

## REMINDER TO INSURERS: YOUR CLAIMS ADJUSTING REPORTS MAY BE DISCLOSED

Stephen J. Berezowskyj

Our *Rules of Court* require disclosure of all documents relating to every matter in issue in the lawsuit that are or have been in the party's possession, control or power. While all relevant documents must be disclosed, a party does not need to produce documents that are privileged. 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 Courts.

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':

1. Litigation must have been a reasonable prospect at the time the material in question was produced; and
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. The Courts have said that there need not be a certainty of litigation in order for litigation privilege to arise, but there must be more than a mere suspicion that litigation might be possible.

In the recent decision in *Filek v. Nute and McDonald v. Nute*, [2008] BCSC 750, the British Columbia Supreme 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 lead 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, which 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 3 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, therefore, all reports produced for the insurer from that point onward were protected by litigation privilege.

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 begins denying the claim. 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 have to be disclosed in subsequent litigation.