

Insurance Bad Faith

| SECOND EDITION |

Gordon G. Hilliker



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Member of the Bar of British Columbia



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INSURANCE BAD FAITH

SECOND EDITION

To my mother, Mary Gloria Hilliker, whose encouragement
and support led me to the practice of law.

PREFACE

When I began practising insurance law in the 1970's there was no such thing in Canada as "bad faith." That was an American concept, spawned in California, and deemed unlikely to ever migrate north of the 49th parallel. How things have changed! Over the last two decades, case by case, the concept of "bad faith" has steadily gained acceptance in courts across Canada, reaching high water marks in 2002, with the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, and in 2006, with the decision of the Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. of Canada*.

As with any new common law concept, the case law in Canada to date with respect to insurance bad faith has developed in a haphazard fashion. Our courts have examined precedents from both the United Kingdom and the United States in an effort to establish the principles that should govern the conduct of insurers doing business in Canada. Unfortunately, the English common law is not particularly helpful in this field, and the American law is difficult to navigate. Insurance law in the United States is a state concern, governed by both statute law and common law principles that vary from state to state. With over 50 separate jurisdictions to contend with, any attempt to understand the American law with respect to bad faith is thus a daunting task.

My aim in writing this text has been two-fold. In addition to contributing to the scholarly development of the law of insurance bad faith I have sought to provide a text that will be of considerable practical assistance to the lawyers and insurance professionals who must contend with this developing area of the law. As well as assembling and analyzing the Canadian law on the subject, I refer to a number of those American authorities which, I believe, are helpful to arriving at an understanding of "bad faith" in the Canadian context. I caution the reader that I have not provided a comprehensive treatment of the American law on the subject, which would require a text many times the size of this one, and in any event would by itself be of limited utility in this country. My goal has not been to explore the nuances of the American law of insurance bad faith but, rather, to provide an understanding of the Canadian law on the subject.

In this, the second edition, I have both updated the Canadian authorities and expanded my treatment of the American law, especially with respect to topics upon which the Canadian authorities are either sparse or non-existent.

Gordon G. Hilliker, Q.C.
Belcarra, British Columbia
December 2008

ABOUT THE AUTHOR

Gordon G. Hilliker, Q.C. is one of Canada's pre-eminent insurance law practitioners. He is the author of *Liability Insurance Law in Canada*, which is now in its fourth edition. It is the leading text in its field, having been referred to by every trial and appellate court in Canada, including the Supreme Court of Canada. A graduate of the University of British Columbia, Mr. Hilliker obtained a Bachelor of Arts in Philosophy in 1974 and a Bachelor of Laws in 1976. He was called to the Bar of British Columbia in 1977 and was appointed Queen's Counsel in 2001. Mr. Hilliker has served as Chair of the Insurance Law Section of the Canadian Bar Association and in 2008 was honoured by the Canadian Bar Association, B.C. Branch, as "Insurance Lawyer of the Year." Mr. Hilliker is a frequent lecturer on topics related to insurance law. He also served for many years as the Head of Course, Civil Procedure for the Law Society of British Columbia's Bar Admission Program.

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