



SUPREME COURT OF CANADA

CITATION: Salomon v. Matte-Thompson,
2019 SCC 14

APPEAL HEARD: March 19, 2018
JUDGMENT RENDERED: February 28, 2019
DOCKET: 37537

BETWEEN:

Kenneth F. Salomon and Sternthal Katznelson Montigny LLP
Appellants

and

Judith Matte-Thompson and 166376 Canada Inc.
Respondents

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT: Gascon J. (Wagner C.J. and Abella, Moldaver,
(paras. 1 to 97) Karakatsanis, Brown, Rowe and Martin JJ. concurring)

DISSENTING REASONS: Côté J.
(paras. 98 to 215)

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SALOMON v. MATTE-THOMPSON

**Kenneth F. Salomon and
Sternthal Katznelson Montigny LLP**

Appellants

v.

**Judith Matte-Thompson and
166376 Canada Inc.**

Respondents

Indexed as: Salomon v. Matte-Thompson

2019 SCC 14

File No.: 37537.

2018: March 19; 2019: February 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Lawyers — Professional liability — Duty to advise — Duty of loyalty — Lawyer recommending financial advisor to clients — Clients investing millions of dollars with recommended financial advisor's firm — Lawyer repeatedly endorsing advisor and encouraging clients to make and retain investments

— Investments made in funds that were parts of Ponzi scheme — Millions lost in fraud — Clients claiming that lawyer and his law firm were professionally negligent — Trial judge dismissing claim — Court of Appeal allowing appeal and ordering that clients be compensated for losses — Whether Court of Appeal erred by employing notion of distorting lens in determining whether trial judge had made palpable and overriding errors — Whether Court of Appeal expanded professional obligations of lawyers who refer clients to independent advisors — Whether Court of Appeal erred by interfering with trial judge's findings relating to faults committed by lawyer and to causation.

In 2003, a lawyer introduced two clients to his financial advisor and personal friend, and recommended that they consult him. In the following four years, the clients ended up investing over \$7.5 million with the recommended financial advisor's investment firm. Over the course of those four years, the lawyer repeatedly endorsed the recommended advisor as a financial advisor and encouraged his clients to make and retain investments with the investment firm. In 2007, the recommended advisor and his associate disappeared with the savings of around 100 investors, including those of the lawyer's clients. The clients instituted legal proceedings, claiming that the lawyer and his law firm were professionally negligent in two ways: first by breaching their duty to advise them and second, by disregarding their duty of loyalty to them.

The trial judge dismissed the claim. The Court of Appeal concluded that the trial judge had made reviewable errors, and it reversed her judgment. In its opinion, the trial judge had viewed the lawyer's acts and their consequences through a distorting lens which had led her to erroneously assess the evidence in isolated silos, without the insight provided by a global analysis. The Court of Appeal ordered the lawyer and his law firm solidarily to fully compensate the clients for their losses.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, **Gascon**, Brown, Rowe and Martin JJ.: The Court of Appeal had a sufficient basis for intervening and reversing the trial judge's decision. It properly applied the standards of appellate review, as imposed by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The professional liability of the lawyer and the law firm for the clients' losses has been established.

Findings with respect to fault involve questions of mixed fact and law and findings with respect to causation, questions of fact. In both situations, absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge. It can only intervene if there is an obvious error in the trial decision that is determinative of the outcome of the case. The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made. An appellate court must identify a crucial flaw in the lower court's decision, and a distorting lens, that is, a

lens through which a trial judge assessed the evidence and that had a distorting effect, cannot be invoked as a substitute for identifying a reviewable error or to mask the fact that an error identified by an appellate court does not meet the high standard imposed by *Housen*. In the case at bar, the Court of Appeal held that the distorting lens through which the trial judge has viewed the evidence — in this case a narrow, siloed approach — had led her to make precisely identified palpable and overriding errors. The notion of a distorting lens was nothing more than a metaphor the Court of Appeal used to explain why the standard of appellate review established in *Housen* was met; it was not used to mask an absence of palpable and overriding errors. The Court of Appeal did not err by employing the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors.

Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, the Court will intervene only if its own disagreement stems from a clear satisfaction that an error has occurred in the first appellate court's assessment of the facts. The focal point of the analysis that the Court — as the second and final court of appeal — has to perform in applying the *Housen* standards of review is the decision of the first court of appeal, not that of the trial judge. The onus is on the appellants to demonstrate an error in the court of appeal's decision. Here, the appellants did not satisfy their onus. The Court of Appeal did not err by concluding that the trial judge had made palpable and overriding errors, by interfering with the trial judge's findings relating to the lawyer's duty to advise and duty of loyalty, nor by interfering with the trial judge's findings that the lawyer's

fault had not caused the clients' losses. There is no reason for the Court to interfere with the Court of Appeal's findings.

The relationship between lawyers and their clients can usually be characterized as a contract of mandate. Although lawyers, as mandataries, do not guarantee the services rendered by professionals or advisors to whom they refer their client, they must nevertheless act competently, prudently and diligently in making such referrals, which must be based on reasonable knowledge of the professionals or advisors in questions. Lawyers who refer clients to other professionals or advisors have an obligation of means, not one of result. They must be convinced that the professionals or advisors to whom they refer clients are sufficiently competent to fulfill the contemplated mandates. Referral is not a guarantee of the services rendered by the professional or advisor to whom the client is referred, but it is also not a shield against liability for other wrongful acts committed by the referring lawyer. In the instant case, the lawyer had done far more than merely make a referral. It was the entirety of his conduct that led the Court of Appeal to hold the lawyer and his law firm liable in the circumstances. The Court of Appeal's decision did not broaden the basis of liability for lawyers who refer clients to other professionals or advisors.

A lawyer's duty to advise is threefold, encompassing duties to inform, to explain, and to advise in the strict sense. It is inherent in the legal profession and exists regardless of the nature of the mandate. Its exact scope depends on the circumstances, including the object of the mandate, the client's characteristics and the

expertise the lawyer claims to have in the field in question. When lawyers do provide advice, they must always act in their clients' best interests and meet the standard of the competent, prudent and diligent lawyer in the same circumstances. Any advice lawyers give that exceeds their mandate may, if wrongful, engage their liability. Here, the Court of Appeal had sufficient basis to intervene and find that the lawyer had failed to advise his clients as a competent, prudent and diligent lawyer would have done. It properly and precisely identified palpable and overriding errors made by the trial judge in her assessment of the parties' relationships, which had a direct impact on her findings regarding the scope of any wrongful advice given. When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the lawyer's advice and reassurances were all part of a single continuum, and that placing them in separate silos would be artificial. The lawyer breached his duty to advise by recommending a non-diversified investment in offshore hedge funds to clients whose primary goal was to preserve the capital, by recommending financial products without performing due diligence and by repeatedly reassuring his clients that their investments gave them security of capital.

As mandataries, lawyers also have a duty to avoid placing themselves in situations in which their personal interests are in conflict with those of their clients. The duty to avoid conflicts of interest is a salient aspect of the duty of loyalty they owe to their clients. The duty of loyalty shields the performance of the lawyer's duty to advise clients from the taint of undue interference. In the instant case, the Court of Appeal was justified in finding that the lawyer's personal and financial relationship

with the recommended advisor had placed him in a conflict of interest and that he had neglected his clients' interests. The trial judge adopted an unduly restrictive approach in analyzing the principles relating to conflicts of interest, which tainted her entire analysis concerning the breach of the lawyer's duty of loyalty. A proper consideration of the evidence as a whole leads to the conclusion that this very close relationship affected the lawyer's objectivity in advising his clients. The lawyer's divided loyalties led him to neglect his clients' interests: he disregarded his duty of confidentiality regarding his communications with them and teamed up with the recommended advisor in an attempt to convince them not to withdraw their investments.

More than one fault can cause a single injury so long as each of the faults is a true cause, and not a mere condition, of the injury. A fault is a true cause of its logical, immediate and direct consequences. This characterization is largely a factual matter, which depends on all the circumstances of the case. A person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and that has no relationship to the initial fault. Two conditions must be met for the principle of *novus actus interveniens* to apply. First, the causal link between the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. A client's ability to rely on advice given by his or her lawyer is central to the lawyer-client relationship and a client's acceptance of a lawyer's negligent advice cannot shield the lawyer from liability. Fraud committed by a third party also does not shield from liability persons who failed to take required precautions. Where the risk of a decline in market prices or

fraud by a third party materialize, and where lawyers have failed to abide by the standards of professional conduct that are meant to protect their clients against these very risks, they may be liable for their clients' investment losses. Here, the trial judge's findings regarding the extent of the faults committed by the lawyer no doubt had an impact on her causation analysis. Assessing the evidence in separate silos based on the timing of the events and the specific funds that had been recommended was artificial. The trial judge's causation analysis was also distorted by her erroneous finding that the lawyer had not breached his duty of loyalty. Taken together, the lawyer's faults with respect to both his duty to advise and his duty of loyalty were a true cause of the losses suffered by his clients. The fraud did not break the chain of causation — no losses would have been suffered without the faults first committed by the lawyer.

Per Côté J. (dissenting): The appeal should be allowed. The Court of Appeal should not have substituted its own view of the case for that of the trial judge as there were no palpable and overriding errors in her key findings. The Court of Appeal wrongly intervened on the basis of mere differences of opinion regarding the assessment of the evidence, which is clearly inconsistent with the role of an appellate court. When a first appellate court interferes with a trial judge's findings in the absence of reviewable errors, it is the Court's role to step in and to restore the trial judge's decision.

On questions of fact or of mixed fact and law, an appellate court cannot make its own findings and draw its own inferences unless the trial judge is shown to have committed a palpable and overriding error. As a precondition to intervening in a trial judge's decision, the appellate court must point to a specific and identifiable error that amounts to more than a divergence of opinion and that error must be shown to be determinative of the outcome of the case. The identification of a palpable and overriding error does not require a review of the evidence as a whole. The focus of the review is the trial judge's reasons and, if need be, specific pieces of evidence to which the appellant draws the attention of the appellate court to show that a given finding is unsupported by the evidence. It would be inappropriate for the appellate court to conduct its own assessment of the evidence and then to take note of points of disagreement with the trial judge's findings and hold that those findings result from palpable and overriding errors in order to justify intervening. Appellate courts are, in comparison to trial judges, ill-equipped for the task of fact-finding and must thus leave the task to trial judges.

The distorting lens metaphor does not dispense with the requirement of identifying reviewable errors in accordance with the standards articulated in *Housen*. A "distorting lens" cannot justify a wide-ranging review of the entire record unless adopting the lens is shown to be, in itself, a reviewable error. The distorting lens metaphor may arguably be useful to illustrate how certain palpable errors taint the analysis of the evidence to the point of having an overriding effect, but a metaphor is not a full explanation. The appellate court must explain why the trial judge erred by

viewing the case through the impugned “distorting lens”, why that error amounts to more than a mere divergence in opinion, and precisely how it distorted the trial judge’s analysis and affected the outcome of the case.

Part of the Court’s role as a second and final court of appeal is to ensure that a trial judge’s findings of fact or of mixed fact and law remain undisturbed unless a palpable and overriding error is established. Although the focal point of the Court is the first appellate court’s decision, not that of the trial judge, the Court must inevitably return to the trial judge’s reasons in order to determine whether the first appellate court correctly identified reviewable errors. In that regard, the Court should not defer to the first appellate court with respect to the identification of reviewable errors. When the Court reviews a decision in which the first appellate court has substituted its own findings of fact or of mixed fact and law for those of the trial judge, it must first inquire into whether the first appellate court correctly identified reviewable errors. If it did not, the trial judge’s findings must be restored regardless of the merits of the first appellate court’s findings. If, however, the Court agrees that the intervention was warranted, it must ask whether the first appellate court has erred in making its own independent assessment of the relevant evidence. It is only at this step that the Court will show a certain deference and will therefore avoid intervening unless clearly satisfied that the first appellate court’s findings are erroneous.

In the instant case, the trial judge did not make a palpable and overriding error with respect to fault and causation. The Court of Appeal merely preferred a

different “lens” than the one used by the trial judge. Further, it relied on a broad reassessment of the evidence in order to identify the purported errors, which is at odds with *Housen* and its progeny. The Court of Appeal’s intervention was unwarranted and the Court must intervene to restore the trial judge’s findings.

Whenever lawyers recommend other professionals, or express confidence in them, they must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances. Lawyers should make such inquiries as will enable them to acquire reasonable knowledge of professionals they recommend unless they already have relevant experience dealing with them. Not every professional error made in making such inquiries — or in failing to make them — will amount to a fault if the lawyer’s conduct does not depart from the standard expected, and courts must be careful not to assess recommendations in light of facts discovered subsequently. Moreover, referring lawyers are not required to monitor the advice given by the professionals they recommended, as this would defeat the purpose of referral.

In the instant case, the Court of Appeal did not identify a specific reviewable error in the trial judge’s reasons in relation to the lawyer’s initial recommendation and later expressions of confidence. The lawyer did not commit a fault in recommending the investment firm and the financial advisor and in expressing confidence in them. While the lawyer had a duty to advise both his clients and a duty of loyalty to both of them, those duties were largely circumscribed by the very nature and scope of his mandates. The precise scope of a mandate does not

always limit a lawyer's duties, but it is certainly one of the main considerations for a judge when assessing professional liability. In the present case, as the lawyer had had no specific mandate with regard to the clients' investments, it was appropriate for the trial judge to eschew an overly broad approach to liability. The lawyer's confidence in the competence and probity of the investment firm and the recommended advisor was based on reasonable knowledge. He therefore acted as a reasonably competent, prudent and diligent lawyer in the circumstances.

A lawyer's duty to advise generally includes obligations to inform the client of the relevant facts, to explain available options and their implications, and to recommend a course of action. Yet, the precise content of that duty is highly dependent on the circumstances, including the scope of the mandate, the obligations assumed by the lawyer and his or her areas of expertise. In this case, there is no palpable and overriding error in the trial judge's finding that the lawyer's only fault relating to his duty to advise was to recommend specific investment products. As the trial judge concluded, the lawyer failed to act as a reasonably competent, prudent and diligent lawyer in recommending specific investment products and in volunteering investment advice even though such advice fell outside of the limits of his mandates. In so doing, he breached his duty to advise. Indeed, to the extent that a lawyer does provide advice, he must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances irrespective of the scope of his mandate.

The Court of Appeal had some basis for concluding that the lawyer had committed the same faults in respect of both his clients, but even if this error is assumed to be palpable, it did not affect the outcome of the case. This error did not justify the Court of Appeal's conducting a broad reassessment of the evidence for the purpose of finding other potential errors.

The analysis of an alleged fault related to the duty of loyalty involves a question of mixed fact and law and, unless a pure question of law can be extricated, the appropriate standard is that of palpable and overriding error. An extricable question of law generally concerns a mischaracterization of the applicable legal test or a failure to consider a required element of that test. The analysis of an alleged conflict of interest is inherently fact-based and alleged conflicts must be assessed on a case-by-case basis. Not every potential violation of the duty of loyalty will give rise to an action in civil liability. The court must analyze the nature and the circumstances of the alleged conflict for the purpose of characterizing the violation and, if warranted, determining the appropriate remedy.

A trial judge does not have to discuss in detail every single fact alleged by the parties or every piece of evidence and declining to draw an inference falls squarely within its purview. The question is not whether the trial judge brushed aside elements that the court of appeal deemed important, but whether those omissions might have affected the conclusion. Here, the Court of Appeal erred in interfering with the trial judge's finding that the lawyer had not breached his duty of loyalty to

his clients. It proceeded to revisit the issue of conflict of interests by applying the standard of correctness, as if a question of law had been identified. Yet, the Court of Appeal has not suggested that the trial judge failed to identify the correct legal principles applicable to the alleged fault related to the duty of loyalty or that there is an error in the trial judge's characterization of the applicable legal test. The Court of Appeal failed to identify a palpable and overriding error and impermissibly reassessed the evidence as a whole on the basis of a disagreement over the weight to be given to the evidence. The fact that the Court of Appeal would have weighed the evidence differently, or drawn different inferences, does not justify its intervention. Even if the trial judge did not address certain aspects of the professional relationship between the lawyer and the recommended advisor, especially the disclosure by the former of communications with his client and the fact that he had cooperated extensively with the recommended advisor and the investment firm on at least one occasion, those omissions did not affect her conclusions. The trial judge properly considered the factors that could have cast doubt on the lawyer's undivided loyalty and commitment to his clients, that is, his friendship with the recommended advisor and their financial relationship, including the gifts or commissions he had received. The conclusion that these factors were not enough to have placed the lawyer in a position where his personal interest conflicted with that of his clients was open to her, and is entitled to deference.

A fundamental principle of civil liability is that a person is liable only for injury caused by his or her own fault. A true cause is established when the plaintiff

proves that the injury is a logical, immediate and direct consequence of the fault. It does not suffice to show that the fault increased the likelihood of the injury occurring if there is no evidence that the fault directly caused the injury either in whole or in part. The analysis of causation remains a context-based exercise which does not lend itself to legal theorizing. It is up to the trier of fact to draw a line, or identify a breaking point, between the consequences that flow directly and immediately from the fault and the others. Proving breaches of a lawyer's professional duties does not suffice to establish civil liability in the absence of a causal link to an injury.

In the instant case, the Court of Appeal should not have completely reassessed the evidence and interfered with the trial judge's conclusions regarding causation on the basis of the distorting lens metaphor. It was open to the trial judge to find that the fraud was the only true cause of the losses and that the recommendation of the investment firm and financial advisor was not close enough to the injury to qualify as a logical, direct and immediate cause. With respect to the duties of loyalty and confidentiality, it is unclear how the alleged breaches might have caused the losses. Moreover, even if the lawyer did commit additional faults related to his duty to advise and his duties of loyalty and confidentiality after he had become aware of a news article raising doubts about the firm's practices, the outcome would be the same as the funds were no longer recoverable by that time. Hence, any faults occurring after that date had no consequence on the losses.

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By Gascon J.

Distinguished: *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Montréal (Ville) v. Lonardi*, 2018 SCC 29; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *J.G. v. Nadeau*, 2016 QCCA 167; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478; *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541; *Softmedical inc. v. Daabous*, 2017 QCCA 1270; *Droit de la famille — 161960*, 2016 QCCA 1300; *Droit de la famille — 132381*, 2013 QCCA 1505; *Francoeur v. 4417186 Canada inc.*, 2013 QCCA 191; *Desrochers v. 2533-0838 Québec inc.*, 2016 QCCA 825; *Gutin v. Cenfood International Inc.*, 2018 QCCA 317; *2758792 Canada inc. v. Bell Distribution inc.*, 2017 QCCA 603; *Mangiola v. R.*, 2017 QCCA 741; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1; *Hydro-Québec v. Construction Kiewit cie*, 2014 QCCA 947; *R. v. Lalonde*, 2014 QCCA 639; *Poulin v. Pilon*, [1984] C.S. 177; *Labrie v. Tremblay*, [2000] R.R.A. 5; *Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248; *Sylvestre v. Karpinski*, 2011 QCCA 2161; *Daigneault v. Lapierre*, [2003] R.R.A. 902; *Canadian National Railway Co. v. McKercher LLP*,

2013 SCC 39, [2013] 2 S.C.R. 649; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Parizeau v. Poulin De Courval*, [2000] R.R.A. 67; *Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419; *Compagnie 99885 Canada Inc. v. Monast*, [1994] R.R.A. 217; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Stellaire Construction Inc. v. Ciment Québec Inc.*, 2002 CanLII 35591; *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638; *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) v. Ducharme*, 2012 QCCA 2122, [2012] R.J.Q. 2090; *Lacombe v. André*, [2003] R.J.Q. 720; *Beaulieu v. Paquet*, 2016 QCCA 1284; *124329 Canada inc. v. Banque Nationale du Canada*, 2011 QCCA 226, [2011] R.J.Q. 295; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

By Côté J. (dissenting)

Laferrière v. Lawson, [1991] 1 S.C.R. 541; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Montréal (Ville) v. Lonardi*, 2018 SCC 29; *Benhaim v. St - Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2; *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Laflamme v.*

Prudential-Bache Commodities Canada Ltd., 2000 SCC 26, [2000] 1 S.C.R. 638; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *P.L. v. Benchetrit*, 2010 QCCA 1505, [2010] R.J.Q. 1853; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *J.G. v. Nadeau*, 2016 QCCA 167; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Waxman v. Waxman* (2004), 186 O.A.C. 201; *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Palsky v. Humphrey*, [1964] S.C.R. 580; *Maze v. Empson*, [1964] S.C.R. 576; *Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248; *Sylvestre v. Karpinski*, 2011 QCCA 2161; *Bessette v. Pharmacie Suzanne Payer inc.*, 2017 QCCS 2474; *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *Phillips v. Naamani*, 1998 CanLII 9332; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Parrot v. Thompson*, [1984] 1 S.C.R. 57; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419; *Stellaire Construction Inc. v. Ciment Québec Inc.*, 2002 CanLII 35591; *Lacombe v. André*, [2003] R.J.Q. 720.

