A CLOSER LOOK AT *UBERRIMAE FIDEI*:

A REVIEW OF *INSURANCE BAD FAITH*, GORDON HILLIKER, Q.C. (MARKHAM: LEXISNEXIS CANADA INC., 2004)

I. INTRODUCTION

The notion that insurance contracts are contracts of "utmost good faith" or *uberrimae fidei* is a fundamental, yet elusive, principle of Canadian insurance law. The requirement of good faith in the insurance context is universally accepted in Canadian jurisprudence[1] and its breach has given rise to notable damage awards.[2] Despite the growing importance of this insurance law principle, however, the exact nature and content of the utmost good faith requirement is not fully understood, developed or explained in Canadian law. In *Insurance Bad Faith*,[3] Gordon Hilliker endeavours to fill this void by providing a detailed explanation and analysis of the good faith doctrine in the context of Canadian insurance law. As the first Canadian text dedicated exclusively to examining the good faith obligation, Hilliker's book leads the way in providing a comprehensive and contextual consideration of the sources, substance and application of this rapidly developing doctrine.

II. OBJECTIVES OF THE BOOK

In the preface to *Insurance Bad Faith*, Hilliker identifies two objectives for his book. First, Hilliker aims to contribute to the "scholarly development of the law of insurance bad faith."[4] Second, he attempts to "provide a text that will be of considerable practical assistance to other lawyers and insurance professionals who must contend with this new area of the law."[5] To the extent that these goals sound modest, they are deceptively so, because the Canadian law of insurance bad faith has thus far been introduced and developed through a diverse bank of court decisions. Accordingly, the basic elements of the good faith duty, the application of the good faith principle and the consequences of a breach of good faith have not yet been clearly and thoroughly defined or synthesized in Canadian law. Despite the

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1 Indeed, this principle has so often been recognized in Canadian insurance law cases that commentators now make reference to it without citing supporting case authority. See *e.g.* Craig Brown *et al.*, *Insurance Law in Canada*, looseleaf (Scarborough: Thomson Canada Limited, 2001) at 10-20 to 10-21 and J. McLeish, "Punitive Damages Against the Accident Benefits Insurer" in *Practical Strategies for Advocates VIII: "Back to Basics"* (The Advocates Society (Ontario): 19-20 February 1999) at para. 2. In terms of case law, the paradigm recognition of this duty is found in *Carter v. Boehm* (1766), 97 E.R. 1162 (K.B.).

2 Of course, the most publicized damage award for a breach of the *uberrimae fidei* duty was the $1,000,000 punitive damages award that was upheld by the Supreme Court of Canada in *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595. Other recent notable damage award cases arising from a breach of the duty of utmost good faith include: *Fidler v. Sun Life Assurance Co. of Canada*, 2004 BCCA 273 (wherein the British Columbia Court of Appeal awarded $20,000 in aggravated damages and $100,000 in punitive damages against the insurer); *Andrusiw v. Aetna Life Insurance Company of Canada* (2001), 289 A.R. 1 (wherein the Alberta Court of Queen's Bench awarded $20,000 in punitive damages against the insured); and *Clarfield v. Crown Life Insurance Co.* (2000), 50 O.R. (3d) 696 (wherein the Ontario Superior Court of Justice awarded aggravated damages of $75,000 and punitive damages of $200,000 against the insurer).

3 Gordon Hilliker, *Insurance Bad Faith* (Markham: LexisNexis Canada Inc., 2004).

4 *Ibid.* at v.

5 *Ibid.*

complicated and potentially confusing state of the law, for the most part Hilliker manages to achieve his objectives while simultaneously avoiding the temptation to oversimplify or overstate the decided elements of the *uberrimae fidei* doctrine.

Hilliker's initial objective is addressed primarily in the first three chapters of the book, which focus on the substantive aspects of insurance bad faith. Titled "Introduction to Bad Faith," Chapter One briefly summarizes the historical development of the good faith doctrine and outlines the main issues that the courts have encountered in arriving at a working definition of good faith and establishing a legal basis for bad faith claims. As useful background to his analysis of Canadian jurisprudence, Hilliker summarizes the development of the utmost good faith doctrine in English and American law before tracing this principle's introduction and acceptance into Canada. In Chapter Two, Hilliker considers the basis of a bad faith action in the context of an insurer's response to an insured's claim for coverage under an insurance policy (a "first party" claim). In Chapter Three, Hilliker focuses on the bad faith doctrine as applied to a liability insurer's obligation to defend and indemnify an insured against a claim brought against the insured by a third party (a "third party" claim).

