

**SUPREME COURT OF CANADA**

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| **Citation:** La Souveraine, Compagnie d’assurance générale *v.* Autorité des marchés financiers, 2013 SCC 63, [2013] 3 S.C.R. 756 | **Date:** 20131121  **Docket:** 34699 |

**Between:**

**La Souveraine, Compagnie d’assurance générale**

Appellant

and

**Autorité des marchés financiers**

Respondent

**Official English Translation:** Reasons of Wagner J.

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 95)  **Dissenting Reasons:**  (paras. 96 to 118)  **Dissenting Reasons:**  (paras. 119 to 141) | Wagner J. (McLachlin C.J. and Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)  Fish J. (LeBel J. concurring)  Abella J. |

La Souveraine, Compagnie d’assurance générale *v.* Autorité des marchés financiers, 2013 SCC 63, [2013] 3 S.C.R. 756

La Souveraine, Compagnie d’assurance générale Appellant

v.

Autorité des marchés financiers Respondent

**Indexed as: La Souveraine, Compagnie d’assurance générale *v.* Autorité des marchés financiers**

2013 SCC 63

File No.: 34699.

2013:  March 20; 2013:  November 21.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Provincial offences — Financial products and services — Nature of offence — Strict liability — Insurance company charged with committing offence on number of occasions by helping or inducing, through its consent and/or authorization, third party to violate regulatory provision — Regulator not responding to written explanations from insurance company before issuing statements of offence — Whether offence at issue one of strict liability — If so, whether proof of mens rea required — Whether actus reus of offence proved beyond reasonable doubt — Whether offence is discrete offence or party liability offence — Whether single conviction should be substituted for multiple convictions entered at trial — Act respecting the distribution of financial products and services, R.S.Q., c. D‑9.2, ss. 482, 491.*

*Provincial offences — Defences — Due diligence — Officially induced error — Conditions for availability of defence based on reasonable mistake of law — Whether official’s passive conduct may be reasonably relied on as approval or inducement.*

S is an Alberta insurance company that is registered with the Autorité des marchés financiers (“AMF” or “Authority”) and is authorized to sell insurance products in Quebec; it offers such products through brokers. The AMF issued 56 statements of offence against S for helping or inducing, through its consent and/or authorization, a broker that was not registered with the AMF to violate a provision of the *Act respecting the distribution of financial products and services*, R.S.Q., c. D‑9.2 (“*ADFPS*”).

Before the statements of offence were issued, S had replied in writing to a request from the AMF for information, explaining why in S’s view, its conduct was not problematic. The AMF issued the statements of offence more than six months later without responding to S’s written explanations.

The trial judge convicted S on the basis that it had authorized, permitted or consented to the distribution by its broker of insurance products for property located in Quebec although it knew that the broker did not hold the licences required by the *ADFPS*. According to the trial judge, the offence at issue is one of strict liability, and the defence raised by S on the basis of a mistake of law was not valid.

The Superior Court allowed S’s appeal and acquitted S on the basis that neither the *actus reus* nor the *mens rea* of the offence had been proved beyond a reasonable doubt. According to the Superior Court, the offence at issue requires proof of a wilful act and of a specific intent, which had not been shown, since S had not known that its broker was breaking the law.

The Court of Appeal allowed the AMF’s appeal and restored the 56 convictions ofS for the offence in question, which it characterized as one of strict liability. Concerning the *actus reus*, the majority of the Court of Appeal found that the authorization S had given its broker was sufficient to establish this element of the offence. They added that the due diligence defence is not available where the mistake being relied on is one of law and that the AMF’s failure to respond to S’s written explanations did not transform that mistake into one of mixed fact and law.

*Held* (LeBel  and Fish JJ. dissenting in part and Abella J. dissenting): The appeal should be dismissed with costs.

*Per* McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and WagnerJJ.: The Court of Appeal was right to review the Superior Court’s conclusions with regard to both *mens* *rea* and the *actus reus*. Had it not been for the Superior Court’s conclusion that proof of *mens rea* was required for the offence at issue, that court would not have arrived at the same interpretation of the content of the *actus reus*, and the *ratio decidendi* of its judgment would have been different. Those issues are inextricably linked, and the Court of Appeal therefore had jurisdiction to decide the *actus reus* issue and set aside the acquittal entered by the Superior Court. Otherwise, the appeal to the Court of Appeal on the issue of *mens rea* would have become moot and irrelevant.

The offence provided for in s. 482 of the *ADFPS* is a regulatory offence. Such offences are generally strict liability offences, and strict liability offences do not require proof of *mens rea*. In enacting the *ADFPS*, the Quebec legislature chose to establish an independent offence in s. 482 rather than establishing a mode of participation in the commission of an offence as has been done in s. 21(1)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C‑46.

The difference between the wording of s. 21(1)(*b*) of the *Criminal Code* and that of s. 482 of the *ADFPS*, and in particular the omission of the words “for the purpose of” from s. 482 of the *ADFPS*, confirms the general rule that, unless otherwise indicated, regulatory offences adopted to protect the public fall into the category of strict liability offences. In this case, proof of *mens rea* was not required: it was not necessary to prove that S knew its broker intended to break the law or that the former had the specific intent of helping or inducing the latter to do so.

On the *actus reus* of the offence, the evidence shows that S’s conduct was not, strictly speaking, passive, since its failure to object in a timely manner to its broker’s actions constituted consent and/or authorization within the meaning of s. 482 of the *ADFPS*. S’s conduct had the effect of provoking a violation of the law by its broker, which means that the *actus reus* of the offence has been established beyond a reasonable doubt. S can avoid liability only by showing that it acted with due diligence.

The due diligence defence is available if the defendant reasonably believed in a mistaken set of facts that, if true, would have rendered his or her act or omission innocent. A defendant can also avoid liability by showing that he or she took all reasonable steps to avoid the particular event. However, this defence will not be available if the defendant relies solely on a mistake of law to explain the commission of the offence. A mistake of law can ground a valid defence only if the mistake was an officially induced error and if the conditions with respect to the application of such a defence are met. No matter how reasonable a mistake of law may be, it cannot — unlike a mistake of fact or an officially induced error — serve as a valid defence in the case of a strict liability offence. The objective of public protection that underlies the creation of regulatory offences militates strongly against accepting a *general* defence of reasonable mistake of law in this context.

Finally, although it is true that the offence provided for in s. 482 of the *ADFPS* is a discrete and independent offence and that S is not liable for the offences committed by its broker, this does not mean that S cannot have committed several discrete offences. That is in fact what occurred here. It would nevertheless be preferable for a prosecutor, when exercising its discretion to issue multiple statements of offence, to assess the context in which the offences were committed on a case‑by‑case basis.

*Per* LeBelandFish JJ. (dissenting in part): The appeal should be allowed in part in order to substitute a single conviction for the 56 convictions entered at trial and restored by the Court of Appeal.

S stands convicted 56 times for what, as a matter of law, was a single offence. Section 482 of the *ADFPS* creates a discrete substantive offence, rather than a party liability offence. Manifestly, an insurerfound to have violated s. 482 of the *ADFPS* is neither guilty of the same offence nor liable to the same penalty as the firm it helped or induced to contravene *another provision of the Act or regulations*. Party liability is expressly provided for in s. 491 of the *ADFPS*.

Section 491 was adopted in its present form in 2009. Had it been in force in 2006, when the proceedings in this case were instituted, it would have been open to the Authority to charge S with having participated as a party in the 56 offences under another provision of the Actcommitted by its broker. Here, without the benefit of s. 491, the Authority charged S with 56 counts under s. 482 ― a substantive offence with a different penalty ― and claimed 56 times the mandatory minimum penalty under s. 482 as if S, *under that section*, was a party to the offences allegedly committed by its broker.

Nowhere does s. 482 of the *ADFPS* provide that an insurer or its mandatary is liable for offences committed by the person or firm induced — byeither the insureror its mandatary — to commit them. Insurer and mandatary alike, when they aid or induce another to commit a substantive offence under the *ADFPS*, such as s. 482,may now be prosecuted under s. 491 of the *ADFPS* as parties to that offence. But they are not liable as parties when charged under s. 482, as S was in this case. The decision to create a discrete substantive offence by enacting s. 482 represents a deliberate legislative choice to which courts must give effect.

*Per* Abella J. (dissenting): The appeal should be allowed and the proceedings stayed.

To date, officially induced error has only been used as a defence in circumstances where an official actually gave erroneous information to an accused. It has been seen, in other words, as requiring official conduct of an *active* kind. But there is no principled basis for excluding conduct of a more passive nature, including silence from an official, which could, in some circumstances, reasonably be relied on as approval, or an “inducement”. This is particularly the case if the silence occurs in a regulatory framework that demonstrably requires a degree of expedition, such as the one S, an insurance company, was subject to. Underlying the defence of officially induced error is the broad principle that an individual not be held culpable when he or she is induced by an official’s conduct into relying on a reasonable but incorrect understanding of the law. Punishing a regulated entity who is dependent on the regulator’s timely response, and reasonably relies on its silence, perpetuates the very injustice that led to the development of the strict liability defences in the first place: finding the morally innocent culpable.

The question in dealing with an official’s passive conduct is whether a reasonable person in the position of the accused would have expected the official to inform him or her in a timely way that their understanding of the law was incorrect. The responsibilities of the official and the field and complexity of the regulation at issue will be relevant, as will the extent to which the accused could reasonably have expected a timely response in order to carry on its undertakings. If a body charged with supervising a regulatory domain fails inexplicably to respond relatively promptly to an accused’s erroneous assertion, it shares the blame for the accused’s ignorance of the law. In such circumstances, it is inappropriate for that very regulatory body to bring charges against an accused who has reasonably relied on its silence.