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Douglas C. Mitchell, Audrey Boctor and Olga Redko, for the appellants.

Pierre Bienvenu, Azim Hussain, Andres C. Garin and Frédéric Wilson,
for the respondents.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

GASCON J. —

I. Overview

[1] This case concerns the professional liability of a lawyer who has referred clients to a financial advisor where that advisor subsequently turns out to be a fraudster and where, in addition to the referral, the lawyer has over a number of years been recommending and endorsing the advisor’s investments.

[2] By 2003, the first appellant, Kenneth F. Salomon, had been the lawyer of the respondents, Judith Matte-Thompson and 166376 Canada Inc. (“166”), in Quebec for a long time. During that year, he introduced them to Themis Papadopoulos, his personal friend and his own financial advisor, and recommended that they consult him. In the following four years, the respondents ended up investing over \$7.5 million with Mr. Papadopoulos’s investment firm, Triglobal Capital Management Inc.

(“Triglobal”). Over the course of those four years, Mr. Salomon repeatedly endorsed Mr. Papadopoulos as a financial advisor and encouraged the respondents to make and retain investments with Triglobal. In 2007, Mr. Papadopoulos and his associate, Mario Bright, disappeared with the savings of around 100 investors, including those of the respondents.

[3] The respondents claimed that Mr. Papadopoulos and Mr. Bright had fraudulently misappropriated their investments. They also claimed that Mr. Salomon and the second appellant, his law firm Sternthal Katznelson Montigny LLP (“SKM”),¹ had been professionally negligent in two ways. First, Mr. Salomon and SKM had breached their duty to advise the respondents by recommending, endorsing and encouraging inappropriate investments with Mr. Papadopoulos’s firm. Second, they had disregarded their duty of loyalty to the respondents by placing themselves in a conflict of interest that led them to turn a blind eye to the situation. The respondents sued Mr. Papadopoulos, Mr. Bright, Mr. Salomon and SKM for the loss of their investment capital, the loss of the opportunity to realize a return on those investments, and moral injury. They also sought an award of punitive damages against Mr. Papadopoulos and Mr. Bright.

[4] The trial judge held that Mr. Papadopoulos and Mr. Bright were liable for the respondents’ investment losses and moral injury, as well as for punitive damages, but dismissed the claim against Mr. Salomon and SKM. She concluded that

¹ In this Court and the courts below, SKM presented a common defence with Mr. Salomon and did not present separate arguments concerning its own liability.

Mr. Salomon had not committed any fault that was a cause of the respondents' losses. In her view, although he had breached his professional standard of care by making his initial recommendation to the individual respondent, Ms. Matte-Thompson, with regard to her investments, there was no causal link between that fault and Ms. Matte-Thompson's subsequent losses. The trial judge also found that Mr. Salomon had not been in a conflict of interest and that he had not provided financial advice to the corporate respondent, 166.

[5] The Court of Appeal concluded that the trial judge had made reviewable errors, and it reversed her judgment. It made a number of findings, including (1) that Mr. Salomon's faults were not limited in time to that of the initial recommendation, (2) that those faults were committed not only against Ms. Matte-Thompson, but also against 166, and (3) that those faults caused the losses suffered by both of the respondents. In the Court of Appeal's opinion, the trial judge had viewed Mr. Salomon's acts and their consequences through a distorting lens which had led her to erroneously assess the evidence in isolated silos, without the insight provided by a global analysis. The Court of Appeal also held that the trial judge had taken an unduly restrictive approach in analyzing Mr. Salomon's conflict of interest.

[6] I am satisfied that the Court of Appeal had a sufficient basis for intervening as it did. I would therefore dismiss the appeal.

II. Context

[7] Malcolm Thompson and his wife, Ms. Matte-Thompson, were business people who operated restaurant franchises in Ontario and Quebec. Four companies (“Companies”), including 166, were set up for the purpose of operating the restaurants. Mr. Thompson and Ms. Matte-Thompson owned, respectively, two thirds and one third of the shares of 166, and Mr. Thompson was the sole shareholder of the other three companies. In 2002, the Thompsons sold all of their restaurant franchises but one. With that one exception, the Companies remained owners of the real estate only.

[8] Mr. Thompson passed away in 2003. Ms. Matte-Thompson then became the sole director of the Companies. She remained 166’s sole director until October 2006, when David Gemmill and Joseph Miller were appointed to the board. Mr. Gemmill had been Mr. Thompson’s lawyer in Ontario, and Mr. Miller had been his brother-in-law.

[9] Mr. Thompson left two wills, in which he created three trusts for his grandchildren and one trust (“Trust”) for most of his assets, including his shares in the Companies. Mr. Thompson appointed his wife, Mr. Gemmill and Mr. Miller as the trustees and executors under the wills. The wills named Ms. Matte-Thompson as

the income beneficiary of the Trust until her death. The capital of the Trust was to be distributed to the children of Mr. Thompson and those of Ms. Matte-Thompson after Ms. Matte-Thompson's death. The purpose of this arrangement was to ensure that Ms. Matte-Thompson's needs were met and to provide her with financial security while preserving the capital for the children. Preserving the capital was a paramount consideration under the wills.

[10] Mr. Salomon had been the Thompsons' lawyer for their business operations in Quebec since 1989. Following her husband's death, Ms. Matte-Thompson regularly consulted Mr. Salomon for advice regarding the interpretation and implementation of the wills. She was uncomfortable with her dual position as an income beneficiary and a trustee of the Trust, and worried about how she could maintain her lifestyle without spending the children's capital. Ms. Matte-Thompson was an educated and experienced businesswoman, but did not have sophisticated knowledge of the investment world.

[11] Mr. Salomon introduced Ms. Matte-Thompson to Mr. Papadopoulos, his personal financial advisor and the directing mind of Triglobal, in September 2003. He had met Mr. Papadopoulos in 2001 when he himself was looking for a personal financial advisor. The two had subsequently become close friends. Mr. Salomon personally invested in three funds promoted by Triglobal: he put the bulk of his savings in a Manulife Financial product ("Manulife") and some smaller amounts in Focus Management Inc. ("Focus") and iVest Fund Ltd. ("iVest"). Respectively based

in the Cayman Islands and the Bahamas, Focus and iVest were two offshore hedge funds linked to Triglobal and to Mr. Papadopoulos and Mr. Bright.

[12] Mr. Salomon recommended Triglobal and its iVest fund to Ms. Matte-Thompson. Among other things, he described iVest as “an excellent vehicle wherever security of capital is important” (A.R., vol. 3, at p. 352). Relying on that advice, Ms. Matte-Thompson decided to invest some of her personal savings with Triglobal in early 2004. She made an initial investment of \$100,000 in iVest and a second one of \$1,245,000 in Manulife. In the months that followed, she transferred \$400,000 from the Manulife account to iVest.

[13] From 2003 to 2006, Mr. Salomon was involved in a reorganization of the Companies. All of them, except the one still operating a restaurant, were merged into 166. Then, in February 2006, Mr. Salomon arranged the sale of 166’s assets and prepared resolutions that authorized the opening of accounts for 166 with iVest and Manulife. In February and April 2006, following instructions received from a Triglobal representative, the proceeds of the sale, in the amount of \$5,830,642, were invested entirely in Focus. In July 2006, Ms. Matte-Thompson redeemed part of her investment in iVest, and she also put a total of \$1,188,949 in Focus in March and October 2006.

[14] Beginning in April 2006, Ms. Matte-Thompson expressed concern to Mr. Salomon regarding the investments, including Focus. She wanted more information on the nature of the investments and had been having difficulty

communicating with Triglobal. Each time she expressed concern, Mr. Salomon either promptly reassured her or informed Mr. Papadopoulos, who would himself reassure her.

[15] Near the end of 2006, Mr. Miller urged the other two trustees and executors to request the redemption of 166's investments in Focus. They followed this advice in January 2007, but requested only gradual redemptions in order to avoid any penalty. Between February and July 2007, 166 received redemptions totalling \$900,000.

[16] In May 2007, the *La Presse Affaires* magazine published an article that questioned investments made through Triglobal in iVest and Focus. In December 2007, Ms. Matte-Thompson asked for complete redemption of the investments in Focus, but by then, Triglobal, iVest and Focus had ceased doing business and their assets had been frozen. Most unfortunately for the respondents, the Focus and iVest funds turned out to be parts of a Ponzi scheme. Ms. Matte-Thompson lost \$1,188,068 in Focus and iVest; 166 lost \$4,006,366 in the same two funds. Globally, almost \$100 million was lost in the fraud by approximately 100 investors.

[17] Sometime after the collapse of Triglobal, Ms. Matte-Thompson learned that Mr. Salomon had received payments from Mr. Papadopoulos totalling \$38,000 in 2006 and 2007. In early 2006, following a recommendation by Mr. Papadopoulos, Mr. Salomon had incorporated a company, 4307909 Canada Inc. ("430"), for the purpose of "financial consulting" (A.R., vol. 6, at p. 1778). Mr. Papadopoulos

instructed 430 to issue two invoices, each in the amount of \$10,000, for which payments were received in May and June 2006 even though no services were ever rendered in this regard. According to Mr. Salomon, these payments constituted a “gift” to help him renovate his apartment (A.R., vol. 10, at p. 3108). In February 2007, 430 received a further payment of \$8,000, the purpose of which was allegedly to cover the taxes on the previous \$20,000 “gift”.

[18] Then, in June 2007, Mr. Salomon made a request for redemption of his \$70,000 investment in Focus, and he eventually received \$50,000 in this regard. In September 2007, again following an instruction from Mr. Papadopoulos, Mr. Salomon issued a \$50,000 invoice through 430 in order to receive an initial “bi-weekly” cheque. The following month, 430 received two cheques of \$5,000 each from a company belonging to Mr. Papadopoulos called Themis Papadopoulos Financial Services Inc. Mr. Salomon testified that these payments represented a redemption of his own investment in Focus, but in an email written by Mr. Papadopoulos at that time, they were referred to as commissions.

[19] At the hearing before us, counsel for the appellants confirmed that Mr. Salomon had personally lost approximately \$20,000 as a result of the fraud. Although the payments received by Mr. Salomon (\$38,000) were small compared to the respondents’ investments with Triglobal, I note that they were in fact greater than his personal loss from the fraud (\$20,000).

[20] The respondents instituted their legal proceedings in January 2008.

III. Judicial History

A. *Quebec Superior Court (2014 QCCS 3072)*

[21] Mr. Papadopoulos and Mr. Bright did not defend the action against them. In a default judgment, the trial judge held that they were liable for the respondents' investment losses and for Ms. Matte-Thompson's moral injury. In addition, she ordered them to pay punitive damages to the respondents. Her conclusions with respect to Mr. Papadopoulos and Mr. Bright were not appealed.

[22] The trial judge dismissed the claim against Mr. Salomon and SKM, however. She found that, although Mr. Salomon had committed a fault in specifically recommending iVest to Ms. Matte-Thompson for her initial personal investment in 2003, that fault was not the cause of her subsequent losses from her investment in Focus. In the trial judge's view, by the time Ms. Matte-Thompson invested in that fund in 2006, she had developed her own relationship with Mr. Papadopoulos and therefore was not relying on Mr. Salomon's advice in making her investment decisions. The judge stressed that Mr. Salomon could not be held liable for the fraud committed by Mr. Papadopoulos and Mr. Bright.

[23] The trial judge also held that Mr. Salomon had committed no fault against 166, because he had not provided investment advice to the company, nor had he gone too far in reassuring it. Noting that Mr. Salomon had not been consulted before the money from 166 was wired to Focus, the trial judge found that 166 had not relied on

his advice in deciding to invest in that fund. It was not Mr. Salomon's responsibility to verify the appropriateness of the investment recommended by specialists. Moreover, there was no proof that Mr. Salomon could have done anything after he learned about 166's investment in Focus.

[24] Finally the trial judge concluded that Mr. Salomon had not been in a conflict of interest. She gave credence to Mr. Salomon's testimony and stated that there was no specific proof that any of the payments made by Mr. Papadopoulos and received by Mr. Salomon through 430 were commissions received in exchange for referring clients to Triglobal.

B. *Quebec Court of Appeal (2017 QCCA 273, 41 C.C.L.T. (4th) 1)*

[25] The Court of Appeal unanimously allowed the appeal, holding that the trial judge had made palpable and overriding errors in her decision. First, it found that she had erred by limiting Mr. Salomon's breach of his duty to advise to the case of Ms. Matte-Thompson. It agreed with the trial judge that Mr. Salomon had breached his duty to advise Ms. Matte-Thompson by recommending iVest. However, the Court of Appeal held that Mr. Salomon had been acting for both of the respondents beginning in 2003, and had had the same obligations to both of them. The Court of Appeal concluded that the judge had viewed the evidence through a distorting lens (para. 66), which had led her to the erroneous conclusion that Mr. Salomon's fault had been committed against Ms. Matte-Thompson only.

[26] Second, the Court of Appeal held that the trial judge had erred by limiting Mr. Salomon's faults to the initial investment in iVest in 2003 and 2004. The Court of Appeal concluded that his faults had continued through to 2007 and that they concerned the respondents' investments in both iVest and Focus. Mr. Salomon's repeated reassurances had induced an air of confidence regarding the investments, when in reality they were manifestly inadequate in relation to the respondents' needs. He had also failed to perform due diligence. These faults ceased only with the collapse of Triglobal at the end of 2007.

[27] Third, the Court of Appeal held that the trial judge had erred by taking a restrictive approach to the evidence when considering Mr. Salomon's duty of loyalty. In its view, Mr. Salomon had placed himself in a conflict of interest which constituted an additional fault committed against the respondents. His relationship with Mr. Papadopoulos had led him to breach his duty of confidentiality and neglect the respondents' interests. The Court of Appeal stressed that Mr. Salomon had teamed up with Mr. Papadopoulos in order to ensure that the respondents retained their investments with Triglobal, revealingly using the pronoun "we" in some of his emails to Mr. Papadopoulos. In addition, the Court of Appeal was of the view that the trial judge had not given satisfactory reasons to explain her conclusion that Mr. Salomon had not received commissions for the clients he had referred to Triglobal.

[28] Fourth, again alluding to the notion of a distorting lens (para. 120), the Court of Appeal held that the trial judge had erred in considering the issue of

causation, and that the impact of Mr. Salomon's faults was far more significant than she had found them to be. The Court of Appeal was convinced that the respondents would have never invested money with Triglobal had Mr. Salomon acted as a competent, prudent and diligent lawyer from the outset. Moreover, Mr. Salomon had missed many opportunities to rectify the situation after 2003. The Court of Appeal also explained that the fraud did not break the causal link between Mr. Salomon's faults and the respondents' losses.

[29] The Court of Appeal therefore ordered Mr. Salomon and SKM solidarily to fully compensate the respondents for their investment losses, and Ms. Matte-Thompson for her non-pecuniary loss.

IV. Issues

[30] The appellants challenge the Court of Appeal's decision on essentially four grounds:

- A. Did the Court of Appeal err by employing the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors?
- B. Did the Court of Appeal err by improperly expanding the professional obligations of lawyers who refer their clients to independent advisors?

C. Did the Court of Appeal err by interfering with the trial judge's findings relating to the faults committed by Mr. Salomon?

D. Did the Court of Appeal err by interfering with the trial judge's findings relating to causation?

V. Analysis

A. *Did the Court of Appeal Err by Employing the Notion of a Distorting Lens in Determining Whether the Trial Judge Had Made Palpable and Overriding Errors?*

[31] To determine whether the Court of Appeal erred by using the notion of a distorting lens, I must summarize the standards of appellate review it was required to apply in this case. These standards of review are not contested in this Court. They are the ones that were articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, which also apply to Quebec civil law cases (see, e.g., *Montréal (Ville) v. Lonardi*, 2018 SCC 29, at para. 68; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36-37).

[32] Findings with respect to fault involve questions of mixed fact and law (3091-5177 *Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43, at para. 23, citing *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at paras. 60 and 104). Findings with respect to causation involve questions of fact (*Éconolodge*, at para. 24, citing *Lonardi*, at para. 41, *Benhaim*, at

para. 36 and *St-Jean*, at paras. 104-5). In both situations, absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge.

[33] Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case (*Benhaim*, at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 56 and 69-70). Morissette J.A. explained this metaphorically as follows in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII): [TRANSLATION] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions” (quoted in *Benhaim*, at para. 39). The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38).

[34] It is helpful at this point to recognize that the *Housen* standards of review also apply to this Court (*Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 51; see also *St-Jean*, at paras. 37 and 46). That said, the focal point of the analysis that this Court — as the second and final court of appeal — has to perform in applying these standards is the decision of the first court of appeal, not that of the trial judge. The onus is on the appellants to

demonstrate an error in the court of appeal's decision; this Court's role is not to conduct a *de novo* analysis of the trial judge's decision. Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, this Court will intervene only if its own disagreement stems from "a clear satisfaction that an error has occurred in the first appellate court's assessment of the facts" (*St-Jean*, at paras. 38-39 and 46).

[35] As a general matter, the appellants suggest that the Court of Appeal erred in applying the standard of appellate review, because it relied on the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors. I disagree.

[36] In its decision, the Court of Appeal alluded twice to the notion of a distorting lens: first in its discussion on the faults committed against 166, and second in its analysis on causation. However, in discussing both of these issues, the Court of Appeal explicitly stated that it could reverse the trial judge's conclusions only if it were to find palpable and overriding errors.

[37] Thus, the notion of a distorting lens was nothing more than a metaphor the Court of Appeal used to explain why the standard of appellate review established in *Housen* was met. That metaphor has its genesis in *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541:

[TRANSLATION] . . . the high degree of deference owed to the trial judge with regard to the assessment of evidence, a principle stated repeatedly by the Supreme Court, cannot preclude intervention by an appellate court where an analysis of the case shows that the trial judge assessed the evidence through a lens that must be discarded and that clearly had a distorting effect. [para. 128 (CanLII)]

[38] Since that case, the Quebec Court of Appeal has on numerous occasions used the notion of a distorting lens when overturning findings made by trial judges that it considered to be tainted to some extent by a general misperception (see *Softmedical inc. v. Daabous*, 2017 QCCA 1270, at paras. 47 and 66 (CanLII); *Droit de la famille — 161960*, 2016 QCCA 1300, at paras. 76-78 (CanLII); *Droit de la famille — 132381*, 2013 QCCA 1505, at paras. 104-5; *Francoeur v. 4417186 Canada inc.*, 2013 QCCA 191, at paras. 64-65 (CanLII)).

[39] Unfortunately, some litigants have seen this as an invitation to ask the court to retry the case, which is simply not what is intended (see *Desrochers v. 2533-0838 Québec inc.*, 2016 QCCA 825, at para. 49 (CanLII)). It is interesting to note that there have been several cases in which the Quebec Court of Appeal has in fact referred specifically to this notion of a distorting lens in declining to interfere with the findings of a trier of fact (*Gutin v. Cenfood International Inc.*, 2018 QCCA 317, at paras. 24-26 (CanLII); *2758792 Canada inc. v. Bell Distribution inc.*, 2017 QCCA 603, at para. 9 (CanLII); *Mangiola v. R.*, 2017 QCCA 741, at paras. 4-5 (CanLII); *Desrochers*, at para. 46; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at para. 120; *Hydro-Québec v. Construction Kiewit*

cie, 2014 QCCA 947, at para. 102 (CanLII); *R. v. Lalonde*, 2014 QCCA 639, at para. 16 (CanLII)).

