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• *DETERRENCE NOT DAMAGES*: THE PUNITIVE RATIONALE FOR SOLICITOR-CLIENT COSTS •

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ABSTRACT

This article discusses the proper use of solicitor-client costs in Canadian law. Traditionally, such costs were used to censure misconduct in litigation, not to compensate the victor. However, recent decisions from the liability insurance context offer a growing departure from this consensus. Such decisions have used solicitor-client costs not to condemn scandalous behaviour, but to preserve an insured's award of coverage from dilution by legal fees. The recent British Columbia decision in *Tanious v. Empire Life Insurance Co*., [2017] B.C.J. No 85, 2017 BCSC 85 marks the latest expansion of this trend, awarding full indemnity costs to a disability insurance claimant despite no misconduct by the defendant insurer.

This article offers three contributions in response to *Tanious*. First, it criticizes *Tanious* itself, arguing that full indemnity was not warranted in the absence of improper conduct. Second, it offers the first published critique of the aforementioned "duty to defend" exception, finding that a liability policy lacks both any express or implied term as might justify such differential treatment. Finally, this article offers an overarching theory for solicitor-client costs in Canadian law. Amidst our default costs regime of partial compensation, I argue that solicitor-client costs are only consistently justified only when responding to procedural misconduct. In theoretical terms, such a framework would legitimize the punishment of solicitor-client costs as a response to a defendant's own misconduct. In practical terms, returning full indemnity costs to a function of a party's own behaviour would preserve consistency

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and predictability of solicitor-client costs, and their exceptional power to deter.

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INTRODUCTION

While some legal questions can appear little more than points of intellectual debate, few things impact litigants more tangibly than solicitor-client costs. Effectively the highest level of costs available, solicitor-client costs awards have been described variously as "punishment",[1] a "penalty",[2] a "chastisement", "punitive"[3] and as a "rebuke".[4] In short, their traditional use has been to discipline a party for procedural misconduct.[5] While their effect is often severe,[6] the unsuccessful litigant has only itself to blame for incurring the court's disapproval.[7]

However, recent decisions have departed from this consensus by using full indemnity to compensate a plaintiff, rather than censure a defendant. Arising out of the liability coverage context, this "duty to defend" exception has begun awarding full costs in favour of liability insureds who have successfully sued their insurer for coverage.

The recent decision in *Tanious v. Empire Life Insurance Co*.[8] saw the British Columbia Supreme Court (the "Court") extend this exception still further. *Tanious* began with one Noha Tanious's fight for disability benefits from her insurer. Ultimately successful, Ms. Tanious was then awarded her solicitor-client costs. Despite no reprehensible misconduct by the insurer, the Court justified its award on two bases. From the "duty to defend" exception it drew the "logical contractual principle"[9] that fulfilment of the intended benefit of Ms. Tanious's policy called for full indemnity.[10] Second, the Court found solicitor-client costs merited by the "unique" characteristics of disability claims themselves, pointing to such characteristics as benefits' provision of basic necessities, and the presence of representational challenges confronting such claims.

This article offers three contributions in response to *Tanious*. First, it analyses the decision itself, concluding that neither of its pillars justified a departure from our

system's default of partial costs. Second, this article considers the "duty to defend" exception, a topic of national significance to insurers across Canada. I argue that such a trend wrongly conflates an insurer's duty to pay defence costs, with an insured's separate expenses of establishing threshold coverage. Properly viewed, coverage proceedings deserve solicitor-client costs neither more nor less than claimants enforcing any other contractual right.

Finally, this paper offers an overarching framework for Canadian awards of solicitor-client costs. I advocate a strictly "punitive" rationale, intended to rebuke misconduct, not to reimburse or preserve recovery. In conceptual terms, such a punitive rationale would maintain the distinction between the procedural role of solicitor-client costs, and the underlying substantive function of damages. In practical terms, the punitive rationale would ensure consistency and predictability, avoiding any wider chilling effect which might attend a normalization of such awards. In summary, the law must reject previous decisions suggesting a compensatory role for solicitor-client awards, replacing it with a bright-line requirement that full indemnity respond only to misconduct.

BACKGROUND

1. Partial Indemnity and the Canadian Costs Regime

In Canada, the costs of litigation are initially borne by the respective parties. Following resolution, of the proceeding, costs are subject to redistribution by a court.[11] In our loser-pays regime, unsuccessful litigants pay a portion of the successful party's costs.[12] In measuring such costs, courts use one of two scales. The default in Canada is partial indemnity,[13] embodied in the "party and party" scale. Such costs offer not only a measure of compensation, but also encourage settlement, deter frivolous actions and discourage unnecessary steps.[14]

2. Solicitor-Client Costs and the "Duty to Defend" Exception

However, Canadian courts will sometimes require a losing party to indemnify all of the victor's costs. Rare and exceptional,[15] this "solicitor-client" scale of costs is an obvious departure from the norm of partial indemnity. At first glance, solicitor-client costs might seem little more than justice, as such compensation will do no more than place the successful litigant in the position they would have occupied had the wrong never occurred, or required legal redress.

However, given the expense of modern litigation and the norm of otherwise partial costs, imposing full indemnity is in seen as "punitive" in nature. Put simply, it punishes "the losing party by making that party pay a greater proportion of the winner's reasonable costs than the loser would have paid absent his reprehensible behaviour".[16] Canadian courts have generally awarded solicitor-client costs only after reprehensible, scandalous or outrageous conduct on the part of one of the parties.[17]

Despite clear guidance that solicitor-client costs are "not to be made by way of damages", or simply to render "the plaintiff intact",[18] Canadian courts have sometimes used full indemnity to compensate rather than condemn.[19] Until recently, such compensatory uses of solicitor-client costs remained rare and thus relatively harmless. In the last decade and a half, however, a "duty to defend" exception has

arisen in the liability insurance context, awarding solicitor-client costs to insureds who have enforced coverage,[20] regardless of whether the defendant insurer was guilty of sanctionable behaviour.

This exception began modestly enough in *Godonoaga (Litigation Guardian of) v. Khatambakhsh (Guardian of)*,[21] where the insurer had denied coverage to certain defendants. After finding the insureds entitled to a defence, the Ontario Court of Appeal awarded solicitor-client costs for the insureds' costs of enforcing coverage:

> 4 The Appellants were entitled to a defence by their insurer without expense to them. Accordingly, that matter having been determined in their favour, they should have their costs on a solicitor and his own client scale for the defence of the main action [and including] the conduct of the third party proceedings and the motion before Pitt J. and this appeal.

Such brief reasons might have gone no further were it not for a decision of the same court some three years later. In *M.(E.) v. Reed*,[22] the insureds had successfully enforced a defence from their insurer. Despite a lack of defendant misconduct, the Ontario Court of Appeal again granted the insured's request for solicitor-client costs. Even though the liability policy was silent on such expenses, the Court pointed to the "unique nature" of liability insurance claims:

> 22 Entitlement to solicitor-and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract which entails a duty to defend at no expense to the insured. The obligation to save harmless the insured from the costs of defending the action is sufficiently broad to encompass the third party proceedings. It is the contractual basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in usual circumstances.[23]

Thus was born the "duty to defend" exception. Despite its slender reasons, *Reed's* conclusion quickly found favour in other provinces, spreading to New Brunswick,[24] Newfoundland and Labrador,[25] Manitoba[26] and British Columbia.[27] In its theoretical justification, *Reed* offered a rationale based in contract, looking to the duty of liability insurers to indemnify all defence costs in the main action. Seizing on this pre-existing obligation of the insurer, the court expanded it to also encompass the separate costs of enforcing coverage.[28]

Cases following *Reed* have glossed over the silence of a liability policy as regards the costs of enforcing coverage. Instead, they have pointed instead to the "unique nature" of a liability policy. The following comments in *Ultramar Ltd. v. Rancur Petroleum Services Ltd*. are illustrative:

> 74 … The insurer's obligation with respect to costs in this context is broadly stated in the *M.(E.) v. Reed* decision (paragraphs 22 to 24 quoted above). A review of the insurance contract in that case … reveals no provision in the contract that directly relates, or could be construed as indirectly relating, to costs incurred by the insured enforcing the duty to defend. In other words, the court's imposition of the requirement to pay solicitor and client costs for the third party proceedings does not arise from a specific provision in the insurance contract. Rather, it arises from the unique nature of that contract. As stated by the Ontario Court of Appeal in *Reed*, an order for solicitor and client costs in this context "constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances" [citations omitted].[29]

Perhaps because of its vague reasoning, this "duty to defend" exception has not remained confined to its original context. In the recent decision in *Hoang (Litigation guardian of) v. The Personal Insurance Co*.,[30] the court cast its ambit wide enough as to justify full indemnity for any insured. Declaring simply that insureds stood "in a different light than other litigants"[31] in matters of costs, *Hoang* reasoned that it would be unfair for insureds to pay legal fees to enforce coverage in addition to previous premiums for said indemnity:

> 6 … One purchases an insurance policy for coverage in the event of liability, and it is the premium payable under the policy that is the cost

> of that coverage. Insurance companies are by their nature constantly involved in litigation, and it would be unfair and burdensome to make their customers pay a premium plus legal fees in order to obtain the coverage they bought. The premium is presumed to reflect the insurance company's risk. If it chooses to attempt to reduce that risk by engaging in litigation over its obligation to provide coverage it should be made to fully compensate the successful party if it loses.[32]

Whether this sweeping conclusion can be reconciled with *Reed's* narrow rationale is doubtful. What is clear, is that *Reed* has introduced a new freestanding basis for solicitor-client costs, focused on the underlying rights of a plaintiff, instead of any litigation misconduct of a defendant.