S took reasonable steps to satisfy itself that it was not violating the law. It set out its understanding of the relevant legal requirements and the basis for its understanding in an unambiguous letter to the investigator responsible for the file. Yet rather than respond to S’s letter, 7 months later the regulatory body brought 56 charges. It was reasonable for S to rely on the regulatory body’s conduct — in this case silence — as confirmation that its understanding of the law was correct and as an inducement to conduct itself accordingly. The regulatory body had a duty to be diligent in performing its statutory role. Had that body responded in any way, let alone in a timely one, S could have brought itself in conformity with the law.

**Cases Cited**

By Wagner J.

**Applied:** *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; **referred to:** *R. v. Keegstra*, [1995] 2 S.C.R. 381; *Vézeau v. The Queen*, [1977] 2 S.C.R. 277; *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420; *Marston v. Autorité des marchés financiers*, 2009 QCCA 2178 (CanLII); *R. v. F. W. Woolworth Co. Ltd.* (1974), 3 O.R. (2d) 629; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *Demers v. Autorité des marchés financiers*, 2013 QCCA 323 (CanLII); *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Molis v. The Queen*, [1980] 2 S.C.R. 356; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. O’Connor*, [1995] 4 S.C.R. 411.

By Fish J. (dissenting in part)

*Demers v. Autorité des marchés financiers*, 2013 QCCA 323 (CanLII).

By Abella J. (dissenting)

*R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420; *R. v. Jorgensen*, [1995] 4 S.C.R. 55.

**Statutes and Regulations Cited**

*Act respecting insurance*, R.S.Q., c. A‑32.

*Act respecting the Autorité des marchés financiers*, R.S.Q., c. A‑33.2, ss. 4(2), (3), 7.

*Act respecting the distribution of financial products and services*, R.S.Q., c. D‑9.2, ss. 71, 462, 482, 487, 491 [am. 2009, c. 58, s. 85].

*Code of Penal Procedure*, R.S.Q., c. C‑25.1, art. 291.

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 21.

*Securities Act*, R.S.Q., c. V‑1.1, s. 208.

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Parent, Hugues. *Traité de droit criminel*, t. 2, 2e éd. Montréal: Thémis, 2007.

Quebec. Assemblée nationale. *Journal des débats de la Commission permanente des finances publiques*, vol. 41, no 47, 1re sess., 39e lég., 26 novembre 2009, p. 20‑21.

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond and Kasirer JJ.A. and Cournoyer J. (*ad hoc*)), 2012 QCCA 13, [2012] R.J.Q. 111, [2012] J.Q. no 33 (QL), 2012 CarswellQue 36, SOQUIJ AZ‑50819137, setting aside a decision of Martin J., 2009 QCCS 4494, [2009] Q.J. No. 10913 (QL), 2009 CarswellQue 10003, SOQUIJ AZ‑50578234, setting aside a decision of Boisvert J.C.Q., 2008 QCCQ 10557, [2008] J.Q. no 12056 (QL), 2008 CarswellQue 11563, SOQUIJ AZ‑50522982. Appeal dismissed, LeBel and Fish JJ. dissenting in part and Abella J. dissenting.

*Jean‑Claude Hébert* and *Patrick Henry*, for the appellant.

*Éric Blais* and *Tristan Desjardins*, for the respondent.

English version of the judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. delivered by

1. Wagner J. — The appellant, La Souveraine, Compagnie d’assurance générale (“La Souveraine”), is appealing a judgment of the Quebec Court of Appeal dated January 10, 2012. The Court of Appeal allowed an appeal of the respondent, the Autorité des marchés financiers (“AMF”), from a judgment rendered by the Quebec Superior Court on October 6, 2009 in which that court had set aside a decision of the Court of Québec dated November 10, 2008. The Court of Québec had convicted La Souveraine of committing, 56 times, the offence provided for in s. 482 of the *Act respecting the distribution of financial products and services*,R.S.Q., c. D‑9.2 (“*ADFPS*”).
2. The appellant argues that the offence of which it was convicted requires proof of *mens rea* and that the subjective element of the offence was not proved beyond a reasonable doubt. In the alternative, it submits that, even if the offence is a strict liability offence, the *actus reus* was not proved. Finally, it argues that, in any event, it exercised due diligence and that, for all these reasons, this Court should acquit it.
3. For the reasons that follow, I find that the appeal must fail. The offence in question is one of strict liability. The *actus reus* was established, and the due diligence defence was not available in this case, because the appellant was relying on a pure mistake of law.

I. Background

1. The appellant is an Alberta insurance company that is duly registered with the AMF under the *Act respecting insurance*, R.S.Q., c. A‑32, and is authorized to sell insurance products in Quebec. It generally offers its products through a number of brokers that operate in various regions of Canada. Flanders Insurance Management and Administrative Services Ltd. (“Flanders”), a Winnipeg‑based company, was one of those brokers, but since it was not registered with the AMF, it was not authorized to offer insurance products in Quebec.
2. In 2004, Flanders, acting on the appellant’s behalf, negotiated and issued to the insured, GE Commercial Distribution Finance Canada (“GE”), a master policy on inventories of goods financed by GE, namely recreational vehicles at various dealerships across Canada. Of those dealerships, 56 with establishments in Quebec agreed to participate under the master policy strictly to insure the portion of their inventories to which GE’s coverage applied. The broker then issued to each Quebec participant an individual insurance certificate in which GE was named as the [translation] “insured” and the dealership as the “certificate holder”. I should add that the insurance premiums were paid directly to the broker by GE, which billed the dealerships for them on a monthly basis. Any indemnity payable by the appellant following the occurrence of an event covered by the policy was paid directly to GE in Ontario.
3. A competitor of Flanders that had previously done what Flanders was now doing filed a complaint with the AMF alleging, *inter alia*, that Flanders was pursuing these activities in Quebec without holding the required licences. The AMF began its investigation on January 13, 2005.
4. In April of that year, the AMF asked the appellant for information about its business relationship with Flanders and GE, and about the insurance products covering the inventories financed by GE for the dealerships located in Quebec.
5. On June 10, 2005, the appellant replied in writing that, in its view, the licensing issue was not problematic, since GE, Flanders’ client, had its head office in Ontario. The appellant added that the master policy had been negotiated and issued in Ontario and that the premiums were paid directly to Flanders by GE. It also mentioned that, in the event of a loss, the indemnity was payable directly to GE and not to the dealership.  At the same time, the appellant sent the AMF a list of the Quebec dealerships that were participants under the master policy issued to GE.
6. On August 25, 2005, Flanders invited the Quebec dealerships to renew their individual insurance certificates.
7. In January 2006, the AMF issued 56 statements of offence against the appellant. This was the first “communication” between the parties since the last letter the appellant had sent on June 10, 2005.
8. The statements of offence, which the appellant contested, were worded as follows:

[translation] At [place], on or about August 25, 2005, did consent to and/or authorize the issuance by Flanders . . ., a firm not registered with the Autorité des marchés financiers, of a floor plan insurance policy, number . . . to [name of dealership], contrary to section 71 of the [*ADFPS*] (the “Act”), thereby committing the offence provided for in section 482 of the Act and rendering itself liable to the penalty provided for in section 490 of the Act.

II. Judicial History

1. Judge Boisvert of the Court of Québec convicted the appellant of the 56 offences (2008 QCCQ 10557 (CanLII)). He found that the offence provided for in s. 482 of the *ADFPS* is one of strict liability. He added that regardless of whether the offence is one of strict or specific liability, the evidence showed that the appellant had known that it was insuring property located in Quebec and that its broker, Flanders, was not duly registered in Quebec. According to Judge Boisvert, the appellant had therefore authorized, permitted or consented to the distribution by its broker of insurance products for property located in Quebec although it *knew* that the broker did not hold the required licences.
2. Judge Boisvert accepted that the appellant had not known that Quebec legislation applied to the master policy for inventories of goods located in Quebec and that its mandatary had to be registered in that province. In his opinion, a mistake of law such as this cannot be raised as a defence. He also explained that the appellant had not done enough to ensure that its commercial transactions were consistent with provincial legislation, but had instead relied on its broker’s opinion without obtaining independent legal advice.
3. In the Superior Court, Martin J. allowed La Souveraine’s appeal and acquitted it on all the counts (2009 QCCS 4494 (CanLII)). He found that the *actus reus* of the offence — the material fact — had not been proved beyond a reasonable doubt. In his view, the words “helps” and “induces” in s. 482 of the *ADFPS* require proof that the defendant performed a wilful act, and the appellant’s passive conduct in relation to the transactions in question could not be considered a wilful act. Martin J. added that the offence in this case requires proof of *mens rea*, or a guilty mind. In his opinion, a party liability offence that sanctions not the conduct of the principal offender but that of a secondary offender, that is, an individual who helped or induced the principal offender to commit the principal offence, continues to require proof of *mens rea* even if the principal offence is one of strict liability. Since the appellant had not known that Flanders was breaking the law, the *mens rea* had not been proved.
4. In any event, Martin J. found that the appellant’s defence was valid, since the mistake the appellant was alleging was not a pure mistake of law, but one of mixed fact and law. That mistake had arisen not only from a misinterpretation of the applicable law, but also from the fact that the AMF’s silence following the letter of June 10, 2005 had been interpreted as a confirmation that the contemplated transactions were lawful.
5. The Court of Appeal granted the AMF leave to appeal under art. 291 of the *Code of Penal Procedure*, R.S.Q., c. C‑25.1, on the following question of law (2012 QCCA 13 (CanLII)): Did the Superior Court judge err in law by imposing on the AMF a burden of proving a specific *mens rea* for the offence provided for in s. 482 of the *ADFPS*?
6. The Court of Appeal, in reasons written by Kasirer and Cournoyer JJ.A., allowed the AMF’s appeal and restored the convictions. The majority found that the offence in this case is one of strict liability and that the *actus reus* of the offence had been proved beyond a reasonable doubt: the appellant had never maintained that Flanders had distributed the insurance products in question without its authorization, and this was sufficient to establish the *actus reus*. Moreover, the due diligence defence was not available in this case, because the mistake being relied on was one of law and because having exercised due diligence in inquiring into the applicable law is not a valid defence in either a criminal or a regulatory context. Finally, the AMF’s failure to reply to the appellant’s letter of June 10, 2005 did not transform that mistake of law into one of mixed fact and law.
7. Dalphond J.A., dissenting, would have dismissed the AMF’s appeal and acquitted the appellant. He agreed with the majority that the offence provided for in s. 482 of the ***A****DFPS* is one of strict liability. However, he also agreed with the Superior Court that the *actus reus* had not been proved, because the wording of the section required active participation in the violation of the law. The appellant’s [translation] “passive acquiescence” (para. 56) to Flanders’ transactions could not have the effect of “helping” or “inducing” Flanders to commit such a violation. According to Dalphond J.A., even if the *actus reus* had been established, the appellant had to be acquitted, because it had exercised due diligence by [translation] “actively [seeking] to comply with the law” (para. 68).
8. More specifically, Dalphond J.A. noted that the appellant had reviewed how its product was distributed and how the product was treated in the other provinces of Canada. It had sought information from Flanders and obtained legal advice to the effect that the transactions in question were lawful. Dalphond J.A. expressed the opinion that the defence of due diligence was available in this case because the appellant’s mistake was the result not only of an erroneous interpretation of the law, but [translation] “also of a set of concurrent facts leading La Souveraine to believe that this interpretation was well founded” (para. 76). These facts, in his view, included in particular the complexity of the transactions at issue, the fact that the insurance premiums and indemnities were payable outside Quebec, the fact that the coverage concerned only assets belonging to GE, the reassurance given by Flanders and its lawyers that the transactions were lawful and, finally, the AMF’s silence following the appellant’s explanatory letter of June 10, 2005.

