Unofficial English Translation of the Judgment of the Court

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| Heller c. Autorité des marchés financiers | | | | | 2022 QCCA 208 | |
| COURT OF APPEAL | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUEBEC | | | | | | |
| REGISTRY OF | | | QUEBEC | | |
| No.: | 200-10-003799-207 | | | | | |
| (200-36-002428-167) (200-61-016897-136) | | | | | | |
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| DATE: | February 11, 2022 | | | | | |
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| CORAM: | | THE HONOURABLE | | FRANÇOIS DOYON, J.A.  DOMINIQUE BÉLANGER, J.A.  MICHEL BEAUPRÉ, J.A. | | |
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| MICHAEL E. HELLER | | | | | | |
| APPELLANT – Appellant/accused | | | | | | |
| v. | | | | | | |
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| AUTORITÉ DES MARCHÉS FINANCIERS | | | | | | |
| RESPONDENT – Respondent/Prosecutrix | | | | | | |
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| JUDGMENT | | | | | | |
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1. Michael E. Heller ("the appellant") appeals from a judgment[[1]](#footnote-1) of the Superior Court, District of Québec (the Honourable Claude Bouchard), rendered on May 25, 2020, dismissing his appeal from a judgment of the Court of Québec. That judgment,[[2]](#footnote-2) rendered orally by the Honourable Jean-Pierre Dumais on August 10, 2016, found him guilty of several violations of the *Securities Act*.
2. For the reasons of Doyon, J.A., Bélanger and Beaupré, JJ.A. concurring, **THE COURT**:
3. **DECLARES** that general *mens rea* (knowledge, intent, or recklessness) must be proved beyond a reasonable doubt by the prosecution when s. 208 of the *Securities Act* is at issue;
4. **DISMISSES** the appeal.

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|  | | FRANÇOIS DOYON, J.A. |
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|  | | DOMINIQUE BÉLANGER, J.A. |
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|  | | MICHEL BEAUPRÉ, J.A. |
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| Mtre Louis F. Carmichael | | |
| HELLER, CARMICHAEL | | |
| For the appellant | | |
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| Mtre Éric Blais | | |
| AUTORITÉ DES MARCHÉS FINANCIERS | | |
| For the respondent | | |
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| Date of hearing: | October 25, 2021 | |

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| REASONS OF DOYON, J.A. |
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1. Does aiding in the commission of an offence under s. 208 of the *Securities Act* (CQLR, c. V-1.1) require proof of a *mens rea*-type moral blameworthiness, or will the strict liability standard suffice? This is the question posed by the appellant.
2. He was found guilty on eight counts of aiding in the distribution of a security (counts 18 to 25 of the statement of offence issued jointly against other persons). All of these charges are worded as follows:

[translation]

... did, by act or omission, aid Beluga Composites Corporation in the distribution of a form of investment subject to the application of the *Securities Act*, RSQ, c. V-1.1 (the “*SA*”) under s. 1 of the *Act* without a prospectus for which a receipt had been issued by the Autorité des marchés financiers, to wit, … shares of Beluga Composites Corporation to ..., the whole in violation of s. 11 of the *Act*, thereby committing the offence set out in s. 202 of the *Act* and thereby rendering himself liable to the penalty set out in s. 204 of the *Act*.

1. He was also found guilty of having engaged in the business of a securities dealer without being registered with the Autorité des marchés financiers (count 17). This charge is not included in this appeal, however, since leave to appeal, required by article 291 of the *Code of Penal Procedure*, was granted only for the eight counts of aiding and abetting an offence, specifically on the issues of *mens rea* and strict liability: *Heller c. Autorité des marchés financiers*, 2020 QCCA 1560.