3. *Tanious v. Empire Life Insurance Co.*

It is against this changing landscape in the law of solicitor-client costs that we come to the recent award in *Tanious*.[33] Faced with a devastating diagnosis of multiple sclerosis, Noha Tanious found herself unable to work, wash her own clothes, or provide even basic personal care.[34] Out of desperation, she began to self-mediate by using crystal methamphetamines to cope with her disease.[35]

Her insurer, the Empire Life Insurance Company, ultimately refused to pay her long-term disability benefits. Although Ms. Tanious had been medically declared unfit to work, Empire Life concluded that her disability arose from an addiction to crystal meth, and not multiple sclerosis. As such, Empire Life invoked the policy's coverage exclusion for any disability caused by a "substance use disorder".[36]

In desperate need of benefits, Ms. Tanious had no choice but to commence coverage proceedings. Lacking funds, she managed to retain counsel on a contingency basis.[37] Following an eight-day trial, the Court ordered Empire Life to pay the benefits, finding multiple sclerosis to have been the cause of Ms. Tanious's disability.[38]

However, Ms. Tanious pressed further for complete recovery of her legal costs. Known as special costs in British Columbia, these full indemnity awards involve the same criteria as govern solicitor-client costs in the rest of Canada. While special costs are traditionally reserved for reprehensible conduct,[39] Ms. Tanious did not allege any improper litigation behaviour by her insurer.[40] Rather, she freely sought solicitor-client costs for the purpose of compensation. Nothing short of full indemnity, she said, would fulfil the "unique nature and fundamental purpose" of her disability insurance.[41]

In a costs judgment running some 156 paragraphs in length, Mr. Justice Brown of the British Columbia Supreme Court agreed. At its essence, his decision rested on two bases. First, the Court found Ms. Tanious's coverage issue similar to that in *Reed* and other instances

> 146 … in which the courts ordered full indemnity in insurance contract claims; the rationale for those costs awards was to provide compensation for legal fees to the successful plaintiff, thereby ensuring they would recover the full benefit of their insurance contract where this was in the interests of justice.

Similar to previous decisions from the liability policy context, the Court found that Ms. Tanious's facts therefore invoked the same basic "contractual principle" of fulfilling a policy's objective. To realize that objective,

> 123 … the insured had to incur legal costs. The courts [in *Reed* and successive decisions] ordered full indemnity costs because they recognized that unless the legal costs incurred by the insured in proceedings against their own insurer to obtain coverage were not [*sic*] fully indemnified, the insured would not receive the full benefits of the policy to which they were entitled.

Without full indemnity for the expenses of obtaining judgment, Ms. Tanious would lose "the full benefit of the contract, leaving her with less than the necessary amount of income by which to obtain the basic necessities of food, clothing, and shelter".[42]

Tanious's second pillar centred around the "unique" characteristics of disability claims. Such singular traits included the fact that:

i. Disability claims possessed a fundamental purpose of providing an insured with enough income to supply shelter, food, and clothing:[43]

> For one like Ms. Tanious, such intention could only be fulfilled if a court preserved such benefits from legal fees;[44]

ii. Disability claims often had no alternative but to incur the expense of trial:

> To settle such claims for less than their full value would leave many of claimants "with insufficient income to meet basic living expenses".[45] This gave them no choice but to press on to trial.

iii. Finally, disability claims faced representational challenges:

> Many claimants could not represent themselves due to their impairments. Ms. Tanious's own "physical and cognitive limitations" closed the courtroom door to her without counsel.[46] Moreover, disabled parties could rarely afford the hourly rate of counsel, and yet were often barred from contingency arrangements due to the periodic nature of their benefits.[47]

I. CRITICISM OF *TANIOUS*

The first part of this article offers a criticism of *Tanious* itself, arguing that its order for full indemnity was not warranted in the absence of improper conduct.

Of *Tanious's* two pillars, let us begin with the supposedly "unique" nature of disability claims. Whether in providing income, shelter, food and clothing to one unable to work, Ms. Tanious persuaded the Court that her claim required full indemnity to ensure the policy's fundamental purpose was fulfilled.[48]

Closely examined, however, none of the above criteria are unique to disability claimants. Other plaintiffs — such as wrongfully dismissed employees — can equally require all of their damages to obtain life's necessities. Or, perhaps picture an elderly and impoverished pensioner who had saved a modest amount for her remaining years, only to find it wiped out by a fraudulent investment advisor. Or, what of the personal injury claimant whose daily medical costs ultimately require every cent (if not more) of a future care costs award made years earlier. Just like Ms. Tanious, these and other plaintiffs may too require all of their damages, be unable to settle, and have little choice but to use some of the damages to pay their counsel.

The next "unique" aspect of disability insureds lay in their vulnerability to representational challenges. Not only did disability insureds face a loss of regular income with which to hire lawyers,[49] but they find that the option of self-representation is often unavailable.

Again, however, such hurdles are not peculiar to any one category of litigants. The hourly rates of professional counsel place them beyond the reach of many ordinary claimants, many of whom are also unable to litigate in-person. One can readily imagine a plaintiff who is grievously injured, and whose health prevents them from performing the steps of litigation.

Given this, we arrive at the final "unique" aspect of disability insureds. Such lay in the structural impediments preventing disability insureds from securing counsel through a contingency arrangement. True, disability claimants are here unique in some ways when compared to other civil plaintiffs.[50] Unlike tort claimants who can sue for the true size of their loss, disability insureds receive only the stipulated damages fixed by their policy.[51] As well, future benefits are paid in periodic monthly payments, instead of a lump sum. The Court found that both features made the "option of a contingency fee, so common in personal injury cases" an impractical option "in most disability insurance cases".[52]

Yet this final characteristic is answered as well. First, we recall Ms. Tanious herself retained counsel on a contingency basis, showing such retainers to be possible.[53] More importantly, contingency barriers are not singular to disability insureds. As counsel for Empire Life observed, there are other types of claimants who receive benefits periodically,

including social assistance claims, Canada Pension Plan disability claims, and dismissed unionized employees.[54] Indeed, still other claims are ill-suited to such contingency retainers for other reasons, as with actions involving modest damages, or non-monetary proceedings, such as claims for injunctive relief, etc.

Properly viewed, the "unique" considerations in *Tanious* are really faced by many other plaintiffs who have also:

i. Received damages intended to functionally place them in the position as if no wrong had occurred;[55]
ii. Faced a choice between litigation and forfeiting their needed damages;[56]
iii. Faced representational challenges;[57] and
iv. Incurred legal costs diluting the full personal benefit of their damages.[58]

Are we simply to grant solicitor-client costs to all civil plaintiffs who share these traits? To do so would effect a costs revolution through judicial law-making, swelling the availability of full indemnity beyond recognition.

II. THE "DUTY TO DEFEND" EXCEPTION ITSELF IS WRONGLY DECIDED

Turning now to criticize *Tanious's* second pillar, we arrive also at this article's second contribution. In criticizing *Tanious's* reliance on the "duty to defend" exception, I argue also that *Reed* itself was wrongly decided. Given a lack of express or implied wording in a liability policy, *Reed* fails as a matter of contractual interpretation, leaving liability insureds no more deserving of full indemnity than any other contractual claimant.

I. Insurance Policies Contain No Express Duty to Pay Solicitor-Client Costs

Let us recall *Reed's* original contractual rationale. The court there focused on the pre-existing duty of a liability insurer to reimburse for all fees incurred in the main action. It was this obligation that the court found

> 22 … sufficiently broad to encompass the third party proceedings. It is the contractual basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances.

