

# Newsletter



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## The insured's access to the insurer's records and litigation privilege

*In a recent decision (Fiset-Trudeau c. Compagnie mutuelle d'assurances Wawanesa, 2017 QCCS 5071), Madam Justice Florence Lucas held that an insurer's notes and records, as prepared by its representatives, were subject to the litigation privilege and that, accordingly, the insurer could not be compelled to disclose them.*

In this case, the insured had filed a claim following a fire that had virtually destroyed his building. Among other arguments, he alleged that the insurer had been negligent in processing his file. The insurer denied coverage based on the insured's misleading or contradictory statements on the source of the fire and the extent of the damages.

During the examination of the claims examiner, testifying on behalf of the insurer, he was unable to answer some of the insured's questions since he did not have personal knowledge of the case and what he did know was in the insurer's computer records, which he could not access at the time.

The insured requested that the insurer undertake to provide a printout of the computer file on the loss, the notes re-

lated to telephone conversations between the insured and the insurer's representatives, as well as a copy of the insurer's investigation reports.

The insurer objected, claiming its litigation privilege. The insured replied that the notes on the conversations were not confidential and that the insurer had implicitly waived its privilege when it chose to have the claims examiner testify.

The Court first reminded the parties that the litigation privilege protects against "the forced disclosure of communications and documents, although not confidential, the principal purpose being to prepare for litigation." [Our translations]



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The Court confirmed that the insurer's electronic records contain "all the elements which constitute the investigation, the principal purpose being to prepare for potential litigation"; therefore, disclosing these notes would be the same as disclosing the elements of the investigation and the contents of the adjusters' reports. Since those records fall under the scope of the litigation privilege, the insurer's objections were maintained.

The Court also ruled that the insurer had not waived this privilege when it requested the claims examiner to testify.

The Court concluded that the litigation privilege did not deprive the insured of his right to information on the facts, dates, progress and handling of his claim: he could examine a representative of the insurer having personal knowledge of the facts.

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