## THE JUDGMENTS OF THE COURT OF QUÉBEC AND THE SUPERIOR COURT

1. In an oral judgment delivered on August 10, 2016, the judge of the Court of Québec found the appellant guilty on the basis that the address of Beluga Composites Corporation ("Beluga") was the address of the principal place of business of the appellant, who is a lawyer, and that the appellant countersigned all investor subscription forms, ensured that all payments were made, and, when Ms. Jaffer was absent, ensured that bank drafts and cheques from investors were deposited in the bank. Moreover, he authorized the use of his electronic signature, and certain meetings took place in his office and in his presence. The judge noted that the appellant, because of his position, could not have been unaware that Beluga was distributing its shares to the public. In short, in the judge's words, he was [translation] "at the forefront of the situation", played an essential role, and, by act or omission, aided Beluga to make a distribution of its securities.
2. With respect to the charge of acting as a dealer's representative, the facts of which may be relevant to the charge of having aided Beluga, the judge stated that the appellant had met an investor at his office (a certain Bélisle) and that it was following that meeting that the investor decided to invest. In addition, the appellant was present at the information meetings held at his office, gave information on the company, and it was at his office that investors obtained their share certificates.
3. The judge added that, since the offences were regulatory in nature, [translation] "the prosecution does not have to establish wrongful intention”. With respect to the grounds of defence, the judge rejected the argument that these were accredited investors or that an exemption could be invoked, pointing out that [translation] "[n]othing in the evidence adduced allows the Court to conclude" such.With respect to due diligence or reasonable error of fact (two arguments related to the concept of strict liability that the judge considered applicable), he stated that the appellant, [translation] "by virtue of his privileged position, took no steps to avoid the commission of an offence", so he rejected this defence as well.
4. The appellant then appealed to the Superior Court, which dismissed his appeal on the basis that the offence set out in s. 208 of the *SA is* a strict liability offence: *Heller c. Autorité des marchés financiers*, 2020 QCCS 2762.
5. The judge summarized the evidence presented by the Autorité des marchés financiers as follows:

[translation]

[4] Beluga is a company registered in 2006 whose economic activities are the manufacture and sale of fibreglass reservoirs. At the time of its registration, the appellant acted as corporate secretary of this corporation.

[5] It should also be noted that Beluga had its place of business at the appellant's law firm on St. Sulpice Street, in Montreal, and that the other two officers of that corporation were Dean Panofsky (President) and Sheney Jaffer (Vice-President).

[6] As corporate secretary, one of the appellant’s duties was to issue and sign the share certificates issued by Beluga through its transfer agent, Manhattan Transfer. In this case, the share certificates issued by Beluga to the investors in this file were signed by the Aappellant, pursuant to the authorization given to Manhattan Transfer to this effect.

[7] In addition to having authorized the use of his signature to issue these share certificates, the appellant also signed, as an "Authorized Officer" of Beluga, every "Subscription Agreement For Non U.S. Persons" certifying the investment by Quebec investors in dispute. The first page of these documents states, in part, that these shares were not registered under the *Securities Act of 1993* and that they were issued by Beluga pursuant to an exemption applicable to the investor.

[8] In this case, it was also established that the investor, Gaétan Bélisle, attended several investor meetings at the appellant's law firm to find financing for Beluga's activities. Indeed, this investor received his Beluga share certificates directly from the appellant.

…

[21] In this case, it is not contested that the appellant was not registered with the Authority as a dealer’s representative, that Beluga did not have a prospectus for which a receipt had been issued in connection with the distribution of shares in dispute, and that the investor witnesses all acquired shares, as set out in the statement of offence. As a result, the only remaining issue in dispute is the appellant’s personal involvement.

[22] In this regard, the evidence reveals that investors attended meetings to find investors at the appellant's office and that the appellant provided specific information to Mr. Bélisle.

1. He also cites the following excerpt from the judgment of the Court of Québec judge:

[translation]

With respect to Mr. Heller, the evidence shows that Beluga's address is located at his principal place of business, he countersigned all investor subscription forms, he ensured that payments were made, and in Ms. Jaffer’s absence, he deposited the investors' cheques or bank drafts in the bank. He also authorized the use of his signature and some... Some meetings were held in his office while he was present.

Because of his position, he could not have been unaware that Beluga was distributing its shares to the public. He had a front row seat and , by act or omission, aided Beluga in the distribution of its securities.

[Citations omitted.]

1. He was of the opinion that, as Beluga’s lawyer, corporate secretary, and director, the appellant's role was not, as he argued, tantamount to that of a [translation] "mere clerk", assigned office tasks limited to countersigning the investment forms after having simply verified [translation] "whether the subscription forms brought to his office, which had been completed and signed by the subscribers, corresponded to the amount of the attached certified cheque or bank draft”. According to the Superior Court judge, the appellant was therefore active in the issuance of share certificates even though the company did not have a prospectus, as required by the *SA*.
2. In this regard, the judge cited a decision of the Financial Markets Administrative Tribunal (*Autorité des marchés financiers c. Affluential Group Corp.*,2015 QCBDR 8) on the liability of corporate officers:

[translation]

[62] As for the respondent Sean Pugliese, the Tribunal considers that the case law is clear as to the responsibility that a corporate officer must assume, particularly when he or she combines – as was the case with the respondent Affluential Group Corp. during the period of the alleged facts – the titles of director, President, majority shareholder and signatory for the bank accounts, and when, moreover, the official mailing address of the respondent Affluential Group Corp. coincides with his personal residence address.