Admittedly, if a policy explicitly required full indemnity from an insurer, solicitor-client costs could be appropriately awarded as expectation damages.[59] The problem is that a liability policy contains no such wording, but requires simply that an insurer defend only those claims which fall within coverage.[60]

A representative example of a liability policy's language comes from *Ultramar Ltd. v. Rancur Petroleum Services Ltd.*,[61] a decision adopting *Reed's* reasoning. In *Ultramar*, the liability policy said that the insurer would defend any action which sought damages for "bodily injury" or "property damage":

> 1. Insuring Agreement
>
> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. ... This insurance applies only to 'bodily injury' and 'property damage' which occurs during the policy period. The 'bodily injury' or 'property damage' must be caused by an 'occurrence'. The 'occurrence' must take place in the 'coverage territory'. We will have the right and duty to defend an 'action' seeking those damages.[62]

The insurer also agreed to pay all the defence costs in the main action:

> **Supplementary Payments — Coverages A, B and D**
>
> We will pay, with respect to any claim or "action" we defend:
>
> 1) All expenses we incur.
>
> 2) The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
>
> 3) All reasonable expenses incurred by the Insured at our request to assist us in the

> investigation or defence of the claim or "action", including actual loss of earnings up to $250 a day because of time off from work.
>
> 4) All costs taxed against the Insured in the "action" and any interest accruing after entry of judgment upon that part of the judgment which is within the application limit of insurance.
>
> These payments will not reduce the limits of insurance.[63]

Such wording places a liability insurer under a legal duty to defend an insured against covered claims. If an insurer fails to do so, the law will hold it liable to reimburse all reasonable costs sustained by the insured itself in so defending.[64]

On the separate legal costs of enforcing said coverage in a court of law, however, a liability policy is deafeningly silent. This was acknowledged in *Ultramar* when the court noted that the policy made "no mention of costs where the duty to defend is disputed by the insurer".[65] In awarding solicitor-client costs nevertheless, *Ultramar* concluded:

> 74 The insurer's obligation with respect to costs in this context is broadly stated in the *M.(E.) v. Reed* decision … A review of the insurance contract in [*Reed*] … reveals no provision in the contract that directly relates, or could be construed as indirectly relating, to costs incurred by the insured enforcing the duty to defend. In other words, the court's imposition of the requirement to pay solicitor and client costs for the third party proceedings does not arise from a specific provision in the insurance contract. Rather, it arises from the unique nature of that contract.[66]

The legal effect of a liability policy is governed by ordinary principles of contractual construction[67] as applied to the words used by the parties. Vague notions of a "unique" or "special"[68] nature should not supplant the actual words used to articulate the parties' bargain.

Examining such terms permits the scope of coverage to become clear. While the defence costs in the main action are covered, any expenses of *enforcing* coverage are not covered. The legal expense of such a claim instead constitute expenses incurred in separate legal proceedings, and not in the main action.

Such costs will therefore lie on the shoulders of any insured who chooses to enter our self-financed litigation system. With no express wording in their policy, there is no reason to privilege liability insurance contracts over other classes of contracts, especially when "no other contractual breach, including other insurance policy breaches"[69] attract such costs.

II. Insurance Policies Contain No Implied Duty to Pay Solicitor-Client Costs

Having found no explicit contractual wording, is there another basis for the same result? Could a duty to pay solicitor-client costs be "implied" into a liability policy, or indeed perhaps all insurance policies? In answering no, we must turn to the legal principles governing the implication of terms.

The law has long recognized that a contract is not always confined to the terms expressly stipulated between the parties.[70] While interpretation gives legal effect to the words used, implication fills gaps in those words.[71] To imply a term, however, one of three distinct categories must apply.

As I now explain, the medium of implied terms is inappropriate for imposing full indemnity on an insurer.

(a) Implied Terms Based on Custom or Usage

The first category are terms implied as a matter of custom or usage. Where parties deal in a particular market, a well-known custom of that industry may be incorporated into their contract.[72]

However, this first category fails in our context. There is no custom in the insurance industry by which insurers are expected to pay the full indemnity costs of a claimant enforcing coverage.

(b) Terms Implied to Give Business Efficacy to a Contract

The second category are those terms implied to give business efficacy to a contract.[73] Two traditional tests exist in Canadian law.

i. The "officious bystander" test, whereby the parties, if questioned, would have said that they obviously assumed a certain term to have been intended;
ii. The business efficacy test, whereby a term is necessary to make the contract effective.[74]

Described as "essentially synonymous", these are overlapping tests for determining the presumed intentions of the parties.[75]

However, this second category also fails in our context. In terms of what the parties intended, insurance contracts are meticulously drafted. If a duty to pay full indemnity for all litigation costs had been intended, it would certainly have been inserted. Moreover, nearly all insurance contracts possess an entire agreement clause, providing yet another sign that no implied term was intended.

As for whether the plain text of our proposed term would give business efficacy to an insurance contract, the answer is no. An insurer's duty to indemnify is satisfied as soon as defence costs are paid in the main action.[76] As soon as the insurer has conveyed this sum, the contract is given effect to, with no need for further terms respecting separate litigation costs.

(c) Terms Implied at Law

The third category are those terms implied at law. Unlike the first two categories which depend on presumed intention, courts may imply a term "as a matter of policy … even where it is clear the parties did not intend it".[77] Such category invokes "a purely legal inquiry which tends to be driven by policy questions".[78]

The test for such implication is "necessity".[79] A broad notion of such a concept might offer some grounds favouring our proposed term. For instance, one might conceive of an insurance contract as more than a stipulated sum of money, but as providing of "peace of mind".[80] Moreover, an policy's indemnity is carefully measured, and every penny is often needed to fulfil its benefit. If so, surely these are policy reasons to view solicitor-client costs as necessary to realize these benefits. Moreover, full indemnity might be a useful mechanism to redress the power imbalance between the parties. Without "implication", a single insured would never possess the leverage to convince an insurer to agree to a duty to pay solicitor-client costs. Indeed, it is arguable that some insureds require the promise of full indemnity in order to realistically litigate against powerful insurers in the first place. As a practical matter, insurance companies would also seem well placed to absorb any duty of full indemnity, as they could spread such cost across their pool of insureds.

Even accepting that all of the above fall within a generous conception of "necessity", I suggest however that they are ultimately outweighed by other considerations of policy.

The first argument against implication is the far-reaching consequences it might unleash. If we find "necessity" in the case of an insured, why should other claimants not demand solicitor-client costs as well? The consistency of the law would suffer were insurance policies to become an island of elevated costs in a sea of partial indemnity, for one can surely envisage non-insurance claimants who share similar features: contracting for peace of mind; facing a shortfall in functional recovery should they not receive solicitor-client costs; facing a powerful corporate defendant who is both better financed, and also able to absorb the burden of full indemnification. As such, insurance policies do not automatically deserve an elevated scale of costs, when other classes of contracts do not.

The second argument against implication is the degree of judicial law-making it would involve. While the courts certainly have a role in implying "necessary" terms, to impose our proposed term would effect a major re-allocation of the burdens of civil litigation. Whereas previously implied duties have been justified as a "modest, incremental step"[81] or an outgrowth of already recognized obligations in other areas of the law,[82] there is no precedent for marking out insurers for the burdens of full indemnity costs. As our Supreme Court has previously said, "major revisions of the law are best left to the legislature".[83]

The third argument against implication is its ineffectiveness against the underlying problem. To merely re-allocate burdensome legal costs leaves intact the root problem of access to justice. Awards of solicitor-client costs only help those fortunate enough to secure judgement, but does nothing for the many others who find our system so expensive that they cannot reach that point. This might be from a lack of funds to initiate a claim to begin with, or, in the fear that if they did proceed, the possibility of defeat brings with it liability for further high costs. We should focus on structural reforms in favour of *all* litigants, not erecting exceptions which will leave the majority of civil litigants still facing costs disproportionate to the amounts in dispute.

The final argument against implication lies in the simple notion that a duty to indemnify is not in fact "necessary". for all insurance contracts. First, an implied duty to pay solicitor-client is not "necessary" for all insureds. Are we really to stand the billion-dollar corporate insured — with its litigation budget and massive resources — alongside the impoverished disability claimant? And yet, to selectively imply the duty is also impossible. The law declares that terms are not to be applied only to certain types of a contract. To differentiate amongst contracts on the basis of a party's personal qualities would, "even if it were sound legally … lead to great uncertainty".[84] Indeed, such a test might reduce to the taste of each passing judge, deciding in their own mind whether any given insured was "needy" enough.