III. Issues

1. The appellant submits, first, that the Court of Appeal lacked jurisdiction to set aside the Superior Court’s judgment of acquittal, because leave had not been granted to appeal the conclusion in that judgment that the *actus reus* had not been proved in this case. It argues that the appeal was limited to the question whether the offence provided for in s. 482 of the *ADFPS* requires proof of *mens rea*.
2. The appellant further submits that the offence in question is one that requires proof of a guilty mind. It argues that, at common law, *mens rea* is always required where the offence involves secondary penal liability**.** In the alternative, if this Court characterizes the offence as one of strict liability, the appellant submits that the *actus reus* of the offence has not been proved. Finally, it argues that the due diligence defence was available given that it had, at the very most, made only a reasonable mistake of law.
3. The AMF takes the position that the offence provided for in s. 482 of the *ADFPS* is one of strict liability for which the *actus reus* has been proved beyond a reasonable doubt. It adds that the appellant’s mistake in this case was purely one of law and that a defence cannot be based on such a mistake.
4. I will begin by discussing the preliminary issue of the Court of Appeal’s jurisdiction before turning to the four main issues raised by this appeal.  The first of those issues concerns the nature of the offence provided for in s. 482 of the *ADFPS* in light of the three categories recognized since *R. v.* *City of Sault Ste. Marie*,[1978] 2 S.C.R. 1299: offences requiring proof of *mens rea*, strict liability offences and absolute liability offences. The second issue relates to the content of the *actus reus* of the offence at issue and whether that element was proved beyond a reasonable doubt. The third issue concerns the content of the due diligence defence and whether that defence was available in this case. The final issue is whether a defence based on a reasonable mistake of law should be accepted.

IV. Analysis

A. *Jurisdiction of the Court of Appeal*

1. I find that the Court of Appeal was right to review the Superior Court’s conclusions with regard to both *mens* *rea* and the *actus reus*. In *R. v. Keegstra*, [1995] 2 S.C.R. 381, this Court considered the arguments that may be raised on appeal in criminal cases. On the subject of appeals for which leave to appeal has been granted, Lamer C.J. began by laying down a general rule (para. 28), but after doing so, he added some significant qualifications (paras. 29 and 31):

. . . the Court may choose to grant leave on restricted grounds or at large. Restricting the leave granted to specific issues constrains the arguments which may be raised by appellants. The arguments which may be raised by respondents are not affected by an order granting leave on narrow grounds. . . .

Leave granted under the *Criminal Code* provisions differs from leave granted under s. 40 of the *Supreme Court Act* in civil matters. While appeal routes in civil cases are not at issue in this motion, it is useful to clarify that the decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, is not relevant to criminal appeals. In *Idziak*, leave was granted on one ground only and both parties were restricted in their argument to addressing that ground. In civil matters, leave to appeal may be sought with respect to any finding adverse to the party in question. The number of such findings in a civil case is nearly always much greater than in a criminal case. Accordingly, as a matter of policy, when restricted leave is granted in civil cases, the respondent will normally be limited to arguing those issues set out by the Court in its order granting leave. . . .

. . .

. . . in some cases, two issues which may have been discussed separately at the court of appeal will be so inextricably linked as to form two aspects of the same question of law. In this case, an appellant who has a narrow right of appeal based on a dissent, or who has been granted leave to appeal on restricted grounds, will be able to address all aspects of the question, even if the court of appeal treated the different aspects separately. One example of this intertwining is the question of whether a particular error of law is so serious that it justifies setting aside the trial verdict. The provisions for taking account of the severity of errors (s. 686(1)(*b*)(iii) in the case of convictions, and the threshold set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, in the case of acquittals) will always be intertwined with any error of law considered by this Court. [Emphasis added; paras. 28‑31.]

1. Although these principles were formulated in relation to a criminal offence, they are also relevant in the context of regulatory offences.
2. In the instant case, Martin J. of the Superior Court found on the basis of his interpretation of the words “helps” and “induces” used in s. 482 of the *ADFPS* that there was no proof with respect to the *actus reus* or to *mens rea* (para. 140):

The operative words of “aiding” and “inducing” are however of prime importance in the resolution of this matter. The role that they play in relation to the culpability of the appellant is pivotal.  In my view, these words indicate the requirement for some sort of voluntary action on the part of the accused as an essential element of the offence and secondly they also invest the offence with a *mens rea* component.

1. It can be seen from Martin J.’s reasons that his interpretation of the content of the *actus reus* and his finding that there was no proof in this regard flowed directly from his reasoning with respect to *mens rea*, as all these elements are inextricably linked. In his opinion, the authorization the appellant had given its broker to distribute insurance products on its behalf was not sufficient to constitute the wilful act required to prove the offence. However, that authorization had clearly had *the effect of inducing* the broker to commit the offence. This means that the judge had to assume that the offence has a *mens rea* component, namely acting with a certain goal, or “for the purpose” of helping or inducing a third party, the appellant’s broker in this case, to perform a certain action. In other words, had it not been for his conclusion that proof of *mens rea* was required, Martin J. would not have arrived at the same interpretation of the content of the *actus reus*, and the *ratio decidendi* of his judgment would have been different (*Vézeau v. The Queen*, [1977] 2 S.C.R. 277). The Court of Appeal therefore had jurisdiction to decide the *actus reus* issue and set aside the acquittal he had entered.
2. Indeed, as a matter of pure logic, no other conclusion is possible on the issue of the Court of Appeal’s jurisdiction. If the Court of Appeal had no legal authority to consider the *actus reus* issue and this issue was *res judicata*, decided in favour of the appellant, then the appeal to that court on the issue of *mens rea*, for which leave was granted, would have become moot and irrelevant. I cannot imagine that the Court of Appeal would have granted leave for an appeal that lacks relevance.
3. Thus, the appellant’s arguments in this regard are without merit and must be rejected.

B. *Nature of the Offence Provided for in Section 482 of the ADFPS*

1. Section 482 of the *ADFPS* reads as follows:

**482.**  Every insurer that helps or, by encouragement, advice or consent or by an authorization or order, induces a firm or an independent representative or independent partnership through which it offers insurance products or an executive officer, director, partner, employee or representative of such a firm or independent partnership to contravene any provision of this Act or the regulations is guilty of an offence.

The same applies to any director, executive officer, employee or mandatary of an insurer.

1. A court inquiring into the nature of an offence must interpret the relevant statutory provision. In doing so, it must take account of the presumption established by this Court that regulatory offences are generally strict liability offences. In *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 16, LeBel J. explained this as follows, citing the presumption of statutory interpretation articulated by this Court in *Sault Ste. Marie*:

Classifying the offence in one of the three categories now recognized in the case law thus becomes a question of statutory interpretation. Dickson J. noted that regulatory or public welfare offences usually fall into the category of strict liability offences rather than that of *mens rea* offences. As a general rule, in accordance with the common law rule that criminal liability ordinarily presupposes the existence of fault, they are presumed to belong to the intermediate category:

Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as “wilfully,” “with intent,” “knowingly,” or “intentionally” are contained in the statutory provision creating the offence. [p. 1326]

