

**SUPREME COURT OF CANADA**

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| **Citation:** Lizotte *v.* Aviva Insurance Company of Canada, 2016 SCC 52, [2016] 2 S.C.R. 521 | **Appeal heard:** March 24, 2016  **Judgment rendered:** November 25, 2016  **Docket:** 36373 |

Between:

Karine Lizotte, in her capacity as assistant syndic

of the Chambre de l’assurance de dommages

Appellant

and

Aviva Insurance Company of Canada and

Traders General Insurance Company

Respondents

- and -

Canadian Bar Association,

Advocates’ Society and Barreau du Québec

Interveners

**Official English Translation**

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 71) | Gascon J. (McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ. concurring) |

Lizotte *v.* Aviva Insurance Company of Canada, 2016 SCC 52, [2016] 2 S.C.R. 521

Karine Lizotte, in her capacity as assistant syndic

of the Chambre de l’assurance de dommages Appellant

v.

Aviva Insurance Company of Canada and

Traders General Insurance Company Respondents

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**Indexed as: Lizotte *v.* Aviva Insurance Company of Canada**

2016 SCC 52

File No.: 36373.

2016: March 24; 2016: November 25.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for quebec

*Law of professions — Ethics — Powers of investigation of syndic — Production of documents — Litigation privilege — Inquiry by syndic of Chambre de l’assurance de dommages into conduct of claims adjuster — Whether statutory provision creating obligation to produce “any . . . document” at request of syndic can be interpreted as abrogating litigation privilege — Act respecting the distribution of financial products and services, CQLR, c. D‑9.2, s. 337.*

In the course of an inquiry into a claims adjuster, the assistant syndic of the Chambre de l’assurance de dommages (the “syndic”) asked insurer A to send her a complete copy of its claim file with respect to one of its insured. The syndic based this request on s. 337 of the *Act respecting the distribution of financial products and services* (“*ADFPS*”). In response, the insurer produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor-client privilege or by litigation privilege. The syndic responded to this refusal by filing a motion for a declaratory judgment.

At the hearing of the motion, the syndic conceded that solicitor-client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. She argued that s. 337 *ADFPS* was sufficient to lift the privilege, because it created an obligation to produce “any . . . document” concerning the activities of a representative whose professional conduct is being investigated by the Chambre de l’assurance de dommages. The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior Court’s judgment, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

*Held*: The appeal should be dismissed.

Litigation privilege is a common law rule that gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. This privilege has sometimes been confused with solicitor‑client privilege, both at common law and in Quebec law. However, since *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, it has been settled law that solicitor‑client privilege and litigation privilege are distinct: the purpose of solicitor‑client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process; solicitor‑client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends; and, finally, litigation privilege applies to unrepresented parties and to non-confidential documents, and is not directed at communications between solicitors and clients as such.

The differences identified in *Blank* between solicitor‑client privilege and litigation privilege have been adopted in Quebec law. Thus, despite certain common characteristics, litigation privilege has not been absorbed into, and does not constitute a component or subcategory of, the institution of professional secrecy.

Although litigation privilege is distinguishable from solicitor‑client privilege, it is nevertheless a class privilege and gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation. Thus, any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies.

Litigation privilege is subject to clearly defined exceptions, not to a case‑by‑case balancing test. In the context of privileges, the exercise of balancing competing interests is associated with case‑by‑case privileges, not class privileges. The exceptions that apply to solicitor‑client privilege are all applicable to litigation privilege. These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications. They also include the exception recognized in *Blank* for evidence of the claimant party’s abuse of process or similar blameworthy conduct. Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances.

Finally, litigation privilege can be asserted against third parties, including third party investigators who have a duty of confidentiality. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise covered by litigation privilege could be made public.

In this case, the litigation privilege invoked by the insurer can be asserted against the syndic, and none of the exceptions to its application justify lifting the privilege. Moreover, this privilege cannot be lifted by applying s. 337 *ADFPS.* There is a robust line of authority according to which a party should not be denied the right to claim litigation privilege without clear and explicit legislative language to that effect. It was the fundamental importance of that privilege that led the Court to require explicit language for its abrogation. There is no question that litigation privilege does not have the same status as solicitor‑client privilege, and it is less absolute than the latter. Nonetheless, like solicitor‑client privilege, litigation privilege is fundamental to the proper functioning of our legal system and is central to the adversarial system that Quebec shares with the other provinces. The parties’ ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of the adversarial process. Litigation privilege cannot therefore be abrogated by inference, and clear, explicit and unequivocal language is required in order to lift it. However, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of “any . . . document” without further precision. This is a general production provision that does not specifically indicate that the production must include records for which privilege is claimed. A provision that merely refers to the production of “any . . . document” does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. It follows that the insurer was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

