a literal foreign action this is not what is meant by foreign, although a literal foreign action would presumably almost always qualify for this criterion in these circumstances unless the parties are legally the same parties*

[11] Ibid.

[12] Ibid at 411,417–419,439,441.

[13] Ibid 441–442.

Subject Type II: Foreign Principle

The foreign principle is a thing that is distinct from both legal maxims and principles, such as the earlier equitable volunteer example. What I propose by a foreign principle in this case is a principle that cannot attach in some probative way to a material fact of the native dispute. A foreign principle is an appeal to a principle that does not go toward the breach or fault of any party in the native dispute and cannot be "nounized" either as a proper-noun (can't be some other party, that's subject type three) or turned into a concrete entity. The noteworthy Canadian case of *Cook v Lewis* is an example of a public policy issue in the context of a private law dispute that was decided by application of a foreign principle imitating what appears to be a simulacrum of fairness, where the ethereal concept of fairness is the principle.[14]

Cook v Lewis saw the improbable occur, two hunters found themselves in a position where each ended up firing mistakenly at the same spot at the same moment, only to wound a third person who was concealed at that location presumably another hunter. On the facts, a jury found it impossible to determine which of the hunters was causally responsible for the injuries to the wounded man.[15] The Supreme Court of Canada (SCC) departed from the original Canadian position of law which required no liability without the establishment of a particular defendant's factual or causal liability in these such circumstances.[16] Perhaps moved from empathy or potentially it was nearly lunch time, the majority of the SCC adopted a seeming ethereal principle of fairness to the victim in a most general sense, and found both hunters to be liable despite the inability to prove severally their causal liability.[17] The principle applied in *Cook v Lewis* was foreign as it had no native probative value that depended on which of the two hunters actually caused the injury, it did not invoke a direct equitable obligation between one hunter and the victim, the other hunter and the victim, or the two hunters and the victim. There was no fiduciary duty owed to the victim or other such equitable native relationship. Unlike the earlier example of equity not helping a volunteer, there was nothing in this principle that relied on a fact not under dispute. Neither hunter denied firing

[14] *Cook v Lewis* [1951] SCR 830, p 842.
[15] Ibid p 837.
[16] Ibid p 849.
[17] Ibid p 842.

their weapons,[18] what was in dispute was which one factually caused the injury. Unlike the earlier equitable example, the application of the principle turned not on the establishment of any native fact, but on a foreign principle that it would be unfair to deny the injured party a route to compensation.[19] In the end it was a principle that a society and its legal order ought to compensate a victim unfairly hurt at the expense of whoever was most proximate to the hurt rather than any establishment that this or that hunter had done the hurt such that a native principle of hunter A or hunter B owes victim C for their actions.

Subject Type III: Foreign Party

The third and final subject class is the subject of a foreign party. For a foreign party subject, a dispute's outcome must be affected or determined by evaluation of the impact of that outcome on or from independent non-native parties. The idea here is that A may be in a private dispute with B, but what is either invoked or reasoned is that A should not be permitted to be successful over B, not because of a failure of some legal merit or equitable maxim but because of the impact that A's success may have on C, a hypothetical and foreign party with no connection to the dispute.

An example of a foreign party subject class is present in the House of Lords case of *Marc Rich v Bishop Rock Marine Co Ltd* (Nichols).[20] In *Nichols*, a ship by that very name suffered damage to its hull and was inspected by a classification service whom initially recommended immediate dry dock repairs before being convinced to change their mind and accept the temporary repairs as sufficient and to alter their position to say the ship was sufficiently seaworthy.[21] Ultimately the temporary repairs failed, and the ship broke apart and sunk with a total loss of cargo.[22] In *Nichols* the owners of the lost cargo sought compensation from the classification society for the amount of the cargo left uncompensated under international shipping law.[23] Appealing from the court of appeal the appellant sought the remaining compensation by claiming the classification company was liable for negligence.[24] In affirming the court of appeal decision the House of Lords was concerned that

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[18] Ibid p 836.
[19] Ibid p 842.
[20] *Marc Rich v Bishop Marine Co Ltd* [1995] 3 All ER 307 ('*Nichols*').
[21] Ibid 310–311.
[22] Ibid.
[23] Ibid.
[24] Ibid.