[40] In this regard, I agree with the appellants that a distorting lens cannot be invoked as a substitute for identifying a reviewable error “or to mask the fact that an ‘error’ identified by an appellate court does not meet the high standard imposed by *Housen*” (A.F., at para. 81). Although appellate courts may find this notion helpful in explaining the basis for their interventions, it in no way changes the standards articulated in *Housen*. An appellate court must identify a crucial flaw in the lower court’s decision, be it — depending on which *Housen* standard applies — an error of law or a palpable and overriding error. More particularly, the notion of a distorting lens does not warrant an appellate court’s reweighing the evidence or merely substituting its own factual findings for those of the trial judge.

[41] In the case at bar, the Court of Appeal did not use the notion of a distorting lens to mask an absence of palpable and overriding errors. On the contrary, the Court of Appeal held that the distorting lens through which the trial judge had viewed the evidence — in this case a narrow, siloed approach — had led her to make precisely identified palpable and overriding errors: first, despite evidence clearly showing that Mr. Salomon had been acting for both respondents as early as 2003, the trial judge found that he had provided financial advice to Ms. Matte-Thompson only; second, despite evidence clearly showing that Mr. Salomon’s faults had continued after 2004, the trial judge found that they had been limited in time to 2003 and 2004;

third, despite clear evidence of Mr. Salomon's divided loyalties to the respondents on the one hand and to Mr. Papadopoulos and Triglobal on the other, the trial judge found that he had not placed himself in a conflict of interest; and fourth, despite the clear relationship between Mr. Salomon's faults and the respondents' losses, causation had not been established.

[42] The appellants have not satisfied me that the Court of Appeal erred by concluding that the trial judge had made these palpable and overriding errors. I see no reason to interfere with the Court of Appeal's findings.

B. *Did the Court of Appeal Err by Improperly Expanding the Professional Obligations of Lawyers Who Refer Their Clients to Independent Advisors?*

[43] Before entering into the details of this analysis, I wish to emphasize that the courts below properly agreed that the relationship between lawyers and their clients can usually be characterized as a contract of mandate, and that the relationship in the instant case is no exception (trial reasons, at para. 113 (CanLII); C.A. reasons, at para. 94; see J.- L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 2-124). As mandataries, lawyers are subject to the obligations provided for in art. 2138 of the *Civil Code of Québec* ("C.C.Q."), which reads as follows:

2138. A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it.

He shall also act honestly and faithfully in the best interests of the mandator, and shall avoid placing himself in a position where his personal interest is in conflict with that of his mandator.

[44] Although they do not frame their arguments in such a way as to allege an error of law, the appellants nonetheless suggest that the Court of Appeal failed to consider one of its recent decisions (*Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1) that, in their submission, limits the obligations owed by a referring lawyer to his or her client. They assert that *Harris* is applicable in the circumstances of this appeal. I do not share that view.

[45] The principles articulated in *Harris* can be summarized as follows. Lawyers who refer clients to other professionals or advisors have an obligation of means, not one of result. Although lawyers do not guarantee the services rendered by professionals or advisors to whom they refer their clients, they must nevertheless act competently, prudently and diligently in making such referrals, which must be based on reasonable knowledge of the professionals or advisors in question. Referring lawyers must be convinced that the professionals or advisors to whom they refer clients are sufficiently competent to fulfill the contemplated mandates (*Harris*, at paras. 16, 20 and 22). In *Harris*, the Quebec Court of Appeal pointed out that the question of the referring lawyer's liability [TRANSLATION] "cannot be answered in the abstract. The answer necessarily depends on the facts of the case" (para. 13). The court added that "[i]n such matters, the circumstances are everything" (para. 22).

[46] That is an apt description of the standard of conduct for lawyers who refer clients to other professionals and advisors, and I endorse it.

[47] Applying these principles, the Quebec Court of Appeal found in *Harris* that Mr. Salomon and SKM (coincidentally also the lawyer and law firm involved in that case) were not liable for the losses suffered by a client as a result of fraud committed by estate liquidator Earl Jones, whom Mr. Salomon had recommended. In the appellants' opinion, the case at hand is analogous to *Harris*, because Triglobal had a good reputation until its collapse in 2007, and Mr. Salomon cannot be faulted for having failed to discover a fraud that no one had seen.

[48] *Harris* can be distinguished on the basis of the facts surrounding the referral, but there is another important distinction between it and the instant case that relates to the entirety of Mr. Salomon's conduct. Whereas *Harris* involved a mere referral, neither the trial judge nor the Court of Appeal found that Mr. Salomon had merely referred the respondents to Mr. Papadopoulos. Although they reached different results, they both analyzed the legal consequences of several of Mr. Salomon's acts subsequent to the referral, from the recommendation of the iVest fund in 2003 to the promotion, endorsement and encouragement of Triglobal's products that followed and, finally, to the reassurances offered in the months before Triglobal's collapse in 2007.

[49] The question in the case at bar is not whether the initial referral of the respondents to Mr. Papadopoulos was or was not sufficient in and of itself to establish

the appellants' professional liability. The focus here is instead on the entirety of Mr. Salomon's conduct. But one thing is clear. Just as a referral is not a guarantee of the services rendered by the professional or advisor to whom the client is referred, it is also not a shield against liability for other wrongful acts committed by the referring lawyer. This is one way in which the facts in this case differ substantively from the facts in *Harris*.

[50] Contrary to the appellants' assertion, the decision of the Court of Appeal in the instant case did not broaden the basis of liability for lawyers who refer clients to other professionals or advisors beyond the standard recently set in *Harris*: lawyers can refer their clients to other professionals or advisors so long as they discharge their professional obligations in so doing. The Court of Appeal did not find that the referral itself was determinative; rather, it assessed all of Mr. Salomon's acts in the context of his professional duties — the duty to advise and the duty of loyalty in particular — to his clients. It found that Mr. Salomon had done far more than merely make a referral. As I will explain below, Mr. Salomon also repeatedly recommended Mr. Papadopoulos, his investment firm and their in-house products, and encouraged the respondents to invest — and retain their investments — in Triglobal funds. Moreover, Mr. Salomon turned a blind eye to a conflict of interest which resulted in him serving two masters and sacrificing the respondents' interests. It was the entirety of Mr. Salomon's conduct that led the Court of Appeal to hold the appellants liable in the circumstances.

C. *Did the Court of Appeal Err by Interfering With the Trial Judge's Findings Relating to the Faults Committed by Mr. Salomon?*

[51] The appellants argue, next, that the Court of Appeal erred by interfering with the trial judge's findings relating to Mr. Salomon's duty to advise and duty of loyalty. I disagree with that submission. I will discuss each of these findings in turn.

(1) Mr. Salomon's Duty to Advise

[52] A lawyer's duty to advise is threefold, encompassing duties (1) to inform, (2) to explain, and (3) to advise in the strict sense. The duty to inform pertains to the disclosure of relevant facts; the duty to explain requires that the legal and economic consequences of a course of action be presented; and the duty to advise in the strict sense requires that a course of action be recommended (*Poulin v. Pilon*, [1984] C.S. 177, at p. 180; M.-C. Thouin, "L'avocat, toujours de bon conseil?", in *Service de la formation permanente du Barreau du Québec*, vol. 228, *Développements récents en déontologie, droit professionnel et disciplinaire* (2005), 49, at pp. 51-52).

[53] The duty to advise is inherent in the legal profession and exists regardless of the nature of the mandate (Baudouin, Deslauriers and Moore, at No. 2-138; *Labrie v. Tremblay*, [2000] R.R.A. 5, at p. 10 (Que. C.A.)). Its exact scope depends on the circumstances, including the object of the mandate, the client's characteristics and the expertise the lawyer claims to have in the field in question (*Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248, at para. 6; Thouin, at pp. 55-69).

[54] As no bright lines can be drawn in this regard, the case law is replete with examples of situations in which courts have had to perform the difficult task of deciding whether lawyers should, in advising their clients, have taken the initiative to go beyond what the clients specifically asked them for (see, e.g., *Labrie*, at p. 11; *Sylvestre v. Karpinski*, 2011 QCCA 2161, at para. 19 (CanLII); *Daigneault v. Lapierre*, [2003] R.R.A. 902 (Que. Sup. Ct.)). One thing is clear, however: when lawyers do provide advice, they must always act in their clients' best interests and meet the standard of the competent, prudent and diligent lawyer in the same circumstances. In this respect, I agree with the Court of Appeal that any advice lawyers give that exceeds their mandates may, if wrongful, engage their liability. Whether Mr. Salomon was acting within the limits of his mandate in providing financial advice to the respondents is therefore immaterial. He is liable for any wrongful advice he gave in that context.

[55] In this case, the Court of Appeal found that Mr. Salomon had failed to advise the respondents as a competent, prudent and diligent lawyer would have done. Contrary to the trial judge, it held that Mr. Salomon was acting for both Ms. Matte-Thompson and 166 when he provided wrongful investment advice, and that his faults had continued throughout the period from 2003 to 2007. On both of these issues, the court properly identified palpable and overriding errors made by the trial judge in her assessment of the parties' relationships and in her finding that those relationships had not continued up until the collapse of Triglobal. These errors were identified precisely, and they had a direct impact on the trial judge's findings regarding the

scope of any wrongful advice given by Mr. Salomon. I conclude that the Court of Appeal had a sufficient basis to intervene as it did in this regard.

[56] First, the Court of Appeal did not err in holding that Mr. Salomon had provided financial advice to both respondents. As the Court of Appeal emphasized, Ms. Matte-Thompson had consulted Mr. Salomon for advice regarding her delicate position as a beneficiary of the Trust's fruits and revenues — which were supposed to meet her financial needs — and as a trustee — with an obligation to preserve the Trust's capital for the children. At the time, Ms. Matte-Thompson wore many different hats, as she (1) was an executor of Mr. Thompson's wills, (2) served as a trustee, (3) was the president and a director of 166, and (4) acted in her personal capacity. It was in these multiple capacities that she retained Mr. Salomon's services, and he understood the nature of this situation very well. To isolate the relationship between Ms. Matte-Thompson and Mr. Salomon from that between 166 and Mr. Salomon was indeed to take an improperly narrow view of the evidence as a whole, and this justified the Court of Appeal's criticism of the trial judge's compartmentalized vision of those relationships.

[57] In this regard, the Court of Appeal noted, for instance, that, starting in 2003, Mr. Salomon had charged virtually all his legal fees to 166, including fees for introducing Mr. Papadopoulos to Ms. Matte-Thompson, preparing the initial email recommending the iVest fund, and requesting investment information from Triglobal.

As well, Mr. Salomon's key memoranda outlining financial strategies for Ms. Matthe-Thompson and for the Trust were addressed to 166.

[58] Second, the Court of Appeal did not err in holding that Mr. Salomon had breached his duty to advise the respondents. Beyond the fact that Mr. Salomon often flirted with — or overstepped — the limits of his professional capabilities, the advice he provided to both of the respondents was wrongful for a number of reasons, which the Court of Appeal summarized (para. 69). To start with, Mr. Salomon should not have recommended a non-diversified investment in offshore hedge funds to clients whose primary goal was to preserve the capital. In this regard, the trial judge herself stated that Mr. Salomon “knew that in order to respect the legal rights and interests of all the beneficiaries of the trusts and to abide by the terms of the wills, the investments decisions had to be consistent with the requirement of capital preservation” (para. 172 (footnote omitted)). Yet, according to the uncontradicted expert evidence, offshore hedge funds (like iVest and Focus) are not investment vehicles that offer security of capital.

[59] Mr. Salomon also breached his duty to advise by continually recommending financial products without performing due diligence or asking any questions about them. The trial judge noted that, before recommending iVest, Mr. Salomon had merely “relied on [Mr.] Papadopoulos' advice and felt comfortable with that advice” (para. 188 (footnote omitted)). Mr. Salomon failed to verify the nature or the terms and conditions of the recommended financial products. Had he

made such inquiries, he would have learned that iVest and Focus were not registered with the Autorité des marchés financiers (“AMF”). In fact, neither Mr. Papadopoulos nor Triglobal was registered with the AMF as a securities adviser or dealer under Quebec securities law. As the Court of Appeal rightly noted, this fault of omission on Mr. Salomon’s part was of a continuous nature, given that he had intervened several times over the years to reassure the respondents prior to Triglobal’s collapse in 2007 without ever making any of the appropriate inquiries.

[60] Third, the Court of Appeal did not err in holding that Mr. Salomon’s faults against the respondents had commenced in 2003 and had continued until 2007. Mr. Salomon had, on the sole basis of his blind confidence in Mr. Papadopoulos, induced his clients to erroneously believe that investing in iVest and Focus was safe. From 2003 to 2007, he repeatedly reassured the respondents that their investments with Triglobal gave them security of capital. In this regard, the Court of Appeal noted the following comments made by Mr. Salomon:

- In August 2003, he stated, “iVest is an excellent vehicle whenever security of the capital is important (as with the grandchildren and yourself)” (para. 52 (emphasis deleted); A.R., vol. 3, at p. 352).
- In September 2003, he suggested that the respondents “invest the Estate assets based on a conservative model, perhaps using iVest products and a mix of segregated products (for absolute security of capital)” (para. 59 (emphasis deleted); A.R., vol. 6, at p. 1828).

- The following month, he added, “I would point out that [Mr.] Papadopoulos is very conservative when it comes to preservation of capital” (para. 62; A.R., vol. 3, at p. 393).
- In July 2004, he stated, “the RBC proposal is somewhat undimensional (*sic*) and is interest rate sensitive. The Triglobal proposal is less risky and the returns are good. Let’s talk” (para. 123 (emphasis deleted); A.R., vol. 3, at p. 566).
- In June 2005, he stated, referring to the iVest and Manulife funds, “I believe that both forms of investments are excellent and quite conservative, and I would have no difficulty in recommending either one to you and to your co-trustee . . . (as trustees acting responsibly)” (para. 125; A.R., vol. 4, at p. 657).
- In April 2006, he responded to concerns expressed by Ms. Matte-Thompson regarding the security of the respondents’ investments (including in Focus) that he was “certain that everything [was] ok” (para. 78 (emphasis deleted); A.R., vol. 4, at p. 935).
- In November 2006, he stated, after informing Ms. Matte-Thompson that he had visited Mr. Bright in Nassau, that the latter “has become resident there in order to manage the Focus, Ivest and structured products funds”, concluding that “[a]ll is well” (para. 130; A.R., vol. 5, at p. 1248).
- In July 2007, he stated, “[t]he Triglobal returns continue to be excellent and I remain very happy to have my investments performing so well with such controlled risk” (para. 133; A.R., vol. 6, at p. 1603).
- In September 2007, he added, “I think that the two funds (iVest and Focus) are performing as predicted” (para. 134; A.R., vol. 6, at p. 1660).

- In December 2007, he stated, commenting on Mr. Papadopoulos's latest promises to worried investors, "FYI. This is good" (para. 138; A.R., vol. 6, at p. 1690).

[61] Given the foregoing, the Court of Appeal had a strong basis for concluding that the trial judge was wrong to assert that Mr. Salomon had committed a fault only as against Ms. Matte-Thompson in her personal capacity and only in 2003. When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the advice and reassurances Mr. Salomon gave between 2003 and 2007 were all part of a single continuum, and that placing them in separate silos would be artificial. Regardless of the scope of his original mandate, Mr. Salomon voluntarily chose to provide (and be paid for) his advice and reassurances to the respondents over the four years leading up to the collapse of Triglobal. Having so chosen, he cannot escape liability by pointing to the narrow scope of his original mandate.

[62] When he interacted with Ms. Matte-Thompson, Mr. Salomon provided advice with respect to all the patrimonies she administered. At no time did he differentiate between the respondents, as he often provided advice to both of them in the same emails and in memoranda addressed to 166. As the Court of Appeal pointed out, references Mr. Salomon had made in 2003 to the trusts, to the Companies and to capital preservation — which he knew to be crucial for the Trust — show that his recommendations extended beyond Ms. Matte-Thompson's personal interests. It should be borne in mind that reconciling her many roles was the very reason why Ms. Matte-Thompson had sought Mr. Salomon's advice from 2003 onwards.

[63] I agree with the Court of Appeal that a proper review of the whole of the evidence reveals that, during this entire period from 2003 to 2007, Mr. Salomon was acting for both respondents when he provided financial information and advice. His comments about the nature and the quality of investments with Triglobal concerned both the financial strategy of 166 and that of Ms. Matte-Thompson.

[64] From this standpoint, it is immaterial that 166's assets had not yet been sold in 2003, since Mr. Salomon consistently maintained the same position vis-à-vis Triglobal and its in-house products. Moreover, he never distinguished between his recommendations and reassurances regarding Ms. Matte-Thompson's personal investments and those regarding 166's later investments. Even the trial judge disbelieved Mr. Salomon's claim that "he had absolutely no involvement in 166's decision to invest and that he knew nothing about it" (para. 220). In fact, his actions included commenting on the advisability of investing the proceeds of the sale of 166's assets in iVest and participating in meetings with Ms. Matte-Thompson and Mr. Papadopoulos at which they discussed the investment strategy for the sale proceeds. It is worth noting, as the Court of Appeal did, that Mr. Salomon himself considered Focus to be "less risky" than iVest (para. 131, quoting A.R., vol. 6, at p. 1553).

[65] In sum, the Court of Appeal provided solid justifications and explanations for concluding that it was not only the initial recommendation of iVest to Ms. Matte-Thompson that was wrongful, but that Mr. Salomon's breaches of his duty to advise

concerned 166 as well and that they continued until Triglobal's collapse in 2007. There is no basis for this Court to interfere and to vary the judgment of the first court of appeal on this point.

(2) Mr. Salomon's Duty of Loyalty

[66] The Court of Appeal also concluded that Mr. Salomon's personal and financial relationship with Mr. Papadopoulos had placed him in a conflict of interest, which constituted an additional fault committed against the respondents. The trial judge had found that there was no conflict of interest. In this regard, the evidence established not only that Mr. Papadopoulos was Mr. Salomon's close friend and personal financial advisor, but also in particular that, unbeknownst to the respondents, Mr. Salomon had received payments totalling \$38,000 from Mr. Papadopoulos in 2006 and 2007 while continuing to reassure them regarding their investments with Triglobal.

[67] On this point, the trial judge found that "[t]he fact that [Mr.] Salomon had some personal investments with Triglobal did not preclude him from referring his clients to a financial advisor with whom he was satisfied", given that the clients were aware of those investments (para. 142). However, this narrow and limited statement disregards the fact that Mr. Salomon went well beyond merely making a referral. As the Court of Appeal noted, [TRANSLATION] "Mr. Salomon put himself in a conflict of interest by not limiting the role he played with the [respondents] to simply

recommending Triglobal, its representative, Mr. Papadopoulos, and the products they offered” (para. 98).

[68] The trial judge also accepted the explanations given by Mr. Salomon for the different payments he had received from Mr. Papadopoulos through 430, namely that these payments represented (1) “gifts” for the renovation of his apartment, (2) an additional amount to cover the taxes on those “gifts”, and (3) the redemption of his own investment in Focus. She found that there was no proof that these payments were commissions for referring clients to Triglobal or that Mr. Salomon had received such commissions in 2003 or in 2006 when Ms. Matte-Thompson and 166, respectively, had made their first investments. She stated that she could not therefore conclude that these circumstances had placed Mr. Salomon in a conflict of interest.

[69] On this issue, the Court of Appeal expressed the opinion that the trial judge had adopted an unduly restrictive approach in analyzing the principles relating to conflicts of interest. It found that she had erred by holding that an exact concomitance between the payments and the referral or “specific proof” that the payments were indeed commissions (trial reasons, at para. 155) was needed before such a conflict of interest could be found to exist. This unduly restrictive approach tainted her entire analysis concerning the breach of Mr. Salomon’s duty of loyalty to the respondents.