**Cases Cited**

**Applied:** *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; **referred to:** *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Lyell v. Kennedy (No. 2)* (1883), 9 App. Cas. 81; *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27; *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d’assurances*, 2014 QCCA 1501; *Canada (Procureur général) v. Chambre des notaires du Québec*, 2014 QCCA 552; *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*, 2012 QCCA 2262; *Union canadienne (L’), compagnie d’assurance v. St‑Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340; *Imperial Tobacco Canada ltée v. Létourneau*, 2012 QCCA 2260; *Société d’énergie de la Baie James v. Groupe Aecon ltée*, 2011 QCCA 646; *Fournier Avocats inc. v. Cinar Corp.*, 2010 QCCA 2278; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *Compagnie d’assurances AIG du Canada v. Solmax International inc.*, 2016 QCCA 258; *Axa Assurances inc. v. Pageau*, 2009 QCCA 1494; *Conceicao Farms Inc. v. Zeneca Corp.*(2006), 83 O.R. (3d) 792; *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, 23 C.P.R. (4th) 185; *Apotex Fermentation Inc. v. Novopharm Ltd.* (1994), 95 Man. R. (2d) 186; *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350; *Opron Construction Co. v. Alberta* (1989), 100 A.R. 58; *R. v. Lanthier*, 2008 CanLII 13797; *Kennedy v. McKenzie* (2005), 17 C.P.C. (6th) 229; *R. v. Soomel*, 2003 BCSC 140; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321; *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84; *Llewellyn v. Carter*, 2008 PESCAD 12, 278 Nfld. & P.E.I.R. 96; *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Kea* (2005), 27 M.V.R. (5th) 182; *D’Anjou v. Lamontagne*, 2014 QCCQ 11999; *Rodriguez v. Woloszyn*, 2013 ABQB 269, 554 A.R. 8; *Aherne v. Chang*, 2011 ONSC 3846, 337 D.L.R. (4th) 593; *Guay v. Gesca ltée*, 2013 QCCA 343, [2013] R.J.Q. 342; *Hickman v. Taylor*, 329 U.S. 495 (1947); *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381; *Penetanguishene Mental Health Centre v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125; *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494, 100 C.P.C. (6th) 70; *TransAlta Corp. v. Market Surveillance Administrator*, 2014 ABCA 196, 577 A.R. 32; *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429; *State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada*, 2010 FC 736; *Louch v. Decicco*, 2007 BCSC 393, 39 C.P.C. (6th) 8; *Ward v. Pasternak*, 2015 BCSC 1190.

**Statutes and Regulations Cited**

*Access to Information Act*, R.S.C. 1985, c. A‑1, s. 23.

*Act respecting the distribution of financial products and services*, CQLR, c. D‑9.2, ss. 284, 289, 312, 329, 337, 352, 353, 376.

*Charter of human rights and freedoms*, CQLR, c. C‑12, s. 9.

*Code of Civil Procedure*, CQLR, c. C‑25.01, art. 11.

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss. 12 [repl. 2010, c. 23, s. 83], 12.1.

*Professional Code*, CQLR, c. C‑26, ss. 14.3, 60.4, 142, 192.

**Authors Cited**

Billingsley, Barbara. “‘Ingathered’ Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?” (2014), 43 *Adv. Q.* 280.

Cardinal, Alain. “Quelques aspects modernes du secret professionnel de l’avocat” (1984), 44 *R. du B.* 237.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

*Halsbury’s Laws of Canada: Evidence*, 2014 Reissue, contributed by Hamish C. Stewart. Markham, Ont.: LexisNexis, 2014.

Royer, Jean‑Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.

Sharpe, Robert J. “Claiming Privilege in the Discovery Process”, in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Evidence*. Don Mills, Ont.: Richard De Boo, 1984, 163.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Williams, Neil J. “Discovery of Civil Litigation Trial Preparation in Canada” (1980), 58 *Can. Bar Rev.* 1.

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Gagnon and St‑Pierre JJ.A.), 2015 QCCA 152, [2015] AZ‑51145074, [2015] J.Q. no 383 (QL), 2015 CarswellQue 384 (WL Can.), setting aside in part a decision of Gagnon J., 2013 QCCS 6397, [2013] AZ‑51031246, [2013] J.Q. no 14254 (QL), 2013 CarswellQue 13283 (WL Can.). Appeal dismissed.

*Claude G. Leduc* and *Olivier Charbonneau‑Saulnier*, for the appellant.

*Éric Azran* and *Patrick Girard*, for the respondents.

*Mahmud Jamal*, *Alexandre Fallon* and *W. David Rankin*, for the intervener the Canadian Bar Association.

*Douglas C. Mitchell* and *Audrey Boctor,* for the intervener the Advocates’ Society.

*François LeBel*, *Jean‑Benoît Pouliot* and *Sylvie Champagne*, for the intervener Barreau du Québec.

English version of the judgment of the Court delivered by

Gascon J. —

1. Overview
2. Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor‑client privilege) in several respects, the two concepts do overlap to some extent. Since *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor‑client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.
3. In the course of an inquiry into a claims adjuster, the appellant, the assistant syndic (the “syndic”) of the Chambre de l’assurance de dommages (the “Chamber”), asked an insurer, the respondent Aviva Insurance Company of Canada, to send her a complete copy of its claim file with respect to one of its insured. Aviva refused to do so on the basis that some of the requested documents were protected by litigation privilege. In response to this refusal, the syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce “any . . . document” concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege. In the syndic’s opinion, litigation privilege can be distinguished from solicitor‑client privilege; it is less important and is not absolute, and should therefore be applied more flexibly.
4. The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior Court’s judgment, holding that even though litigation privilege is distinguishable from solicitor‑client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.
5. I would dismiss the appeal. Although there are differences between solicitor‑client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non‑disclosure applies.
6. The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of “any . . . document” without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.
7. Background
8. The Chamber is a self‑regulatory organization established by s. 284 of the *Act respecting the distribution of financial products and services*, CQLR, c. D‑9.2 (“*ADFPS*”). It is responsible for overseeing the professional conduct of a number of representatives working in the insurance field, including claims adjusters, damage insurance agents and damage insurance brokers (ss. 289 and 312 *ADFPS*). In this regard, the Chamber has a role similar to that of a professional order governed by the *Professional Code*, CQLR, c. C‑26, although it is not such an order. Its “mission [is] to ensure the protection of the public by maintaining discipline among and supervising the training and ethics of its members” (s. 312 *ADFPS*). For this purpose, the syndic of the Chamber inquires into any offences under the *ADFPS* or its regulations (s. 329 *ADFPS*). She may bring a complaint against a representative before the Chamber’s discipline committee, and the complaint may result in a fine (ss. 352, 353 and 376 *ADFPS*).
9. In July 2008, a fire damaged the residence of a person insured by Aviva. Aviva assigned one of its claims adjusters, M.B., to investigate the claim. The syndic of the Chamber later received information to the effect that M.B. had made certain errors in managing the file. On January 24, 2011, the syndic opened an inquiry with respect to M.B. In the course of that inquiry, a member of the syndic’s team sent Aviva a request for a [translation] “complete copy of [its] file, both physical and electronic, for this claim”, and for a list that would enable her “to identify the employees who worked on the file” (emphasis deleted). The syndic based this request on s. 337 *ADFPS*, which reads as follows:

**337.** Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act(chapter V‑1.1) must, at the request of a syndic, forward any required document or information concerning the activities of a representative.

1. In response, Aviva produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor‑client privilege or by litigation privilege. The syndic insisted, however, and made several subsequent requests for the complete claim file, explaining that she could not conduct her inquiry without it.
2. On June 30, 2011, the insured person in question brought legal proceedings against Aviva to obtain compensation. While that action was still pending in court, the syndic applied in June 2012 for a declaratory judgment against Aviva in order to obtain the documents it sought. On June 26, 2013, Aviva and the insured person reached an out‑of‑court settlement, and on October 17, 2013, Aviva finally sent the syndic the entire file regarding the insured person’s claim.
3. Although that settled the dispute between the parties with respect to the production of the required documents, the syndic nevertheless proceeded with her motion for a declaratory judgment. As agreed by the parties, that motion raised the following question:

[translation] The parties agree that at the time when the ChaD (Chambre de l’assurance de dommages) made its request to the defendant on January 24, 2011, some of the documents included in the claim file of the insured person N.F. were not produced by the defendant on the basis of litigation privilege or of professional secrecy (solicitor‑client privilege). Accordingly, was the defendant entitled to assert those privileges against the ChaD and to refuse on that basis to produce the documents covered by them?

1. The Superior Court judge who heard the motion held that it raised a [translation] “genuine problem”, because other insurers and claims adjusters had raised the same question in response to requests for documents from the Chamber’s syndics. At the hearing of the motion, the syndic conceded that solicitor‑client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. As well, Aviva abandoned its argument that some of the requested documents did not relate to “the activities of a representative” within the meaning of s. 337 *ADFPS*. As a result, no facts were at issue before the motion judge.
2. Judicial History
   1. Quebec Superior Court (2013 QCCS 6397)
3. The Superior Court ruled in Aviva’s favour. The motion judge began by observing that s. 9 of the *Charter of human rights and freedoms*, CQLR, c. C‑12 (the “*Quebec Charter*”), grants quasi‑constitutional protection to professional secrecy of lawyers, which is closely linked to [translation] the “democratic values” (paras. 46 and 50‑51 (CanLII)). Although claims adjusters are not bound to professional secrecy by law, counsel retained by a claims adjuster or an insurer is so bound (paras. 47‑48). In *Blood Tribe*, it was held that an authority may not “pierce” solicitor‑client privilege absent express words in the applicable legislation. Because the *ADFPS* (and s. 337 thereof) contains no express abrogation of solicitor‑client privilege, the latter may be asserted against the syndic (paras. 53‑56).
4. The motion judge then considered the syndic’s argument that litigation privilege can be distinguished from solicitor‑client privilege, in particular in that it is not protected by s. 9 of the *Quebec Charter*. In the motion judge’s view, this argument represented a [translation] “departure from the position taken by the Supreme Court in *Foster Wheeler*” (para. 63). In that case, LeBel J. had written that litigation privilege “is now being absorbed into the Quebec civil law concept of professional secrecy” (*Foster Wheeler Power Co.* *v.* *Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 44). The motion judge also noted that the Federal Court had held, in two cases originating in common law provinces, that the principles applicable to solicitor‑client privilege in the context of the statute at issue in *Blood Tribe* (the *Personal Information Protection and Electronic Documents Act*,S.C. 2000, c. 5 (“*PIPEDA*”)) also applied to litigation privilege (paras. 64‑67).
5. In light of the decision in *Foster Wheeler*, the motion judge considered himself bound to apply these principles to Quebec law and to find that, in the absence of express language, the *ADFPS* does not abrogate litigation privilege, which can therefore be asserted against the syndic (para. 68). He accordingly declared that both solicitor‑client privilege and litigation privilege can be asserted against the syndic of the Chamber [translation] “by anybody who receives a request for information” (para. 83).
   1. Quebec Court of Appeal (2015 QCCA 152)
6. The Court of Appeal upheld the judgment on the motion, concluding that litigation privilege could be asserted against the syndic. In its view, the syndic had been right to concede that solicitor‑client privilege could be asserted against her, since the legislature is required to use express language to abrogate that privilege, which it had not done in this case. The court also noted that, by way of comparison, express language had been used in ss. 14.3, 60.4 and 192 of the *Professional Code* (which does not apply to claims adjusters) in the context of disciplinary inquiries (paras. 23 and 30 (CanLII)).
7. Although solicitor‑client privilege and litigation privilege must be viewed as being conceptually distinct, the Court of Appeal noted that in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39,[2006] 2 S.C.R. 319, this Court had written that the two rules “serve a common cause: The secure and effective administration of justice according to law” (para. 25, quoting *Blank*, at para. 31). As well, the Federal Court, the Ontario Court of Appeal and the Alberta Court of Appeal had held that litigation and/or settlement privilege cannot be abrogated without clear and explicit language (paras. 31‑32). In the Court of Appeal’s view, the same reasoning applies to the instant case.
8. The Court of Appeal added that this Court had also stated in *Blank* that the *Access to Information Act*, R.S.C. 1985, c. A‑1, had been enacted in a context in which the term “solicitor‑client privilege” was understood to include litigation privilege (para. 29). Yet the same context had also applied when the *ADFPS* was enacted in 1998, and when the legislature made amendments to that Act after *Blank* was decided, it did not add anything to abrogate solicitor‑client privilege or litigation privilege even though it had done so in the *Professional Code* with respect to professional secrecy (para. 30). The Court of Appeal concluded from this that litigation privilege could be asserted against the syndic. The court allowed the appeal, but solely to amend the motion judge’s conclusion such that it would apply to [translation] “the respondents” rather than to “any person” (para. 37).
9. Issue
10. In this Court, the syndic rightly admits that solicitor‑client privilege can be asserted against her in the context of a request for documents relating to a claim file. The central issue of the appeal is therefore whether Aviva could also assert litigation privilege against the syndic in the same context. To resolve it, I will have to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language and, accordingly, whether s. 337 *ADFPS* can be interpreted as establishing a valid abrogation of the privilege. Before doing so, however, I must first review the characteristics of litigation privilege.
11. Analysis
    1. Characteristics of Litigation Privilege
12. Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer’s file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.‑C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009‑10.
13. Litigation privilege is a common law rule of English origin: *Lyell* v. *Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor‑client privilege, which at the time was considered to be a rule of evidence that was necessary to ensure the proper conduct of trials: A. Cardinal, “Quelques aspects modernes du secret professionnel de l’avocat” (1984), 44 *R. du B.* 237, at pp. 266‑67. In an oft‑cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer’s brief rule, as follows:

Turning to the “lawyer’s brief” rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer’s preparation of his client’s case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other’s briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system. [Emphasis added.]

(*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33‑34)

1. Because of these origins, litigation privilege has sometimes been confused with solicitor‑client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003‑4; N. J. Williams, “Discovery of Civil Litigation Trial Preparation in Canada” (1980), 58 *Can. Bar Rev.* 1, at pp. 37‑38.
2. However, since *Blank* was rendered in 2006, it has been settled law that solicitor‑client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that “[t]hey often co‑exist and [that] one is sometimes mistakenly called by the other’s name, but [that] they are not coterminous in space, time or meaning” (para. 1). It identified the following differences between them:

* The purpose of solicitor‑client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
* Solicitor‑client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
* Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
* Litigation privilege applies to non‑confidential documents (para. 28, quoting R. J. Sharpe, “Claiming Privilege in the Discovery Process”, in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164‑65);
* Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

1. The Court also stated that litigation privilege, “unlike the solicitor‑client privilege, is neither absolute in scope nor permanent in duration” (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose “dominant purpose” is litigation (and not those for which litigation is a “substantial purpose”) are covered by the privilege (para. 60). It noted that the concept of “related litigation”, which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege’s effect (paras. 38‑41).
2. While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor‑client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges “serve a common cause: The secure and effective administration of justice according to law” (para. 31). More specifically, litigation privilege serves that cause by “ensur[ing] the efficacy of the adversarial process” (para. 27) and maintaining a “protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (para. 40, quoting Sharpe, at p. 165).
3. The differences identified in *Blank* between solicitor‑client privilege and litigation privilege have been adopted in Quebec law: *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d’assurances*, 2014 QCCA 1501, at para. 8 (CanLII); *Canada (Procureur général) v. Chambre des notaires du Québec*, 2014 QCCA 552, at para. 47 (CanLII); *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*, 2012 QCCA 2262, at para. 15 (CanLII); *Union canadienne (L’), compagnie d’assurance v. St‑Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, at paras. 23‑24; *Imperial Tobacco Canada ltée v. Létourneau*, 2012 QCCA 2260, at paras. 7‑8 (CanLII); *Société d’énergie de la Baie James v. Groupe Aecon ltée*, 2011 QCCA 646, at para. 14 (CanLII); *Fournier Avocats inc. v. Cinar Corp.*, 2010 QCCA 2278, at para. 21 (CanLII). In light of *Blank* and the subsequent case law, the earlier *obiter dictum* of LeBel J. in *Foster Wheeler* on which the motion judge relied in the instant case (para. 63) must be placed in its proper context. In *Foster Wheeler*, LeBel J. wrote that litigation privilege “is now being absorbed into the Quebec civil law concept of professional secrecy” (para. 44). However, that observation referred to a tendency that is no longer representative of the state of the law in Quebec. Moreover, because litigation privilege applies, for example, to an unrepresented party without the involvement of a professional counsellor (*Blank*, at para. 27), it cannot be said, despite the common characteristics, that it has been absorbed into, or constitutes a component or subcategory of, the institution of professional secrecy.
4. This being said, the syndic in the case at bar is relying on *Blank* and on the differences identified in it as the basis for three arguments that support her view that litigation privilege should be given a limited scope.
5. First, she submits that litigation privilege is not a class privilege and that this distinguishes it from solicitor‑client privilege, as it is intended not to protect a relationship, but solely to facilitate a process. Although taking care not to say that litigation privilege is essentially a [translation] “case‑by‑case privilege”, she submits that it is nevertheless a “limited privilege that must yield where the ends of justice so require or where that is justified by an overriding public interest”.
6. Next, the syndic argues that litigation privilege must be subjected to a balancing test. In her view, courts must in every case assess the harm that would result from the application of the privilege and consider the opposing interests in deciding whether it should apply. The very existence of the privilege thus depends on an analysis specific to a given situation rather than on the application of certain defined exceptions as is the case for solicitor‑client privilege. The syndic considers that litigation privilege no longer reflects contemporary legal realities, which require more extensive co‑operation in the courts, and that it should therefore be given a very narrow scope.
7. Finally, the syndic submits that it should not be possible to assert the privilege against someone who is not a party to the litigation in question. The Court should even adopt a [translation] “third party investigator exception”. In the syndic’s opinion, such an exception should apply in favour of anyone who:

[translation] . . . (i) is not a party to the litigation that gave rise to the privilege and is therefore a “third party” to the litigation who has no interest in it; (ii) has investigative powers conferred by the legislature in relation to a function being performed in the public interest; (iii) requests the production of documents that are directly relevant to the fulfillment of that function; (iv) has a duty of confidentiality that bars him or her from disclosing the requested documents, directly or indirectly, to the opposing party in the litigation that gave rise to the privilege; and (v) is authorized to disclose the documents only in a forum that itself is obligated and has the ability to maintain their confidentiality for at least as long as the duration of the litigation that gave rise to the privilege (and any related litigation). [A.F., at para. 136]

1. I note that this last argument goes well beyond the narrow issue of legislative abrogation of the privilege raised in this appeal. The proposed exception, which is based on a balancing test, could cause the privilege to be inapplicable even before that issue arises. In support of the exception, the syndic asserts that her oath of discretion and duty of confidentiality substantially limit, or even eliminate, any risk of harm. In short, in a situation like the one in this case, the very limited scope of litigation privilege means that it should yield given the importance of the syndic’s function of protecting the public.
2. I find these three arguments to be without merit. Although litigation privilege is distinguishable from solicitor‑client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case‑by‑case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.
   * 1. Litigation Privilege Is a Class Privilege
3. There are two types of privileges in our law: class privileges and case‑by‑case privileges. A class privilege entails a presumption of non‑disclosure once the conditions for its application are met. It is “more rigid than a privilege constituted on a case‑by‑case basis”, which means that it “does not lend itself to the same extent to be tailored to fit the circumstances”: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 46. On the other hand, “[t]he scope of [a] case‑by‑case privilege”, as the name suggests, “will depend, as does its very existence, on a case‑by‑case analysis, and may be total or partial” (*National Post*,at para. 52). The four “Wigmore criteria”, the last of which is a balancing of the interests at stake, are applied:

The “Wigmore criteria” consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be “sedulously fostered” in the public good (“Sedulous[ly]” being defined . . . as “diligent[ly] . . . deliberately and consciously”). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. . . .

. . .

The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good). [paras. 53 and 58]

1. In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for “the dominant purpose of litigation” (*Blank*, at para. 59) and the litigation in question or related litigation is pending “or may reasonably be apprehended” (para. 38), there is a “*prima facie* presumption of inadmissibility” in the sense intended by Lamer C.J. in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

The parties have tended to distinguish between two categories: a “blanket”, *prima facie*, common law, or “class” privilege on the one hand, and a “case‑by‑case” privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). [Emphasis deleted; p. 286]

1. From this perspective, litigation privilege is similar to settlement privilege and informer privilege, which the Court has already characterized as class privileges: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, at para. 22. Like them, litigation privilege has long been recognized by the courts and has been considered to entail a presumption of immunity from disclosure once the conditions for its application have been met: *Blank*, at paras. 59‑60; *Compagnie d’assurances AIG du Canada v. Solmax International inc.*, 2016 QCCA 258, at paras. 4‑8 (CanLII); *Groupe Ledor inc.*, at paras. 8‑9; *St‑Pierre*, at para. 41; *Axa Assurances inc. v. Pageau*, 2009 QCCA 1494, at para. 2 (CanLII); *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.), at paras. 20‑21; *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, 23 C.P.R. (4th) 185, at paras. 31‑33 and 72;*Apotex Fermentation Inc. v. Novopharm Ltd.* (1994), 95 Man. R. (2d) 186 (C.A.), at paras. 18‑20; *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.), at p. 368;*Opron Construction Co. v. Alberta* (1989), 100 A.R. 58 (C.A.), at para. 5.
2. Furthermore, several courts and authors have, although sometimes diverging on the basis for the privilege or the applicable criteria, explicitly concluded that litigation privilege is in fact a class privilege: *R. v. Lanthier*, 2008 CanLII 13797 (Ont. S.C.J.), at para. 6; *Kennedy v. McKenzie* (2005), 17 C.P.C. (6th) 229 (Ont. S.C.J.), at para. 22; *R. v. Soomel*, 2003 BCSC 140, at para. 76 (CanLII); H. C. Stewart, *Halsbury’s Laws of Canada: Evidence* (2014 Reissue), at para. HEV‑183; B. Billingsley, “‘Ingathered’ Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?” (2014), 43 *Adv. Q.* 280, at pp. 283‑85.
3. Thus, although litigation privilege differs from solicitor‑client privilege in that its purpose is to facilitate a process — the adversary process (*Blank*, at para. 28, quoting Sharpe, at paras. 164‑65) — and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).
4. This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case‑by‑case basis that the privilege should apply in light of the facts of the case and the “public interests” that are at issue (*National Post*, at para. 58).
   * 1. Litigation Privilege Is Subject to Clearly Defined Exceptions and Not to a Case‑by‑Case Balancing Exercise
5. Despite the fact that litigation privilege is a class privilege, the syndic proposes that the Court adopt the balancing test developed by Doherty J.A. of the Ontario Court of Appeal in his dissenting reasons in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test . . . . If it meets that test, then it should be determined whether in the circumstances the harm flowing from non‑disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. [Emphasis added; p. 365.]