finding the particular classification company liable would result in other shipping classification companies adopting detrimental procedures with respect to their traditional roles.[25] By taking into account shipping classification services in general the House of Lords was taking into consideration parties not native to the dispute but rather the foreign uninvolved and fictional party of those groups of classification societies as an aggregate. In *Nichols*, it was the Bishop Rock Marine Company that had certified the temporary repairs, not some aggregate of all other marine classification societies. The dispute did not turn in the end on whether Bishop was negligent in its classification of the Nichols, but what impact finding Bishop negligent would have had on hypothetical and completely independent classification societies around the globe, and presumably the downstream effects to global shipping as a whole.[26] An issue qualifying as a public policy consideration will have a foreign subject —as in *Nichols*— where the dispute between two native parties is determined based on the effects or impacts of another factually and legally independent party. In such circumstances the foreign subject is a foreign party A loses to B because of uninvolved C.

Criterion III: Significance

The third criterion for an issue in a private law adjudication context to qualify as one of public policy is the criterion of significance, or rather whether the issue concerned is significant enough to warrant intervention. Unlike the criteria of factual foreignness and subject foreignness, the significance criterion does not go to the content of the policy but its ability to be determinative in the dispute. Significance in this respect is retrospective and merely confirmatory. Where a public policy consideration is sufficient to alter the outcome of the dispute the significance criterion will be met, where it is not sufficient to alter the outcome, it will fall short. Operatively this criterion would have an adjudicator consider whether the policy issue would be significant enough to warrant interference into the private dispute. I liken the final criterion in similarity to statutory and common law approaches found in the tort of negligence. For illustration of a significant test in legislation see section 9(1)(b) of the *Civil Liabilities Act 2003* (Qld) which is essentially the significance rule as put forward in *Drinkwater v Howarth* which itself was dervied from *Wyong Shire*

[25] Ibid 331–332.
[26] Ibid.

Council v Shirt.[27] Each of these three primary sources use the concept of significance much in the same way as I propose for the criterion of significance, namely 'is this policy issue not insignificant or fanciful enough to warrant intervention'. The final criterion then operates no more than to conclude "yes public policy has or must be invoked here". This final criterion is however necessary as policy considerations are often discussed by courts before they almost always ultimately declare they are not for the court to apply.[28] There is a rich set of psychological and philosophical works that discuss whether such non-application does or can be possible in the human mind, but here for the sake of this project I merely presume it to be the case. One can boil down significance to the actual application that the public policy invocation was actually *the* deciding factor that pushed the proceeding toward one particular outcome.

Concluding Remarks

As I mentioned at the start, the inspiration for this article was largely driven by Ross Grantham and Darryn Jensen's *The Proper Role of Policy in Private Law Adjudication*. In the concluding remarks of the *DJ Article* the authors themselves preface their conclusion with (emphasis added) 'The legitimacy of using policy considerations in the adjudication of private law disputes depends in the first instance on what *one means by the notion of policy*.'.[29] It was in "what one means by the notion of policy" that I have attempted to lay down the barest requirements an issue must possess in order to be considered an application of public policy within a private law context. I do not seek in this article to weigh in on the propriety of using public policy consideration in private law adjudication but in attempting to define and clarify the basis of when they might actually be said to have been applied. In seeking these barest of requirements, I look to give examples of the application of public policy in a private law context specifically in a way that it cannot fall under a justification that its use is of mere internal legal coherence or a methodological application of some common law.[30] While I very much agree with Ross Grantham and Darryn Jensen that *most* claimed applications of public policy are actually not

[27] *Civil Liabilities Act 2003* (Qld) s 9(1)(b); *Drinkwater v Howarth* [2006] NSWCA 222, [13]; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, per Mason J.
[28] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at [15].
[29] *GJ Article*, above n 1, 229
[30] Ibid, 219–220, 229.