Our proposed term is also unnecessary in another sense. Previous terms implied by law have revolved around actions intrinsically "necessary" to a party's own performance of the contract. Examples include a duty of good faith respecting matters "directly linked to the performance of the contract",[85] or, a duty to give reasonable notice of termination in an employment contract.[86] In contrast, I suggest that any obligation on an insurer to pay an insured's legal fees arises out of the cost of litigating in our society, a burden which both parties knew of when they signed the policy. It is not an obligation "necessary" for the insurer to itself perform the underlying duties of the policy itself.

III. Conclusion on the "Duty to Defend" Exception

Insurance policies are made in the context of our system of self-financed litigation and partial indemnity. To overcome this default norm of self-financed litigation, express contractual allocation should be required. A standard commercial general liability policy offers neither express allocation,[87] nor implied terms, as would exempt liability insureds from the above reality. As such, the "duty to defend" exception must be abandoned. Absent some stain on an insurer's litigation conduct, insureds must return to the world of partial indemnity.

III. CANADIAN LAW MUST ADOPT A PUNITIVE RATIONALE FOR SOLICITOR-CLIENT COSTS

The third contribution of this article is in offering an overarching framework for the Canadian law of solicitor-client costs.

Tanious and its forebears raise the fundamental question of whether a compensatory use of solicitor-client costs can ever be justified? Compensatory uses of solicitor-client costs come in different forms. A court might be driven by a desire to preserve the specific and intended purpose of a plaintiff's underlying damages.[88] *Tanious* used solicitor-client costs to ensure that Ms. Tanious's award provided her with the income necessary to obtain basic necessities.[89] Alternatively, another court might simply find it unjust that a plaintiff will lose a single penny for establishing rights which were theirs all along. Such recourse to solicitor-client costs might care little as to just what exactly was the intended purpose of the damages.[90]

In any event, the common thread in any "compensatory" use of solicitor-client costs will be a desire to reimburse the plaintiff, rather than rebuke the defendant. Such uses of full indemnity have always appeared from time to time throughout Canadian jurisprudence, as disclosed by such comments as:

i. "justice can only be done by a complete indemnification";[91]

ii. full indemnity is appropriately awarded to avoid a "pyrrhic victory";[92]
iii. solicitor-client costs are warranted where "principles of equity cry for some sort of relief";[93]
iv. full indemnification can be justified "even though there is no misconduct exhibited".[94]

Following the rise of *Reed*, the importance of determining the soundness of these comments is greater now than ever.

I. Theoretical Defects of the Compensatory Rationale

(a) The Compensatory Rationale Wrongly Intrudes into the Province of Damages

Let us begin with the theoretical flaws of the compensatory rationale.

The first defect is the confusion created as to the separate roles of costs versus damages. Costs are "appropriately characterized as procedural", being incidental to the determination of parties' rights, and "not part of the *lis* between litigants".[95] Previous courts have explained that full indemnity awards are "not to be used as a means of shoring up a damages award, nor as a means to ensure that a plaintiff is not put to any expense".[96] Whereas damages deal "with the conduct of the parties giving rise to the cause of action",[97] solicitor-client costs address behaviour in the litigation itself.

The compensatory approach risks blurring these distinct roles. It would refashion costs from a tool of "incidental" discipline into a "substantive" remedy for the underlying merits. *Tanious* provides an illustration. There, the Court made its normal award of contractual damages following trial,[98] intended simply to reflect the "substantive" amounts owed under the contract. However, the Court then duplicated this same inquiry when making its subsequent award of solicitor-client costs. The Court used costs to place Ms. Tanious in the same financial position she "would have been in had the insurer fulfilled its obligations initially",[99] thereby effectively replicating the same *substantive* focus which had driven its earlier award of damages.

Using costs to act as damages goes far beyond the "incidental" role of costs. It ignores too that costs are a poor substitute for damages. Whereas damages can be tailored to the loss at hand, the size of a solicitor-client order is fixed by a plaintiff's legal bill, not the purpose of the underlying compensation. Illustrating again with *Tanious*, we recall that its use of costs professed the aim of restoring to the insured the necessary amount of income for basic necessities of food, clothing, and shelter,[100] but presumably no more. If so, should not the Court have tailored any award of costs to the exact shortfall preventing Ms. Tanious, in *her* personal circumstances, from obtaining those necessities?

The fixed quantum of solicitor-client costs means that they are a blunt tool of "compensation", giving a claimant their entire solicitor-client costs even if they subjectively required indemnity of only a fraction of their legal fees to still receive the benefit of the policy.[101]

(b) The Compensatory Rationale Operates on Considerations Outside the Unsuccessful Party's Control

The second conceptual flaw lies in the punishment it inflicts on defendants for factors outside their control.

That solicitor-client costs are "punitive" is clear. While all costs penalize to a degree, full indemnity awards go "beyond mere indemnity" and enter "the realm of punishment".[102] For each dollar awarded in favour of a plaintiff, that is one dollar confiscated from a defendant. Because of this burden, courts have characterized solicitor-client costs as providing a tool of discipline, not to be awarded

> … unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.[103]

A "punitive" rationale for solicitor-client costs properly recognises that such penalizing costs are only legitimately imposed as a response to a party's

own conduct. In contrast, the "compensatory" rationale wrongly treats full indemnity costs as some sort of judicial tool of benevolence, available to make a deserving plaintiff whole regardless of a defendant's potentially faultless behaviour.

Such can produce startling results. We illustrate by reference to *Tanious*, where the defendant found itself saddled with punitive costs despite no misconduct.[104] This outcome received little attention from a Court preoccupied with the plaintiff's penury,[105] need for total recovery,[106] inability to self-represent[107] and difficulties in retaining professional counsel.[108]

By focusing on the personal circumstances of the plaintiff, the compensatory rationale can expose even the most virtuous of parties to costs burdens which bear no relationship to their conduct.

(c) The Compensatory Rationale Transcends the Proper Limits of Judicial Law-Making

The final theoretical shortcoming of the compensatory rationale is in the degree of judicial law-making it entails, doing by judicial fiat what instead lies best in the power of our elected representatives.

Our modern system of litigation caused of Ms. Tanious's shortfall in compensation. It is our system which requires a plaintiff to navigate a complex regime, in which the only trained practitioners command high market rates. By then offering only partial costs awards, our system will always deny claimants a portion of the compensation awarded them. However, by altering this reality through judicial decree, the "compensatory" rationale treads on ground properly left to our democratic lawmakers.

This is not to say that courts lack the raw power to change the partial nature of our default costs regime. Just as the courts helped establish our partial indemnity norm, they could presumably abandon it. However, I do say that courts should choose not to exercise the power. Complex reliance interests have now arisen, with expectations of a costs exposure limited by the partial quantum of costs tariffs. Such structural change deserves the considered process and democratic legitimacy of legislation.

Our Supreme Court has previously declared, "it is the legislature and not the courts which have the major responsibility for law reform",[109] while noting elsewhere that judicial costs awards should not be used to "bring an alternative and extensive legal aid system into being"[110] lest courts enact an "imprudent and inappropriate judicial overreach".[111] However, by urging judicial restraint, I do not myself minimize the inequities of modern Canadian litigation. No thinking person can deny that the expense of litigation impedes ordinary plaintiffs from obtaining effective justice. Time, space and resources force this article to leave unanswered the underlying question of the ideal funding and costs system.

However, I do suggest that issues are not amenable to one-off judicial "innovations". The answer to such questions lie instead in comprehensive reform, combining the consistent development of the law with consultation amongst those affected. Until such change arrives, courts should respect our cost system's partial nature, and its compromise between the "burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser".[112]

II. Practical Defects of the Compensatory Rationale

A compensatory rationale is unworkable not only in theory, but in practice.

The first practical failing stems from a "normalization" of solicitor-client costs. We have seen earlier that countless plaintiffs fall within *Tanious's* basic compensatory reasoning, and its basic logic that solicitor-client costs are appropriate where a plaintiff will otherwise lose the "full benefit" of the damages awarded.[113] However, what is to stop this basic reasoning from applying to countless other claimants whose intended damages would also be eroded without full indemnity?

Were solicitor-client costs to become more routine, a number of consequences could ensue. First, the traditional deterrent potency of such costs would be at risk. The power of solicitor-client costs to is a zero-sum exercise. To truly discourage,

the maximum level of full indemnity must be reserved for reprehensible behaviour. Situations involving no misconduct must naturally receive something less. Commentators have recognized as much, explaining that

> … if full indemnification were to be awarded in every case, then there would be no way of punishing those unsuccessful parties who subject the successful party to an abusive proceeding. Once courts settled on the two principles that costs should be limited to indemnification against actual outlay and that, in deciding the extent of costs to award, the courts may properly take into account the goal of punishing abusive or wasteful conduct, it was inevitable that they would adopt the approach the awarding only partial indemnity costs where there was no evidence of abuse or waste.[114]

Where losing parties to face full indemnity costs irrespective of their litigation conduct, the incentive to good conduct would correspondingly diminish.