[63] Such an officer cannot claim to escape all liability by simply stating to the Tribunal that he or she did not draft anything, make any representations to the public, and that, on balance, did not know exactly what the corporation he or she presided over and its employees were up to, especially when the Authority's evidence is to the contrary.

## APPLICABLE LAW

1. First, we must read the *SA*. The following are the relevant sections:

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| **11**. Every person intending to make a distribution of securities shall prepare a prospectus that shall be subject to a receipt issued by the Authority. The application for a receipt must be accompanied with the documents prescribed by regulation.  Notwithstanding the foregoing, in the case of a distribution made by a dealer acting as firm underwriter, the issuer is responsible for preparing the prospectus.  **202**. Unless otherwise specially provided, every person that contravenes a provision of this Act commits an offence and is liable to a minimum fine of $2,000 in the case of a natural person and $3,000 in the case of a legal person or double the profit realized, whichever is the greatest amount. The maximum fine is $150,000 in the case of a natural person and $200,000 in the case of a legal person, or four times the profit realized, whichever is the greater amount.  In determining the penalty, the court shall take particular account of the harm done to the investors and the advantages derived from the offence.  **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. | **11.** Toute personne qui entend procéder au placement d’une valeur est tenue d’établir un prospectus soumis au visa de l’Autorité. La demande de visa est accompagnée des documents prévus par règlement.  Toutefois, dans le cas du placement par un courtier de titres pris ferme, il incombe à l’émetteur d’établir le prospectus.  **202**. Sauf disposition particulière, toute personne qui contrevient à une disposition de la présente loi commet une infraction+ et est passible d’une amende minimale, selon le plus élevé des montants, de 2 000 $ dans le cas d’une personne physique et de 3 000 $ dans le cas d’autres personnes, ou du double du bénéfice réalisé. Le montant maximal de l’amende est, selon le plus élevé des montants, de 150 000 $ dans le cas d’une personne physique et de 200 000 $ dans le cas d’autres personnes, ou du quadruple du bénéfice réalisé.  Dans la détermination de la peine, le tribunal tient compte notamment du préjudice causé aux épargnants et des avantages tirés de l’infraction.  **208**. Celui qui, par son acte ou son omission, aide quelqu’un à commettre une infraction est coupable de cette infraction comme s’il l’avait commise lui-même. Il est passible des peines prévues à l’article 202, 204 ou 204.1 selon les infractions en cause.  La même règle s’applique à celui qui, par des encouragements, des conseils ou des ordres, amène quelqu’un à commettre une infraction. |
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1. Section 21(1) of the *Criminal Code* is also important for understanding what follows, since it contains the concepts of aiding and abetting:

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| **21 (1)** Every one is a party to an offence who  **(a)** actually commits it;  **(b)** does or omits to do anything for the purpose of aiding any person to commit it; or  **(c)** abets any person in committing it. | **21 (1)** Participent à une infraction+ :  **a)** quiconque la commet réellement;  **b)** quiconque accomplit ou omet d’accomplir quelque chose en vue d’aider quelqu’un à la commettre;  **c)** quiconque encourage quelqu’un à la commettre. |

1. Let us now examine how the case law deals with the issue of moral blameworthiness in criminal and penal matters.
2. In *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, Dickson J., as he then was, wrote on behalf of the Supreme Court in relation to regulatory offences:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. 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. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey’s* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first 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. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

[Emphasis added.]

1. In short, according to the Supreme Court, regulatory offences (those adopted for the public welfare, but that are not criminal) are presumed to be of strict liability, whereas criminal offences are presumed to be *mens rea* offences, thus requiring proof of "wrongful intention".
2. Dickson J. added another reason why a regulatory-type offence should not be presumed to be a *mens rea* offence:

There is another reason, however, why this offence is not subject to a presumption of *mens rea.*The presumption applies only to offences which are “criminal in the true sense,” as Ritchie J. said in *The Queen v.* *Pierce Fisheries*(*supra*)*,*at p. 13. *The Ontario Water Resources Commission Act*is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possibly create an offence which is criminal in the true sense.