truly policy applications but are really some other form of internal legal coherence reasoning; I propose that where an invocation to a public policy decision meets the three criteria motioned above one will find the use of public policy in a way that necessarily keeps them outside of arguments that the invocation is just a dressed up form of just such internal legal coherence. In order to define this proverbial cloud of public policy I have employed terms such as foreign in contrast to native, and independent in contrast to dependent. For an issue to even meet the 'public' part of public policy it must possess foreignness and independence from the native dependent disputing parties. For an issue to be readily identified as foreign then that issue must contain a foreign subject and that subject must be a matter, principle, or party on which the content of the policy can take its shape, be evaluated for application, and be applied to the local and native parties' dispute. And lastly, to warrant an after-the-fact finding that an issue of public policy did materially alter the outcome of the proceeding between the native and dependent parties the foreign subject must have a significance with enough strength to overcome or displace the legal merits of the native proceeding such to decide the outcome of the dispute by its presence or invocation. Where an issue of public policy consists of a subject matter that is foreign and independent of the parties and has sufficient significance to invite intervention in the private dispute's outcome, that is when public policy can be faithfully said to have been applied in its pure and unadulterated form within a private law context. Whether public policy in that situation or in general ought to have been applied is up for the court of appeal to decide.

A Note on the Covid-19 Conundrum (2021)

The onset of the Covid-19 pandemic has thrown further confusion and fuel onto the fire of the question of the application of public policy to private law adjudication. Private and public parties alike jumped to the switch, whether they had a *force majeure* clause or not, to suspend, cancel, or terminate agreements or impose liabilities.[31] The importance of this was that each of those terms carry very different legal liabilities to them. A suspension may or may not amount to a contractual breach or warranty.[32] A termination may come with penalties — specifically where a *force majeure* clause is lacking— for the breach of the agreement

[31] Take for instance season ticket holders to various professional sports leagues that cancelled parts or all of their 2020 and 2021 seasons. (https://www.tsn.ca/cfl-cancels-2020-season-1.1510345)
[32] *Black's Law Dictionary* (9th ed, 2009) 'suspension'.

and that termination teleologically places the parties in the position they were at the time of the breach or where they ought to be if the agreement completed or rather the breach had not occurred.[33] Distinct to the term 'termination' is the term 'cancellation' which operates differently from a termination and should not be readily used as a synonym to termination.[34] A cancellation, unlike a termination, seeks as far as possible to put the parties back into the position they were in before the agreement and considers the agreement *void ab initio*.[35] A cancellation may generate an equitable claim for restitution if one party benefits from the cancellation such that they are in a position they would not be but for the agreement that has now been voided.[36] Further, cancellation may affect hold over clauses such as non-compete, non-disclosure, or any other clause designed to survive the completion of the contract or its termination by the innocent party.[37] The cancellation of a contract is a harsh consequence as there is nothing in the contract that is permitted to persist at law except that which is inequitable to remain in the hands of one of the parties who gained it when the contract existed. While contracts can have cancellation provisions in them, the providing for extinguishment of a contract via a cancellation provision should not be taken lightly at least when compared to one under a termination provision.[38] While the distinction between cancellation and termination may seem archaic to many, and may perhaps be, the legal precedent continues and using cancellation when termination is desired can complicate contracts and the subsequent litigation upon their collapse.

I predict in the coming years that intentional as well as haphazard uses of the term "cancellation" will attempt to be reinterpreted and applied to instead mean instances of termination or suspension by the parties relying on a public policy argument from a perspective of the society at large via the pandemic virus's effects itself or the extensive and intrusive interruptions caused by purportedly lawful public health orders. The discussion on the application of public policy considerations in private law adjudication, I suspect, will rapidly expand in the year 2022 and onward.

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[33] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at [106].
[34] See for example the distinction in application between the term 'termination' and 'cancellation' as written in British Columbia's *Strata Property Act* [SBC 2008] CHAPTER 43 like s. 214 versus s. 39.
[35] *Black's Law Dictionary* (9th ed, 2009) 'cancellation'; see also *Boileau c. Lamarre*, [1953] 2 SCR 456 at page 460 where a contract was cancelled by operation of legislation voiding all obligations save only implied equitable requirements to pay for goods already sold and delivered.
[36] Ibid.
[37] *Strata Property Act* [SBC 2008] CHAPTER 43 at section 39.
[38] See for example the dissent in *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919 [76]-[81] where the dissenting justice doubt the cancelled contract might really have been an attempt to terminate but "with impunity".

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