1. I disagree. In the context of privileges, the exercise of balancing competing interests is associated with case‑by‑case privileges (*National Post*, at para. 58), not class privileges. Rosenberg J.A., who wrote reasons concurring with those of Carthy J.A. for the majority in *Chrusz*, refused to apply such a test, citing the uncertainty that would be caused by a case‑by‑case approach of balancing the advantages and disadvantages of applying the privilege. I adopt his comments on this point:

The litigation privilege is well established, even if some of the nuances are not. In my view, the competing interests or balancing approach proposed by Doherty J.A. is more appropriate for dealing with emerging claims of privilege . . . . I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre‑trial motions in civil litigation.

That is not to say that litigation privilege is absolute. The Supreme Court of Canada has made it clear that all of the established privileges are subject to some exceptions. . . .

In my view, with established privileges like solicitor‑client privilege and litigation privilege it is preferable that the general rule be stated with as much clarity as possible. Deviations from the rule should be dealt with as clearly defined exceptions rather than as a new balancing exercise each time a privilege claim is made . . . . [Emphasis added; p. 369.]

1. Moreover, other courts have cited Justice Rosenberg’s analysis with approval: *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, at paras. 57‑58; *Llewellyn v. Carter*, 2008 PESCAD 12, 278 Nfld. & P.E.I.R. 96, at para. 52; *Kennedy*, at para. 39; *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (S.C.J.), at paras. 43‑46. Similarly, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, this Court discussed the certainty that was needed in the case of another fundamental privilege, that of the police informer, explaining as follows why a case‑by‑case determination of whether relevant information is privileged would undermine the confidence of those who are protected by the privilege:

Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate. [Emphasis added; para. 30.]

The same considerations apply to litigation privilege.

1. What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather than conducting a balancing exercise in each case. In this regard, the Court held in *Smith v. Jones*, [1999] 1 S.C.R. 455, that the exceptions that apply to solicitor‑client privilege are all applicable to litigation privilege, given that solicitor‑client privilege is the “highest privilege recognized by the courts” (para. 44). These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications (paras. 52‑59 and 74‑86). They also include the exception to litigation privilege recognized in *Blank* for “evidence of the claimant party’s abuse of process or similar blameworthy conduct” (para. 44).
2. Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances. From this perspective, Aviva is proposing a new exception that is narrower than the balancing exercise being advocated by the syndic and that would apply only in the cases of urgency and of necessity. Unsurprisingly, the syndic says that she agrees with the substance of this exception.
3. The idea of an exception based on urgency and necessity is of course appealing. It would help compensate for the fact that, even though litigation privilege is temporary, it may sometimes delay access to certain documents that another party urgently needs in order to prevent serious harm. Such an exception would be based on criteria such as the need to obtain evidence to prevent serious harm, the impossibility of obtaining it by other means and the urgency of obtaining it before the [translation] “natural” lapsing of the effects of litigation privilege.
4. This exception would certainly be much narrower than the excessively broad balancing exercise proposed by the syndic. What would be required would be not to ask in each case whether litigation privilege should protect a document whose dominant purpose is preparation for litigation, but to lift the privilege in the rare cases in which a party succeeds in discharging its heavy burden with regard to this exception. Therefore, in a situation similar to the one in this case, it would not be enough for a syndic to simply invoke the need to sanction alleged disciplinary breaches in order to lift the privilege. If that did suffice, such a request would always be sufficient to establish the urgency exception, and that exception would then become the rule. This, in my view, would be improper. To establish the urgency exception in a disciplinary context, the existence of an urgent investigation in which extraordinary harm is apprehended during the period in which litigation privilege applies would instead be needed.
5. However, the record of this appeal from a declaratory judgment reveals no facts that might be presented as concrete examples of circumstances that could justify the application of such an exception. Because the urgency that is required may vary in nature depending on the legal context of the case and the nature of the relationship between the parties, I consider it preferable to leave the actual adoption of such an exception and a detailed analysis of the conditions for its application for a later date. For now, it would be advisable to limit this discussion to the defined exceptions that have been mentioned above.
   * 1. Litigation Privilege Can Be Asserted Against Third Parties, Including Third Party Investigators Who Have a Duty of Confidentiality
6. At the hearing, the syndic submitted, lastly, that in every case, it should not be possible to assert litigation privilege against third parties: it should apply only to parties to the litigation in question. In the case at bar, because the syndic is not a party to any litigation related to the litigation between the insurer and the insured person, that privilege cannot, in her opinion, be asserted against her. This is because of the limited purpose of the privilege, which is intended to facilitate the adversarial process in which the parties alone are involved. In the alternative, the syndic proposes the adoption of an exception to the effect that the privilege cannot be asserted against third party investigators who have a duty of confidentiality.
7. These arguments are unconvincing. I instead agree with the courts that have held that litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation: *R. v. Kea* (2005), 27 M.V.R. (5th) 182 (Ont. S.C.J.), at paras. 43‑44; *D’Anjou v. Lamontagne*, 2014 QCCQ 11999, at paras. 92‑93 (CanLII).
8. There are several reasons that justify this conclusion. The first is that the disclosure of otherwise protected documents to third parties who do not have a duty of confidentiality would entail a serious risk for the party who benefits from the protection of litigation privilege. There would be nothing to prevent a third party to whom such documents are disclosed from subsequently disclosing them to the public or to the other party, which could have a serious adverse effect on the conduct of the litigation in question. The documents could then be presented to the court in a manner other than that contemplated by the party protected by the privilege. This is the very kind of harm that litigation privilege is meant to avoid: *Susan Hosiery Ltd.*, at pp. 33‑34. Moreover, in *Blank*, which concerned the *Access to Information Act*, this Court held that a provision authorizing the government to invoke solicitor‑client privilege could also be used to invoke litigation privilege in order to deny a request for access to information by a third party to the litigation (for example, the media or a member of the public) (para. 4).
9. There are also cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all: *Rodriguez v. Woloszyn*, 2013 ABQB 269, 554 A.R. 8, at para. 44; *Aherne v. Chang*, 2011 ONSC 3846, 337 D.L.R. (4th) 593, at paras. 12‑13. The decisions in those cases are based on the assumption that litigation privilege can be asserted against third parties. To conclude that there are consequences associated with disclosure to third parties, one must first assume that confidentiality in relation to those parties corresponds to a normal application of the privilege.
10. As for the exception the syndic proposes for third party investigators who have a duty of confidentiality, it is hardly more justifiable. Even where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic (s. 376 *ADFPS* and s. 142 of the *Professional Code*; art. 11 of the *Code of Civil Procedure*, CQLR, c. C‑25.01). If, in the case at bar, the syndic had decided to file a complaint with the Chamber’s discipline committee, or if she had decided to turn to the common law courts (to obtain, for example, an injunction against the person being investigated, as the syndic of the Barreau du Québec did in *Guay v.* *Gesca ltée*, 2013 QCCA 343, [2013] R.J.Q. 342), it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have had to be disclosed in the course of those proceedings.
11. In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court’s opinion, “[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies” (para. 44). In that case, the fact that the third parties had duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.
12. This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk that a syndic’s inquiry will result in the disclosure of privileged documents, the possibility of a party’s work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.
13. I would add that any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise covered by litigation privilege could be made public. The United States Supreme Court gave a good description of this chilling effect, which litigation privilege (referred to as the “work product doctrine”) is in fact meant to avoid:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Emphasis added.]