[70] As the Court of Appeal rightly noted, the trial judge had failed to comment on or explain certain other factors that confirmed the very close nature of

the relationship between Mr. Salomon and Mr. Papadopoulos and that could not be ignored in assessing the payments received by Mr. Salomon in 2006 and 2007. A proper consideration of the evidence as a whole leads to the conclusion that this very close relationship affected Mr. Salomon's objectivity in advising the respondents. This breach of his duty of loyalty informs the assessment of Mr. Salomon's breach of his duty to advise, as it ultimately led him to turn a blind eye to a situation to which he should have been more attentive and alert.

[71] As mandataries, lawyers have a duty to avoid placing themselves in situations in which their personal interests are in conflict with those of their clients (art. 2138 para. 2 *C.C.Q.*). The duty to avoid conflicts of interest is a salient aspect of the duty of loyalty they owe to their clients (*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 19, citing *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 19; see also C.A. reasons, at para. 94). In conjunction with the duty of commitment to the client's cause, the duty to avoid conflicting interests ensures that "divided loyalt[ies] d[o] not cause the lawyer to 'soft peddle' his or her representation of a client out of concern for [other interests]" (*McKercher*, at para. 43, quoting *Neil*, at para. 19). In the same manner, the duty of loyalty shields the performance of the lawyer's duty to advise clients from the taint of undue interference.

[72] It is true that Mr. Salomon's friendship with Mr. Papadopoulos had been divulged to Ms. Matte-Thompson. However, that disclosure did not entitle him to

shirk his duty to properly advise the respondents. Again, the Court of Appeal had a solid basis for finding that the record showed that Mr. Salomon's relationship with Mr. Papadopoulos had caused him to neglect his professional duty to advise the respondents. In addition to his blindly endorsing Triglobal without performing due diligence, there were two clear indications that Mr. Salomon's divided loyalties had led him to neglect the respondents' interests. But because of the trial judge's restrictive approach to the conflict of interest analysis, she did not comment on these revealing examples of his divided loyalties.

[73] The first of these indications was that Mr. Salomon had disregarded his duty of confidentiality regarding his communications with the respondents. As this Court stated in *McKercher*, “[t]he first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts of interest reinforces the lawyer’s duty of confidentiality — which is a distinct duty — by preventing situations that carry a heightened risk of a breach of confidentiality” (para. 24). In the case at bar, Mr. Salomon’s close relationship with Mr. Papadopoulos fostered the precise type of divided loyalties that would increase the risk of a breach of confidentiality. And such breaches did in fact occur. Mr. Salomon repeatedly disclosed confidential communications he had received from Ms. Matte-Thompson to Mr. Papadopoulos without her authorization. For instance, he transmitted the content of several of her emails to Mr. Papadopoulos, including ones in which she expressed concerns about the trustworthiness of the investment

firm, asked about withdrawing the investments or announced that she intended to commence legal proceedings.

[74] The second indication was that Mr. Salomon had teamed up with Mr. Papadopoulos in an attempt to convince Ms. Matte-Thompson not to withdraw the respondents' investments with Triglobal. In emails addressed to Mr. Papadopoulos or to his assistant, Mr. Salomon wrote:

What [Ms. Matte-Thompson] wants to have is a report

I believe that I know exactly what she wants and would like to help prepare this report If we do this right, there will be no uncertainty in the future.

It is important that we get this right this time so that she feels secure and can deal with the critics (e.g. her accountant). Please let me know if it is okay for me to discuss this briefly with Mario [Angelopoulos].

(A.R., vol. 5, at p. 1441 (emphasis added), referred to in C.A. reasons, at para. 99.)

I believe that we have a very good mix of investments set up for Judy She has received input (from her accountant) that is critical of the investment strategy, and I want us to be able to respond to same.

(A.R., vol. 5, at p. 1445 (emphasis added))

She is unhappy with the Focus setup. Can we make it simpler? Perhaps straight Ivest? Or is the idea to have the capital in the less risky Focus?

(A.R., vol. 6, at p. 1553 (emphasis added), quoted in C.A. reasons, at para. 131.)

[75] The Court of Appeal pointed to the use of the word “we” as a strong indication of Mr. Salomon's divided loyalties in the key period from 2006 to 2007.

These emails evidenced a form of coalition between Mr. Salomon and Mr. Papadopoulos. When Ms. Matte-Thompson expressed concerns regarding the respondents' investments, Mr. Salomon decided to help Mr. Papadopoulos prepare a report meant to appease her and to [TRANSLATION] "silence the criticisms" (C.A. reasons, at para. 100), without ever inquiring into the basis of her concerns. Another illustration of Mr. Salomon's divided loyalties arose in May 2007, when he failed to inform the respondents of the *La Presse Affaires* article, which raised "serious doubts about the investments made through Triglobal in the iVest or Focus funds" (trial reasons, at paras. 260-61). In this context, the Court of Appeal was right to conclude that Mr. Salomon had acted in a manner that was incompatible with the respondents' interests. The documentary evidence supported this finding, which could hardly be disregarded in assessing a conflict of interest allegation like the one raised by the respondents against Mr. Salomon.

[76] Furthermore, given the circumstances, including this close relationship, the Court of Appeal was right to find it troubling that Mr. Salomon had received \$20,000 in "gifts" from Mr. Papadopoulos in May and June 2006 through a company that had been incorporated solely for that purpose and after invoices had been issued for services that were in fact never rendered. These "gifts" were subsequently topped up in February 2007 with an additional amount of \$8,000 that was meant to cover the taxes on the amount that had already been received.

[77] Despite these facts, the trial judge found that there was no conflict of interest, relying for this purpose solely on the explanations given by Mr. Salomon. She insisted that there was no proof that the payments constituted commissions for the referral of the respondents to Triglobal or that that referral was contemporaneous with the payments. The Court of Appeal found that this conclusion was palpably wrong. It was inconsistent with the documentary evidence, which contained no mention of “gifts”, and ignored the fact that 430’s stated purpose — “financial consulting” — was relevant to the question of whether these payments were gifts or commissions. As well, the payments had not been considered in the context of the evidence as a whole, a context that raised concerns as to the divided loyalties of Mr. Salomon: after all, the payments were at all times kept secret from the respondents. In addition, the troubling fact of Mr. Papadopoulos’s willingness to request and pay artificial invoices to 430 had improperly been considered irrelevant, even though this raised obvious concerns as to the general probity of the individual Mr. Salomon was recommending and endorsing to the respondents at the same time as he was receiving these payments. In fact, irrespective of whether they were characterized as gifts or commissions, the payments raised serious doubts regarding the independence of the lawyer who had received them.

[78] The impact of this evidence was reinforced by the two \$5,000 cheques Mr. Salomon had subsequently received in October 2007 and by Mr. Papadopoulos’s email referring to these payments as “comms” (A.R., vol. 6, at p. 1674). When she considered this email, the trial judge wrote that there was nonetheless “no specific

proof that those commissions were given to [Mr.] Salomon in consideration of the investments made by the [respondents] or any other clients” (para. 155). The Court of Appeal was clearly uncomfortable with this conclusion, as it stated: [TRANSLATION] “How can it not be concluded that Mr. Salomon received commissions for the clients he referred to Mr. Papadopoulos?” (para. 107). Once again, the Court of Appeal emphasized the trial judge’s failure to explain this.

[79] I would reiterate that the incorporation of 430 for “financial consulting” purposes and the payment of false invoices for services that had never been rendered occurred between March and June 2006. Mr. Papadopoulos’s lack of probity in issuing payments for those false invoices was therefore known to Mr. Salomon at that time. Yet it was in April 2006 that some of his specific reassurances to the respondents about their investments with Triglobal (which at the time included those in Focus) were made, and without a single qualification. Meanwhile, the respondents were not aware of the payments, which were never disclosed to them.

[80] I therefore find that the Court of Appeal had strong bases for overturning the trial judge’s conclusion in this respect, and for concluding that Mr. Salomon’s personal and financial relationship with Mr. Papadopoulos did place him in a conflict of interest in more than one way. The trial judge’s unduly restrictive approach prevented her from properly assessing the totality of the evidence on this topic. The evidence not only pointed to questionable payments received by Mr. Salomon at the same time as he was reassuring the respondents about their investments, it also

revealed his very close relationship with Mr. Papadopoulos and the divided loyalties that had resulted from that relationship. The evidence as a whole on this issue pointed to one reasonable conclusion: that Mr. Salomon was in a conflict of interest.

[81] Conflicts of interest must be proven on a balance of probabilities (*Parizeau v. Poulin De Courval*, [2000] R.R.A. 67, at paras. 22-23 and 29 (Que. C.A.); see also, in the common law context, *McKercher*, at para. 38). The trial judge erred by disregarding the overwhelming evidence of Mr. Salomon's close personal and financial relationship with Mr. Papadopoulos on the basis that it did not lead to the conclusion that there was a conflict of interest (paras. 163-64; see also C.A. reasons, at para. 107). The Court of Appeal was justified in finding that Mr. Salomon had been in a conflict of interest and that he had in the end neglected the respondents' interests, thereby violating his duty of loyalty to them in addition to his duty to advise them.

D. *Did the Court of Appeal Err by Interfering With the Trial Judge's Findings Relating to Causation?*

[82] Finally, the Court of Appeal held that the trial judge had made a palpable and overriding error by concluding that Mr. Salomon's fault had not caused the respondents' losses. In its view, the impact of Mr. Salomon's faults was much greater than she had found it to be. The appellants argue that this decision was erroneous. They point out that the trial judge had found that the respondents' investment losses were a consequence of the fraud committed by Mr. Papadopoulos and Mr. Bright, and

not of Mr. Salomon's faults. Once again, I disagree with the appellants. Once Mr. Salomon's faults had been properly identified and circumscribed, the causal link to the respondents' losses was in fact quite obvious. As I will explain, the Court of Appeal was right to intervene in the trial judge's conclusion on causation.

(1) True Causal Connection

[83] There is no doubt that the fraud committed in the Ponzi scheme is a cause of the respondents' losses. That said, more than one fault — a contractual fault in this case — can cause a single injury so long as each of the faults is a true cause, and not a mere condition, of the injury (Baudouin, Deslauriers and Moore, at No. 1-685; *Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419, at p. 425; see, e.g., *Compagnie 99885 Canada inc. v. Monast*, [1994] R.R.A. 217, at p. 221 (Que. C.A.)). The liability of Mr. Papadopoulos and Mr. Bright for their fraud therefore does not mean that the appellants are not liable if their faults were a cause of the respondents' losses.

[84] A fault is a true cause of its logical, immediate and direct consequences (art. 1607 *C.C.Q.*; Baudouin, Deslauriers and Moore, at No. 1-683; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 2962; see *Lonardi*, at para. 76; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 50). This characterization is largely a factual matter, which depends on all the circumstances of the case (Lluelles and Moore, at No. 2962-63;

Stellaire Construction Inc. v. Ciment Québec Inc., 2002 CanLII 35591, at para. 39 (Que. C.A.)).

[85] I agree with the Court of Appeal that the trial judge erred by minimizing the consequences of the fault that Mr. Salomon had in her view committed in relation to Ms. Matte-Thompson's initial investment in iVest. First, if he had performed due diligence regarding the funds he recommended, he would have known that neither iVest nor Focus was registered with the AMF. This information would have triggered further suspicions about Mr. Papadopoulos and Triglobal, who were not authorized to offer investment funds such as iVest and Focus. Second, if Mr. Salomon had told Ms. Matte-Thompson from the start that offshore hedge funds were not investment vehicles that provide security of capital, she would not have invested in either iVest or Focus.

[86] The trial judge's findings regarding the extent of the faults committed by Mr. Salomon no doubt had an impact on her causation analysis. As I explained above, assessing the evidence in separate silos based on the timing of the events and the specific funds that had been recommended was artificial. The events at the heart of this case are part of a single continuum that concerned both respondents and their losses in both iVest and Focus. The trial judge's causation analysis was also distorted by her erroneous finding that Mr. Salomon had not breached his duty of loyalty.

[87] Taken together, Mr. Salomon's faults with respect to both his duty to advise and his duty of loyalty were a true cause of the losses suffered by the

respondents. Ms. Matte-Thompson referred to Mr. Salomon as her “friend and lawyer for the past 20+ years” (A.R., vol. 4, at p. 948). It is clear from the record that she had full confidence in him and that she relied not only on his legal advice on the management of the patrimonies she administered, but also on his professional judgment concerning the investments she was contemplating. As the Court of Appeal found, Mr. Salomon induced an air of confidence regarding the investments when in reality they were manifestly inadequate in relation to the respondents’ needs. The evidence supported the view that this was based on far more than simply a general sense of confidence on their part. The respondents’ trust in and reliance on Mr. Salomon was based on recommendations, endorsements and reassurances that remained constant and uniform over the years. Mr. Salomon actively encouraged their reliance by providing multiple investment recommendations and professing to be knowledgeable in that field. Over the years, Mr. Salomon made every effort to convince the respondents to invest — and to retain their investments — with Triglobal. I would add that such reliance by a client on the advice and opinion of his or her lawyer is unsurprising, as it is inherent in the lawyer-client relationship. The credibility that lawyers generally enjoy with their clients is a factor to bear in mind when assessing the impact of the advice they provide (see *Harris*, at para. 19).

[88] From this standpoint, the fact that Mr. Salomon initially recommended iVest and that the bulk of the respondents’ monies were subsequently transferred to or directly invested in Focus is immaterial. This is a distinction without a difference because, as I mentioned above, the respondents would never have invested in either

iVest or Focus had Mr. Salomon performed due diligence before making his initial investment recommendation or had he told them that offshore hedge funds are not investment vehicles that provide security of capital. It should be borne in mind in this regard that iVest and Focus constituted a single Ponzi scheme in which funds were transited through iVest to pay off investors in Focus, and that Mr. Salomon himself considered Focus to be “less risky” than iVest (C.A. reasons, at para. 131, quoting A.R., vol. 6, at p. 1553). As the Court of Appeal aptly put it, the respondents’ lost investments [TRANSLATION] “form indissociable parts of a system into which the [respondents] were drawn by Mr. Salomon’s faults” (para. 140).

[89] For the Court of Appeal, if Mr. Salomon had properly advised the respondents as a competent, prudent and diligent lawyer, and if the conflict of interest had not tainted his recommendations, endorsements and reassurances over the years, the respondents would never have invested, nor retained their investments, with Triglobal. They would consequently not have suffered the significant losses they did. There is no dispute that the faults of Mr. Salomon occurred well before any of their losses materialized.

[90] I note that the appellants argue that the respondents’ losses were also caused by imprudence on Ms. Matte-Thompson’s part. Given the circumstances of this case, I cannot accept this argument. While one might find that Ms. Matte-Thompson was very trusting, Mr. Salomon not only provided her with wrongful advice, but also repeatedly reassured her when she did express concern regarding the

investments. In this context, Mr. Salomon's liability is neither excluded nor diminished by the fact that the respondents did not second-guess his wrongful advice. A client's ability to rely on advice given by his or her lawyer is central to the lawyer-client relationship. As a matter of principle, "[a] client's acceptance of a lawyer's negligent advice cannot shield the lawyer from liability" (R.F., at para. 102). That would turn the law of professional liability on its head (see by analogy *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638, at paras. 54-56).

(2) Absence of a Break in the Chain of Causation

[91] I also agree with the Court of Appeal that the fraud did not break the causal link between Mr. Salomon's faults and the respondents' losses. It is true that a person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and that has no relationship to the initial fault. This is sometimes referred to as the principle of *novus actus interveniens*: that new event may break the direct relationship required under art. 1607 *C.C.Q.* between the fault and the injury. Two conditions must be met for this principle to apply, however. First, the causal link between the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. Otherwise, the initial fault is one of the faults that caused the injury, in which case an issue of apportionment of liability may arise (Baudouin, Deslauriers, Moore, at Nos. 1-691 to 1-692; *Laval (Ville de) (Service de protection des citoyens, département de police et*

centre d'appels d'urgence 911) v. *Ducharme*, 2012 QCCA 2122, [2012] R.J.Q. 2090, at paras. 64-65; *Lacombe v. André*, [2003] R.J.Q. 720, at paras. 58-60 (C.A.)).

[92] The Court of Appeal rightly found that the first of these two requirements was not met in the case at bar; the causal link between the fault and the injury was not completely broken, quite the contrary. The case law confirms that fraud committed by a third party does not shield from liability persons who failed to take required precautions (see, e.g., *Beaulieu v. Paquet*, 2016 QCCA 1284, at paras. 36-41 (CanLII); *124329 Canada inc. v. Banque Nationale du Canada*, 2011 QCCA 226, [2011] R.J.Q. 295, at paras. 82-89). In the instant case, Mr. Salomon's blind endorsement of Mr. Papadopoulos, his failure to perform due diligence and his baseless reassurances caused the respondents to be vulnerable to a potential fraud (see *Beaulieu*, at para. 41). The fraud did not break the chain of causation. No losses would have been suffered without the faults first committed by Mr. Salomon. As this Court stated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, albeit in the common law context, where the breach of an obligation "initiated the chain of events leading to the investor's loss it is right and just that the breaching party account for this loss in full" (p. 443).

(3) Foreseeability and Recoverability

[93] I wish to add two comments. First, the appellants argue that Mr. Salomon could not be held liable for damages that were not foreseeable. In the contractual context, art. 1613 *C.C.Q.* provides that "the debtor is liable only for damages that

were foreseen or foreseeable at the time the obligation was contracted, where the failure to perform the obligation does not proceed from intentional or gross fault on his part”. This does not assist the appellants here.

[94] This standard does not mean that it was necessary to be aware of or to suspect a potential fraud (see *Beaulieu*, at para. 41). The major risks associated with investment advice are a decline in market prices or fraud by a third party, either of which would result in the loss of the invested money. Where these risks materialize, and where the lawyers have failed to abide by standards of professional conduct that are meant to protect their clients against these very risks, they may be liable for their clients’ investment losses (C.A. reasons, at para. 146; see also *Hodgkinson*, at p. 452). This does not turn lawyers into insurers for their clients’ losses.

[95] Second, the trial judge found that there was no proof that Mr. Salomon could have remedied the situation on learning about the respondents’ investments in Focus. The Court of Appeal countered that the issue of recoverability in 2006 or 2007 is irrelevant, given that the faults had already been committed at that time. I agree. It is often the case that the person who committed a fault has no chance to correct it afterwards. That has no impact on his or her liability. There is thus no need to speculate about whether the respondents would have been successful if they had asked to redeem their investments earlier. I nevertheless note that the respondents were able to redeem \$900,000 from Focus and iVest between February and July

2007. In June 2007, Mr. Salomon, too, requested the redemption of his \$70,000 investment in Focus, and he received \$50,000.

VI. Conclusion

[96] This is not a case about a mere referral. It concerns a referring lawyer who, over the course of several years, recommended and endorsed a financial advisor and financial products, and encouraged his clients to retain their investments with that advisor. Further, in doing this, he failed to perform adequate due diligence, misrepresented investment information, committed breaches of confidentiality and acted despite being in a conflict of interest. In such a context, a lawyer cannot avoid liability by hiding behind the high threshold for establishing liability that applies in a case in which a lawyer has merely referred a client.

[97] I am satisfied that the Court of Appeal applied the *Housen* standards of appellate review properly before overturning the trial judge's decision. The trial judge made palpable and overriding errors in her assessment of fault and causation, and she also erred in analyzing the conflict of interest at issue in this case. The professional liability of the appellants for the respondents' losses has been established. I would dismiss the appeal with costs.