1. I note, first, that the offence provided for in s. 482 of the *ADFPS* is a regulatory offence. Protection of the public is the underlying rationale for such offences, which are enacted as “incidental sanctions whose purpose is to enforce the performance of various duties, thereby safeguarding the general welfare of society” (*City of Lévis*, at para. 13, *per* LeBel J.). The objective of the scheme established by the *ADFPS*, which includes the offence provided for in s. 482, is essentially to regulate the insurance products distribution industry in order to protect the public (*Marston v. Autorité des marchés financiers*, 2009 QCCA 2178 (CanLII), at para. 46).
2. Accordingly, in keeping with the presumption of statutory interpretation established in *Sault Ste. Marie*, and in the absence of specific language indicating a contrary intention on the legislature’s part, the regulatory offence provided for in s. 482 of the *ADFPS* will be presumed to be one of strict liability, hence one that does not require proof of *mens rea*.
3. In the case at bar, the appellant refers to other considerations in support of its argument that the offence provided for in s. 482 of the *ADFPS* falls into the category of *mens rea* offences. According to the appellant, in the case of a party liability offence like the one at issue here, the common law continues to require proof of *mens rea* even where the principal offence is one of strict liability. This is the standard of secondary penal liability, which requires, more specifically, proof of a *mens rea* of knowledge: the accomplice must have had knowledge of the essential elements of the principal offence and must have acted as he or she did with the specific intent of helping or inducing the principal offender to break the law.
4. In this regard, the appellant relies in particular on the judgment of the Ontario Court of Appeal in *R. v. F. W. Woolworth Co. Ltd.* (1974), 3 O.R. (2d) 629, which concerned being a party to an offence within the meaning of s. 21(1)(*b*) of the *Criminal Code* (now R.S.C. 1985, c. C‑46). In that case, two salespersons had been convicted of making false representations to the public about the prices of products they were offering for sale in a space made available to them by a Woolworth store in exchange for a commission on sales. The issue was whether, under s. 21 of the *Criminal Code*, Woolworth should be convicted of being a party to the same offence on the basis that it had aided the two salespersons to commit it.
5. The Ontario Court of Appeal held that, to be convicted of being a party to an offence under s. 21 of the *Criminal Code*, a defendant had to have *known* that the principal offender’s acts constituted an offence and to have done something *for the purpose* of aiding the latter to commit that offence. The court explained this as follows:

. . . even in offences of strict liability, to hold one guilty as an aider and abettor, the Crown had the onus of proving knowledge on the part of the alleged aider of the circumstances necessary to constitute the offence which he is alleged to have aided, although it is not required that it be proven the alleged aider knew that those circumstances constituted an offence.

. . .

. . . Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence (*Sweet v. Parsley*, *supra*) but if what is done incidentally and innocently assists in the commission of an offence that is not enough to involve the alleged party whose purpose was not that of furthering the perpetration of the offence.

. . . one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs. [pp. 639-40]

1. The reasoning adopted by this Court in *R. v.* *Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, *per*Charron J., is also relevant:

Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. . . . The aider or abettor must also have the requisite mental state or *mens rea*. Specifically, in the words of s. 21(1)(*b*), the person must have rendered the assistance *for the purpose* of aiding the principal offender to commit the crime.

The *mens rea* requirement reflected in the word “purpose” under s. 21(1)(*b*) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, [1995] 2 S.C.R. 973, that “purpose” in s. 21(1)(*b*) should be understood as essentially synonymous with “intention”. The Crown must prove that the accused intended to assist the principal in the commission of the offence. . . .

As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. [Emphasis in original; paras. 15‑17.]

1. With respect, I find that *Woolworth* and *Briscoe* do not support the proposition that proof of *mens rea* is required in every case of secondary penal liability. It is true that the reasoning set out in *Woolworth* and *Briscoe* applies where the secondary penal liability provided for in s. 21 of the *Criminal Code* is at issue. However, for the following reasons, I find that that reasoning does not apply in the instant case.
2. First of all, there is a significant difference between the wording used for the independent offence provided for in s. 482 of the *ADFPS* and the wording of s. 21(1)(*b*) of the *Criminal Code*, which defines the concept of being a “party to an offence”. Whereas the former provides that “[e]very insurer that helps or . . . induces a firm . . . to contravene any provision of this Act . . . is guilty of an offence”, the latter provides that “[e]very one is a party to an offence who . . . does or omits to do anything for the purpose of aiding any person to commit it”.
3. This difference in wording is determinative. As this Court has pointed out, the expression “for the purpose of” is synonymous with intention, which is why intention and knowledge on the accomplice’s part must be established in order to convict him or her under s. 21(1)(*b*) of the *Criminal Code* (*R. v. Hibbert*, [1995] 2 S.C.R. 973).
4. Furthermore, in enacting the *ADFPS*, the Quebec legislature, rather than establishing a secondary penal liability offence by, for example, reproducing the words of s. 21(1)(*b*) of the *Criminal Code*, chose to establish an independent offence in s. 482 of the *ADFPS*. In *Woolworth*, it was clear from the provision in question that Parliament had taken the opposite approach:

In enacting s. 33 [of the *Combines Investigation Act*, R.S.C. 1970, c. C‑23], Parliament had the option of including in the Act provisions extending culpability for the infraction of the section to those other than the actual perpetrators in which even the Courts would have been called upon to interpret the scope of the words used by Parliament to convey its intention. However, instead of so doing Parliament has chosen to rely upon the extension by s. 21 imported into any offence created by statute. [p. 637]

1. In my opinion, the Quebec legislature’s choice is not inconsequential.  The difference between the wording of s. 21(1)(*b*) of the *Criminal Code* and that of s. 482 of the *ADFPS* leads to different conclusions as regards the characterization of the offences in question. The omission of the words “for the purpose of” from s. 482 of the *ADFPS* confirms the general rule that, unless otherwise indicated, regulatory offences adopted to protect the public fall into the category of strict liability offences.
2. In addition to the distinction based on the *mens rea* requirement that flows from the use of the expression “for the purpose of” in s. 21(1)(*b*) of the *Criminal Code* and the absence of that expression from s. 482 of the *ADFPS*, another more general distinction persuades me that s. 482 of the *ADFPS* is not subject to the common law rule that proof of *mens rea* continues to be required for a party liability offence even when the principal offence is one of strict liability. This distinction is based on the difference between a provision that establishes an independent offence and one that establishes a mode of participation in the commission of an offence.
3. In the recent case of *Demers v. Autorité des marchés financiers*, 2013 QCCA 323 (CanLII), the Quebec Court of Appeal considered a provision that establishes a mode of participation in the commission of an offence rather than an independent offence, namely s. 208 of the *Securities Act*, R.S.Q., c. V‑1.1 (“*SA*”), which reads as follows:

**208.**  Every person who, by act or omission, aids a person in the commission of an offence is guilty of the offence as if he had committed it himself. He is liable to the penalties provided in section 202, 204 or 204.1 according to the nature of the offence.

The same rule applies to a person who, by incitation, counsel or order induces a person to commit an offence.

1. In light of its decision in the case at bar, the Court of Appeal could have held in *Demers* that s. 208 of the *SA* establishes a strict liability offence. That conclusion would have been based on the fact that, like s. 482 of the *ADFPS* and unlike s. 21(1)(*b*) of the *Criminal Code*, s. 208 of the *SA* does not require proof of a specific *mens rea*.
2. But the Court of Appeal rejected that argument and held that it did not have to rule on the nature of the offence provided for in s. 208 of the *SA*. Because the evidence in the record was sufficient to establish beyond a reasonable doubt that the person in question had the specific intent “[to aid] a person in the commission of an offence” within the meaning of that provision, a conviction was warranted. The Court of Appeal nonetheless took the time to note that an important distinction had to be drawn between the offence provided for in s. 208 of the *SA* and the one at issue in the instant case (*Demers*, at paras. 54‑56):

[translation] Unlike section 482 [*ADFPS*], section 208 *SA* provides for a mode of participation rather than an independent offence. In this sense, section 208 *SA* is more similar to section 21(1)(b) *Cr.C.* than to the provision at issue in *La Souveraine*.

It should be noted that according to section 208 *SA*, an accomplice is guilty of the offence committed by the principal offender “as if he had committed it himself/comme s’il l’avait commise lui‑même”. Section 482 [*ADFPS*], on the other hand, provides that an insurer that acts in the contemplated manner is guilty of “an offence/une infraction” that is distinct from the one committed by the principal offender. Thus, section 208 is merely a mode of participation . . . and not a separate “offence”.

It should also be noted that the [*ADFPS*] includes a provision — section 491 [*ADFPS*] — that is practically identical to section 208 *SA*. Like section 208 *SA*,it defines a mode of participation which renders an accomplice guilty of the same offence as the principal offender “as if the person had committed it himself/comme s’il l’avait commise lui‑même”. This section, which parallels section 208 *SA*, was not raised in *La Souveraine* as a basis for the insurer’s liability. The differences between section 208 *SA* and section 482 [*ADFPS*] suffice for me to conclude that this Court’s decision in *La Souveraine* cannot serve as a precedent in the case at bar.

1. In sum, s. 482 of the *ADFPS*, which creates a separate offence, differs from ss. 208 of the *SA* and 491 of the *ADFPS*, which create modes of participation more similar to those established in s. 21(1)(*b*) of the *Criminal Code* (see also the reasons of the Court of Appeal, at paras. 41‑44, *per* Dalphond J.A., dissenting but not on this issue). It follows that the offence provided for in s. 482 of the *ADFPS* need not be subject to the common law rule that proof of *mens rea* continues to be required for party liability offences.
2. Before concluding on this issue, I will add a few observations about the comment made by the Ontario Court of Appeal in *Woolworth* that a person does not incur liability by loaning or renting a car for some legitimate activity merely because the person to whom it is loaned or rented chooses to use it to transport stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs.
3. I agree with that comment in the criminal context and am of the opinion that s. 21(1)(*b*) of the *Criminal Code* addresses these concerns by requiring proof of *mens rea*. However, I consider the situation to be quite different in the context of regulatory offences. Those who engage in regulated activities agree in advance to adhere to strict standards, and they accept that they will be rigorously held to those standards, which are typical of such spheres of activity. It is therefore not surprising in the regulatory context to find strict liability offences that encompass forms of secondary penal liability for the ultimate purpose of vigilantly ensuring compliance with a regulatory framework established to protect the general public.
4. For these reasons, I conclude that the offence provided for in s. 482 of the *ADFPS* is one of strict liability and that it was not necessary to prove that the appellant knew its broker intended to break the law or that the former had the specific intent of helping or inducing the latter to do so. Proof that the appellant’s actions *in fact* helped or induced its broker to contravene s. 71 of the *ADFPS* by distributing insurance products without holding the required licences is sufficient to convict the appellant.