1. Since it goes without saying that a provincial statute cannot create criminal offences, which are the domain of Parliament, a provincial offence cannot be presumed to be a *mens rea* offence, since only truly criminal offences are presumed to be so. On the other hand, it may be a *mens rea* offenceif the provincial legislature so chooses.
2. Furthermore, in *Sault Ste. Marie,* the offence at issue may have been similar in some ways to the one under appeal, since it involved "permitting" illegal conduct, a term that may be similar to aiding or abetting:

The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: “cause” and “permit.” These two words are troublesome because neither denotes clearly either full *mens rea*nor absolute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over-simplification.

1. Nevertheless, Dickson J. was of the opinion that these terms remain in the realm of strict liability, as the offence is neither a *mens rea* offence nor a strict liability offence, as intended by the legislator:

The conflict in the above authorities, however, shows that in themselves the words “cause” and “permit”, fit much better into an offence of strict liability than either full *mens rea*or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as “knowingly” or “wilfully” expressly to import *mens rea,*application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

1. It should be noted that the term "permit" was not used in the context of a mode of participation applicable to all offences, as is the case with s. 208 of the *SA*, but rather of an independent offence of "permitting discharge of pollutant”. In other words, *Sault Ste. Marie* does not exclude the possibility that a provision that governs a mode of participation, rather than create an independent offence, requires proof of *mens rea* depending on the context, even in the absence of words such as "wilfully", "with intent", "knowingly", or "intentionally".
2. Later, in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 S.C.R. 756, the Supreme Court examined an offence under s. 482 of the *Act respecting the distribution of financial products and services,* R.S.Q., c. D-9.2 ("*ADFPS"*), which provides that:

**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.

1. Here again, despite its apparent resemblance to a complicity rule, we are dealing with a statutory provision that does not establish a mode of participation, but in itself creates an offence. Wagner J., as he then was, on behalf of the majority, concluded that the offence under s. 482 is a strict liability offence:

[32] 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).

[33] 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*.

[Emphasis added.]

1. Wagner J. rejected the appellant's contention that proof of *mens rea* is required, given that the offence is one of complicity in the following terms:

[34] 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.

[35] 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), 1974 CanLII 707 (ON CA), 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.

[36] 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]

[37] 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 CanLII 110 (SCC), [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.]

[38] 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.

[39]  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”. [Emphasis in the original]

[40] 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 CanLII 110 (SCC), [1995] 2 S.C.R. 973).

[41] 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*. . …

[Emphasis added.]

1. In short, in the presence of a discrete, independent offence that does not constitute a mode of participation, and whose wording does not show the legislature’s intention to make it a *mens rea* offence, it must be concluded that the offence under s. 482 *ADFPS* is not covered by the common law rule requiring proof of *mens rea* in the case of complicity and that it therefore creates a strict liability offence. It is clear, however, that despite the resemblance, this does not answer the issue raised in this appeal. As Wagner J. pointed out:

[47] In sum, s. 482 of the *ADFPS*, which creates a separate offence, differs from ss. 208 *SA* and 491 *ADFPS*, which create modes of participation more similar to those established in s. 21(1)(*b*) *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 *ADFPS* need not be subject to the common law rule that proof of *mens rea* continues to be required for party liability offences.

1. In *Demers c. Autorité des marchés financiers*, 2013 QCCA 323, Kasirer J.A, then of the Court of Appeal, also makes this important distinction:

[translation]

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

[55]  It should be noted that according to s. 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, s. 208 is merely a mode of participation *―* Ms. Demers was found guilty of contravening s. 11 of the *SA* by application of the rule in s. 208 *―* and not a separate “offence”.

[56] It should also be noted that the *ADFPS* includes a provision — s. 491 *ADFPS* — that is practically identical to s. 208 *SA*. Like s. 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 s. 208 *SA*, was not raised in *La Souveraine* as a basis for the insurer’s liability. The differences between s. 208 *SA* and s. 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.

[57] There are other differences between s. 208 *SA* and s. 482 *ADFPS* relevant to a potential characterization of the nature of an offence that applies through secondary liability under the *Securities Act*. For example, unlike s. 208 *SA,* s. 482 *ADFPS* at issue in *La Souveraine* targets only complicity by named actors subject to the regulatory regime. In contrast, the scope of s. 208 *SA* is extremely broad. The respondent argues that the offence does not seek to criminalize the conduct of all accomplices and will be implemented only for the director and for the senior officer – the directing minds of corporate entities – who help their companies commit the actual offences. However, the wording of s. 208 *SA*, at least on its face, does not distinguish between a person high up in the decision-making hierarchy of the legal person and a mere clerk who, by act or omission, aids a corporation, but whose moral share of the blame for the wrongful behaviour of the principal offender, beyond knowledge, would be trivial.