The following are the reasons delivered by

TABLE OF CONTENTS

	Paragraph
I. <u>Overview</u>	98
II. <u>Applicable Standard of Appellate Review</u>	105
A. <i>The Principle of Appellate Non-Intervention</i>	105
B. <i>The Identification of Palpable and Overriding Errors</i>	109
C. <i>The “Distorting Lens” Metaphor</i>	117
D. <i>The Role of a Second and Final Appellate Court</i>	121
III. <u>Analysis of the Trial Judge’s Purported Errors</u>	127
A. <i>The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Fault</i>	130
(1) <u>Mr. Salomon’s Mandates</u>	134
(2) <u>Mr. Salomon’s Duty in Recommending Triglobal and Mr. Papadopoulos</u>	139
(3) <u>Mr. Salomon’s Duty to Advise</u>	156
(4) <u>Mr. Salomon’s Duty of Loyalty</u>	178
B. <i>The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Causation</i>	194
(1) <u>Principles of Causation</u>	194
(2) <u>Application to the Case at Bar</u>	199
IV. <u>Conclusion</u>	215
I. <u>Overview</u>	

[98] No one doubts the disastrous consequences, for the respondents, Judith Matte-Thompson and 166376 Canada Inc. (“166”), of the fraud committed by their financial advisors, Themis Papadopoulos and Mario Bright. No one would dispute that the conduct of their lawyer, the appellant Kenneth F. Salomon, was in many respects far from commendable. Not content with referring his clients to the two financial advisors and their firm, Triglobal Capital Management Inc. (“Triglobal”), Mr. Salomon went on to improperly volunteer investment advice, which he was not qualified to do. Nevertheless, after carefully and thoroughly assessing the evidence, the trial judge found that Mr. Salomon was not liable for the losses the respondents had suffered as a result of their financial advisors’ fraudulent conduct (2014 QCCS 3072). Contrary to my colleague, I fail to see how that finding is marred with reviewable errors. I am therefore of the opinion that the Court of Appeal’s intervention was not warranted.

[99] The Court of Appeal purported to have identified four reviewable errors, and substituted the following findings for those of the trial judge: (1) Mr. Salomon’s faults were not limited in time to the initial recommendation of specific investment products, but instead took place over a four-year period; (2) those faults were committed not only against Ms. Matte-Thompson, but also against 166; (3) Mr. Salomon’s close relationship with Mr. Papadopoulos amounted to a conflict of interest; and (4) the impact of Mr. Salomon’s faults was such that they caused the respondents’ losses (2017 QCCA 273, 41 C.C.L.T. (4th) 1).

[100] The Court of Appeal's grounds for intervening rested largely on the premise that the trial judge had analyzed the case through a distorting lens in that she had failed to adopt a so-called "global" approach to the assessment of the evidence. In my view, however, it was open to the trial judge to find that all of Mr. Salomon's professional acts over a *four-year* period could not be regarded as forming a single continuum for the purpose of assessing his liability. Quite properly, the trial judge carefully analyzed the evidence to determine the "exact nature of the fault . . . and its consequences", as required by the general principles of Quebec civil law (*Lafferrière v. Lawson*, [1991] 1 S.C.R. 541, at p. 609 (emphasis added)). In so doing, she benefited from a unique familiarity with the record acquired in the course of a nine-day trial during which six witnesses were heard and over 600 exhibits were produced. The trial judge's conclusions are entitled to deference.

[101] It in fact appears to me that the Court of Appeal's approach, far from being truly "global", focused unduly on Mr. Salomon's conduct, to the point that the Court of Appeal lost sight of relevant circumstances. For instance, concerning fault, the Court of Appeal overstated Mr. Salomon's role and largely disregarded the specificity of his mandates and the involvement of other professionals. With respect to causation, the Court of Appeal disregarded the respondents' own relationship with Triglobal and Mr. Papadopoulos, and the fact that Mr. Salomon took no part in the investment decisions that led directly to the losses. Such a harsh approach to civil liability might inadvertently increase the exposure of numerous professionals who

regularly recommend other advisors and then collaborate with them in their clients' interests.

[102] In any event, regardless of the merits of the Court of Appeal's approach, it should not have substituted its own view of the case for that of the trial judge. With all due respect, the Court of Appeal's findings stem from nothing more than a divergence of opinion that is based on its reweighing of the evidence as a whole, which is clearly inconsistent with the role of an appellate court (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 3, quoting *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204).

[103] More specifically, I am satisfied that there were no palpable and overriding errors in the following key findings of the trial judge:

- (a) Mr. Salomon did not commit a fault by recommending Triglobal and Mr. Papadopoulos as financial advisors and expressing confidence in them (paras. 302-4 (CanLII)).
- (b) Mr. Salomon did commit a fault by recommending specific investments, in 2003 and 2004 in particular, without making any inquiries and without being a qualified financial advisor (paras. 188-99).
- (c) However, Mr. Salomon's wrongful investment recommendations did not directly cause the losses (paras. 208-10 and 216).

- (d) In 2005 and 2006, Mr. Salomon was not consulted regarding the investment decisions of Ms. Matte-Thompson and 166 which caused the losses (i.e. investing in Focus). By then, the respondents had established a good relationship with Mr. Papadopoulos and were relying on him for investment advice (paras. 201-11, 284, 288 and 290-292).
- (e) Although Mr. Salomon became aware in April 2006 that Ms. Matte-Thompson was nervous about some of the investments, and later acted as a “conduit” to help her obtain the information she needed from Mr. Papadopoulos and Triglobal, it was not his responsibility in the circumstances to second-guess the investment advice given by the respondents’ financial advisors or to discover the fraud (paras. 214, 248-49 and 299-300).
- (f) Insofar as Mr. Salomon should have warned Ms. Matte-Thompson and 166 when he became aware of the May 2007 *La Presse Affaires* article that raised doubts about Triglobal’s practices, it was at that point likely too late to recover the funds (paras. 304 and 308).
- (g) Despite Mr. Salomon’s personal and financial relationships with Mr. Papadopoulos, especially the gifts he received, he did not place himself in a conflict of interest, given his limited involvement in the respondents’ investment decisions and the nature and timing of the payments made by Mr. Papadopoulos (paras. 132-65).

[104] When, as in this case, a first appellate court interferes with a trial judge's findings in the absence of reviewable errors, it is this Court's role to step in and to restore the trial judge's decision. In this regard, I worry that my colleague Gascon J. adopts an overly deferential approach towards the Court of Appeal, and that this approach undermines the principle of appellate non-intervention in respect of findings of fact or of mixed fact and law made at trial. I find it necessary to address this issue before considering the propriety of the Court of Appeal's grounds for intervention in this case.

II. Applicable Standard of Appellate Review

A. *The Principle of Appellate Non-Intervention*

[105] In the present case, the only appropriate standard of appellate review is that of "palpable and overriding" error, which applies both to findings of fact, including inferences of fact, and to findings of mixed fact and law (unless an extricable error of law can be shown to exist) (*Housen*, at paras. 10, 19, 28-31 and 36; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 66). Findings of fault raise questions of mixed fact and law, because they involve the application of norms of behaviour required by law to a set of facts (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 104; *Housen*, at para. 29). As for causation, it plainly involves questions of fact (*Montréal (Ville) v. Lonardi*, 2018 SCC 29, at para. 41; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36 and 92).

[106] Palpable and overriding error is a “highly deferential” standard (*South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46, quoted in *Benhaim*, at para. 38). As this Court has stressed repeatedly, “it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole” (*Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4; see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84; *Housen*, at paras. 10, 20 and 29).

[107] The many reasons that underlie this principle of appellate non-intervention were aptly expounded in *Housen* (paras. 11-18). First, it promotes the autonomy and integrity of trial proceedings, which furthers the goal of providing final, effective and efficient solutions to legal disputes. Second, it recognizes that trial judges are better placed to make factual findings, given their exposure to the entire record and their advantage of having heard testimony *viva voce*. Third, it prevents a duplication of the fact-finding process which would increase the number, length and cost of appeals without offering any guarantee of a better outcome.

[108] Given the importance of this principle of appellate non-intervention for the sound administration of justice, this Court has characterized it as a “rule of law”, and insisted that, failing a reviewable error, “an appellate court simply has no jurisdiction” (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 49, and *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1

S.C.R. 638, at para. 41, quoting *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, itself citing *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at pp. 358-59). Therefore, on questions of fact or of mixed fact and law, an appellate court *cannot* make its own findings and draw its own inferences unless the trial judge is shown to have committed a palpable and overriding error (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 89).

B. *The Identification of Palpable and Overriding Errors*

[109] It follows that, as a precondition to intervening in a trial judge's decision, an appellate court must properly identify a palpable and overriding error. While a palpable error is of course one that is "obvious" or "plainly seen" (*Housen*, at paras. 5-6), it must nevertheless be *explained*. The appellate court must show *why* and *in what respect* a given finding is marred with a "crucial flaw, fallacy or mistake" — meaning that it is "unreasonable or unsupported by the evidence" (*H.L.*, at paras. 56 and 70). Saying that an error is "palpable" does not make it so (*P.L. v. Benchetrit*, 2010 QCCA 1505, [2010] R.J.Q. 1853, at para. 24).

[110] The appellate court must point to a "specific and identifiable error" that amounts to more than a "divergence of opinion" (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 33 (emphasis deleted); see also *Housen*, at paras. 23, 56, 58 and 62). As the majority explained in *Housen*, "a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and

chooses to emphasize some portions of the evidence over others” (para. 56). Likewise, it does not suffice to say that the basis of certain findings appears to be “thin” (*South Yukon Forest Corp.*, at para. 53). If the trial judge’s findings are reasonably supported by the evidence, an appellate court cannot “reweigh the evidence by substituting . . . an equally — or even more — persuasive inference of its own” (*H.L.*, at para. 74 (emphasis in original); see also *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38; *Housen*, at paras. 22-23).

[111] I would add that an omission in the reasons does not amount to a palpable and overriding error unless “it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion” (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15, quoted in *Housen*, at para. 72; see also *South Yukon Forest Corp.*, at paras. 50-51). Trial judges are *presumed* to have based their conclusions on a review of the entirety of the evidence (*Housen*, at para. 72).

[112] That being said, how should an appellate court proceed in order to identify a palpable and overriding error? By definition, this should not be a strenuous task. In this respect, like my colleague, I find the metaphor used by Morissette J.A. in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), to be very accurate and relevant: [TRANSLATION] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye” (quoted in *Benhaim*, at para. 39). This metaphor does not merely show how obvious the error must be. Most importantly, it

illustrates that the identification of a palpable and overriding error does *not* require a review of the evidence as a whole. If the appellate court cannot find such an error without combing through the proverbial haystack, then there is *none*. Here is how Morissette J.A. explained it:

[TRANSLATION]

Thus, the error must be one that can be identified without expending extensive resources, without provoking a long semantic debate and without requiring the review of great quantities of documentary or testimonial evidence that is divided and contradictory, as is quite regularly what happens in contentious cases of some difficulty that go to trial.

Although the above ideas are not at all complex, and are even crystal-clear in several respects, it might be asked whether they are clearly understood by all members of the Bar. It still happens too frequently that a party urges the judges hearing an appeal to review most of the evidence in the record in minute detail in order to identify an alleged “palpable and overriding” error. A submission that is supported like that seems instantaneously to be suspect, as it contravenes the rule of conduct I stated in the final lines of the preceding paragraph. . . .

. . .

. . . [T]he Court of Appeal’s role is not to restart from the beginning — as if its responsibility were to take the place of the judge who presided the trial — the exercise of assessing the probative value of each witness’s testimony, an arduous exercise that the trial judge is required to conduct. In *South Yukon Forest Corporation*, Stratas J.A. wrote the following with respect to the role of an appellate court: “The Federal Court judge had a basis in the record for her key factual findings”. The same is necessarily true in the instant case, in which the Court must determine, and confine itself to determining, whether there is support for the trial judge’s findings of fact in the evidence. [Emphasis added; paras. 76-77 and 79.]

[113] This Court, too, has stressed that “the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence” (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 55). Thus, the focus of the review is not the entire record, but the trial judge’s reasons and, if need be, specific pieces of evidence to which the appellant draws the attention of the appellate court to show that a given finding is unsupported by the evidence (see *Housen*, at para. 4; *Waxman v. Waxman* (2004), 186 O.A.C. 201, at para. 307; *Benchetrit*, at para. 24). Put another way, it would be inappropriate for the appellate court to conduct its own independent assessment of the evidence and then to take note of points of disagreement with the trial judge’s findings and hold that those findings result from “palpable and overriding errors” in order to justify intervening (see *Van de Perre*, at para. 16; *Galambos*, at para. 53). That would be not a review for error, but a disguised rehearing, which is not the proper role of an appellate court (*H.L.*, at paras. 52 and 64).

[114] In this regard, it should be borne in mind that a trial judge’s familiarity with the case as a whole, and often large quantities of evidence, is vastly superior to that of appellate courts (*Housen*, at paras. 14, 18 and 25). The corollary is that appellate courts are in comparison ill-equipped for the task of fact-finding. As the Court of Appeal for Ontario explained in *Waxman*, appellate courts can hardly claim to be in a better position to examine cases in a “global” manner:

In a case as lengthy and factually complex as this case, appellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the “palpable and overriding” standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding.

Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make. [Emphasis added; paras. 294-95.]

[115] In other words, while an appellate court can certainly identify specific palpable errors in a trial judge’s decision, it must acknowledge the trial judge’s privileged position and its own institutional limitations. Owing to time constraints and to its inability to hear witnesses, for instance, it cannot hope to do a better job than the trial judge in assessing the evidence as a whole (see *Benchetrit*, at para. 24). Absent palpable errors, appellate courts must thus leave the task of fact-finding to trial judges and dedicate their efforts and limited resources to their primary role, which is “to delineate and refine legal rules and ensure their universal application” (*Housen*, at para. 9).

[116] Further, it bears reiterating that identifying a truly “palpable” error in an impugned finding does not give the appellate court free rein to reassess the evidence as a whole and overturn all the trial judge’s other findings. To warrant intervention,

the error must also be *shown* to be “overriding”, that is, it must be determinative of the outcome of the case (*Nelson*, at para. 38; *H.L.*, at paras. 55-56). Otherwise, whatever the error, the trial judge’s findings must stand. To borrow the vivid metaphor used by Stratas J.A. in *South Yukon Forest Corp.*, at para. 46, “it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall” (quoted in *Benhaim*, at para. 38).

C. *The “Distorting Lens” Metaphor*

[117] It is a different metaphor that informed the appellate decision in the instant case, however. Resorting to the notion of a “distorting lens”, the Court of Appeal found that the trial judge had in analyzing the evidence taken an overly compartmentalized approach to civil liability, thereby misapprehending Mr. Salomon’s professional conduct towards 166 and misconstruing the causal link between Mr. Salomon’s faults and the losses of Ms. Matte-Thompson and 166 (paras. 65-66 and 120). I am of the view that, in so doing, the Court of Appeal wrongly intervened on the basis of mere differences of opinion regarding the assessment of the evidence.

[118] As my colleague recognizes (at para. 40), the distorting lens metaphor does not dispense with the requirement of identifying reviewable errors in accordance with the standards articulated in *Housen*. It follows that a “distorting lens” cannot justify a wide-ranging review of the entire record unless adopting the lens is shown to be, in itself, a reviewable error. A decision to the contrary would upend the principle

of appellate non-intervention, since it would allow an appellate court to reweigh the evidence *before* a reviewable error has been identified. In my view, the distorting lens metaphor may, at most, be useful to illustrate how certain *palpable* errors (or errors of law) taint the analysis of the evidence to the point of having an *overriding* effect. A metaphor is not a full explanation, however. The appellate court must explain why the trial judge erred by viewing the case through the impugned “distorting lens”, why that “error” amounts to more than a mere divergence in opinion, and precisely how it distorted the trial judge’s analysis and affected the outcome of the case. In this regard, it is worth noting that, in the first decision in which the Court of Appeal invoked the distorting lens metaphor, *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541, at paras. 126-35 (CanLII), it held that adopting the “lens” at issue — an incorrect understanding of the concept of abuse of right — constituted an error of law which had distorted the trial judge’s assessment of the evidence and resulted in reviewable errors of fact. Further, the effect on the outcome of the case could be readily ascertained by examining the trial judge’s reasons, without conducting an independent review of the record (see paras. 130-32). Used in this way, the distorting lens metaphor was arguably consistent with the principles from *Housen*.

[119] In the instant case, however, I find that the Court of Appeal merely preferred a different “lens” than the one used by the trial judge. In my view, no true reviewable error justifying a broad reassessment of the evidence was identified. The Court of Appeal does not even say that, let alone explain how, the trial judge’s “distorting lens” — her supposed failure to take a “broad” approach to the case —

was in itself a palpable error. Yet the Court of Appeal relied on that “lens” to justify reassessing and reweighing the evidence (paras. 50, 65, 97 and 121), thus disregarding well-settled principles of appellate review. My understanding is that the Court of Appeal began its analysis by re-examining the entire record, concluded that it disagreed with the trial judge’s approach to the case, purported to identify “palpable and overriding errors”, and proceeded to substitute its own findings for those of the trial judge. Indeed, this is largely how my colleague describes the Court of Appeal’s review process:

When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the advice and reassurances Mr. Salomon gave between 2003 and 2007 were all part of a single continuum, and that placing them in separate silos would be artificial. [Emphasis added; para. 61, see also paras. 63 and 70.]

[120] In my respectful view, this is not how the “distorting lens” metaphor should be invoked, and it is certainly not how the standard of appellate review should be applied to findings of fact or of mixed law and fact. My colleague condones this approach, but I see it as a serious, and unjustified, dilution of the principle of appellate non-intervention as articulated in *Housen*.

D. *The Role of a Second and Final Appellate Court*

[121] Whenever this Court hears an appeal, part of its role as a second and final court of appeal is to ensure that a trial judge’s findings of fact or of mixed fact and law remain undisturbed unless a “palpable and overriding” error is established. It

follows that this Court should not refrain from intervening if a first appellate court has disregarded or misapplied the standards of appellate review.

[122] In my view, my colleague downplays this Court’s role in ensuring that the appropriate standards are applied (para. 34). I agree that the “focal point” of this Court as a second and final court of appeal is the first appellate court’s decision, not that of the trial judge. Our role is not to redo the first appeal as if the first appellate court did not exist. Therefore, there is no question that the onus is on the appellants who are asking this Court to intervene, or that careful attention must be paid to the reasons articulated by the first appellate court. However, the existence of “palpable and overriding errors” is not simply to be accepted at face value. In order to determine whether the first appellate court correctly identified reviewable errors, this Court must inevitably return to the trial judge’s reasons and conduct its own assessment (see *Prud’homme*, at paras. 66-67; as illustrations of this approach, see, e.g., *Housen*, at paras. 50-55, 64, 66 and 71-75; *H.L.*, at paras. 111-36; *Laflamme*, at paras. 39-50; *Galambos*, at paras. 48-62; *Benhaim*, at paras. 80-86).

[123] To be clear, this Court should not defer to the first appellate court with respect to the identification of reviewable errors. As the Court noted in *Schwartz*, at para. 36, it will intervene if it is satisfied that the first appellate court’s decision unjustifiably interfered with the trial court’s findings: “Clearly, if the ground upon which a first appellate court relies to justify disturbance — being a question of law — is, in the eyes of a second appellate court, ill-founded, the trial judge’s decision will be

restored by the second appellate court” (emphasis in original; see also *St-Jean*, at para. 40; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9; *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Maze v. Empson*, [1964] S.C.R. 576, at pp. 578-79).

[124] Deferring to a conclusion that the trial judge made a palpable and overriding error would mean that, in practice, this Court would be affording more weight to the first appellate court’s assessment of the facts than to the trial judge’s findings. This, it seems to me, would be incompatible with the principle of appellate non-intervention, which is primarily concerned with the autonomy and integrity of the *trial* process. As La Forest J. noted in *Schwartz*, at para. 37, “judicial policy concerns . . . regarding a trial court’s role would obviously not justify deference towards the assessment made by an appellate court”.

[125] It is worth clarifying that there are two steps to be taken when this Court reviews a decision in which the first appellate court has substituted its own findings of fact or of mixed fact and law for those of the trial judge. The first step is to inquire into whether the first appellate court correctly identified reviewable errors. If it did not, the trial judge’s findings must be restored regardless of the merits of the first appellate court’s findings (see *Nelson*, at para. 38). If, however, this Court agrees that the intervention was warranted, then the first appellate court was justified in proceeding with its own independent assessment of the relevant evidence and substituting its own findings. At that point, and this is the second step, this Court must

ask whether the first appellate court has erred in making its assessment. It is only at this step that this Court will show a certain deference and will therefore avoid intervening unless “clearly satisfied” that the first appellate court’s findings are erroneous (*St-Jean*, at para. 46).