C. *Content and Proof of the Actus Reus*

1. The appellant argues that the *actus reus* of the offence provided for in s. 482 of the *ADFPS*, which it describes as an offence [translation] “in the form of incitement to break the law” in light of the use of the words “help” and “induce” in that section, requires proof that the defendant “recommended or suggested the commission of an offence to someone”. In the appellant’s view, this implies “a real action on the defendant’s part and not simply passive acquiescence or a laissez‑faire attitude” (A.F., at paras. 37‑39). In this case, the appellant submits, the “real action” required to convict has not been established, since all it did was passively acquiesce to the offence, committed by its broker, of issuing the individual insurance certificates to the Quebec dealerships without the required licences.
2. This argument must fail. I agree with the majority of the Court of Appeal on this point: the appellant helped Flanders commit the offence provided for in s. 71 of the *ADFPS* by authorizing or consenting to the issuance of the individual insurance certificates to the Quebec dealerships. The evidence shows that the appellant was aware that the insured property was located in Quebec. It was also aware no later than June 10, 2005 of the list of Quebec dealerships that were participants under the master policy issued to GE, since that was when it gave the list to the AMF. Thus, Flanders did not issue the individual insurance certificates to the Quebec dealerships without the appellant’s knowledge, and the appellant did not object to its insurance products being so distributed. The appellant’s conduct was therefore not, strictly speaking, passive. On the contrary, it had the effect of provoking a violation of the law, which means that the *actus reus* of the offence has been established beyond a reasonable doubt.
3. I should reiterate that the legislature has, in setting out that *actus reus*, provided that it can consist “[of] encouragement, advice or consent or [of] an authorization or order”. In my view, the appellant’s failure to object in a timely manner to the proposed issuance of the individual insurance certificates by Flanders constituted consent and/or authorization within the meaning of the statute. Its conduct helped and/or induced Flanders to contravene s. 71 of the *ADFPS*. This is sufficient to establish the *actus reus* of the offence provided for in s. 482 of the *ADFPS*.
4. The appellant raised an additional argument at the hearing: the *actus reus* was not established in this case, because the appellant had been unaware that Flanders did not hold the licenses the broker was required to hold in order to distribute the insurance products in question. It submitted that its unawareness of that fact implied that it had not acted wilfully. In my opinion, the appellant’s claim that it was unaware of the situation is not supported by the evidence. Its argument based on this claim is therefore of no assistance to it, and I accordingly do not need to consider this argument that the wilfulness required for the *actus reus* of the offence was absent.
5. As I mentioned above, the offence provided for in s. 482 of the *ADFPS* is one of strict liability. Once the *actus reus* has been proved beyond a reasonable doubt, the defendant can avoid liability only by showing that it acted with due diligence. It must therefore be asked whether the due diligence defence was available and, if so, whether the appellant discharged its burden of proof in this regard.

D. *Due Diligence Defence*

1. The due diligence defence is available if the defendant reasonably believed in a mistaken set of facts that, if true, would have rendered his or her act or omission innocent. A defendant can also avoid liability by showing that he or she took all reasonable steps to avoid the particular event (*Sault Ste. Marie*, at p. 1326). The defence of due diligence is based on an objective standard: it requires consideration of what a reasonable person would have done in similar circumstances.
2. However, this defence will not be available if the defendant relies solely on a mistake of law to explain the commission of the offence. Under Canadian law, a mistake of law can ground a valid defence only if the mistake was an officially induced error and if the conditions laid down in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, with respect to the application of such a defence are met. A defendant can therefore gain nothing by showing that it made a reasonable effort to know the law or that it acted in good faith in ignorance of the law, since such evidence cannot exempt it from liability.
3. In this Court, the appellant argues that the due diligence defence was available in this case because it was unaware that its broker did not hold a license in Quebec. Thus, the question is purely one of fact.
4. I cannot accept this argument. The testimonial evidence shows that the appellant consented to and/or authorized the issuance by its broker, Flanders, of the individual insurance certificates to the Quebec dealerships because it believed that the broker did not need to hold a license given that the certificates were merely accessory to the master policy issued to GE in Ontario. The evidence does not support the conclusion suggested by the appellant, namely that it consented to and/or authorized the issuance of the certificates because it mistakenly believed that Flanders was duly registered with the AMF in Quebec. On the contrary, the appellant explained that it would have been alarmed if it had learned that Flanders was distributing insurance products in Quebec other than those accessory to the master policy issued to GE. The appellant said that Flanders had assured it that it was using the services of a broker licensed in Quebec in such cases.
5. The following are excerpts from the testimony of the appellant’s representative, Robert Phillips, on this point:

Q. So, now, you were aware that it was a problem of unlicensed broker in Quebec?

A. Yes, which we subsequently phoned . . . as I said earlier, we subsequently phoned Flanders . . .

Q. And asked?

A. . . . and asked and we were told that they were . . . we’re using the services of a broker in Quebec to act as signing authority on their behalf.

Q. Even for the floor plan?

A. Not necessarily for floor plan, but for any other coverages that they would be issuing because we keep coming back to this, the floor plan. As far as we were concerned, it was GE Ontario account that didn’t require . . .

Q. So, there was no problem with Flanders?

A. Well, as far as the floor plan was concerned. If they were doing other coverages and we were doing other coverages, we would have immediately suspended them and taken another action.

Q. So . . .

A. So, we weren’t issuing other coverages in Quebec for GE or the dealers or were we aware what Flanders was doing. [Emphasis added; A.R., vol. III, at pp. 106‑7.]

1. Thus, the evidence shows that the appellant was unaware not that its broker was not registered in Quebec, but that a licence was required for the broker to issue the individual insurance certificates to the Quebec dealerships. This is not a mistake of fact, but a pure mistake of law that cannot serve to ground the due diligence defence.
2. In the alternative, the appellant argues that its participation in the commercial transactions at issue was based on a mistake of mixed fact and law and that, since such a mistake has the same effect as a mistake of fact, it is still entitled to rely on the due diligence defence. In other words, the appellant argues that it reasonably believed in a mistaken set of facts or legal situation which, if true, would have rendered its conduct innocent.
3. On its argument with respect to a mistaken legal situation, the appellant refers once again to its belief that Flanders did not have to be registered with the AMF in the circumstances and says that its mistake of fact was based on several other factors. It explains, in particular, that the AMF’s failure to reply to its explanatory letter of June 10, 2005 wrongly reassured it that its transactions were lawful. Its assessment of the situation in this regard was also reinforced by the legal advice of Flanders’ lawyers and the fact that its transactions were recognized to be lawful in all the other Canadian provinces. Finally, the minimal secondary role played by the Quebec dealerships in the complex commercial transactions that essentially took place in Ontario supported the view that the appellant’s belief was reasonable: the master policy was negotiated and signed in Ontario, the “principal” client, GE, had its head office in that province, GE paid the insurance premiums directly to Flanders in Winnipeg, and any indemnities would be payable directly to GE in Ontario. In short, it was reasonable for the appellant to believe that it was proceeding lawfully in selling the insurance products in question.
4. In my opinion, the appellant’s arguments can lead to only one conclusion: its mistake was one of law. Moreover, I note that the appellant is not claiming that it believed in a mistaken legal situation *and*, at the same time, a mistaken set of facts. Rather, it is arguing that it mistakenly believed in the existence of a legal situation *because* of a set of facts that were actually true. At the very least, it claims that its belief in that mistaken legal situation was *justified* and should be excused in light of that factual reality.
5. In this regard, I agree with Cournoyer J.A. that [translation] “[t]he AMF’s silence cannot on its own transform an error of law into an error of mixed fact and law” (para. 232). And as I mentioned above, under the law as it now stands in Canada, no matter how reasonable a mistake of law may be, it cannot — unlike a mistake of fact or an officially induced error — serve as a valid defence in the case of a strict liability offence. In *Molis* *v. The Queen*, [1980] 2 S.C.R. 356, Lamer J. noted:

. . . the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation. [p. 364]

1. Since the mistake relied on by the appellant was purely one of law, I find that the appellant’s argument based on the mistake having been one of mixed fact and law must be rejected and that the due diligence defence was not available in the instant case.
2. However, the appellant also argues, in the alternative, that this Court should qualify the rule with respect to ignorance of the law and recognize reasonable mistake of law in the vast mosaic of regulatory offences. More specifically, it asks that this defence be made available in cases in which reasonable ignorance of or honest confusion about the applicable law is closely tied to improper conduct on the part of a regulatory body. It thus argues that the competent authority set a “trap” by acting unfairly toward it. I will now consider this final argument.

E. *Reasonable Mistake of Law*

1. This Court has held many a time that the fact that a defendant has exercised due diligence to find out and verify the nature of the applicable law is not a defence (*City of Lévis*,at para. 22). It has characterized the rule with respect to ignorance of the law as “an orienting principle of our criminal law which should not be lightly disturbed” (*Jorgensen*, at para. 5, *per* Lamer C.J.). In *City of Lévis*, at paras. 22‑27, LeBel J. noted that this rule has the same weight in regulatory law.
2. The rule with respect to ignorance of the law exists to ensure that the criminal justice system functions properly and that social order is preserved. G. Côté‑Harper, P. Rainville and J. Turgeon explain this rule, conveyed by the maxim “ignorance of the law is no excuse”, as follows (*Traité de droit pénal canadien* (4th ed. 1998), at p. 1098):

[translation] The presumption of knowledge of the law becomes the *quid pro quo* for the principle of legality. The legislature assures citizens that it will not punish them without first telling them what is prohibited or required. But in exchange, it imposes on them an obligation to ask for information before acting. . . .

Fear of social disorder and anarchy is the main argument of those who want to uphold the maxim. To accept an unrestricted possibility of hiding behind a subjective excuse of ignorance would be dangerous and improper.

1. In *Jorgensen*, Lamer C.J. also endorsed this view, quoting the following passage on the rationale for the rule against a defence based on mistake of law:

Don Stuart identifies four aspects of the rationale for the rule against accepting ignorance of the law as an excuse:

1. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.