The organization of the book's first three chapters is a useful platform for Hilliker's analysis of the substantive law of *uberrimae fidei*. In particular, Hilliker's clear division between first party and third party claims mirrors a real and fundamental distinction in the nature of insuring agreements, thereby giving an important practical context to his substantive analysis of the law. Through this organizational structure, Hilliker is able to provide the reader with a readily understandable summary of the established principles and outstanding issues regarding bad faith in Canadian insurance law.

These three chapters comprise more than half of the total book space and offer a thorough discussion of the basic elements and issues of utmost good faith without becoming unduly congested with lengthy case descriptions or discussions.

Hilliker's second objective comes alive primarily in the last three chapters of the book, in which Hilliker addresses remedies for bad faith breaches (Chapter Four), defences to bad faith claims (Chapter Five) and procedural issues involved in conducting a bad faith action (Chapter Six). In these chapters, Hilliker speaks to the method and utility of dealing with a bad faith claim and thereby provides assistance to practitioners dealing with the substantive claims described in the first three chapters of the book. Here again, Hilliker's clear organization and methodical approach to his topic makes this book a readily accessible tool for the reader.

III. CHALLENGES IN EXPLAINING THE LAW OF INSURANCE BAD FAITH

Currently, there are two main challenges that must be confronted by any Canadian insurance law text dedicated to explaining the doctrine of utmost good faith. First, as already noted, the Canadian case law provides a patchy understanding of the doctrine, leaving much room for speculation about the true meaning of utmost good faith. Second, although the number of Canadian cases on utmost good faith appear to be steadily increasing, much of the most relevant jurisprudence is found in American case law, which is diverse because of the variety of state court rulings.

Hilliker directly acknowledges both of these obstacles and, in particular, does not shy away from pointing out areas where the law is uncertain. In some instances, however, Hilliker's use of American authorities is not clearly delineated from his consideration of Canadian legal principles.[6] Further, he sometimes treats the findings of American courts as reflective of "the law" on points that have not yet been decided by Canadian courts.[7] Accordingly, the reader may occasionally be confused as to whether Hilliker is reporting on the state of the law in Canada or providing commentary on what the law, in his view, ought to be. In a groundbreaking text such as this, which is likely to be relied upon by courts and practitioners, it would be preferable for this distinction to be more clearly drawn.

There are several instances throughout the book, however, where Hilliker frankly offers his opinion of what the law ought to be, and, even more importantly, of how the Canadian understanding of *uberrimae fidei* should be changed. For example, Hilliker argues that a breach of contract does not necessarily translate into a breach of the principle of good faith. He also argues that a breach of the principle of good faith does not always necessitate the awarding of punitive damages. This sort of critical commentary is useful and much needed in Canadian insurance law because it raises larger, fundamental questions about our understanding of the doctrine of utmost good faith. These questions include: What type of conduct on behalf of the insured and the insurer is mandated by the principle of *uberrimae fidei*? When does a breach of the insurance contract constitute a breach of utmost good faith? What is the appropriate remedy for a breach of the *uberrimae fidei* duty? These questions are of increasing importance as more and more bad faith claims are brought before Canadian courts. Overall, Hilliker's text makes a useful contribution to the law of *uberrimae fidei* by both raising these important issues and providing some thought provoking answers.

Barbara Billingsley
Assistant Professor
Faculty of Law
University of Alberta

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6 On this point, the book's alphabetical List of Cases makes no effort to distinguish the Canadian cases from the American cases, so the reader must refer to the text for this information (*ibid.* at xiii-xxii). Accordingly, the book does not provide an easily accessible listing of Canadian case law, a listing which would be very useful to practitioners and scholars alike.

7 These are the points in the text where Hilliker states a legal principle and it is only from looking at the footnote that the reader sees that the source of the stated principle is an American court.