[126] To sum up, I would reiterate that when the occasion arises, it is the proper role of this Court to inquire into whether the first appellate court’s intervention in the trial judge’s decision was justified. If a reviewable error has not been correctly established, the trial judge’s findings must be restored. Although our analysis focuses on the first appellate court’s stated grounds for intervening, we must review them in light of the trial judge’s decision itself.

III. Analysis of the Trial Judge’s Purported Errors

[127] When the principles of appellate review, which I believe to be uncontroversial, are properly applied to the instant case, the inevitable conclusion is that the Court of Appeal’s intervention was unwarranted. In my respectful view, the reason why my colleague comes to a different conclusion is that he largely skips over the first, and most important, step of the analysis — that is, the review of the purported grounds for intervention — and instead focuses on the Court of Appeal’s own findings. For instance, regarding Mr. Salomon’s alleged fault in relation to the duty to advise, my colleague concludes in a single paragraph that the Court of Appeal “properly identified palpable and overriding errors” (para. 55) before going on to consider whether it erred in its assessment of the facts (paras. 56-65). Moreover, in

discussing the duty of loyalty, my colleague does not take issue with the Court of Appeal's obvious failure to point to any specific reviewable error, as if, in his view, disagreeing with the trial judge's "restrictive approach" was sufficient to justify retrying the case on the basis of the written record. With respect, I beg to differ.

[128] Upon a more rigorous examination, I am satisfied that the Court of Appeal impermissibly reassessed the evidence as a whole, and nonetheless found no truly reviewable error. As I noted above, the Court of Appeal's approach to appellate review was inconsistent with the principles articulated in *Housen*. If I may paraphrase Morissette J.A.'s metaphor, the Court of Appeal searched through the haystack, arguably found a needle, and tried to present it as a beam. This Court should therefore restore the trial judge's findings.

[129] With these considerations in mind, I will now consider the purported palpable and overriding errors in the trial judge's findings on the subjects of (a) fault and (b) causation. While my understanding of the case differs from my colleague's, I am largely in agreement with his summary of the context and judicial history and do not see a need to replicate it. Rather, I will discuss the relevant facts in the course of my analysis. In this respect, I feel compelled to delve into factual matters more than would generally be appropriate for an appellate judge. This is warranted in the instant case, however, given the approach taken by the Court of Appeal and by my colleague.

A. *The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Fault*

[130] Concerning fault, the purported errors identified by the Court of Appeal boil down to a view that the trial judge failed to assess the evidence in a “global” manner, and erroneously compartmentalized Mr. Salomon’s conduct in accordance with the chronology of the respondents’ investments (paras. 50, 65-67, 70-71, 97 and 120). On the basis that this “lens” had had a distorting effect, the Court of Appeal reassessed the evidence as a whole and reached the conclusion that Mr. Salomon’s faults were not limited to the initial recommendation of specific investments to Ms. Matte-Thompson. Rather, in its view, those faults were part of a single four-year continuum, and were committed against both Ms. Matte-Thompson and 166. It added that the trial judge’s restrictive approach to the evidence had led her to downplay the potential conflict of interest arising from Mr. Salomon’s personal relationship with Mr. Papadopoulos.

[131] As mentioned above, the purported distorting lens could not, in my view, justify a broad reassessment of the evidence. My colleague endorses the Court of Appeal’s approach (paras. 55-56, 61, 63, 65, 70 and 80-81), but I find that it falls squarely into “divergence of opinion” territory. It was open to the trial judge to consider that all of Mr. Salomon’s professional acts — in a four-year period — could not be lumped together. And may I add that it was the proper way to approach the case. As required under the principles of Quebec civil law, the trial judge canvassed the evidence so as to determine the “exact nature of the fault” (*Lafferrière*, at p. 609). Quite correctly, she was careful not to oversimplify and inappropriately mix the multiple mandates, professional relationships and investments at issue over the

relevant period. The Court of Appeal's preferred "lens", by contrast, is "global" only insofar as Mr. Salomon's conduct is concerned. As my colleague explains, the scope of a lawyer's duty to advise depends largely on the context (para. 53). Yet, in the instant case, the Court of Appeal lost sight of some of the relevant circumstances, especially the scope of Mr. Salomon's mandates and the roles of the other players. This resulted in an approach which disregarded Mr. Salomon's limited role in respect of the investments that led to the losses.

[132] In any event, irrespective of the merits of the Court of Appeal's approach, the trial judge's findings should not be disturbed. First, as I noted above, the Court of Appeal relied on a broad reassessment of the evidence in order to identify the purported errors, which is at odds with *Housen* and its progeny. This, it seems to me, should suffice to resolve the matter. Second, I disagree with my colleague that the trial judge made her findings "despite evidence clearly showing" the contrary (para. 41). But even if that were true, it would not by itself amount to a palpable and overriding error. It is open to trial judges to place more weight on some parts of the evidence than on others (*Housen*, at para. 72; *Nelson*, at para. 38). Indeed, that is precisely their job. The question is not whether the Court of Appeal has found clear evidence supporting its preferred view of the case, but whether it has shown that the trial judge's findings are unsupported by the evidence. If it has not done so, it is impermissibly reweighing the evidence. As this Court stated in the very first paragraph of *Housen*, an appellate court is *prohibited* "from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach

that conclusion” (emphasis added). In the instant case, the trial judge’s findings regarding fault were available to her.

[133] I will now explain in greater depth why I am satisfied that there is no reviewable error with respect to fault. For that purpose, I will examine (1) Mr. Salomon’s mandates, (2) his duty in recommending Triglobal and Mr. Papadopoulos, (3) his duty to advise and (4) his duty of loyalty.

(1) Mr. Salomon’s Mandates

[134] The trial judge was justified in starting her analysis by circumscribing the scope of Mr. Salomon’s mandates (paras. 120-31). While the precise scope of a mandate does not always limit a lawyer’s duties (*Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248, at para. 6), it is certainly one of the main considerations for a judge when assessing professional liability (see, e.g., *Sylvestre v. Karpinski*, 2011 QCCA 2161, at para. 19 (CanLII); *Bessette v. Pharmacie Suzanne Payer inc.*, 2017 QCCS 2474, at paras. 90-102 (CanLII)). As Baudouin, Deslauriers and Moore explain:

[TRANSLATION]

Fault is established by reference to the type of obligation that is assumed, to its intensity (obligation of means or of result), and to the whole of the circumstances of the case.

...

Lawyers can, first of all, be held liable for any faults committed in advising their clients, where, for example, the clients consult them to learn about their rights or about the legal consequences of a transaction. Although the duty to advise exists regardless of the nature of the mandate, the scope of the latter has an undeniable impact on liability. This means that it is necessary to specifically review the scope of the lawyer's mandate. The standard for comparison, once again, is that of the normally competent, prudent and diligent lawyer. [Emphasis added; footnotes omitted.]

(J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at Nos. 2-136 and 2-138)

[135] The trial judge noted that Mr. Salomon had had “no specific mandate” with regard to the respondents’ investments (para. 130). This is a very significant — and, in my view, unchallenged — finding. Mr. Salomon was only occasionally consulted regarding the investment decisions, and always in the context of mandates related, *inter alia*, to the wills and trusts of Ms. Matte-Thompson’s late husband Malcolm Thompson, the family business, the reorganization of the companies and the sale of their properties (trial reasons, at para. 129). In this respect, I disagree with my colleague’s assertion that Mr. Salomon was “continually recommending financial products” (para. 59 (emphasis added)). In light of the trial judge’s findings, such an assertion clearly overstates Mr. Salomon’s role and the obligations he assumed, and skews the analysis on his liability. Moreover, in the absence of a reviewable error, it amounts to an impermissible reweighing of the evidence.

[136] Given the absence of a specific and continuous mandate relating to the respondents’ investments, it was appropriate for the trial judge to eschew an overly broad approach to liability. She instead narrowed her analysis down to Mr. Salomon’s

actual involvement in the various investments of Ms. Matte-Thompson and 166. I see no palpable error in that approach, quite the contrary.

[137] I pause to point out that the trial judge found that Mr. Salomon had from the outset been acting for both respondents. For instance, she noted that, in 2003, his legal opinion on the interpretation of Mr. Thompson's wills, in which he had discussed the goal of capital preservation, had been provided to both Ms. Matte-Thompson and 166 (paras. 44 and 122-23). It is thus not in dispute that Mr. Salomon had a duty to advise both respondents and a duty of loyalty to both of them. However, those duties were largely circumscribed by the very nature and scope of his mandates.

[138] Although Mr. Salomon did volunteer investment advice on several occasions, he did not purport to act as the respondents' financial advisor, nor did he assume the obligation to fashion, monitor or verify their investment strategy. Indeed, he referred Ms. Matte-Thompson and 166 to Triglobal and Mr. Papadopoulos precisely so that his clients could obtain investment advice and services from professionals in that field (trial reasons, at paras. 45 and 50). The respondents subsequently developed their own independent relationship with the recommended professionals (trial reasons, at paras. 211 and 288). With this in mind, the first question I will discuss is whether Mr. Salomon committed a fault in recommending Triglobal and Mr. Papadopoulos and in expressing confidence in them.²

² The trial judge did not address the initial referral to Triglobal and Mr. Papadopoulos (or the later expressions of confidence in them) in a separate part of the judgment. But it is clear from her

(2) Mr. Salomon's Duty in Recommending Triglobal and Mr. Papadopoulos

[139] In my view, the Court of Appeal should not have interfered with the trial judge's finding that recommending Triglobal and Mr. Papadopoulos — and expressing confidence in them — had not in itself constituted a fault (trial reasons, at paras. 197 and 302-4). In keeping with its “global” approach to the case, the Court of Appeal did not address that recommendation separately, but considered it together with the recommendation of specific investment products. With all due respect, my understanding is that rather than reviewing the trial judge's reasons for errors, the Court of Appeal proceeded, from the outset, to reassess the case from another perspective.

[140] While the Court of Appeal did not distinguish explicitly between the referral and the specific investment advice, its reasons suggest that recommending Triglobal and Mr. Papadopoulos without first making inquiries of the Autorité des marchés financiers (“AMF”) was in itself wrongful (paras. 70-72 and 117). The same suggestion can be found in my colleague's reasons (para. 59). This suggestion is at odds with the trial judge's reasons, as she found that Mr. Salomon's initial referral and later expressions of confidence in Triglobal and Mr. Papadopoulos had been reasonable at least until May 2007, when the *La Presse Affaires* article was published. For my part, I am satisfied that there is no palpable error in the trial judge's findings in that regard.

analysis on causation that she distinguished such recommendations from the recommendation of specific investment products (see *inter alia* trial reasons, at paras. 302-4).

[141] It is common practice for lawyers to recommend other professionals to their clients. Indeed, as the appellants points out, it is sometimes their *duty* to recognize the limits of their competence and, where the circumstances so require, to consult other professionals or to advise their clients to consult such persons. Whenever they recommend other professionals, or express confidence in them, lawyers must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances. While they cannot be expected to guarantee the services of the recommended professionals, they nonetheless have an obligation of means.

[142] I agree with my colleague that the Quebec Court of Appeal correctly set out the applicable principles in *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1, at para. 22:

[TRANSLATION] A lawyer who, as in this case, recommends that a client consult another person must be convinced that the person is competent enough to adequately perform the mandate in question. His conviction must be based on a reasonably informed knowledge of the recommended person. In such matters, the circumstances are everything.

[143] In the instant case, the trial judge's decision is consistent with this approach even though it was rendered before *Harris*. The trial judge took into consideration the fact that Mr. Salomon had conducted "due diligence" in 2001 before retaining Triglobal's services for his own investments (paras. 34 and 133), that is, that he had inquired about the lawyers and accountants assisting Mr. Papadopoulos. He knew and respected many of them, which convinced him to invest

with Triglobal. In the years that followed, Mr. Salomon referred family members, friends and clients to the firm, and was himself very pleased with the investment advice he received (trial reasons, at paras. 35 and 134). Further, the trial judge pointed out that “[Mr.] Salomon had no reason to suspect any wrongdoing from Papadopoulos or Triglobal” and that “Triglobal had the reputation of a first class investment firm [that was] very well-rated” before its implosion at the end of 2007 (paras. 302-3). As the Court of Appeal explained in *Harris*, at para. 28, courts must be careful not to assess recommendations in light of facts discovered subsequently. Mr. Salomon’s confidence in the competence and probity of Triglobal and Mr. Papadopoulos was based on reasonable knowledge. Contrary to what my colleague asserts, it was not “blind confidence” (para. 60).

[144] It follows that, although further inquiries would have been advisable, especially given that Mr. Salomon went as far as to say that he perceived Mr. Papadopoulos to be “very conservative” when it came to capital preservation (trial reasons, at para. 49), Mr. Salomon acted as a reasonably competent, prudent and diligent lawyer in the circumstances. While it may be true that contacting the AMF would have been preferable, omitting to do so did not amount to a fault given the reputation of the firm and Mr. Salomon’s own familiarity with Triglobal’s services.

[145] Moreover, recommending Triglobal and Mr. Papadopoulos did not in itself require Mr. Salomon to double-check whether the investment advice they gave was appropriate. As the appellants point out, the very purpose of a referral is

generally to have the client consult a professional whose areas of expertise differ from those of the referring lawyer. It would defeat that purpose to require a referring lawyer, as a general rule, to monitor the advice given by the professionals he or she recommended.

[146] I am concerned that a conclusion to the contrary would impose an excessive burden on many lawyers (and other professionals) who routinely recommend other trusted professionals. In my view, this would imply that making systematic inquiries of professional orders and other regulatory bodies would generally be required before another professional could be recommended, and that monitoring and verifying the recommended professional's advice might subsequently be required. This would go too far. Professionals might become overcautious and avoid making recommendations altogether, which would be a disservice to their clients.

[147] I would instead say that lawyers should make such inquiries as will enable them to acquire reasonable knowledge of professionals they recommend unless they already have relevant experience dealing with them. I would add that, as in other contexts, not every professional "error" made in making such inquiries — or in failing to make them — will amount to a fault if the lawyer's conduct does not depart from the standard expected of a reasonably competent, prudent and diligent professional (see *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 427-28; *Phillips v. Naamani*, 1998 CanLII 9332 (Que. Sup. Ct.), at paras. 66-67).

[148] In the case at bar, Mr. Salomon already had reasonable knowledge of Triglobal and Mr. Papadopoulos as a result of his personal experience. With the benefit of hindsight, failing to take further steps was very unfortunate, but it does not in itself make him liable.

[149] In saying this, I am well aware that this case is not merely about a referral. The trial judge found that Mr. Salomon's involvement was not limited to the initial recommendation in 2003, but that he also went on to provide wrongful advice regarding specific investment products (paras. 198-99). However, the principles from *Harris* are nonetheless relevant to the assessment of Mr. Salomon's conduct, and applying them properly leads to the conclusion that it was open to the trial judge to find that recommending Triglobal and Mr. Papadopoulos did not in itself constitute a fault.

[150] This is true not only of the initial referral, but also of the later expressions of confidence. I see no ground for intervening in the trial judge's findings that Mr. Salomon's confidence remained reasonable until at least the publication of the *La Presse Affaires* article in May 2007 and that, although he may have been "overly reassuring" to Ms. Matte-Thompson at times, this does not suffice to establish liability (trial reasons, at paras. 301-4). Up to the time when Mr. Salomon should reasonably have begun to doubt the probity or competence of Triglobal and Mr. Papadopoulos, it was just as appropriate for him to reaffirm his confidence in them as it had been for him to recommend them on day one. Likewise, it was open to

the trial judge to find that Mr. Salomon had no duty either to withdraw his recommendation or to investigate Triglobal and Mr. Papadopoulos. As the trial judge found, to Mr. Salomon, “there was no indication of anything illegal or unethical occurring at Triglobal up until May 2007” (para. 304).

[151] In this regard, I wish to comment on the “gifts” Mr. Papadopoulos made to Mr. Salomon in May and June 2006 and, later, in February 2007. The trial judge found that Mr. Papadopoulos had wanted to help Mr. Salomon renovate his apartment. For that purpose, he had proposed that Mr. Salomon incorporate a company that could issue invoices for “financial consulting” services. Mr. Salomon accepted, and later received \$28,000 through that company without having rendered any services (trial reasons, at paras. 142-46; C.A. reasons, at para. 104). My colleague is of the view that Mr. Papadopoulos’s willingness to request fake invoices was sufficient to raise “obvious concerns as to the general probity of the individual” (para. 77). I agree that such a scheme is troubling in many respects. However, as the trial judge noted, regardless of whether the scheme constituted tax fraud, it had “no connection to the investments made by the [respondents]” (para. 147). This means that Mr. Papadopoulos’s gifts were arguably insufficient to set off alarms with respect to the potential misappropriation of the respondents’ investments and to undermine Mr. Salomon’s confidence in Triglobal and Mr. Papadopoulos.

[152] That being said, I would agree that Mr. Salomon’s reaction to the May 2007 *La Presse Affaires* article was inappropriate. As the trial judge found,

Mr. Salomon failed to bring the article to his clients' attention despite the fact that it "raised serious doubts about the investments made through Triglobal in the iVest or Focus funds" (paras. 260-61). Accordingly, it might be argued that Mr. Salomon should have warned the respondents and recommended that they consult other financial advisors.

[153] There is little doubt that Mr. Salomon should have been more circumspect from that point onwards. For instance, it was probably inappropriate for him to state in July 2007 that he remained "very happy to have [his] investments performing so well with such controlled risk", especially given that the respondents were having difficulty retrieving their funds at the time (C.A. reasons, at para. 133). Even in December 2007, when Triglobal was on the brink of collapse and the fraud was about to be uncovered, Mr. Salomon was still reassuring Ms. Matte-Thompson about Mr. Papadopoulos's purported attempts to salvage the situation (C.A. reasons, at para. 138).

[154] However, even though these reassurances might have been wrongful, the trial judge did not see the need to linger on them. This is because she found that the loss had likely already been incurred by May 2007, which meant that there could be no causal link between faults committed by Mr. Salomon at that time and the injury (trial reasons, at paras. 304-5, 308 and 312-13). I will return to this finding in my discussion on causation.

[155] To sum up, I am of the opinion that the Court of Appeal did not identify a specific reviewable error in the trial judge's reasons in relation to Mr. Salomon's initial recommendation and later expressions of confidence. It follows that the Court of Appeal could not reassess the evidence as a whole on the basis of its preferred "global" view of the case (paras. 69-75).

(3) Mr. Salomon's Duty to Advise

[156] Again, the trial judge did not find that Mr. Salomon's conduct had been free of fault. She concluded that he had failed to act as a reasonably competent, prudent and diligent lawyer in recommending specific investment products (i.e. iVest and Manulife), especially in 2003 and 2004, and that in so doing, he had breached his duty to advise in three respects. First, he had failed to inform Ms. Matte-Thompson of the limits of his competence with respect to financial investments (trial reasons, at paras. 196-99). Second, he had recommended investment products without making any inquiries and without obtaining any information about their terms and conditions (trial reasons, at paras. 188-91). Third, he had recommended investing in an offshore hedge fund, iVest, which was inconsistent with his clients' primary goal of preserving capital (trial reasons, at paras. 193-94 and 198). These findings are not in dispute.

[157] As my colleague explains, to the extent that a lawyer does provide advice, he must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances irrespective of the precise scope of his mandate (para. 54; see also C.A. reasons, at para. 44). In the case at bar, Mr. Salomon committed faults in

volunteering investment advice even though such advice fell outside the limits of his mandates.