2. It would encourage ignorance where knowledge is socially desirable.

3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.

4. Ignorance of the law is blameworthy in itself.

(*Canadian Criminal Law: A Treatise* (3rd ed. 1995), at pp. 295‑98) [para. 5]

1. It should nonetheless be noted that if the rule that *ignorantia juris non excusat* — ignorance of the law excuses no one — were absolute, this could seriously hinder the application of another cardinal rule of our criminal justice system: there can be no punishment without fault. The overlap between these rules is all the more significant given the current simultaneous proliferation of regulatory measures and penal statutes. Indeed, several authors have pointed out that it is now impossible for citizens to have comprehensive knowledge of every law:

[translation] The presumption of knowledge of laws was acceptable and defensible in the past because those laws concerned only serious offences and crimes against morality. The situation is very different today, and the criminal or penal law must be interpreted by consulting an abundant case law. The much‑discussed multiplication of penal statutes must also be considered, and no one, not even criminal lawyers and other specialists in such matters, can profess to know all of them. The situation created by this proliferation of statutes is aggravated by the problem of their publication, which, although formal, is often not really effective.

(Côté‑Harper, Rainville and Turgeon, at p. 1099)

1. Dickson J. also commented on this in *Sault Ste. Marie*, at p. 1310:

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

1. Despite the problems that flow from regulatory measures, the rise in the number of such measures and the commensurate multiplication of penal provisions designed to enforce them go hand in hand with the evolution of modern societies. These trends are well established. Regulatory measures are adopted to protect the public from dangers that can result from activities that are otherwise legitimate. The reason why penal sanctions are used in this context rather than civil law or administrative law sanctions lies in the deterrent power of penal law (H. Parent, *Traité de droit criminel*, vol. 2 (2nd ed. 2007), at paras. 496‑500). Cory J. eloquently explained the importance of regulatory offences in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 221‑22:

It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. . . .

In short, regulation is absolutely essential for our protection and well being as individuals, and for the effective functioning of society. It is properly present throughout our lives.

1. The foregoing discussion underscores the conflicts that inevitably result from the constantly expanding presence of regulatory measures. Such measures play an essential role in the implementation of public policy. The rule that ignorance of the law is not a valid defence supports the state’s duty in this regard. For this reason alone, it needs to be enforced.
2. At the same time, the rise in the number of statutes coupled with their growing complexity increases the risk that a citizen will be punished in circumstances in which ignorance of the law might nevertheless be understandable.
3. In light of all these considerations, I find that the objective of public protection that underlies the creation of regulatory offences militates strongly against accepting a *general* defence of reasonable mistake of law in this context. As Cory J. noted in *Wholesale Travel*, at p. 219,

[r]egulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests.

1. Moreover, it is incumbent on a regulated entity that engages in an activity requiring specific knowledge, including knowledge of the applicable law, to obtain that knowledge. The following observations of Hugues Parent are of particular relevance in a regulatory context such as the one in the instant case. Although he objects to the rule conveyed by the maxim “ignorance of the law is no excuse” being absolute, Parent mentions a very important limit — unforeseeability of the mistake — that would have to apply should the rule be relaxed:

[translation] An individual who acts in ignorance of a provision he or she is not in a position to know about, despite being in good faith and exercising due diligence, does wrong unknowingly, and therefore unintentionally. Such an individual cannot therefore be held liable.

To be successfully argued, insurmountable ignorance of the law must be *unforeseeable*, which means that it must not be related to an activity requiring special knowledge: thus, a professional fisher charged with possession of immature lobsters cannot use ignorance of the law as a defence. As O’Hearn Co. Ct. J. stated in [*R. v. Maclean* (1974), 17 C.C.C. (2d) 84 (N.S. Co. Ct.)], “if an accused wishes to indulge in an activity that requires special knowledge including knowledge of the applicable law, he can fairly be held to be under an obligation to acquire that knowledge”. Because the information needed to attain that knowledge is essential, it must be accessible and comprehensible. [Emphasis in original.]

(*Traité de droit criminel*, vol. 1 (3rd ed. 2008), at paras. 580‑81)

1. The regulator at issue in the instant case, the AMF, is not required by law to reply to those to whom the law applies or to inform them about their rights and obligations. As a result, it was not reasonable in this case for the appellant to view the AMF’s silence as a confirmation of its interpretation of that law. This being said, the AMF’s attitude is of some concern. Nevertheless, although its attitude does not reflect the greater transparency a regulator is normally expected to show, and as unfortunate as that might be, that attitude cannot be equated with improper conduct or bad faith on its part.
2. Furthermore, even if the AMF’s conduct were so vexatious as to justify accepting a new exception to the rule with respect to ignorance of the law, which I cannot find to be the case here, I am of the opinion that the steps taken by the appellant to avoid breaking the law do not meet the requirements for the due diligence defence. The appellant relied solely on the legal advice of professionals acting for a third party, Flanders, in Manitoba. A reasonable person would at least have sought an independent opinion from a member of the Barreau du Québec, preferably one who specializes in insurance law. Thus, the appellant in this case has not shown that it took all reasonable steps to avoid breaking the law.
3. I am well aware of the difficulties of statutory interpretation that might result from the complexity of certain regulated activities. Here, it is troubling that the AMF itself had serious difficulty interpreting the applicable law in deciding whether the transactions in question were lawful. Is it reasonable to require those to whom regulatory measures apply to have a more extensive knowledge of the law than the body responsible for enforcing it?
4. As I mentioned above, the complexity of regulations results from the need to ensure the proper functioning of civil society (*Wholesale Travel*, *Sault Ste. Marie*, *City of Lévis*). In this regard, I agree with the following comment made by Lamer C.J. in *Jorgensen*:

. . . the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. [para. 25]

1. I would therefore suggest postponing the debate about the appropriateness of accepting a new exception to the rule that mistake of law can be a valid defence only in very specific circumstances.

F. *Number of Statements of Offence*

1. My colleague Fish J. raises, in support of his conclusion, the distinction drawn by the Court of Appeal in *Demers* between s. 482 of the *ADFPS*, which creates an independent offence, and ss. 208 of the *SA* and 491 of the *ADFPS*, which establish a mode of participation in an offence. In his view, s. 482 creates a single offence and the AMF was wrong to issue 56 separate statements of offence against the appellant.
2. In other words, whereas a person who commits the offences provided for in ss. 208 of the *SA* and 491 of the *ADFPS* is a secondary offender, the same person, in the context of s. 482, is guilty of a single discrete and independent offence. A person who consents to or authorizes a broker’s acting on his or her behalf commits just one fault and should therefore receive just one statement of offence.
3. I agree with my colleague that the offence provided for in s. 482 of the *ADFPS* is a discrete and independent offence and that the appellant is not liable for the offences committed by its broker. Nonetheless, this does not, in my opinion, mean that the appellant cannot have committed several discrete offences. That is in fact what occurred here.
4. The evidence in the record shows that the consent or authorization the appellant gave its broker was not only general, but was also specific. As of June 2005, the appellant was in possession of the list of Quebec dealerships whose inventories were to be insured starting in August 2005. Furthermore, the following words appeared above its broker’s signature on each of the individual insurance certificates the broker issued to the Quebec dealerships: [translation] “Signed on behalf of the insurer(s) by Flanders Insurance Management and Administrative Services Ltd.” Thus, the appellant participated, through its representative, Flanders, in the issuance of each of the individual insurance certificates in Quebec. This means that the appellant specifically consented to and/or authorized each of the 56 transactions that took place in Quebec, thereby committing the offence provided for in s. 482 of the *ADFPS* 56 times. In short, it performed 56 separate acts of authorization and/or consent.
5. Although I cannot find as a matter of law that there was a single transaction in this case and that the appellant is guilty of just one offence, I do consider it necessary to add a few comments about the AMF’s decision to issue 56 separate statements of offence against the appellant.
6. I recognize that a prosecutor, the AMF in this case, has a broad quasi‑judicial decision‑making power that flows from its ability, and above all discretion, to issue statements of offence in the cases that come before it (G. Létourneau, *Code de procédure pénale du Québec: annoté* (9th ed. 2011), at p. 324). Moreover, a very high standard of intervention must be met by a court reviewing the exercise of this broad power. Courts can order stays of penal proceedings only in the “clearest of cases”, where “there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed” (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, *per* L’Heureux‑Dubé J.; see also *R. v. O’Connor*, [1995] 4 S.C.R. 411). This is clearly not such a case.
7. However, I believe it is important to remember the fundamental distinction between the regulatory penal law system and the criminal law system in Canada. In the leading case of *Sault Ste. Marie*, at pp. 1302‑3, this Court laid down the following principles:

[Regulatory offences] are not criminal in any real sense, but are prohibited in the public interest. . . . Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.

1. These two systems, the regulatory penal law and criminal law systems, serve societal purposes that are important and complementary, but also different. In the words of Cory J., whereas “criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care” (*Wholesale Travel*, at p. 219). It is therefore essential not to lose sight of the basic differences between the two systems and, as a result, to weaken the application of one by distorting the application of the other.
2. In the instant case, at the risk of crossing the line between regulatory penal liability and criminal liability, the fact that there is a substantial minimum fine to sanction the commission of the offence provided for in s. 482 of the *ADFPS* raises the question whether it was fair for the AMF to decide to lay 56 separate charges against the appellant.
3. It might have been preferable for the AMF to file a single statement of offence rather than the 56 statements it did file. Nevertheless, it will not be necessary to determine whether the AMF’s conduct in proceeding as it did constitutes an improper use of procedure, since this question was not before the other courts and was touched on only indirectly in argument in this Court.
4. *Dura lex, sed lex*: The law is harsh, but it is the law, and the AMF has obviously given full meaning to this expression where the appellant is concerned. Yet the AMF chose to prosecute Flanders, the principal wrongdoer, under s. 462 of the *ADFPS*, which meant that Flanders was liable to a lesser sanction that is in no way comparable to the fine that could be imposed on the appellant under s. 487 of that same Act. Although technically speaking the appellant did consent to and/or authorize the issuance of individual insurance certificates on 56 occasions, the fact remains that these offences arose out of a single decision to retain Flanders as a broker.
5. In my opinion, it would be preferable for a prosecutor, when exercising its discretion to issue multiple statements of offence, to assess the context in which the offences were committed on a case‑by‑case basis. This would ensure that its procedures are not transformed into the equivalent of criminal proceedings and do not fuel confusion between regulatory penal liability and criminal liability.