[Citations omitted.]

1. Note that in *Autorités des marchés financiers c. Patry*, 2015 QCCA 1933, and *Desbiens c. Autorités des marchés financiers*, 2017 QCCA 1690, the Court did not decide the issue, given its hypothetical nature.
2. What to learn from all of this?

* Section 21(1)(*b) Cr. C.* identifies a mode of participation and is not an independent offence;
* It is criminal in nature, such that it is a *mens rea* offence, given the presumption and the language used by Parliament ("does or omits to do anything for the purpose of aiding any person to commit it / quiconque accomplit ou omet d’accomplir quelque chose en vue d’aider quelqu’un à la commettre");
* Moreover, this language makes it not only a *mens rea* provision, but also a specific *mens rea* provision (specific intention to aid);
* The *SA* is a regulatory statute that falls under the second category of offences identified in *Sault Ste. Marie*, that is, the category where offences are presumed to be strict liability offences;
* Section 208 *SA* is not an independent offence, unlike s. 482 *ADFPS*;
* In contrast, like s. 21(1)(b) *Cr. C.* and s. 491 *ADFPS*, s. 208 *SA* establishes a mode of participation and is therefore more similar to those statutory provisions than to s. 482 *ADFPS*;
* Unlike s. 208 *SA,* s. 482 *ADFPS* targets only complicity by certain named actors subject to the regulatory regime at issue ("an insurer … any director, executive officer, employee or mandatary of an insurer"/ “un assureur…de même de tout administrateur, dirigeant, employé ou mandataire d’un assureur”); by contrast, s. 208 *SA* is much broader in scope and is not limited to specific persons governed by the regulatory scheme ("Every person who"/ “Celui qui”);
* Thus, as this Court pointed out in *Demers*, s. 208 *SA* can cover the conduct of a [translation] "mere clerk" who was not familiar with his employer's situation, but who may nevertheless be the subject of a statement of offence;
* Part of the rationale for the strict liability regime is that those engaged in regulated activities agree in advance to be held to high standards and recognize that they will be held to those standards by demonstrating due diligence; such a characteristic is incompatible with the position of office worker;
* No decision of this Court or of the Supreme Court has ruled on the issue of the level of penal liability required by s. 208 *SA*;
* To do so, it is necessary to distinguish between provisions that create independent offences and those that provide only for a mode of participation.