[158] The Court of Appeal did not take issue with the trial judge's findings in this regard (see paras. 68-69). However, as I explained above, it concluded that the trial judge had played down the extent of Mr. Salomon's breaches of his duty to advise in finding (i) that he had provided wrongful investment advice to Ms. Matte-Thompson only (paras. 61, 65, 69 and 89); and (ii) that the faults had concerned only certain specific investment products and had occurred within a limited timeframe rather than continuing until the end of 2007 (paras. 70-75 and 89). In the Court of Appeal's opinion, these two reviewable errors stemmed from the trial judge's distorting lens, that is, her failure to consider the case from a "global" perspective (paras. 50, 66 and 120).

[159] I agree with my colleague that the Court of Appeal had some basis for concluding that Mr. Salomon had committed the same faults in respect of both respondents (paras. 56-57 and 62). The trial judge's assertion that "[Mr.] Salomon never acted as a professional providing financial advice to 166376" (para. 283) appears to be contradicted by her own factual findings to the effect that Ms. Matte-Thompson had consulted him both as an executor and a beneficiary of the trusts and as a director of 166 (para. 44). Indeed, Mr. Salomon's memorandum of September 13, 2003 recommending an investment in iVest was addressed directly to 166 (C.A. reasons, at paras. 49 and 59). And when the sale of 166's properties was

being contemplated in June 2005, Mr. Salomon reiterated his recommendation to invest the proceeds in Manulife or iVest. It therefore seems to me that, contrary to the trial judge's finding, Mr. Salomon gave the same wrongful investment advice to both respondents.

[160] But even if this error is assumed to be palpable, I fail to see how it affected the outcome of the case. As I will explain below in my analysis on causation, 166 did not rely at all on Mr. Salomon's investment advice after selling its assets in early 2006 (trial reasons, at paras. 288). Ms. Matte-Thompson decided on her own to invest the proceeds of the sale of 166's assets in Focus rather than in the products Mr. Salomon had initially recommended (i.e. Manulife and iVest). In this context, the trial judge's error cannot be said to have been "overriding" and, therefore, to have justified appellate intervention. Neither did it justify the Court of Appeal's conducting a broad reassessment of the evidence for the purpose of finding *other* potential errors.

[161] I also part ways with my colleague on the second purportedly reviewable error the Court of Appeal identified *after* delving into the record. I am satisfied that there was no basis for overturning the trial judge's finding that Mr. Salomon had committed faults only in recommending Manulife and iVest products, mostly in 2003 and 2004 (paras. 196-97), and that he was not at fault for the later investments in Focus. After all, he was not involved in the respondents' fateful decisions to invest in that particular product in 2006 (trial reasons, at paras. 210-15, 285-88 and 290-94).

[162] In purporting to identify a palpable and overriding error, the Court of Appeal relied on its view that Mr. Salomon had committed continuous faults of omission in failing, from 2003 to 2007, to make inquiries regarding Triglobal and Mr. Papadopoulos and to verify their investment products (paras. 70-72). This begs the question whether Mr. Salomon had an obligation to take such steps in regard to the later investments in Focus. As I mentioned above, the trial judge found that he had had no specific mandate to recommend or review investment products (para. 130), and this finding has not been challenged. Further, it was open to the trial judge to find that, on the facts of the case, Mr. Salomon had had no obligation to make inquiries of regulatory bodies before recommending Triglobal and Mr. Papadopoulos. It is thus unclear to me what obligations Mr. Salomon might have failed to fulfill.

[163] What, then, might underlie the view that Mr. Salomon had committed continuous faults of omission? The Court of Appeal seems to have considered that Mr. Salomon's [TRANSLATION] "interventions" with respect to the respondents' investments in Focus up until the end of 2007 also triggered a duty to advise and thus to make inquiries and conduct verifications (paras. 71 and 75). I agree that a lawyer's duty to advise generally includes obligations to inform the client of relevant facts, to explain available options and their implications, and to recommend a course of action (Gascon J.'s reasons, at para. 52). Yet the precise content of that duty is highly dependent on the circumstances, including the scope of the mandate, the obligations assumed by the lawyer and his or her areas of expertise (see *Côté*, at para. 6).

[164] In the case at bar, the trial judge thoroughly and carefully examined the role played by Mr. Salomon in 2006 and 2007 and, based on her assessment of the evidence, she drew the reasonable inference that Mr. Salomon had had no duty to advise his clients regarding their investments in Focus, and had certainly had no duty to double-check the respondents' investment decisions (paras. 213-14 and 285-88). Here again, the Court of Appeal did not pinpoint a specific "crucial" flaw in the trial judge's findings, but instead intervened on the basis of a mere difference of opinion.

[165] First, it is worth recalling the trial judge's uncontested factual finding that Mr. Salomon has not been consulted about the respondents' decisions to invest in Focus in 2006 and had not been involved in those decisions (see paras. 204-5, 210, 219-22 and 290-93)³. He was not informed of them until after the fact. Although he did participate in meetings regarding the upcoming sale of 166's assets, there is no evidence that potential investments in Focus were discussed on those occasions. Further, he did not attend a key December 2005 meeting that dealt specifically with 166's investment strategy. In any event, an investment in Focus was not yet being contemplated at that time. At 166's request, Mr. Salomon drafted resolutions that authorized the opening of investment accounts for the sale proceeds, but those resolutions referred to Manulife and iVest, not to Focus (C.A. reasons, at para. 79).

³ My colleague overstates Mr. Salomon's role in the sale of 166's assets, at para. 13 of his reasons. In light of Ms. Matte-Thompson's own testimony, Mr. Salomon cannot be said to have "arranged" the sale (A.R., vol. 7, at pp. 2220-21).

[166] I believe it will be helpful to quote several paragraphs from the trial judge's reasons on the subject of 166's investments in Focus. These paragraphs clearly underline how limited Mr. Salomon's involvement and knowledge were:

At the end of 2005 and the beginning of 2006, [Mr.] Salomon still had a lawyer-client relationship with Ms. Thompson. He was handling numerous matters that related to the wills and trusts and family businesses. He knew that the proceeds of the sale needed to be invested and was aware Papadopoulos was providing investment proposals to Ms. Thompson and her Ontario lawyers. However, [Mr.] Salomon did not participate in this investments strategy meeting. Although he received a copy of the proposal provided by Papadopoulos to Ms. Thompson, he was not part of the recommendations nor the discussions that related to the investment.

[Mr.] Salomon argues that he had absolutely no involvement in 166376's decision to invest and that he knew nothing about it. The evidence establishes the contrary.

[Mr.] Salomon prepared the resolutions for the opening of the investment account for the executors and trustees. Prior to the investment, he was involved in the investment discussions related to the sale proceeds and the expected return required to meet Ms. Thompson's needs. He knew that 166376 was contemplating to invest a significant portion of the sale proceeds through Triglobal.

However 166376, through Ms. Thompson, intended to invest with Triglobal in Manulife and iVest, the same investment vehicle that had been previously recommended to Ms. Thompson in her personal capacity.

...

The exhibits filed and the evidence show that in the winter of 2006, [Mr.] Salomon was not aware of the exact amount invested by 166376 or in which vehicles it had been invested. Contrary to the first investment made personally by Ms. Thompson back in 2003, he was not consulted with respect to the investments contemplated by 166376 in Focus.

How could [Mr.] Salomon stop 166376 from entering into such a transaction when he was not even aware that such investment was being made?

The Court cannot conclude that [Mr.] Salomon failed to advise 166376 of the limit of his ability at the time 166376 made the investment because he never recommended the investment made in Focus. He only learned about it after the fact.

Although [Mr.] Salomon encouraged that the investment be made through Triglobal, he did not encourage 166376 to purchase the Focus fund in February 2006. The proposition and recommendations with respect to the investment were discussed in a strategy meeting with Papadopoulos, which [Mr.] Salomon did not attend. [Emphasis added; footnotes omitted; paras. 219-22 and 290-93.]

[167] Second, even when Mr. Salomon was finally made aware of the respondents' investments in Focus (in April 2006 in the case of 166, and in October 2006 in the case of Ms. Matte-Thompson), he did not provide any wrongful legal advice, recommendation or reassurance regarding that specific fund (trial reasons, at paras. 227-28, 236-37, 294 and 301), at least not until May 2007. In fact, the Court of Appeal did not point to any instance where Mr. Salomon had clearly recommended or endorsed Focus. The only example it gave was an email Mr. Salomon had received from Ms. Matte-Thompson on April 29, 2006, from which he had learned for the first time that 166 had invested in Focus:

Ken

I do need to talk to you as a friend... I am a bit nervous about my investment from the sale. I have had a difficult time getting info and only have received a note from Austin Harris at Focus stating [sic] amt of funds invested and interest to date. I have no contract to know about details...looks like a loan but I was told it is not...where are funds invested? The letter states there are conditions re early repayment and request [sic] for early repayment... I have not been informed [sic] of any of this. I think it all happened too fast and maybe I was too trusting ... I think of Bernie R and then the LaCroix scandal...I cannot afford to be caught in something that has not been fully explained.

Perhaps I need to reconsider having all of my eggs in one basket. As a friend and confidant [sic] I would like to talk to you...outside of business... [Emphasis added.]

(quoted in C.A. reasons, at paras. 77-78 and in trial reasons, at paras. 227-28.)

[168] In response to Ms. Matte-Thompson’s concerns about the “difficult time” she was having getting information about the fund, Mr. Salomon responded — without making any inquiries — that he was “certain that everything is ok”. He also offered to discuss the matter further and then asked Mr. Papadopoulos to answer her questions (trial reasons, at para. 228).

[169] In my view, the Court of Appeal had no basis for overturning the trial judge’s finding that Mr. Salomon’s response did not constitute a fault (trial reasons, at paras. 296-300).⁴ At the time, Ms. Matte-Thompson’s main concern was about the difficulty she was having in obtaining information about 166’s investments. In this regard, Mr. Salomon “did his best to get Papadopoulos to answer his clients” (see trial reasons, at paras. 228 and 299). As the trial judge pointed out, it might have been preferable for him to recommend that the respondents consult another professional to obtain a second opinion, but this does not mean that his conduct amounted to a fault (paras. 299-301). This finding of mixed law and fact is based on the trial judge’s assessment of the evidence and is entitled to deference.

⁴ I note that the Court of Appeal erroneously found that Mr. Salomon knew, when he received the email, that 166 had invested *all* of the sale proceeds in Focus (para. 79). This is not what the email says, and there is no other evidence to that effect.

[170] Moreover, Ms. Matte-Thompson's email did not constitute a mandate to verify the propriety of 166's investments. She made clear that she was only asking for Mr. Salomon's opinion "outside of business", as a "friend" — words which are not included in the Court of Appeal's quotation of the email (para. 77). I wonder on what basis Mr. Salomon should have gotten involved, on his own initiative, in a review of the investment decisions the respondents had made with their financial advisors (see, e.g., *Sylvestre*, at paras. 16-19). As well, Mr. Salomon did say that he would be "happy to discuss [the matter] at any time", but it seems that Ms. Matte-Thompson preferred not to involve him further (trial reasons, at para. 230).

[171] It is also worth noting that Mr. Salomon knew he was not the only lawyer involved in the sale of 166's assets (trial reasons, at paras. 217-19). At the time, lawyers David Gemmill and Rod Farn were handling the Ontario legal aspects of the transaction. One of them, Mr. Gemmill, was also an executor of Mr. Thompson's estate (and Ms. Matte-Thompson's neighbour). Contrary to Mr. Salomon, Mr. Gemmill and Mr. Farn had had Triglobal's investment proposals presented to them (trial reasons, at para. 219). I am not suggesting that they are to blame, but this might also help explain why, under the circumstances, Mr. Salomon did not consider that he had received a new legal mandate, especially given that he was being asked for his personal opinion as a "friend". He knew that lawyers were already involved in the investment strategy. This is an example of the Court of Appeal losing sight of relevant circumstances and placing undue emphasis on Mr. Salomon's behaviour.

[172] Overall, I see no reason to believe that the trial judge misapprehended the email's content and Mr. Salomon's response to it. I wish to be clear that a lawyer's "friendship" with a client does not give rise to any form of immunity. However, given the absence of a specific mandate, it was reasonable under the circumstances to find that Mr. Salomon's duties had not required him to verify 166's investments. Accordingly, the fact that Mr. Salomon conducted no inquiries or verifications cannot in itself justify the Court of Appeal's intervention.

[173] The Court of Appeal also criticized Mr. Salomon for certain [TRANSLATION] "communications that were seemingly more trivial" (para. 130). For instance, in the fall of 2006, at a time when Mr. Salomon knew that the respondents were still having difficulty obtaining information from Triglobal (trial reasons, at para. 248), he visited Mr. Bright in the Bahamas. He informed Ms. Matte-Thompson of his visit, which he had made while on vacation, and stated that Mr. Bright had become a resident there "in order to manage the Focus, Ivest and structured products funds", adding that "[a]ll is well". In retrospect, such an expression of confidence may appear misguided. However, the trial judge was entitled to find that, all things considered, those reassurances did not amount to a fault.

[174] At the time, Mr. Salomon was well aware of the communication problems between his clients and Triglobal (trial reasons, at para. 248). In fact, from April 2006 to the end of 2006, he tried to solve them by serving as a "conduit" in order to obtain more information about the nature and the status of 166's investments in Focus (trial

reasons, at para. 249), especially for the purpose of helping the corporation's accountant complete the year-end financial statement (trial reasons, at paras. 240-44). Put another way, Mr. Salomon was cooperating with his clients' other advisors, which was arguably his professional obligation in such circumstances (see, e.g., s. 25 of the *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1). As the trial judge explained, it might have been advisable to go further and recommend that the respondents consult another financial advisor. However, this omission does not necessarily amount to a fault, given that Mr. Salomon had not been confronted with any indicia of wrongdoing related to the respondents' investments other than communication issues (trial reasons, at paras. 299-302).

[175] The Court of Appeal's finding that Mr. Salomon should have taken it upon himself to advise the respondents against investing in Focus — given that his personal "investment philosophy" favoured diversification — is surprising, to say the least (para. 84). First, the respondents did not view Mr. Salomon as their financial advisor (trial reasons, at paras. 283-84) and did not expect him to provide advice as to 166's investment strategy (trial reasons, at para. 288). Second, and more importantly, Mr. Salomon was not a qualified financial advisor, which means that it might have amounted to a *fault* for him to give investment advice about Focus, just as he committed faults by recommending iVest and Manulife. In this context, it was reasonable for the trial judge to find that Mr. Salomon had taken an acceptable — though admittedly not ideal — approach, that is, to help his clients obtain more information from their actual financial advisors.

[176] As I explained above, it is certainly arguable that from the time of the publication of the May 2007 *La Presse Affaires* article, Mr. Salomon's reassurances became negligent and that from then on he had an obligation to recommend that the respondents consult other financial advisors. However, even if it is assumed that Mr. Salomon committed a fault at that time, the trial judge found that it would have had no impact on the respondents' losses. Hence, if the trial judge made a palpable error by failing to properly consider Mr. Salomon's conduct after he had become aware of the *La Presse Affaires* article, that error would have no bearing on the outcome of the case.

[177] In sum, I am satisfied that there is in fact no palpable and overriding error in the trial judge's finding that Mr. Salomon's only fault relating to his duty to advise was to recommend *specific* investment products, i.e. iVest and Manulife, mostly in 2003 and 2004. Having carefully assessed the evidence, the trial judge was entitled to decide that failing to raise concerns about the respondents' investments in Focus while occasionally serving as a "conduit" between his clients and their financial advisors did not amount to a fault.

(4) Mr. Salomon's Duty of Loyalty

[178] I am also satisfied that the Court of Appeal erred in interfering with the trial judge's finding that Mr. Salomon had not breached his duty of loyalty to the respondents. Although Mr. Salomon was certainly a client and a friend of Mr. Papadopoulos, and did receive significant sums from him, support could be found

in the record for the view that he was not in a conflict of interest. This finding is based on a careful weighing of the evidence, including oral evidence, and should not be disturbed absent a reviewable error. Here again, I come to the conclusion that the Court of Appeal failed to identify such an error and that it impermissibly reassessed the evidence as a whole.

[179] It is striking that the Court of Appeal did not point to *any* reviewable error but merely criticized the trial judge's supposedly restrictive approach to the principles of conflict of interest (para. 97; Gascon J.'s reasons, at para. 69). On that basis, the Court of Appeal proceeded to revisit the issue by applying the standard of correctness, as if a question of law had been identified. With respect, this shows a blatant disregard for the principle of appellate non-intervention.

[180] It is trite law that the analysis of an alleged fault, including one related to the duty of loyalty, involves a question of mixed fact and law. Where such a question arises, the appropriate standard is that of a "palpable and overriding error" unless a pure question of law can be readily extricated from it (*Housen*, at paras. 29-33). An extricable question of law generally concerns a mischaracterization of the applicable legal test or a failure to consider a *required element* of that test (*Housen*, at para. 36).

[181] Yet, in the instant case, the Court of Appeal did not assert — nor does my colleague do so — that the trial judge had made an extricable error of law. Indeed, no one has suggested that she failed to identify the correct legal principles applicable to the alleged fault related to the duty of loyalty (paras. 107-13 and 118-19). She

properly recognized that, as a mandatary under the *Civil Code of Québec* (“C.C.Q.”), a lawyer is bound to “act honestly and faithfully in the best interests of the mandator” and to “avoid placing himself in a position where his personal interest is in conflict with that of his mandator” (art. 2138 para. 2 C.C.Q.; trial reasons, at para. 111). The trial judge also pointed to the rules applicable to conflicts of interest under the former Quebec *Code of ethics of advocates*, CQLR, c. B-1, r. 3, which at the relevant time informed the standard of a reasonably competent, prudent and diligent lawyer in such circumstances (see Baudouin, Deslauriers and Moore, at Nos. 2-1 to 2-2). And she summarized the general principles of civil liability, namely that a plaintiff has the burden of proving a fault, an injury and a causal link between the two. All in all, there is no error in her characterization of the applicable legal test, which is consistent with my colleague’s own summary of the relevant principles (para. 71).

[182] I would add that, in cases involving negligence, “it is often difficult to extricate the legal questions from the factual” (*Housen*, at para. 36). The analysis of an alleged conflict of interest, in particular, is inherently fact-based. For instance, a potential conflict might not have the same ramifications in the context of day-to-day business dealings as in that of a litigation case. Alleged conflicts must be assessed on a case-by-case basis. Not every potential violation of the duty of loyalty — including breaches of specific ethical rules — will give rise to an action in civil liability. In each case, the court must analyze the nature and the circumstances of the alleged conflict for the purpose of characterizing the violation and, if warranted, determining the appropriate remedy (*Côté*, at paras. 9-11 and 14). It follows that extricating an

error of law should be reserved for exceptional cases in which the legal test has been mischaracterized, or one of its required elements disregarded.

[183] Given that the trial judge applied the correct legal principles, the next question is whether the Court of Appeal identified a palpable and overriding error. Plainly, it did not. It bears repeating that the Court of Appeal did not — nor does my colleague — state explicitly that the trial judge had made any such error. Rather, their conclusion is — as my colleague puts it — that the trial judge disregarded the “overwhelming evidence of Mr. Salomon’s close personal and financial relationship with Mr. Papadopoulos on the basis that it did not lead to the conclusion that there was of a conflict of interest” (para. 81; see also para. 70; C.A. reasons, at paras. 97 and 109). That is not a reviewable error, but a disagreement over the weight to be given to the evidence. In my view, the trial judge properly considered the factors that could have cast doubt on Mr. Salomon’s undivided loyalty and commitment to his clients, that is, his friendship with Mr. Papadopoulos and their financial relationship, including the “gifts” or “commissions” he had received (see, e.g., trial reasons, at paras. 136-37, 142, 156-57 and 163). Having weighed various pieces of evidence, she came to the conclusion that, on the facts of the case, these factors were not enough to have placed Mr. Salomon in a position where his personal interest conflicted with that of his clients. That conclusion was open to her.