V. Conclusion

1. For these reasons, I would dismiss the appeal with costs.

The reasons of LeBel and Fish JJ. were delivered by

Fish J. (dissenting in part) —

I

1. The appellant stands convicted 56 times for what, as a matter of law, was in my view a single offence. For the reasons that follow, I would therefore substitute a single conviction.

II

1. According to the respondent (the “Authority”), the appellant (“La Souveraine”) contravened s. 482 of *An Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2 (“*ADFPS*”),56 times on the same day ― in 56 different localities across Québec.
2. The 56 counts are virtually identical, except for the place where each offence is said to have been committed. They all allege that La Souveraine [translation] “did consent to and/or authorize” Flanders Insurance Management and Administrative Services Ltd. (“Flanders”) ― an unregistered firm ― to contravene s. 71 of the *ADFPS*, thereby itself committing an offence under s. 482 of the *ADFPS*.
3. Upon conviction on all 56 counts, La Souveraine would be liable to a mandatory minimum punishment ― a fine of $560,000.
4. Section 482 of the *ADFPS* reads:

**482.** *Every insurer* *that helps or, by encouragement, advice or consent or by an authorization or order, induces a firm* or an independent representative or independent partnership through which it offers insurance products or an executive officer, director, partner, employee or representative of such a firm or independent partnership *to contravene any provision of this Act or the regulations is guilty of an offence*.

The same applies to any director, executive officer, employee or mandatary of an insurer.

1. I am satisfied that this provisioncreates a discrete substantive offence, rather than a party liability offence. Manifestly, an insurerfound to have violated s. 482 of the *ADFPS* is neither guilty of the same offence nor liable to the same penalty as the firm it helped or induced to contravene *another provision of the Act or regulations*. Party liability is expressly provided for in s. 491 of the *ADFPS*.
2. This view is supported by *Demers v. Autorité des marchés financiers*, 2013 QCCA 323 (CanLII), a unanimous judgment of the Quebec Court of Appeal released after it had decided the matter now before us. In *Demers*, Kasirer J.A. explained the differences between s. 482 of the *ADFPS* and true party liability offences this way (paras. 55-56):

[translation] It should be noted that according to section 208 [*Securities Act*, R.S.Q., c. V-1.1], an accomplice is guilty of the offence committed by the principal offender “as if he had committed it himself/comme s’il l’avait commise lui-même”. *Section 482 [ADFPS], on the other hand, provides that an insurer that acts in the contemplated manner is guilty of “an offence/une infraction” that is distinct from the one committed by the principal offender. Thus, section 208 is merely a mode of participation ― Ms. Demers was found guilty of contravening section 11 of the SA by application of the rule set out in section 208 ― and not a separate “offence”.*

It should also be noted that the *Act respecting the distribution of financial products and services* includes a provision — section 491 [*ADFPS*] — that is practically identical to section 208 *SA*. Like section 208 *SA*, it defines a mode of participation which renders an accomplice guilty of the same offence as the principal offender “as if the person had committed it himself/comme s’il l’avait commise lui-même”. This section, which parallels section 208 *SA*, was not raised in *La Souveraine* as a basis for the insurer’s liability. The differences between section 208 *SA* and section 482 [*ADFPS*] suffice for me to conclude that this Court’s decision in *La Souveraine* cannot serve as a precedent in the case at bar. [Emphasis added.]

1. I agree with Justice Kasirer.
2. Section 491 was adopted in its present form in 2009 (S.Q. 2009, c. 58, s. 85). Had it been in force in 2006, when the proceedings in this case were instituted, it would have been open to the Authority to charge La Souveraine with having participated as a party in the 56 offences under s. 71 of the *ADFPS* committed by Flanders. Only then could La Souveraine, as in *Demers*, properly be convicted “of the same offence as the principal offender ‘as if the person had committed it himself/comme s’il l’avait commise lui-même’” (*Demers*, at para. 56). La Souveraine would in that case have been liable, of course, to the penalty for a violation of s. 71, rather than the much larger mandatory minimum penalty for a violation of s. 482.
3. But one thing is certain: No such charges could be laid, as they were here, under s. 482. That is precisely why s. 491 was adopted in its present form: Its declared purpose was to provide for party liability ­— which did not exist under s. 482, nor apparently under any other provision relevant to the present proceedings. This was recognized by the Minister of Finance in 2009, when the amendment to s. 491 of the *ADFPS* was introduced in the National Assembly.
4. The Minister explained that the amendment [translation] “introduces a new section 491 *to include complicity among the offences*. And the inset also adds that *the same applies to a person who, by encouragement or advice or by an order, induces another person to commit an offence*”(R. Bachand, *Journal des débats de la Commission permanente des finances publiques*, vol. 41, No. 47, 1st Sess., 39th Leg., November 26, 2009, at p. 21 (emphasis added)).
5. Here, without the benefit of s. 491, the Authority charged La Souveraine with 56 counts under s. 482 ― a substantive offence with a different penalty ― and claimed 56 times the mandatory minimum penalty under s. 482 as if La Souveraine, *under that section*, was a party to the offences allegedly committed by Flanders.
6. In essence, this is how the Authority itself sought at the hearing of the appeal to defend the multiplicity of charges laid against La Souveraine. Replying to questions by the Court, counsel for the Authority submitted that La Souveraine committed an offence under s. 482 of the *ADFPS* *by proxy* (“*par procuration*”) each time Flanders, its mandatary, committed an offence under some other provision of the Act or regulations (transcript, at pp. 37-40).
7. As we have seen, however, the first paragraph of s. 482 creates neither a vicarious liability nor a party liability offence. Rather, it creates a discrete substantive offence, of which the gravamen is to help or induce another firm to contravene the Act or regulations.
8. Under the second paragraph of s. 482, a mandatary of the insurer likewise commits the substantive offence set out in the first paragraph when it (the mandatary) helps or induces another person or firm to contravene the Act or regulations.
9. Nowhere does s. 482 of the *ADFPS* provide that an insurer or its mandatary is liable for offences committed by the person or firm induced — byeither the insureror its mandatary — to commit them. Insurer and mandatary alike, when they aid or induce another to commit a substantive offence under the *ADFPS*, such as s. 482,may now be prosecuted under s. 491 of the *ADFPS* as parties to that offence. But they are not liable as parties when charged under s. 482, as La Souveraine was in this case.
10. While Flanders issued 56 individual certificates, each signed on behalf of La Souveraine, it hardly follows that Flanders was acting under 56 separate authorizations — the basis of the substantive offence under s. 482 with which La Souveraine was charged. La Souveraine was not charged with an offence under s. 71, nor, as we have seen, could it have been charged as a party to that offence under s. 491. Flanders contravened s. 71 of the *ADFPS* under La Souveraine’s single authorization.
11. The decision to create a discrete substantive offence by enacting s. 482 represents a deliberate legislative choice to which courts must give effect. So, too, must the legislator’s choice, long after the present proceedings were instituted, to provide for party liability in s. 491 (see G. Létourneau, *Code de procédure pénale du Québec: annoté* (9th ed. 2011), at pp. 118-19).
12. On no view of the matter can it be said, as the Authority does here, that an insurer is guilty under s. 482 of offences committed by its mandatary under some other provision of the Act.

III

1. It is undisputed that Flanders, with the authorization of La Souveraine, renewed the insurance policies of the 56 Quebec merchants located in Alma and elsewhere in Quebec, contrary to s. 71 of the *ADFPS*.
2. It is also uncontested that the precise location where the authorization was granted is immaterial to the outcome of these proceedings; that this case would in any event fall within the territorial jurisdiction of the Court of Quebec; and that La Souveraine was not misled or prejudiced in its defence or appeal by the locations specified in the complaint.
3. No injustice would therefore be occasioned by convicting La Souveraine on the first count as drafted, even if La Souveraine in fact consented or authorized Flanders to contravene the *ADFPS* elsewhere in Quebec.

IV

1. In the result, as mentioned at the outset, I would allow the appeal in part and substitute a single conviction for the 56 convictions entered at trial and restored by the Court of Appeal (2012 QCCA 13 (CanLII)).

The following are the reasons delivered by

1. Abella J. (dissenting) — I agree with Justice Wagner that s. 482 of *An Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2, creates a strict liability offence. With great respect, however, in my view the defence of officially induced error should apply and La Souveraine’s appeal allowed.
2. Strict liability offences exist as an “intermediate category” of offences, between criminal offences which incorporate a *mens rea* element and absolute liability offences, where proof of a proscribed act alone is sufficient for a conviction. The category of strict liability offences was developed by Dickson J. in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, to acknowledge the unique character of public welfare offences, which

evolved in mid-nineteenth century Britain . . . as a means of doing away with the requirement of *mens rea* for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society. [p. 1310]

1. The Court concluded that absent language indicating a different legislative intent, public welfare offences should be construed as strict liability offences. The purpose was to avoid having an individual who is “morally innocent in every sense . . . branded as a malefactor and punished as such”, as occurred in an absolute liability offence (p. 1310). As Dickson J. explained:

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent. [p. 1310]

1. As with absolute liability offences, the Crown would still need to prove that the prohibited act was committed, but in strict liability offences it would be open to the accused to establish that “all reasonable care was taken” (p. 1315). Reasonable care was defined as follows:

This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. [p. 1326]

(See also *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 15.)