## ANALYSIS

1. According to the appellant, s. 208 *SA* requires proof of *mens rea*. He does not argue, however, that it must be specific *mens rea*, as in s. 21(1)(b) *Cr*. *C*. I agree with him.
2. I repeat, s. 208 of the *SA* is very broad in scope in that allows the sanctioning of the actions of a person who, at first glance, may not necessarily be aware of the unlawful nature of the activities he or she has aided in committing. It is clear that a clerk, delivery person, and office worker can all unwittingly assist a company in committing an offence under the *SA*. Naturally, they would most likely be acquitted if they were charged, but they would have to defend themselves and prove their due diligence if s. 208 of the *SA* were a strict liability provision. I would see this as a profound injustice.
3. I may be told that the Authority would never charge such persons. However, that is not the issue. As in *R. v. Smith*, [1987] 1 S.C.R. 1045, what is important, for the sole purpose of the analysis, is that the charge can be laid and that, if it is, the defendant will necessarily have the burden of proving the absence of moral blameworthiness. In my view, this points strongly to the need to require proof of *mens rea*. I would add, without drawing a firm conclusion, that this argument would not hold with respect to s. 482 *ADFPS.* This does not mean that this section should be characterized as a strict liability provision. I am simply pointing out the difference between the two rules.
4. It cannot be argued that that a delivery person and an office clerk working at a brokerage firm have agreed to be under the yoke of complex regulations when performing their routine activities, as the securities broker, its officers, and representatives, for example, have done. Strict liability is easy to understand because the person who engages in a regulated activity (such as trading in securities) knows that he or she will be subject to strict rules for the protection of the public and will have to act diligently to comply with them. This is not the case for all employees, and Wagner J.'s rationale in *La Souveraine* that "[t]hose 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" simply cannot be applied with respect to s. 208 of the *SA*, which is directed at all persons, not just those who have necessarily agreed to meet strict standards of the kind imposed by the *SA*.
5. Furthermore, while *Sault Ste. Marie* endorses the idea that permitting an offence to be committed can nevertheless be a strict liability offence, a distinction must be made. Permitting an offence to be committed suggests that the accused (or defendant) had some control over the activity, hence the requirement that he or she exercised diligence, or oversaw the activity, which leads to the same result. This cannot apply to every employee.
6. The fact that s. 208 of the *SA* is not an independent offence, but only a general mode of participation, also weighs in favour of *mens rea*. *Sault Ste. Marie* establishes that public welfare offences are *prima facie* strict liability offences. However, s. 208 of the *SA* is not an offence, but a mode of participation, and the teachings of *Sault Ste. Marie* cannot be applied indiscriminately to mere modes of participation.
7. Of course, s. 208 of the *SA* doesnot contain expressions such as "knowingly", "wilfully", or “intentionally”. While this is a strong argument, it is not, in my view, a compelling one. Of course, such terms would have the advantage of clarifying the legislature’s intention. It does not follow, however, that a careful reading of the entire *Securities Act* or of some of its provisions cannot lead to the same result. To repeat, the very wording of s. 208 *SA*, which is extremely broad in scope and is not an independent offence, leads me to conclude that the legislature intended it to be a *mens rea* provision. Take note, however, this is not a specific *mens rea* offence, but a general *mens rea* offence, i.e., the prosecution must establish knowledge, intent, or recklessness, not a specific intent to pursue a subsequent goal.
8. I note that, according to some authors, proof of the guilty mind of an accomplice is essential, even in regulatory law, given [translation] "the intrinsic nature of participation in an offence", whether or not the legislature used the word "knowingly". This is what authors Gisèle Côté-Harper, Pierre Rainville, and Jean Turgeon argue in *Traité de droit pénal canadien*, 4th ed. (Cowansville: Yvon Blais, 1998) at 746–747:

[translation]

There is another difference between an accomplice and an actual perpetrator in provincial penal law. They are subject to different liability regimes. Proof of the accomplice’s guilty state of mind is essential to a conviction. In federal regulatory law, this conclusion follows from very the wording of s. 21(1) *Cr. C.* In Quebec law, it stems instead from the intrinsic nature of participation in an offence. The concept of complicity requires [translation] "*per se* conscious assistance in the commission of the offence, whether or not the legislature has used the word 'knowingly'”. Only an express statutory exemption supports a different conclusion. Section 200 of the *Building Act* is among such provisions that depart from the norm: “Whoever, by act or omission, assists another in committing an offence is guilty of the offence as if he had committed it himself, if he knew *or should known* that his act or omission would probably result in assistance towards the commission of the offence”.

[Citations omitted.]

1. Similarly, in *Code de procédure pénale du Québec annoté*, 11th ed. (Montreal: Wilson & Lafleur, 2019) at 129, authors Gilles Létourneau and Guy Cournoyer write the following regarding provisions dealing with a mode of participation:

[translation]

145. The following shall be party to an offence and liable to the penalty provided in the same manner as the person committing the offence: any person *who aids* or abets *the commission* *thereof* and, when the offence is committed by a legal person or an association, every director, officer or manager shall be guilty of the offence who in any manner approves of the act which constitutes the offence or acquiesces therein.

*Labour Code* (CQLR, c. C-27, s. 145). See also *Securities Act* (CQLR, c. V-1.1, s. 208); *Act respecting labour relations, vocational training and workforce management in the construction industry* (CQLR, C. r-20, s. 118).

While the first of these provisions expressly requires that the aid be provided knowingly, the second, when read in comparison with the first, seems to lead the reader to conclude that aid in the commission of an offence may be provided unknowingly. We must nevertheless resist drawing such a conclusion.

First, the word "knowingly" in the first clause merely expresses the need for a *mens rea* of knowledge and makes the legislative intent easier to interpret. The absence of this magic word, however, does not necessarily mean it is not an offence requiring a *mens rea*. The words used in the provision creating the offence may well be sufficiently indicative of legislative intent to make the use of such explicit language unnecessary and redundant.

*Pichette v. Deputy Minister of Revenue of Quebec* (1982), 29 C.R. (3d) 129, EYB 1982-139961 (C.A. Que.); *R. v. Brown*, (1982) 29 C.R. (3d) 107 (C.A. Alta.).