The second practical flaw of the compensatory rationale is its chilling effect on blameless defendants. Courts have previously recognized the *in terrorem* nature of full indemnity costs.[115] Were such awards to fall indiscriminately even on well-behaved defendants, it would not be difficult to "visualize the indirect harm that could well be done by inhibiting prospective litigants from bringing to the attention of the Courts matters which they have every right to have put into litigation".[116] Indeed, in *Evaskow v. Internal Brotherhood of Boilermakers, etc.*,[117] the Manitoba Court of Appeal explained the intolerable burden which would fall on defendants were solicitor-client costs to become routine:

> 25 … No doubt every plaintiff would like to receive his damages intact, without at all assuming any portion of the costs of the litigation which he instituted. Perhaps in an ideal system (for plaintiffs), such a hope might be realized. But in the process it would result in the imposition of intolerable burdens upon defendants. Our system accordingly seeks for a just compromise or balance by requiring, or at least expecting, that the costs of litigation will be shared or distributed between the parties.[118]

Against this backdrop, we see why party and party costs are partial by design. While offering some compensation to the successful party, they avoid unduly discouraging legitimate proceedings.

The spectre of a chilling effect was brought to the Court's attention in *Tanious*. The Court responded by noting that insurers in light of *Reed* had still continued to dispute coverage, even while "knowing that they may be liable for full indemnification".[119] However, the bare fact that some insurers have persisted in resisting coverage does not prove how many others were not in fact deterred. Absent statistical figures suggesting otherwise, we are left with the compelling logic that a litigant faced with solicitor-client costs will hesitate before raising a reasonable claim or defence. Even if their position appears valid at the outset, few claims are guaranteed, and the downside risk would simply act to discourage much litigation.

The third practical defect of the compensatory rationale is its subjective nature. As illustrated in *Tanious*, the compensatory rationale injects a subjective focus on the personal circumstances of any given plaintiff. For instance, *Tanious* emphasized Ms. Tanious's particularly impoverished state, noting that she had been reduced to living on "CPP benefits and some financial support from her parents",[120] with an income depressed "below the amount required to meet her basic necessities".[121] The Court was persuaded by the fact that Ms. Tanious's *own* legal expenses would leave *her* finances with insufficient income for *her* necessities.[122]

Such a subjective element brings discrepancy and unpredictability, however. Let us illustrate with two hypothetical insureds. Imagine that both have just lost in disability coverage proceedings, and behaved with equal propriety in the litigation. Rather, the only point of differentiation is in a factor beyond their control, being the financial condition of the plaintiffs they faced:

i. The first disability claimant was already independently wealthy. Under a subjective needs-based test (such as in *Tanious*) the purpose of his disability policy will be fulfilled in any event,

regardless of the amount of costs he receives. Even after payment of his legal fees, this insured will still possess "the necessary amount" of income for basic necessities.

The result is that this first insurer need not pay solicitor-client costs, under a compensatory rationale.

ii. The second hypothetical insurer faces an impoverished disability claimant. Under a subjective needs-based test, the purpose of this insured's disability policy will go unfulfilled without solicitor-client costs. Namely, if forced to pay all of his legal fees out of his award, he will not have "the necessary amount" of income for basic necessities.

The result is that this second insurer *does* need to pay solicitor-client costs.

So viewed, the compensatory rationale risks drastically different outcomes for similar defendants, ignoring the admonition of previous courts that "it would be a sorry result if like cases were not decided in like ways with respect to costs".[123]

Finally, predictability is lost under the compensatory rationale. Previous courts have declared that all litigants should be able to "forecast with some degree of precision what penalty they face should they be unsuccessful".[124] If costs can be predicted, each side can better calculate the risks of whether to proceed or settle instead. The compensatory approach however risks awarding costs as a result of a plaintiff's financial condition, being a factor beyond a defendant's control, In doing so, it deprives the latter of the ability to predict their exposure to costs. Indeed, even if a defendant could learn the financial condition of the plaintiff, such knowledge is a moving target. Much can change between a writ and the close of proceedings.

III. The Punitive Rationale — Its Theoretical and Practical Benefits

Given the foregoing defects, I suggest that the law must adopt an exclusively punitive rationale for solicitor-client costs.

In an imperfect system, the punitive framework comes closest to an ideal use of full indemnity. First, in conceptual terms, this punitive rationale would restore "costs" as a product of litigation's surface rather than its underlying merits, while also legitimizing the "punishment"[125] of solicitor-client costs, as being in response to the offender's misconduct. In practical terms, the punitive rationale would restore the rare and exceptional nature of such costs, renewing their power to deter. It would also ensure that defendants could predict their own exposure to any full indemnity award, while also avoiding a wider chilling effect which might otherwise deter good faith litigants.

Canadian law has never yet made an absolutist embrace of the punitive framework, but instead has too often tolerated suggestions that justice may be done only "by a complete indemnification for costs",[126] or that full indemnity was permissibly awarded to ensure that a winner was put no "expense for costs in the circumstances".[127] I argue that these deviations must end. While perhaps harmless in isolation, *Reed* illustrates how modest anomalies may grow far beyond their original ambit. The law must instead adopt a disciplinary use of solicitor-client costs.

If we are to make "punishment" the operative rationale for such awards, what specific behaviour would trigger recourse to full indemnity? No list can be exhaustive, as any court must analyse the individual facts before it. However, existing case law offers many examples, revolving around acts delaying or confusing the litigation, harassing the opposite party, or deceiving the court.[128] In short, the common thread of conscious misconduct will always be present.

Even the punitive rationale is not without occasionally ungainly results, however. With no real tailoring to the circumstances of individual defendants' misconduct, some awards might seem unduly severe on occasion. However, such occasional harshness is justifiable for two reasons. First, it is inevitable, as it would be difficult to apply a monetary "discount" against full indemnity awards, reflecting different gradations of misconduct. Second, however,

even a particularly harsh award will be justified by its ultimate origins in the defendant's own conscious wrongdoing. Even such severe awards will serve the deterrent purpose of solicitor-client costs, discouraging future litigants by the punishment of their forebears.

IV. Future Issues for the Law of Solicitor-Client Costs

Fertile ground still remains for future debate, not only for solicitor-client costs, but for our costs regime as a whole.

(a) Can Pre-Litigation Misconduct Justify Solicitor-Client Costs?

One future issue for solicitor-client costs revolves around whether pre-litigation conduct can form the basis for full-indemnity awards.[129]

With no direct analysis from the Supreme Court,[130] one line of Canadian authority has held that a court may properly consider conduct both preceding and during the litigation,[131] a view shared by some other Commonwealth courts.[132] However, a second line of decisions declares that antecedent conduct "cannot be the basis for an award of solicitor-client costs".[133]

This author favours the latter view. In practical terms, it is unnecessary to use solicitor-client costs to punish pre-litigation misconduct when punitive damages are already designed to serve such a purpose. Indeed, this temporal distinction is one of the things which separates punitive damages from solicitor-client costs. Otherwise, as courts have explained, both share a similar disciplinary function, bearing

> … no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant.[134]

Both are "meant to punish a losing party for reprehensible conduct".[135] If the law were to impose costs for behaviour already "compensable in damages", it would risk compensating a party "twice for the same wrongdoing".[136]

Further, a conceptual symmetry exists when litigation costs of litigation are used to discipline litigation conduct. In such case, "costs" are used to punish the very procedure, tactics, and expenses from which such costs arose. Such symmetry is lost, however, when costs of litigation are used to punish acts far removed in time and relevance form the litigation.

To avoid stretching costs beyond their conceptual breaking point, damages should remain the sole means of denouncing conduct preceding a writ.

(b) Why Not Award Full Indemnity to all Successful Litigants?

A still wider issue underlying this entire article is a simple yet profound question: why not make full recovery the norm, not the exception?

There is a certain justice in mandating solicitor-client costs for all successful claimants. After all, why should an unsuccessful party have to suffer a penny for establishing rights which were theirs all along. To not require full indemnity concedes to the loser the power to diminish the value of a victor's rights by wrongly resisting a just claim.