(*Hickman v. Taylor*, 329 U.S. 495 (1947), at pp. 510‑11)

1. In short, in the instant case, the courts below were right to hold that the litigation privilege invoked by Aviva could be asserted against the syndic. None of the exceptions to its application justify lifting the privilege in this case. Thus, all that remains to be determined is whether the privilege can, as the syndic submits, be lifted by applying the statutory provision — s. 337 *ADFPS* — that is central to the case.
   1. Was It Open to Aviva to Assert Litigation Privilege Against the Syndic in Order to Refuse to Produce the Requested Documents?
2. The syndic argues that the rule from *Blood Tribe* on abrogating solicitor‑client privilege must not apply to litigation privilege. She submits that a legislature may abrogate litigation privilege by statute without using express language. In her view, the words “any . . . document” in s. 337 *ADFPS* must be interpreted in light of the statute’s purpose, namely the protection of the public, and it must be concluded that litigation privilege cannot be asserted against the syndic, because that would [translation] “interfere with” her work by delaying her access to the documents to which it applies.
3. Because litigation privilege is a common law rule, it will be helpful to reiterate the general principle that applies to legislative departures from such rules. This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; see also R. Sullivan, *Sullivan* *on the Construction of Statutes* (6th ed. 2014), at pp. 504‑5. Professor Sullivan writes in this regard that “[t]he stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes” (p. 504).
4. The Court has therefore imposed strict requirements for the amendment or abrogation of certain fundamental common law rules. For example, in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Court emphasized the need for clear and explicit language to oust the inherent general jurisdiction of the provincial superior courts (para. 46). The requirement for such language in this context, which originated in English law (*Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87‑88), is based on the fundamental role played by the inherent jurisdiction of the superior courts in the common law system inherited by Canada.
5. Similarly, in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, the Court refused to consider informer privilege to have been abrogated by a provision of the *Code of Civil Procedure*, CQLR, c. C‑25.01, finding that it was not “specific” enough (p. 103). In so doing, the Court emphasized the “public order” and “public interest” nature of informer privilege (p. 93). It was the fundamental importance of that privilege that led the Court to require explicit language for its abrogation.
6. *Blood Tribe*, on which much of the argument in this appeal was focused, was to the same effect. In it, the issue was whether solicitor‑client privilege had been abrogated or diluted by a statutory provision that authorized an administrative investigator to compel a person to produce any records the investigator considered necessary to investigate a complaint “in the same manner and to the same extent as a superior court of record” and to “receive and accept any evidence and other information . . . that the [investigator] sees fit, whether or not it is or would be admissible in a court of law” (s. 12 *PIPEDA*, now s. 12.1 (S.C. 2010, c. 23, s. 83)). The Court held that the provision at issue was insufficient to abrogate solicitor‑client privilege: “Open‑textured language governing production of documents [does] not . . . include solicitor‑client documents” (para. 11 (emphasis deleted)). Instead, the legislature must use “clear and explicit language” to abrogate solicitor‑client privilege (para. 2). The Court stated that the privilege “cannot be abrogated by inference” and added that any provisions that allow incursions on the privilege must be interpreted restrictively (para. 11).
7. To justify these requirements, the Court relied on the unique and foundational importance of solicitor‑client privilege, which is “fundamental to the proper functioning of our legal system” (*Blood Tribe*, at para. 9). The Court cited a significant body of case law to the effect that the privilege is a “fundamental policy of the law” (para. 11) that must be “as close to absolute as possible to ensure public confidence and retain relevance” (para. 10, quoting *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 35). The Court also noted that solicitor‑client privilege is of paramount importance because it promotes “access to justice”, the “quality of justice” and “[the] free flow of legal advice” (para. 9). What I take from this is that in *Blood Tribe*, the Court held that there is a requirement similar to the one that applies in Quebec under s. 9 of the *Quebec Charter*, which provides that an “express” legislative override is necessary in order to abrogate professional secrecy.
8. This being said, *Blood Tribe* represents neither a return to the “plain meaning rule” nor an abandonment of the modern approach to statutory interpretation, the goal of which is not to focus solely on the specific words of the provision, but to read the words “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Blood Tribe*, at para. 26. First of all, the legislature does not necessarily have to use the term “solicitor‑client privilege” in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege. Next, even where there is a specific reference to solicitor‑client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor‑client privilege in order to determine its meaning and scope in *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at paras. 22‑34. But in accordance with *Blood Tribe*, unless clear, explicit and unequivocal language has been used to abrogate solicitor‑client privilege, it must be concluded that the privilege has not been abrogated.