In other words, the need for a *mens rea* may be implicit in the wording of the offence itself and, we submit, in the case of an accomplice, in the very notion of complicity. Indeed, by definition, a person cannot be an accomplice to an act or fact of which he or she is unaware, since, according to the usual dictionary meaning, [translation] “complicity” (“*complicté*” in French) implies collusion between the participants (see *Larousse illustré*,1984at 227) or intentional or conscious participation in the offence committed by another (see *Petit Robert*,1991 at 351; *Black's Law Dictionnary*, 6th ed., (1990) at 17; *R. v. Finta*, [1994] 1 S.C.R. 701, EYB 1993-67654; *Ramirez v. M.E.I.*, [1992] 2 F.C. 306 at 317–318 (F.C.A.)). In this context, the accused’s wilful blindness is tantamount to actual guilty knowledge of the existence of the offence he or she is helping commit (see *Finta*, above). Thus, a truck driver who is unaware that illegal substances have been concealed in the middle of the load aids in the illegal transportation of goods, but is not at any time an accomplice to the offence, since there was no collusion with the principal offender and participation is not intentional or conscious. The concept and offence of complicity require at least a *mens rea* of knowledge, either of the fact that an offence is being or will be committed, or of the facts necessary for the commission of the offence that he or she is helping to commit (*R. v. F.W. Woolworth Co.* (1975), 18 C.C.C. 23 (C.A. Ont.), *Commission des valeurs mobilières du Québec c. Binette*, [1995] R.J.Q. 1566, EYB 1995-72394 (C.Q.)). They inherently require conscious aid in the commission of the offence, whether or not the legislature used the word "knowingly".

1. In *Turp c. Autorité des marchés financiers*, 2012 QCCS 1925, this led Sophie Bourque J. to conclude that the prosecution’s burden of proof is higher under s. 208 *SA*, since it does not benefit from any presumption as to the defendant's blameworthy state of mind. The prosecution must therefore prove the defendant’s knowledge of the circumstances:

[translation]

[45] However, the prosecution's burden does not go any further. To impose on the prosecution, as the appellant requests, the burden of proving that the accomplice knew the terms of the distribution and was able to determine its legality would be to impose a burden on the prosecution that is not set out in the statute, as it would be tantamount to proving that the accomplice knew that the circumstances in question constituted an offence.

[46] In other words, the prosecution does not have to establish that the accused knew that distribution without a prospectus is an offence, it only has to establish that the accused knew that the distribution in question was made without a prospectus. To take the example of the truck driver, the prosecution does not have to establish that he knew the substance he was carrying was illegal, but it must establish that he knew he was carrying the substance.

[47] The prosecution, with respect to the accomplice, must therefore prove the mental element of the offence, namely, knowledge. Mere proof of the existence of the *actus reus* is insufficient.

[48] Thus, since the prosecution does not benefit from the presumption of the offence as it does with respect to the principal offender, it follows that there is no reversal of the burden of proof onto the accused. Therefore, once the *actus reus* isproved, the accused does not have to prove his or her innocent state of mind by proving due diligence, or a reasonable mistake of fact, in order to be acquitted. The burden remains on the prosecution to demonstrate knowledge of all the elements of the *actus reus*.

1. In short, I am of the view that s. 208 of the *SA* requires proof of general *mens rea* (knowledge, intent, or recklessness), and it is now necessary to ascertain what that means for the outcome of this appeal.