However, this beguiling notion bows to two competing considerations, touched upon earlier in the context of implied terms. First, what would be the effect of such a rule on ordinary litigants? The notion of solicitor-client costs is satisfying when ordered against a faceless and well-heeled corporation, in favour of the ordinary citizen who has won justice. However, a blanket rule would cut both ways. Given that the modern expense of ordinary litigation is already unbearable under current costs regime, countless individuals of limited means would find it impossible to pursue their own modest claims. In an era when few can afford to pay even their own lawyer's monthly billings, to impose liability for double costs would cause many persons to hesitate or abandon their rights.

This brings us to the second argument against a full cost recovery system. Namely, it obscures the true issue facing the Canadian system of civil justice, being the disproportionate expense of litigation costs. Until this structural burden is lessened, the basic hurdles to accessing justice will remain, irrespective of costs allocation.

High hourly rates and institutional inefficiencies mean that costs often rival the amounts in issue, preventing ordinary individuals from advancing a valid claim. Rather than simply shifting this burden onto the loser, the answer is to comprehensively reform the structural excesses of costs. As one academic has written:

> … the most important task in improving access to justice is to bring expenses down. If we want to improve the system, the most important thing we can do even before changing allocation rules is to keep attorneys' fees proportionate to the amount in dispute. Whether the rule is loser-pays or the practice is no indemnity, the issue of allocation is of far less consequence if the magnitude of total expenses for all parties is a modest fraction — say ten percent — of the amount in controversy.[137]

Similarly, the English Lord Justice of Appeal Sir Rupert Jackson wrote the following in his *Review of Civil Litigation Costs: Final Report*:

> Access to justice is only practicable if the costs of litigation are proportionate. If costs are disproportionate, then even a well-resourced party may hesitate before pursuing a valid claim or maintaining a valid defence. That party may simply drop a good claim or capitulate to a weak claim, as the case may be.[138]

As such, simply re-allocating oppressive costs for those fortunate enough to secure judgment, does nothing for the many others who lack the funds to even get that far.[139] So long as legal expenses intrinsically onerous, countless plaintiffs will be intimidated to pursue reasonable positions before our courts. This might be from a lack of funds to initiate a claim's first stage, or, in the fear that if they did proceed, the possibility of defeat brings with it liability for some of their opponent's high costs.

I leave for others the task of designing a system of proportionate, predictable and modest legal expenses. The potential solutions deserve full and scholarly study, but a few warrant immediate mention. One might be an increase in funding out of general taxation. The government already offers certain public subsidy to civil litigants, in the form of court staff, facilities, judges etc. Who is to say that the state cannot do more, given its interest in ensuring that rights can be enforced, debts collected, and dispute resolved?[140] Other sources of funding might lay in the private sphere, however. Just as people insure against various disasters, why not against the costs of certain civil litigation? Another potential solution is to reform the system itself, whether reducing the voluminous and often unnecessary paper, better utilizing technology, or improving the procedures for self-represented litigants. Waste is still another factor. Anyone who ever sat through a long Chambers list alongside a dozen other expensive counsel realizes the wasted time too often inherent in court proceedings.

Until legislatures enact a proportionate, predictable and low-cost regime, partial indemnity is the best amongst flawed options. On the one hand, it provides for *some* cost shifting, as is appropriate when a loser has forced the winner to incur expense to enforce rights which were theirs all along. Moreover, cost-shifting helps dissuade meritless litigation,[141] and provides the court with a means to control conduct in the litigation process.[142]

On the other hand, while the partial system inevitably results in less than full recovery, it recognizes that a loser cannot pay everything. Most parties would be hesitant to advance reasonable positions if they faced the burden of two full sets of costs.[143] There is societal good in ensuring the accessibility of justice and ensuring that all individuals can vindicate their rights in the courts.[144] As such, the Canadian system deliberately adopts a partial regime as to not put "litigation beyond the reach of the loser".[145]

CONCLUSION

This article began by contending that *Tanious* was wrongly decided. Beguiling at first, *Tanious* appeared to preserve hard-won benefits for a sympathetic insured, while also placing itself squarely amidst prior authority. However, I argue that its award of full indemnity was not warranted in the absence of misconduct. Not only was "duty to defend" exception unsound, but no "unique" features justified differential treatment for disability claimants over any other litigant.

Second, this article rejects the "duty to defend" exception, both as a matter of interpretation and implication. *Reed* and its successors confuse a contractual duty to pay an insured's costs in the main action, with an insured's separate responsibility to fund their own litigation. Lacking any textual support for the notion of an "unique" contractual rationale, future liability claimants should once more submit to the default of partial indemnity.

Finally, this article considered what framework should govern the Canadian law of solicitor-client costs as a whole. Ms. Tanious will not be the last plaintiff desiring to be made whole, and the law must choose a path to pursue. Does it permit solicitor-client costs to become an instrument of compensation, awarded irrespective of the behaviour of any given defendant? Or, does it restrict such awards to punishment of a "losing party for reprehensible conduct"?[146]

This paper favours the latter view, and advocates a punitive rationale for solicitor-client costs. Given Canada's partial indemnity regime, solicitor-client awards should remain exceptional, used only to reprimand but not reimburse. In conceptual terms, such will justify the burden of full indemnity costs, while ensuring that costs do not duplicate the function of damages. In practical terms, the punitive rationale will renew the exceptional disciplinary power of full indemnity to deter, while also avoiding the unpredictability and inconsistency which arise when costs are divorced from a defendant's conduct.

It is too early to predict *Tanious's* final legacy. If Canadian law was to accept its framework, the availability of solicitor-client awards would swell beyond recognition. One industry commentator has already warned that *Tanious* will prompt disability insureds to demand "full indemnity in claims for disability insurance", and use same as a "negotiating tactic for settlement".[147] This author indeed suggests that the repercussions may be far broader, with many other classes of civil claimants soon realizing the implications offered by *Tanious's* compensatory logic.

However, there is an alternative. *Tanious* may instead prompt a re-appraisal of the Canadian law of solicitor-client costs, and ideally, an embrace of a punitive framework. Let this be *Tanious's* ultimate legacy, a restoration of solicitor-client costs to their role in justice's machinery, not its final product.[148]

…

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1 *Goulin v. Goulin*, [1995] O.J. No. 3115, 26 O.R. (3d) 472 (Ont. Gen. Div.) at para. 14.

2 *Barry v. Estabrooks Estate*, [2016] N.B.J. No. 216, 2016 NBCA 55 at para. 44.

3 *Lindsay v. Royal Bank of Canada*, [1981] O.J. No. 1331 (Ont. H.C.J.) at para. 6.

4 *Humby v. Newfoundland and Labrador*, [2013] N.J. No. 20, 2013 NLCA 7 at para. 48.

5 *Provincial Judges' Assn of Manitoba v. Manitoba*, [2013] M.J. No. 279, 2013 MBCA 74 at para. 177 [*Provincial Judges'*].

[6] *Brown Bros. Enterprises Ltd v. Dolecki*, [2004] B.C.J. No. 1902, 2004 BCSC 1217 at para. 18.

[7] *Brown v. Metropolitan Authority*, [1996] N.S.J. No. 146, 1996 NSCA 91 at para. 81.

[8] 2017 BCSC 85, [2017] BCWLD 1051 [*Tanious*].

[9] *Ibid*., at para. 123.

[10] *Ibid*., at para. 155(c).

[11] Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, "*The Costs and Funding of Civil Litigation: A Comparative Perspective*" (Oxford: Hart Publishing, 2010) at p. 239.

[12] E.S. Knutsen, *"The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada"* (2010) 36 Queen's L.J. 113.

[13] Hodges, Vogenauer & Tulibacka, *supra* note 11 at p. 254. See also *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)*, [1992] A.J. No. 745, [1993] 1 W.W.R. 450 (Alta. Q.B.) at para. 7 [*Reese*].

[14] *1465778 Ontario Inc. v. 1122077 Ontario Ltd*., [2006] O.J. No. 4248, 275 DLR (4th) 321 at para. 26, (Ont. C.A.).

[15] *Evaskow v. BBF*, [1969] M.J. No. 74, 9 D.L.R. (3d) 715 (Man. C.A.) at para. 24 [*Evaskow*].

[16] *McPhillips v. British Columbia Ferry Corp.*, [1993] B.C.J. No. 1365, 16 C.P.C. (3d) 284 (B.C.S.C.) at para. 5 [*McPhillips*].

[17] *Young v. Young*, [1993] S.C.J. No. 112, [1993] 4 S.C.R. 3 at para. 260.

[18] *Hunt v. TD Securities Inc*., [2003] O.J. No. 3245, 229 D.L.R. (4th) 609 (Ont. C.A.) at para. 123, rev'g [2002] O.J. No. 474, [2002] O.T.C. 93 (Ont. S.C.J.) [*Hunt*], citing Mark M. Orkin, *The Law of Costs* 2nd ed. (Toronto: Canada Law Book, 2011) (loose-leaf updated 2016) vol. 1 at pp. 2-91 to 2-92.