9. In the syndic’s view, these requirements that must be met in order to override certain rules of fundamental importance should not apply to litigation privilege. She bases this argument on the limited nature of the privilege, which is not absolute and which, in her opinion, requires a balancing of competing harms and interests.
10. I disagree. The requirements discussed in *Blood Tribe* apply with equal force to litigation privilege. Not only is litigation privilege a class privilege, but it serves an overriding “public interest” as that expression is used in *Bisaillon*. This public interest, as was explained in *Blank*, is “[t]he secure and effective administration of justice according to law” (para. 31). The purpose of litigation privilege is to “ensure the efficacy of the adversarial process” (*Blank*, at para. 27) by maintaining a “protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (para. 40, quoting Sharpe, at p. 165). By maintaining a protected area for the preparation of litigation, litigation privilege in its own way promotes “access to justice” and the “quality of justice” (*Blood Tribe*, at para. 9).
11. There is of course no question that litigation privilege does not have the same status as solicitor‑client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor‑client privilege, litigation privilege is “fundamental to the proper functioning of our legal system” (*Blood Tribe*, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: *Penetanguishene Mental Health Centre v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 39; *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties’ ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor‑client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.
12. This conclusion is consistent with a robust line of authority. Like the Quebec Court of Appeal in the instant case, the Alberta Court of Appeal has also held that a party should not be denied the right to claim litigation privilege without “clear and explicit legislative language to that effect”: *TransAlta Corp. v. Market Surveillance Administrator*, 2014 ABCA 196, 577 A.R. 32, at para. 36. As well, the Federal Court has applied the principles from *Blood Tribe* to litigation privilege in two cases: *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429, at paras. 14 and 30‑37 (CanLII); *State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada*, 2010 FC 736, at para. 115 (CanLII).
13. In the case at bar, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of “any . . . document” without further precision. This is what the Court characterized in *Blood Tribe* as a “general production provision that does not specifically indicate that the production must include records for which . . . privilege is claimed” (para. 21). In fact, s. 337 *ADFPS* is even less specific than the provisions at issue in *Blood Tribe*, which empowered the investigator to obtain all the evidence he or she wished to obtain, “whether or not it is or would be admissible in a court of law” and “in the same manner and to the same extent as a superior court of record” (s. 12 *PIPEDA*, now s. 12.1).
14. A provision that merely refers to the production of “any . . . document” does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. There are a number of statutes that provide for the disclosure or production of “any . . . document” without further precision. As the intervener Advocates’ Society points out, Quebec’s *Code of Civil Procedure* does so, as do the rules of civil procedure of several other provinces. Some courts have held in the past that rules of civil procedure providing for the disclosure of documents in very general terms did not contain the language that would be required in order to abrogate litigation privilege: *Louch v. Decicco*, 2007 BCSC 393, 39 C.P.C. (6th) 8, at para. 63; *Ward v. Pasternak*, 2015 BCSC 1190, at paras. 37‑38 (CanLII). The same conclusion applies in the instant case.
    1. Collateral Issue: The Professional Code and Litigation Privilege
15. I must address one final point. In response to certain comments made in the Court of Appeal’s reasons, the Barreau du Québec has intervened in this Court to raise a collateral issue with respect to the scope of s. 192 of the *Professional Code*, as amended in 1994. That section explicitly abrogates professional secrecy in the context of a disciplinary inquiry, but does not refer to the assertion of litigation privilege by a professional in such a context. In its reasons, the Court of Appeal made two references to s. 192 (at paras. 23 and 30) to illustrate a situation in which the legislature has expressly abrogated professional secrecy, which it has not done in s. 337 *ADFPS*.
16. Wishing to clear up any ambiguity concerning the scope of those comments, the Barreau submits that s. 192 should be read as abrogating not only professional secrecy, but also litigation privilege, even though it does not actually mention the latter. The Barreau relies on *Blank*, in which this Court held that the protection afforded to solicitor‑client privilege by s. 23 of the *Access to Information Act*, which did not mention litigation privilege, also applied to the latter privilege.
17. Although I am mindful of the concerns expressed by the Barreau, I am of the opinion that it would not be appropriate for the Court to rule on this issue at this time without full argument in an adversarial context by all parties who might have an interest in it.
18. Disposition
19. Litigation privilege is a class privilege that is distinct from solicitor-client privilege and is subject to certain defined exceptions that do not apply in this case. Given the absence of clear, explicit and unequivocal language in the *ADFPS* providing for the abrogation of this privilege, it may be asserted against the syndic, and the Superior Court and Court of Appeal were right to reach this conclusion. I would accordingly dismiss the appeal with costs to Aviva.

*Appeal dismissed with costs.*

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