

Update

SCC ruling on regulatory offences

An insurer offering products through a broker not registered with the AMF is found guilty of a regulatory offence. Canada's highest court dismisses ignorance of the law as a defence to the case at bar.

The Supreme Court of Canada recently rendered an important judgment in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*,¹ in which it addressed the penal liability of an insurer offering its insurance products through a broker that was not registered with the Autorité des marchés financiers (the "AMF").

The insurer, La Souveraine, was accused of having infringed the Act Respecting the Distribution of Financial Products and Services (the "ADFPS") by helping or inducing, through its consent and/or authorization, a broker to infringe the ADFPS, which prohibits "purport[ing] to be a firm without being registered with the [AMF]". La Souveraine was duly registered with the AMF and offered its insurance products through brokers. The broker, Flanders Insurance Management and Administrative Services Ltd. ("Flanders"), located in Alberta, was not registered with the AMF, and was thus not authorized to offer insurance products in Quebec. Flanders acted as broker on a master insurance policy issued by La Souveraine to the insured, GE Commercial Distribution Finance Canada ("GE"), which had its head office in Ontario. Fifty-six dealerships with establishments in Quebec agreed to participate under the master insurance policy. Flanders issued individual insurance certificates to each participant.

Before issuing statements of offence, the AMF had asked La Souveraine to provide certain information in relation to its dealings with Flanders.

La Souveraine replied in writing that, in its view, the broker did not need to register in Quebec. The broker's client, GE, had its head office in Ontario, the insurance policy had been negotiated and issued in Ontario and the premiums were paid directly to the broker by GE. Moreover, in the event of loss, the indemnity was payable directly to GE. Since the AMF did not respond to the written explanation provided by La Souveraine, it allowed Flanders to renew the individual insurance certificates of the fifty-six Quebec dealerships. Six months later, however, rather than responding to La Souveraine's letter, the AMF charged the insurer with fifty-six offences in regard to these renewals.

The issues before the Court included whether the offence is a strict liability offence or, on the contrary, whether proof of criminal intent is required, i.e. that the insurer knew its broker intended to break the law or that it had the specific intent of helping or inducing its broker to do so. Another issue before the Court was whether the wrongful act of the offence had been proven beyond all reasonable doubt; more specifically, whether the insurer had given its consent or authorization to the issuance of the individual insurance certificates to the Quebec dealerships.

At first instance, the Court of Quebec ruled that the offence at issue is one of strict liability and found the insurer liable to a fine of CAD 560,000.² On appeal, the Superior Court acquitted the insurer on the basis that the offence is not one of strict liability and that proof of

1 *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63.

2 *Autorité des marchés financiers v. La Souveraine, Compagnie d'assurance générale*, 2008 QCCQ 10557.

criminal intent and a wrongful act had not been established.³ The Court of Appeal allowed the AMF's appeal of the Superior Court's decision and restored the fifty-six convictions on the basis that it is a strict liability offence and that the wrongful act of the offence had been proven beyond all reasonable doubt.⁴ In a split four-three judgment, the Supreme Court dismissed the appeal.

The Supreme Court reiterated the principle according to which "regulatory offences are generally strict liability offences"⁵ and thus do not require evidence of criminal intent. Section 482 of the ADFPS creates an independent, strict liability regulatory offence intended to provide a framework for the distribution of insurance products in order to protect the public. Consequently, it is not necessary to prove that the insurer knew that its broker intended to break the law or that it had the specific intent of helping or inducing its broker to do so.

With respect to the wrongful act of the offence, the Court ruled that the mere fact that the insurer had given its authorization or consent to the issuance of certificates to the dealerships constituted consent and/or authorization within the meaning of section 482 of the ADFPS.

The Court ruled that the defence of reasonable diligence raised by the insurer was not available, notwithstanding the silence of the authority and the difficulties in interpreting the law. The insurer knew that its broker was not registered in Quebec, but was not aware that it required a licence to issue individual insurance certificates to the Quebec dealerships. This was a pure mistake of law, which was not available as a defence.

Finally, the Supreme Court recognized the "quasi-judicial decision-making power"⁶ of the AMF and ruled that the insurer had participated in the issuance of each of the individual insurance certificates in Quebec, which resulted in it being charged with fifty-six offences. That said, it invited the prosecution to assess "the context in which the offences were committed on a case-by-case basis".⁷ The Court also noted that the complexity of the regulations was such that the AMF itself had serious difficulty interpreting the law in deciding whether the transactions at issue were lawful. However, it decided to postpone the debate on the existence of a new exception to the rule that mistake of law "can be a valid defence only in very specific circumstances".⁸

Further information

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³ *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2009 QCCS 4494.

⁴ *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2012 QCCA 13.

⁵ *Supra* note 4 at para. 31.

⁶ *Supra* note 4 at para. 88.

⁷ *Supra* note 4 at para. 94.

⁸ *Supra* note 4 at para. 82.