[19] See for example *Wright v. National Life Assurance Co. of Canada*, [1987] O.J. No. 594, 25 C.C.L.I. 1 (Ont. H.C.J.) at para. 45 [*Wright*].

[20] *Chubb Insurance Co. of Canada v. SA Armstrong Ltd.*, [2012] O.J. NO. 3564, 2012 ONSC 3416 at para. 6.

[21] [2000] O.J. No. 3807, 191 D.L.R. (4th) 221 (Ont. C.A.).

[22] [2003] O.J. No. 1791, 171 O.A.C. 145 (Ont. C.A.).

[23] Emphasis added.

[24] *Dionne Farms Ltd. v. Fermes Gervais Ltée*, [2002] N.B.J. No. 402, 2002 NBCA 98.

[25] *Ultramar Ltd. v. Rancur Petroleum Services Ltd.*, [2005] N.J. No. 98, 2006 NLCA 55 [*Ultramar*].

[26] *Gilewich v. 3812511 Manitoba Ltd*., [2012] M.J. No. 308, 2012 MBQB 252.

[27] *Williams v. Canales*, [2016] B.C.J. No. 2067, 2016 BCSC 1811.

[28] The court further cited English and American authority suggesting that an insured should be fully compensated for any action required to establish a duty to defend. See, R. Merkin, *Colinvaux's Law of Insurance*, 7th ed. (London: Sweet & Maxwell, 1997) at 405, and *Chicago Title Ins. Co. v. FDIC*, 172 F 3d 601 (8th Cir. 1999) and *Preferred Mut. Ins. Co. v. Gamache*, 686 NE 2d 989 (Mass. Sup. Ct. 1997).

[29] *Supra* note 25 [emphasis added].

[30] [2017] O.J. No. 3511, 2017 ONSC 4193.

[31] *Ibid*., at para. 4.

[32] Emphasis added.

[33] *Supra* note 8.

[34] *Ibid*., at para. 15.

[35] *Ibid*., at para. 6.

[36] *Tanious v. Empire Life Insurance Co.*, [2016] B.C.J. No. 125, 2016 BCSC 110 at para. 18.

[37] *Tanious, supra* note 8 at para. 81. Ms. Tanious's counsel received 35 per cent of any amount recovered in payable benefits (while leaving all future benefits to Ms. Tanious).

[38] *Ibid*., at para. 1.

[39] *Leung v. Leung*, [1993] B.C.J. No. 2909, 77 B.C.L.R. (2d) 314 at para. 6 (B.C.S.C.). This articles uses the term "solicitor-client costs" when describing the "special costs" award made in *Tanious*.

[40] *Tanious*, *supra* note 8 at paras. 13 and 112.

[41] *Ibid*., at paras. 13 and 15.

[42] *Ibid*., at para. 155(d).

[43] *Ibid*., at para. 73.

[44] *Ibid*., at para. 155(a) and para. 155(d).

[45] *Ibid*., at para. 92.

[46] *Ibid*.

[47] Such lessened the attractiveness of a claimant's ability to attract counsel on a contingency basis. *Ibid*., at para. 76.

[48] *Ibid*., at para. 97.

[49] *Ibid*., at para. 76.

[50] *Ibid*., at paras 76, 78 and 107.

[51] *Ibid*., at para. 107.

[52] *Ibid*.

[53] *Ibid*., at para. 81.

[54] *Ibid*., at para. 137.

[55] *Ibid*., at para. 155(a).

[56] *Ibid*., at para. 155(c).

[57] *Ibid.*

[58] *Ibid*., at para. 155(d).

[59] I say "might", as the parties' consent cannot fetter nor usurp a court's ultimate discretion over costs. Prior courts have made clear that provisions in an insurance contract do "not bind a judge in the exercise of his or her discretion as to the appropriate costs order". See *Alie v. Bertrand & Frère Construction Co.*, [2002] O.J. No. 4697, 222 DLR (4th) 687 (Ont. C.A.) at para. 267. See also *Darling v. Kay*, [1993] O.J. No. 1904, 15 O.R. (3d) 299 (Ont. Gen. Div.).

As an aside, any award of solicitor-client costs made in response to a contractual provision would be better classed as "damages", as opposed to discretionary "costs". In other words, such an award would arise from the parties' bargain, not their incidental litigation conduct.

[60] Gordon Hilliker, *Liability Insurance Law in Canada*, 6th ed. (Markham, Ont.: LexisNexis, 2016) at 3.

[61] *Ultramar*, *supra* note 25.

[62] *Ibid*., at para. 13 [emphasis added].

[63] *Ibid*., at para. 72 [emphasis removed].

[64] See for example *Carneiro v. Durham (Regional Municipality)*, [2015] O.J. No. 570, 2015 ONCA 90 at para. 13. See also *Zhou v. Markham (Town)*, [2014] O.J. No. 351, 2014 ONSC 435 at para. 25.

[65] *Ultramar*, *supra* note 25 at para. 73.

[66] Emphasis added.

[67] Hilliker, *supra* note 60 at 34.

[68] It is acknowledged that insurers are subject to a unique duty to act fairly and in good faith. However, a breach in the underlying pre-litigation conduct gives rise to a separate cause of action for damages (see *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.*, [2002] O.J No. 3588, 217 D.L.R. (4th) 34 (Ont. C.A.) at para. 78). That is separate from procedural misconduct warranting solicitor-client costs. *Reed* therefore did not expressly invoke this "unique" feature of insurance contracts, nor would the law have supported such an assertion, as mandating solicitor-client costs where an insurer litigated a legitimate contractual position against an insured.

[69] Neil R. Maclean, "Special costs imposed for breach of Duty to Defend by Insurer" (October 27, 2016), online: Guild Yule LLP http://www.guildyule.com/uncategorized/special-costs-imposed-for-breach-of-duty-to-defend-by-insurer/.

[70] GHL Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 463.

[71] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Markham: LexisNexis, 2016) at 175.

[72] *Fairview Donut Inc. v. The TDL Group Corp.*, [2002] O.J. No. 834, 2012 ONSC 1252 (Ont. S.C.J.) at para. 451.

[73] *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41 [1992] 1 S.C.R. 986 at para. 49 [*Machtinger*].

[74] *Canadian Pacific Hotels Ltd v. Bank of Montreal*, [1987] S.C.J. No. 29, [1987] 1 S.C.R. 711 at para. 52 [*Canadian Pacific*].

[75] John D. McCamus, *The Law of Contracts,* 2d ed. (Toronto: Irwin Law, 2012) at 780.

[76] Hilliker, *supra* note 60 at 151.

[77] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] S.C.J. No. 84, [1992] 3 S.C.R. 299 at para. 283.

[78] Hall, *supra* note 72 at 177.

[79] *Machtinger*, *supra* note 73 at para. 49.

[80] *Langton v. Personal Insurance Company*, [2009] A.J. No. 837, 2009 ABQB 467 at para. 58.

[81] *Bhasin v. Hryne*, [2014] S.C.J. No. 71, 2014 SCC 71 at para. 73 [*Bhasin*].

[82] *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94, [1997] 3 S.C.R. 701 at para. 145.

[83] *Watkins v. Olafson*, [1989] S.C.J. No. 94, [1989] 2 S.C.R. 750 at para. 19.

[84] *Canadian Pacific*, supra note 74 at para. 50.

[85] *Bhasin*, *supra* note 81 at para. 73.

[86] *Machtinger*, *supra* note 73 at para. 47.

[87] See Hilliker, *supra* note 60, where the author notes that:

> In a standard CGL wording the insurer has "the right and duty to defend" an action, and the insurer also agrees to certain supplementary payments, including all expenses it incurs, reasonable expenses of the insured incurred at the insurer's expense, and costs and interest in the underlying action. <u>At no time does the insurer agree to fully indemnify an insured for an action to enforce a duty to defend</u> [emphasis added].

[88] *Tanious* was an example of such an award. See *supra* note 8 at para. 123.

[89] *Ibid*., at para. 155(d).

[90] See for instance *Wright*, *supra* note 19 at para. 45. *Apotex Inc. v. Egis Pharmaceuticals*, [1991] O.J. No. 1232, 4 O.R. (3d) 321 (Ont. Gen. Div.) at para. 12.

[91] *Foulis et al. v. Robinson*, [1978] O.J. No. 3596, 92 D.L.R. (3d) 134 (Ont. C.A.) at para. 20 [*Foulis*].