## THE APPLICATION OF THE LAW

1. It must now be determined whether the erroneous characterization of s. 208 of the *SA* by the Court of Québec and the Superior Court, which constitutes an error in law, means that the appeal from the Superior Court judgment must be allowed or nevertheless dismissed (articles 313 and 286–287 *Code of Penal Procedure*).
2. For the reasons that follow, I find that the appeal from the conviction must be dismissed, despite the error on the notion of *mens rea.*
3. To prove the appellant's guilt, the prosecution had to show that he knew he was aiding in a distribution without a prospectus for which a receipt had been issued. According to the evidence, this knowledge is self-evident in the circumstances and, in any event, the appellant admitted that he knew that there was no prospectus.
4. He raised another argument at the hearing, however: the prosecution also had to establish that he knew that he was not dealing with "accredited investors", which constitutes an exemption from the prospectus requirement. Indeed, s. 43 of the *SA* provides for an exception in these cases: “No prospectus is required where a distribution of securities is made to an accredited investor determined by regulation and the distribution meets the conditions prescribed by regulation /*Le placement de titres auprès d’un investisseur qualifié déterminé par règlement est dispensé de l’établissement d’un prospectus, dans la mesure où il est conforme aux conditions prévues par règlement*”.
5. I note that the regulations are very specific in this regard. As counsel for the respondent pointed out before the Court of Québec, under *Regulation 45-106*, such investors have income that is significantly higher than average and net assets of at least $5,000,000.
6. The appellant is wrong. The prosecution is not obliged to exclude every possibility and every defence that a defendant may raise. In fact, article 64 of the *Code of Penal Procedure* so provides: “It is incumbent upon the defendant to establish that he has the benefit of an exception, exemption, excuse or justification provided for by law / *Il incombe au défendeur d’établir qu’il bénéficie d’une exception, d’une exemption, d’une excuse ou d’une justification prévue par la loi*”.
7. In addition, the demonstration that they were dealing with accredited investors is a matter of *actus reus* (the facts giving rise to the offence), not *mens rea* (the knowledge of these facts). The appeal, however, was not authorized with respect to the *actus reus*. Similarly, on the issue of knowledge, the appellant has not persuaded me that he presented satisfactory evidence in this regard.
8. Indeed, he did not testify that the investors were accredited investors or that he believed they were. He relied on his co-defendant’s testimony in this regard. We therefore do not know his level of knowledge. He even states in his written argument before this Court that [translation] "none of the factual witnesses called by the Respondent (other than Mr. Bélisle) knew the appellant.” If he did not know them, he could not have thought that they were accredited investors.
9. Similarly, how can he argue that he thought they were accredited investors when he maintains that his only involvement consisted of receiving the subscription documents at his office and ensuring that the bank draft was for the required amount?
10. In other words, his lack of knowledge about the investors contradicts his argument.
11. Furthermore, even his co-defendant was not very explicit on this issue. The following excerpt from his testimony establishes this:

[translation]

François Dauphinais is René Dauphinais's brother. René Dauphinais and Martine Dauphinais are also investors in Beluga and have been characterized by the Authority as accredited investors. All of these individuals work in the agricultural sector...

...

As for François and Nancy Dauphinais, I have...to my surprise, they said they were not accredited, but I have information here that I can pass on.

...

As for Mr. Jean-François Desrosiers, Jean-François Desrosiers, I can tell you that he was a very close friend of mine at the time – he has confirmed this to you himself – and Jean-François, to my surprise, was not an accredited investor, which I learned, but he was a very close friend of mine. He was not an accredited investor, which I learned, but he was a very close friend and I was a senior officer of Beluga at the time, which is why he was able to invest a small amount of money. It's a shame, I lost a friend and he lost his money for the time being.

1. In fact, when asked if he was an accredited investor, Mr. Desrosiers simply replied, [translation] "No".
2. This example alone shows that the evidence on accredited investor status is far from clear.
3. In fact, only one investor was clearly an accredited investor according to the evidence. This was a man named Denis for whom, in any event, the charges did not concern the lack of a prospectus.
4. The appellant adds an argument with respect to the *actus reus*: it was his co-defendant who recruited the investors, while he just signed the share certificates. He argues that the distribution had already been made when he signed the certificates, such that he did not aid in the distribution, as required by the charges. In his view, the certificate is not a distribution. At most, it is proof of a distribution.
5. To repeat, the appeal was not allowed with respect to the *actus reus* and, in any event, the certificate was necessary to give effect to the distribution. The facts accepted by the Court of Québec and the Superior Court leave no doubt as to the proof of the *actus reus*. His appeal could therefore not succeed, even on this aspect.

## CONCLUSION

1. The Superior Court judge erred in concluding that s. 208 *SA* is a statutory provision creating a strict liability offence. I think it is appropriate to make this clear by stating that general *mens rea*, that is, knowledge, intent, or recklessness, must be proved beyond a reasonable doubt by the prosecution when this provision is at issue. In addition, I suggest that the Court dismiss the appeal as this has successfully been established, whether by the appellant's direct knowledge or recklessness.

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| FRANÇOIS DOYON, J.A. |

1. *Heller c. Autorités des marchés financiers,* 2020 QCCS 2762. [↑](#footnote-ref-1)
2. *Autorités des marchés financiers c. Heller* (10 August 2016) 200-61-168997-136 (C.Q.). [↑](#footnote-ref-2)