There were thus two defences to strict liability offences: mistake of fact, and due diligence — taking all reasonable steps to avoid the impugned act.

1. Since *Sault Ste. Marie*, a new defence to strict liability offences has emerged: officially induced error. It was first recognized by Lamer C.J. in his concurring reasons in *R. v. Jorgensen*, [1995] 4 S.C.R. 55:

Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. . . . [T]he complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat*. [para. 25]

1. Lamer C.J. explained the differences between officially induced error and due diligence as follows:

While due diligence *in ascertaining the law* does not excuse, reasonable reliance on official advice which is erroneous will excuse an accused but will not, in my view, negative culpability. There are two important distinctions between these related provisions. First, due diligence, in appropriate circumstances, is a full defence. If successfully raised, the elements of the offence are not completed. Officially induced error, on the other hand, does not negative culpability. Rather it functions like entrapment, as an excuse for an accused whom the Crown has proven to have committed an offence. Second, diligence may be necessary to obtain the advice which grounds an officially induced error. This is so because an accused who seeks to rely on this excuse must have weighed the potential illegality of her actions and made reasonable inquiries. This standard, however, does not convert officially induced error into due diligence. [Emphasis added; para. 22.]

1. Lamer C.J. set out six criteria for what he called the “excuse” of officially induced error. LeBel J. formally endorsed it as a defence in *Lévis*, and characterized the six criteria as being:

(1) that an error of law or of mixed law and fact was made;

(2) that the person who committed the act considered the legal consequences of his or her actions;

(3) that the advice obtained came from an appropriate official;

(4) that the advice was reasonable;

(5) that the advice was erroneous; and

(6) that the person relied on the advice in committing the act. [para. 26]

1. LeBel J.emphasized that the burden is on the accused to establish not only that the information it obtained was objectively reasonable, but also that reliance on it was reasonable. The reasonableness of the reliance was to be determined by such factors as

the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion . . . . [para. 27]

1. To date, officially induced error has only been used as a defence in circumstances where the official actually gave erroneous information to an accused. It has been seen, in other words, as requiring official conduct of an *active* kind. In my respectful view, however, there is no principled basis for excluding conduct of a more passive character, including silence from an official, which could, in some circumstances, reasonably be relied on as approval, or an “inducement”. This is particularly the case if the silence occurs in a regulatory framework that demonstrably requires a degree of expedition. Punishing a regulated entity who is dependent on the regulator’s timely response, and reasonably relies on its silence, perpetuates the very injustice that led to the development of the strict liability defences in the first place: finding the morally innocent culpable.
2. Underlying the six elements of the defence of officially induced error is the broad principle that an individual not be held culpable when he or she is induced by an official’s conduct into relying on a reasonable but incorrect understanding of the law. The analogous test in cases where official silence is relied on, will amount to determining whether thatsilence can be construed as an inducement to rely on a reasonable but incorrect understanding of the law. To paraphrase LeBel J. in *Lévis*, it will be necessary to demonstrate not only that the “advice” gleaned from the silence was reasonable, but also that reliance on it was reasonable in the circumstances.
3. The question, then, in dealing with an official’s passive conduct, is whether a reasonable person in the position of the accused would have expected the official to inform it in a timely way that its understanding of the law was incorrect. The responsibilities of the official and the field and complexity of the regulation at issue will be relevant, as will the extent to which the accused could reasonably have expected a timely response in order to carry on its undertakings. If a body charged with supervising a regulatory domain fails inexplicably to respond relatively promptly to an accused’s erroneous assertion, it shares the “blame” for the accused’s ignorance of the law (*Jorgensen*, at para. 36). In such circumstances, it seems to me to be particularly inappropriate for that very regulatory body to bring charges against an accused who has reasonably relied on its silence.
4. That brings us to the facts of this case. The Autorité des marchés financiers (“AMF”) is the regulatory body responsible for supervising the financial sector in Quebec and regulating the activities of those engaged in business in that sector. Under s. 4(3) of *An* *Act respecting the Autorité des marchés financiers*, R.S.Q., c. A-33.2, the AMF is charged with the responsibility to

supervise the activities connected with the distribution of financial products and services, administer the rules governing eligibility for and the carrying on of those activities, and take any measure provided by law for those purposes;

It must also

ensure that the financial institutions and other regulated entities of the financial sector comply with . . . the obligations imposed on them by law with a view to protecting the interests of consumers of financial products and services, and take any measure provided by law for those purposes; [s. 4(2)]

Moreover,

[t]he Authority shall also act as an information and reference centre in all fields of the financial sector. [s. 7]

The AMF is thus the expert and administrator of the laws governing the financial sector, including *An* *Act respecting the distribution of financial products and services*. It is also the designated resource for information about the financial sector that it regulates, a singularly complex regulatory environment.

1. La Souveraine is an Alberta-based insurance company, registered with the AMF as an insurer in Quebec. It issues insurance certificates through brokers, one of whom was Flanders Insurance Management and Administrative Services Ltd. La Souveraine used Flanders to insure display-floor inventories of recreational products. These inventories were financed by GE Commercial Distribution Finance Canada (“GE”) in what is called “floor plan financing”, and distributed to 56 dealers in Quebec.
2. The chronology in this case is key. When Flanders became the broker for GE’s inventories, the previous broker, Hayhurst Elias Dudek Inc., complained about Flanders to the regulatory authorities in every province, alleging breaches of the respective provincial statutory scheme. Its complaint to the AMF, dated November 1, 2004, alleged that Flanders was acting as an insurer in Quebec without a licence contrary to s. 71 of *An* *Act respecting the distribution of financial products and services*.
3. On April 28, 2005, as a result of the complaint, the AMF’s Deputy Director of Investigations wrote to La Souveraine asking it for documents and information pertaining to the “floor plan” insurance it was providing in Quebec through Flanders. He also directed La Souveraine to send the documents to the investigator in charge of the file.
4. On June 10, La Souveraine sent the requested documents to the investigator. Its accompanying letter gave a full accounting of its business relationship in Quebec with Flanders. Notably, it also stated that in its view there was no licensing issue, a view, as found by the trial judge, supported by a legal opinion La Souveraine had obtained from Flanders’ lawyers:

As GE-CDF is Flanders’ client, and has its head office in Ontario, there is no licensing issue.

. . .

We are aware that a previous broker . . . decided to issue letters of complaint against Flanders to all provincial jurisdictions across the country. We believe that to date most if not all have responded positively to the response given by Flanders through their lawyer.

We trust that the information provided is to your satisfaction and responds to your needs. Should you have any other questions or require further detail please do not hesitate to contact the writer. [A.R., vol. X, at pp. 15-16]

1. The AMF did not respond. On August 25, Flanders renewed the insurance certificates for the 56 Quebec dealers.
2. In January 2006, the AMF brought 56 charges against La Souveraine for each of the renewals of insurance that had taken place at the end of August. Each charge was for [TRANSLATION] “consent[ing] and/or authoriz[ing]” a non-licensed entity to issue insurance in Quebec. There was a minimum penalty of $10,000 for each charge.
3. I see in these facts all the requisite elements for officially induced error. La Souveraine took reasonable steps to satisfy itself that it was not violating the law. It based its conduct on a legal opinion from Flanders’ lawyers, an opinion it could reasonably have concluded to be reliable based not only on the assumption that a lawyer’s advice can be relied on as accurate, but also on the fact that that advice had proved to be accepted by the other provincial regulatory agencies. La Souveraine was entitled to assume that since Flanders was a national company, its lawyers would take the necessary steps to ensure compliance with respective provincial regulations. The jurisdiction in which the law firm was based is not relevant.
4. The legal context was far from readily ascertainable. The AMF is responsible for regulating and being a resource for information about a highly complex financial sector. It has a duty to be diligent in performing its statutory role. Most of the entities it regulates require information in a timely way in order to carry on their businesses. This is certainly true in dealing with insurance, where the consequences of not having coverage can be catastrophic. La Souveraine set out its understanding of the relevant legal requirements and the bases for its understanding in an unambiguous letter to the investigator responsible for the file. Yet rather than respond to La Souveraine’s letter, the AMF brought 56 charges 7 months later. As Cournoyer J.A. noted (2012 QCCA 13 (CanLII)):

[translation] . . . the AMF acts as an information and reference centre in all areas of the financial industry within the meaning of its constituent legislation. It is therefore not surprising that [La Souveraine’s] executives believed that the AMF would answer their questions. It is even possible to imagine that the commission of the offences would have been avoided in this case if it had. [para. 249]

Lamer C.J.’s observation in *Jorgensen* is particularly apt in these circumstances, namely that “[a]s in the case of entrapment . . . the state has done something which disentitles it to a conviction” (para. 37).

1. In addition, it is worth remembering that the “clarity or obscurity” of the law will be a factor in determining whether reliance on information from an official is reasonable (*Lévis*, at para. 27). The legal question at issue in this case was indisputably complex. As Wagner J. points out, the regulatory body itself had great difficulty determining whether the law was being violated. In fact, there was nothing so demonstrably unreasonable with La Souveraine’s asserted understanding of the law that it prompted the investigator responsible for the file to send a corrective response.
2. In these circumstances it seems to me to have been reasonable for La Souveraine to rely on the AMF’s conduct — in this case silence — as confirmation that its understanding of the law was correct and as an inducement to conduct itself accordingly and permit Flanders to renew the insurance coverage for the 56 dealers. Had the AMF responded in any way, let alone in a timely one, La Souveraine could have brought itself into conformity with the law. As Martin J. said in the Superior Court (2009 QCCS 4494 (CanLII)):

[The Regulator] ought not to be seen to be lurking in wait in the bushes ready to pounce, so to speak, once it is satisfied that offences have been committed. [para. 12]

1. I would allow the appeal and stay the proceedings.

*Appeal dismissed with costs,* LeBel *and* Fish JJ. *dissenting in part and* Abella J. *dissenting.*

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