

CLAIMS ADJUSTING REPORTS MAY BE DISCLOSED

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Rule 26 of the Supreme Court of British Columbia's *Rules of Court* requires disclosure of all documents relating to all matters in issue in a lawsuit that are or have been in a litigating party's possession, control or power. While all relevant documents must be disclosed, a party does not need to produce documents that are privileged, although it must give reasons for claiming such privilege. Insurers are regularly involved in litigation and some assume, often incorrectly, that their adjusters' investigation reports are privileged because they were prepared to assist in the defence of a claim. But the reality is that many such reports do not meet the test established by the Supreme Court over time.

In order to properly claim litigation privilege over an adjuster's investigation report, the party asserting privilege must satisfy both criteria of the "dominant purpose test" which hold that:

1. The litigation must have been reasonably foreseeable at the time the material in question was produced;
2. The dominant purpose for the production of the material must have been to assist in litigation.

Often, this test cannot be met because the investigation report is produced before an insurer is even contemplating litigation, let alone preparing for it. Recognizing this circumstance, the B.C. Supreme Court has held that the prospect of litigation need not be certain for privilege to arise but there must be more than a mere suspicion of its possibility.

In a recent decision, *Filek v. Nute and McDonald v. Nute*, the Court ruled that an insurance adjuster's reports on a house fire were privileged because it was known from the outset that the claim was not likely to be resolved without litigation. The particular circumstances which led the Court to uphold the claim of privilege in this case included the following:

- On the day of the fire, April 2, 2004, a fire inspector attributed the cause of the fire to the conduct of the defendants.

- In his first report to the insurer, the adjuster confirmed that the claim involved significant loss to third parties that were not covered by the insurer and that the defendants were being blamed for the fire.
- A claims examiner for the insurance company said that she read the adjuster's report three days later on April 5, 2004 and concluded that litigation was likely to ensue.

Based on these circumstances, Master Hyslop concluded that litigation was a reasonable prospect by April 5, 2004 and, from that date, litigation privilege protected all reports produced for the insurer.

A determination as to whether or not adjuster's reports are privileged will always depend on the particular facts of a case. But, generally speaking, a reasonable prospect of litigation begins when an adjuster stops investigating a claim and instead begins denying it. Once an investigation is concluded, an insurer should consider moving quickly to deny a claim or retain counsel to engage litigation privilege. Until then, insurers and their adjusters should be aware that investigation reports will likely be disclosed in subsequent litigation.