[92] *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.*, [2016] A.J. No. 1056, 2016 ABCA 303 at para. 19. See also *Meleshko v. Alberta*, [2013] A.J. No. 868, 2013 ABQB 468 at para. 37-38.

[93] *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1991] S.J. No. 403, [1992] 4 W.W.R. 712 (Sask. C.A.) at para. 74.

[94] *Hennessy v. Horse Racing Alberta*, [2007] A.J. No. 309, 2007 ABQB 178 at para. 5.

[95] *Somers v. Fournier*, [2002] O.J. No. 2543, 214 D.L.R. (4th) 611 (Ont. C.A.) at para. 19 [*Somers*], citing *Somers v. Fournier*, [2001] O.J. No. 2683, 8 C.C.L.T. (3d) 112 (Ont. S.C.J.) at para. 61.

[96] *Hunt*, *supra* note 18 at para. 123. See also Orkin, *supra* note 18 at pp. 2-91 to 2-92.

[97] *Max Sonnenberg Inc. v Stewart*, *Smith* (*Canada*) *Ltd.*, [1986] A.J. No. 1036, 48 Alta. L.R. (2d) 367 (Alta. Q.B.) at para. 20.

[98] *Tanious*, *supra* note 8 at para. 1(b).

[99] *Ibid*., at para. 153.

[100] *Ibid*., at para. 155(d).

[101] While the "punitive" rationale equally fails to tailor its awards to the misdeeds at issue, this is distinguishable. First, while is eminently possible to measure what is required to fulfil a contract's objective, it is virtually impossible to quantify any given "misconduct" into a monetary amount. Second, a punitive rationale intends full indemnity costs to be harsh by design, as they are deliberately meant to penalize "beyond the ordinary order for costs" (see *Dusik v. Newton*, [1984] B.C.J. No. 3084, 51 B.C.L.R. 217 (B.C.S.C.) at para. 7). In essence, any "excessive" costs are rationalized under the punitive approach, in a manner not available under the compensatory rationale.

[102] *Fullerton v. Matsqui (District)*, [1992] B.C.J. No. 2986, 74 B.C.L.R. (2d) 311 (B.C.C.A.) at para. 23.

[103] *Stiles v. Workers' Compensation Board of British Columbia and City of Vancouver*, [1989] B.C.J. No. 1450, 38 B.C.L.R. (2d) 307 (B.C.C.A.) at para. 12 [emphasis added] [*Stiles*].

[104] *Tanious*, *supra* note 8 at para. 76.

[105] *Ibid*., at para. 155(d).

[106] *Ibid*., at para. 97.

[107] *Ibid*., at para. 86 and 109.

[108] *Ibid*., at paras. 76 and 107.

[109] *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 at para. 39.

[110] *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, [2007] S.C.J. No. 2, 2007 SCC 2 at para. 44.

[111] *Ibid*.

[112] *Foulis*, *supra* note 91 at para. 20.

[113] *Tanious*, *supra* note 8 at para. 153.

[114] Linda S. Abrams & Kevin P. McGuinness, *Canadian Civil Procedure Law*, 2d ed. (Markham: LexisNexis Canada, 2010) at 1428.

[115] *Verlaan v. von Deichmann*, [2006] B.C.J. No. 2018, 2006 BCCA 389 at para. 35.

[116] *Vanderclay Development Co. v. Inducon Engineering Ltd.*, [1968] O.J. No. 1268, 1 D.L.R. (3d) 337 (Ont. H.C.J.) at para. 21.

[117] *Evaskow*, *supra* note 15.

[118] Emphasis added. See also *Orkin*, *supra* note 18 at pp. 2-91 to 2-92.

[119] *Tanious*, *supra* note 8 at para. 146.

[120] *Ibid*., at para. 94.

[121] *Ibid*., at paras. 95 and 155(d).

[122] *Ibid*., at para. 155(d).

[123] *Stiles*, *supra* note 103 at para. 11.

[124] *Houweling Nurseries Ltd v. Fisons Western Corp.*, [1988] B.C.J. No. 306, 49 D.L.R. (4th) 205 (B.C.C.A.) at para. 136.

[125] *Goulin v. Goulin*, [1995] O.J. No. 3115, 26 O.R. (3d) 472 (Ont. Gen. Div.) at para. 14.

[126] *Foulis*, *supra* note 91 at para. 20. See also *Siemens v. Bawolin*, [2002] S.J. No. 398, 2002 SKCA 84 at para. 118.

[127] *Apotex*, *supra* note 90 at para. 12.

[128] For numerous previously recognized examples of reprehensible conduct, see *Sidorsky v. CFCN Communications Ltd.*, [1997] A.J. No. 880, 1997 ABCA 280 at para. 28.

[129] *Provincial Judges', supra* note 5 at para. 175.

[130] *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, [2017] A.J. No. 41, 2017 ABCA 19 at para. 7.

[131] See *Pelley v. Pelley*, [2003] N.J. No. 13, 2003 NLCA 6 and *Brace v. Snow*, [2012] N.J. No. 152, 2012 NLCA 24 at para. 24.

[132] See for instance the New Zealand decision in *Binnie v. Pacific Health Ltd.*, [2003] NZCA 69, where the Court awarded the plaintiff substantial indemnity costs on account of the employer defendants' flagrant and outrageous pre-litigation misconduct. In Australia, see *Oshlack v. Richmond River Council*, [1998] HCA 11, 193 C.L.R. 72 which held that in assessing costs, a court may take into account "misconduct relating to the litigation, or the circumstances leading up to the litigation" (see para. 69). The situation in Australia may be changing however. See for instance *NMFM Property Pty. Ltd. v. Citibank Ltd. (No. 11)*, [2001] FCA 480, 109 FCR 77 at para. 56, where the court held that the conduct relevant when awarding full indemnity costs is the "party's conduct *as litigant*" (emphasis in original). See also *Prantage v. Prantage*, [2013] FamCAFC 105 (2013) 49 Fam. L.R. 197 at paras. 102-103 (Fam. C.A.).

[133] See *Larter v. Solid Rock Free Lutheran Church of Camrose*, [2012] A.J. No. 1299, 2012 ABCA 292 at para. 8; *Gerula v. Flores*, [1995] O.J. No. 2300, 126 D.L.R. (4th) 506 (Ont. C.A.) at para. 74; *Nygard International Ltd v. Robinson*, [1990] B.C.J. No. 1155, 46 B.C.L.R. (2d) 103 (B.C.C.A.) at para. 13, *Cook v. Bowen Island Realty Ltd.*, [1998] B.C.J. No. 415, 19 C.P.C. (4th) 148 (B.C.S.C.) at para. 10.

[134] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 SCR 1130 at para. 199. The court was describing the use and function of punitive damages, but in terms applicable also to solicitor-client costs.

[135] *McPhillips*, *supra* note 16 at para. 15.

[136] *Hunt*, *supra* note 18 at para. 130. See also *Eusanio v. Janolino*, [1997] B.C.J. No. 2066 (B.C.S.C.) at para. 9. LEFT OFF is that itlient costs .cidental costs be stretched beyond its breaking point, when any pre-litigation ulfil this purp.

[137] James Maxeiner, *"Cost and Fee Allocation in Civil Procedure"* (2010) 58 Am. J. Comp. L. 195 at 216.

[138] Sir Rupert Jackson, *"Review of Civil Litigation Costs: Final Report*" (London: TSO, 2010) at paras. 2.4-2.5.

[139] I have earlier argued that imposing a norm of full indemnity would discourage ordinary citizens from advancing reasonable positions. One reply to this might be that a costs award could be reduced where the losing party's position was ultimately shown to be legitimate and reasonable on the face of the facts. However, as discussed above, this still does not provide access to justice, unless there is first structural reform of our system's intrinsic and "up front" costs of litigation.

[140] Hodges, Vogenauer & Tulibacka, *supra* note 11 at 75.

[141] *Catalyst Paper Corp v. Companhia de Navegação Norsul*, [2009] B.C.J. No. 52, 2009 BCCA 16 at para. 16.

[142] Hodges, Vogenauer & Tulibacka, *supra* note 11 at 74.

[143] *Reese*, *supra* note 13 at para. 8.

[144] Hodges, Vogenauer & Tulibacka, *supra* note 11 at 4.

[145] *Foulis*, *supra* note 91 at para. 20.

[146] *McPhillips*, *supra* note 16 at para. 8.

[147] Luke Dineley & Kelsey McIntyre, "Full Indemnity for Costs award in disability insurance dispute has far reaching consequences" (February 17, 2017), online: Borden Ladner Gervais http://blg.com/en/News-And-Publications/Publication_4834.

[148] See the analogy employed at *Somers*, *supra* note 95 at para. 18.