[184] First, support can be found in the evidence for the trial judge’s conclusion that Mr. Salomon’s friendship with Mr. Papadopoulos, once put in context, had not

run counter to his duty of loyalty to the respondents. The trial judge found that Ms. Matte-Thompson had been well aware of the relationship from the beginning. Mr. Salomon had never attempted to hide it (trial reasons, at paras. 135-37). In fact, before making her final decision to invest with Triglobal, Ms. Matte-Thompson had asked for his impressions, “as long as it does not cross any lines for you”. I agree that, under certain circumstances, such a close personal relationship could certainly have placed Mr. Salomon in a conflict of interest regardless of the disclosure. But in this case, it should be borne in mind that Mr. Salomon had no specific mandate related to the investment strategy. As I explained above, until at least May 2007, he had no duty to advise his clients in that regard, and certainly no duty to double-check their investment decisions. Further, when the respondents decided to redeem their investments with Triglobal, they made a decision not to involve Mr. Salomon precisely because of his close relationship with Mr. Papadopoulos (trial reasons, at para. 266). Perhaps Mr. Salomon should have been more circumspect in his expressions of confidence in Mr. Papadopoulos. Yet it seems to me that, given Ms. Matte-Thompson’s awareness of their personal relationship and Mr. Salomon’s limited role in respect of the respondents’ investments, it was open to the trial judge to find that the friendship itself had not placed Mr. Salomon in a conflict of interest.

[185] Second, it was also open to the trial judge to find that, in light of their nature and timing, the payments received by Mr. Salomon had not placed him in a conflict of interest (paras. 157 and 164-65). The trial judge found credible Mr. Salomon’s explanation for the two payments of \$10,000 each made by

Mr. Papadopoulos on May 16 and June 9, 2006 and the additional payment of \$8,000 on February 6, 2007 (paras. 143-48). As I mentioned above, Mr. Salomon testified that the payments had been gifts to help him renovate his apartment at a time when he was having financial difficulties. The documentary evidence shows that the payments were transited through a corporation Mr. Salomon had set up, which issued invoices for “financial consulting” services. Mr. Salomon explained that those services had never been rendered. Contrary to what my colleague suggests, the trial judge did not disregard this evidence. In fact, she addressed it directly (para. 143).

[186] The trial judge also discussed two subsequent payments of \$5,000 each that Mr. Salomon had received in October 2007, which were described as “comms” — for “commissions” — in one of Mr. Papadopoulos’s emails (paras. 151-55; see also C.A. reasons, at paras. 105-7). The trial judge noted that Mr. Salomon had claimed that the payments represented redemptions of his own investments in Focus and that, even assuming they were in fact commissions, there was no evidence that they had been paid for referring the respondents. Most importantly, the trial judge stressed that the payments received in October 2007 could hardly amount to proof that Mr. Salomon had been paid commissions when he initially referred the respondents to Triglobal in 2003, or when the respondents invested in Focus in 2005 and 2006. Nor were they proof that the “gifts” received in 2006 had been commissions. There is nothing “palpably wrong” in that reasoning (see Gascon J.’s reasons, at para. 77).

[187] In this regard, I disagree that the trial judge erred in stating that there was no specific proof that Mr. Salomon and Mr. Papadopoulos had had a financial relationship that placed him in a conflict of interest when the respondents' investments were made (paras. 155, 160 and 163). In saying that, she was merely declining to infer from the fact that Mr. Salomon had received payments from Mr. Papadopoulos in October 2007 that he had been in a conflict of interest at all relevant times, including at the time of the referral four years earlier (trial reasons, at para. 156). Declining to draw an inference falls squarely within the purview of the trier of fact (see *St-Jean*, at para. 114; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 55; *Benhaim*, at paras. 93-94).

[188] In short, I accept that the trial judge's characterization of the payments of May and June 2006 as personal gifts was based on a reasonable assignment of weight to contradictory evidence, including oral evidence that she perceived to be credible. As this Court reiterated in *Housen*, at para. 58, "it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing". The fact that the Court of Appeal would have weighed the evidence differently, or drawn different inferences, does not justify its intervention.

[189] That said, assuming that the payments were not commissions, I agree with my colleague that receiving a personal gift, especially one of nearly \$30,000 that is not disclosed, may raise "serious doubts regarding the independence of the lawyer"

(para. 77). But once again, this will depend on the circumstances. In this case, Mr. Salomon received the gift in May and June 2006, a period in which he had no specific mandate regarding the investments. It is true that in the following months he served as an occasional “conduit” between the respondents and Triglobal, but his role was nonetheless limited, and he had no duty to verify the investments. Moreover, other lawyers were involved and were advising the respondents regarding their investment strategy. Indeed, when the respondents decided to gradually withdraw their funds from Triglobal, Mr. Salomon was largely kept out of the loop. Although I agree that Mr. Salomon should have been more forthright about the gifts he had received from Mr. Papadopoulos, I am nevertheless satisfied that, given all the relevant circumstances, the Court of Appeal failed to identify a reviewable error in that regard.

[190] I acknowledge that the trial judge did not address certain aspects of the *professional* relationship between Mr. Salomon and Mr. Papadopoulos, especially the disclosure by the former of communications with Ms. Matte-Thompson (C.A. reasons, at paras. 87 and 101-3; Gascon J.’s reasons, at paras. 70 and 73) and the fact that he had cooperated extensively with Mr. Papadopoulos and Triglobal on at least one occasion (C.A. reasons, at paras. 98-100; Gascon J.’s reasons, at paras. 74-75). However, as a majority of this Court stressed in *Housen*, “the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence” (para. 39). A trial judge does not have to discuss in detail every single fact alleged by the parties or every piece of evidence. The question

here is not whether the trial judge brushed aside elements that the Court of Appeal (or this Court) deemed important, but whether those omissions might have affected her conclusions (*Van de Perre*, at para. 15; *Housen*, at para. 72). In my view, they did not.

[191] While it may be true that Mr. Salomon's indiscretions amounted to breaches of his duty of confidentiality under the applicable rules of professional ethics, I am not convinced that they constitute evidence that Mr. Salomon was in a conflict of interest at all relevant times. For instance, I note the trial judge's finding that, when Mr. Salomon had informed Mr. Papadopoulos in April 2006 of Ms. Matthe-Thompson's concerns, he had merely been doing "his best" to pressure Mr. Papadopoulos to respond to her questions (paras. 228 and 299). Given that he had not obtained her authorization to do this, the attempt was certainly misguided, but it does not necessarily reveal a conflict of interest. As to his forwarding of the August 2007 email concerning the respondents' intent to withdraw entirely from iVest and Focus, I agree that it appears to be a serious breach of Mr. Salomon's duties of loyalty to his clients and of confidentiality. As I explained above, I would tend to find that Mr. Salomon's conduct after the May 2007 *La Presse Affaires* article was wrongful. However, it may not have been enough to justify, retroactively so to speak, an inference that Mr. Salomon had been in a conflict of interest that began with the initial referral in 2003 and continued over time.

[192] As for the claim that Mr. Salomon “teamed up” with Mr. Papadopoulos in March 2007 to prepare a report on the respondents’ investments, Mr. Salomon’s conduct on that occasion can be interpreted in different ways (Gascon J.’s reasons, at paras. 74-75; C.A. reasons, at paras. 98-100). At the time, Ms. Matte-Thompson was encountering serious communication issues with Triglobal. Mr. Salomon, with Ms. Matte-Thompson’s knowledge, volunteered to help the financial advisors prepare a report that would contain all the information she sought, and in plain language. In this context, the fact that Mr. Salomon used the pronoun “we” in an email addressed to Mr. Papadopoulos is hardly determinative. Granted, it could raise doubts about Mr. Salomon’s independence. But it could also indicate a good faith effort to cooperate with Triglobal for the purpose of solving what Mr. Salomon perceived to be essentially a problem of communication. Given that the trial judge is presumed to have made her findings on the basis of the entire record and that there were different inferences that might have been drawn from the communications at issue, I am satisfied that the fact that she failed to discuss this matter is not in itself sufficient to cast doubt on those findings.

[193] Overall, the Court of Appeal identified no reviewable errors in the trial judge’s analysis of the alleged faults relating to the duty of loyalty. In saying this, I do not mean to trivialize Mr. Salomon’s conduct. For lawyers, avoiding conflicts of interest is essential if they are to retain the independence they need in order to be entirely dedicated to their clients. When in doubt, they should generally err on the side of caution and disclose personal interests to their clients. In this case,

Mr. Salomon should probably have been more transparent about the payments he had received from Mr. Papadopoulos. Nonetheless, the trial judge found that he had not been in a conflict of interest at the relevant times, that is, when he had recommended Triglobal and Mr. Papadopoulos and later reiterated his confidence in them. That finding is entitled to deference. I would agree, however, that the evidence strongly suggests that Mr. Salomon breached his duty of confidentiality and placed himself in a conflict of interest in the last few months of 2007. But by that time, it would likely have been impossible for the respondents to retrieve the funds. It follows that, even if Mr. Salomon did commit a fault at that point, he could not be held liable for the respondents' losses. This brings us to causation.

B. *The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Causation*

(1) Principles of Causation

[194] A fundamental principle of civil liability is that a person is liable only for injuries *caused* by his or her own fault (*Lonardi*, at para. 32; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 132). Baudouin, Deslauriers and Moore explain this as follows:

[TRANSLATION]

Logically, a person who commits an act that constitutes a fault cannot be held liable for damage that is unrelated to the fault or that he or she had nothing to do with. A certain causal connection is essential, and it

therefore does not, despite what certain judicial decisions sometimes seem to suggest, coincide with the fault itself. . . .

The fact that a person has committed a fault and a victim has sustained damage does not necessarily mean that the person who committed the fault must be held liable for it. One example will suffice to illustrate this. A municipality that maintains its sidewalks or its roads poorly commits a fault in the sense that it does not act as would an informed, prudent and diligent municipality. If someone is injured, however, nothing in this fact alone makes it possible to automatically, and with certainty, connect the municipality's fault with the victim's injury. For that, a link must be established between the two circumstances. . . .

The Quebec courts maintain a distinction between fault and causation, stressing that on its own, the breach of a legal obligation that involves a basic standard of prudence leads, in theory, to a presumption of fault, but does not entitle one to compensation unless there is a sufficient causal connection with the injury. [Emphasis added; footnotes omitted; Nos. 1-665 to 1-666.]

[195] In civil liability matters, a *true* cause is established when the plaintiff proves that the injury is a “logical, immediate and direct consequence of the fault” (arts. 1607 and 1613 *C.C.Q.*; see, e.g., *Hinse*, at para. 132, citing *Parrot v. Thompson*, [1984] 1 S.C.R. 57, at p. 71). Put another way, the fault must have a *close* relationship with the injury (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 50, quoting Baudouin, Deslauriers and Moore, at No. 1-683; see also *Roberge*, at p. 442). It does not suffice to show that the fault increased the likelihood of the injury occurring if there is no evidence that the fault directly caused the injury either in whole or in part (*Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419, at p. 425; *St-Jean*, at para. 116). The purpose of this

directness requirement is to limit the scope of any remedy (see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 770).

[196] Once again, the analysis of causation raises a question of fact (*Lonardi*, at para. 41; *Benhaim*, at paras. 36 and 92). In seeking a causal link that is logical, direct *and* immediate, the trial judge must assess “the events leading to the damage, their sequence and their causal connection with the damage suffered” on the basis of the evidence as a whole (see *Dallaire*, at pp. 425-26). As Baudouin, Deslauriers and Moore put it:

[TRANSLATION] The courts require that the victim prove a direct connection between the injury for which he or she claims compensation and the defendant’s alleged fault. The directness of that connection is assessed primarily by a review of the fact situation in which the judge must weigh the respective influence of each of the events and circumstances linked to the accident. [Emphasis added; No. 1-697.]

[197] Various theories have been advanced to distinguish true causes, which may result in civil liability, from mere “conditions”, that is, the circumstances or occasion of the injury (see, e.g., Baudouin, Deslauriers and Moore, at Nos. 1-669 to 1-677 and 1-687; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at Nos. 787-95; F. Lévesque, *Précis de droit québécois des obligations* (2014), at Nos. 463-67). In light of those theories, it may be helpful to inquire into whether the fault made the injury objectively possible, whether the injury was reasonably foreseeable *and* whether the sequence of events over time is sufficient to support the existence of a close relationship (see Baudouin, Deslauriers and Moore, at Nos. 1-683

and 1-697). However, while such guideposts from the academic literature may help in sifting through the facts, the analysis of causation remains a context-based exercise which does not lend itself to legal theorizing (see D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at Nos. 2962-63). As the Court of Appeal stated in *Stellaire Construction Inc. v. Ciment Québec Inc.*, 2002 CanLII 35591 (Que.), at para. 39, it is up to the trier of fact to [TRANSLATION] “‘draw a line’, or identify a ‘breaking point’, between the consequences that flow directly and immediately from the fault and the others” (footnotes omitted). In doing so, a trial judge is entitled to great latitude (Baudoin, Jobin and Vézina, at No. 770).

[198] On appeal, given that causation essentially requires an assessment of facts, the trial judge’s findings are owed deference and cannot be disturbed absent a palpable and overriding error.

(2) Application to the Case at Bar

[199] In my view, the Court of Appeal should not have interfered with the trial judge’s conclusions regarding causation on the basis of the “distorting lens” metaphor (C.A. reasons, at para. 120). I am satisfied that there is no reviewable error in the finding that Mr. Salomon’s only fault — recommending Manulife and iVest — had no bearing on the respondents’ decisions to invest in Focus, and therefore on their losses. Granted, if palpable errors had been identified in the trial judge’s findings regarding *fault*, they might have tainted the causation analysis, which, in turn, might have affected the outcome of the case. However, no such errors have been identified,

and I see no other reason to disturb the trial judge's factual findings on causation. Even if it were assumed that Mr. Salomon committed a fault by recommending Triglobal and Mr. Papadopoulos, the fact remains that he was not involved in the respondents' decisions to invest in Focus. By then, the respondents were relying on their financial advisors, with whom they had developed their own relationship over a period of approximately three years. It was thus open to the trial judge to find that the fraud was the only true cause of the losses. This implies that Mr. Salomon's fault was too remote from the injury to be considered a *logical, direct and immediate* cause. For all intents and purposes, the chain of causation had been stretched beyond the breaking point.

(a) *The Recommendation of Triglobal and Mr. Papadopoulos*

[200] I cannot accept the Court of Appeal's conclusion that [TRANSLATION] "the [respondents] would never have invested their money with Triglobal had Mr. Salomon acted diligently and competently from the outset" (para. 121). As I explained above, there was no reviewable error in the trial judge's finding that the initial referral of the respondents to Triglobal and Mr. Papadopoulos (like the later expressions of confidence up until May 2007) was not wrongful (para. 302). Hence, independently of the causation issue, Mr. Salomon cannot be held liable with respect to the referral given that his conduct in making it was not wrongful.

[201] Even if it were assumed that Mr. Salomon committed a fault by recommending Triglobal and Mr. Papadopoulos, there would be no reviewable error

in the trial judge's finding that the only true cause of the losses was the fraud itself (paras. 215 and 318). In reaching this conclusion, I am not relying on the principle of *novus actus interveniens*, that is, the notion that an independent event may break the direct causal link between the fault and the injury (*Lacombe v. André*, [2003] R.J.Q. 720 (C.A.), at paras. 58-59). Rather, I would say that it was open to the trial judge to find, on the basis of her assessment of the evidence, that the recommendation of Triglobal and Mr. Papadopoulos was not close enough to the injury to qualify as a *logical, direct and immediate* cause.

[202] It bears repeating that, before investing in Focus, the respondents had over a period of nearly three years established their own "good" relationship with Triglobal and Mr. Papadopoulos (trial reasons, at paras. 211 and 288). It was only then that they made the decision to transfer their funds, and they did so without involving Mr. Salomon. Here is a short summary of the sequence of events:

- (a) In 2004, shortly after the initial referral by Mr. Salomon, Ms. Matte-Thompson invested \$1,245,000 (over 90 percent of her personal funds) in a legitimate and appropriate vehicle, Manulife, on the recommendation of both Mr. Salomon and Triglobal (trial reasons, at paras. 178-81 and 200).
- (b) At the time she made that investment, Ms. Matte-Thompson also filled out, directly with Triglobal, a client data form setting out her investment objectives (para. 181).

- (c) In the following months, she made the decision to transfer \$400,000 from Manulife to iVest. By that time, she was dealing directly with Triglobal, and Mr. Salomon was not consulted (trial reasons, at paras. 201-2).
- (d) In the fall of 2005, Ms. Matte-Thompson was “pleased” with her investments with Triglobal, so she decided — on the basis of her “good relation[ship]” with Mr. Papadopoulos — to invest the proceeds of the sale of 166’s assets with the firm (trial reasons, at para. 288; A.R., vol. 7, at pp. 2603-4).
- (e) In early 2006, Ms. Matte-Thompson, an “educated business woman”, transferred funds, both her own and 166’s, to Focus without consulting anyone outside Triglobal and without making any inquiries (trial reasons, at paras. 204-10 and 289).
- (f) In April 2006 and in the following months, when Ms. Matte-Thompson began expressing concerns about the investments in Focus and asked for Mr. Salomon’s opinion as a “friend” and “outside of business”, it was primarily Mr. Papadopoulos who reassured her (see, e.g., trial reasons, at paras. 228, 233, 238 and 247).

[203] The trial judge had to draw a line somewhere. And she came to the conclusion that the fraud was the only true cause — and therefore that Mr. Salomon’s recommendation of Triglobal and Mr. Papadopoulos was not a *logical, direct* and *immediate* cause — of the losses. By the time the respondents invested in Focus, they

had formed their own opinion on their financial advisors' competence and probity which was not dependent on Mr. Salomon's initial recommendation or his subsequent reassurances. Contrary to the suggestion made by the Court of Appeal and by my colleague, this is not tantamount to saying that the fraud itself constituted a *novus actus interveniens*. Rather, it is the result of the trial judge's careful examination of the sequence of events that led to the injury. Although one may disagree with her assessment, the fact remains that a direct causal link must be broken at some point. Otherwise, any lawyer who makes a wrongful referral would become an insurer of the recommended professionals' services for years to come — with no end in sight. I am not suggesting that a referring lawyer will never be liable for a recommended professional's faults. In the instant case, for instance, the outcome might have been different if the respondents had not over time developed their own independent relationship with their financial advisors. Put simply, this depends on the circumstances, and no hard and fast rule can be stated. In the instant case, the trial judge was in the best position to assess causation, and she found that the only true cause was the fraud. I see no ground for interfering with that finding.

[204] My colleague insists that the respondents were entitled to rely on Mr. Salomon's recommendation and his later reassurances because of their lawyer-client relationship and that their own "imprudence" — in deciding to transfer funds to Focus without consulting anyone and without making any inquiries — is therefore irrelevant (para. 90). This may sometimes be the case when a lawyer gives specific legal advice in his area of expertise, which the client cannot be expected to second-

guess. However, I cannot accept that such a principle applies to the recommendation of another professional. The respondents could not assume that Triglobal and Mr. Padapopoulos would *always* conduct themselves as competent and prudent financial advisors and that all of their advice would be appropriate simply because Mr. Salomon expressed confidence in them.

(b) *The Recommendation of iVest*

[205] I will now turn to the faults that the trial judge did identify, which related solely to Mr. Salomon's specific recommendation of the Manulife and iVest funds. Yet, as we know, the respondents' losses stemmed mostly from their investments in Focus, a fund which Mr. Salomon had not recommended, about which he had not been consulted, and that he had had no duty to verify. More specifically, the respondents' decision to invest in Focus was taken by Ms. Matte-Thompson without any input from Mr. Salomon. As the trial judge explained:

Even if the Court concludes that [Mr.] Salomon was negligent when he reassured Ms. Thompson with respect to the iVest investments, such negligence does not have any causal link to the loss she suffered following her investments with Focus. The evidence shows that [Mr.] Salomon was never involved in the decision to transfer the investments into the Focus funds. He was not consulted and never provided any recommendations with regard to the security offered by the investments made with Focus.

At the time the decision was taken to transfer Ms. Thompson's personal investments in Focus, she dealt directly with the financial advisor and most of the time [Mr.] Salomon was not involved. The evidence shows that by then, Papadopoulos had established a good relationship with Ms. Thompson directly and she did not discuss the investment proposals with [Mr.] Salomon.

...

... [T]he evidence shows that when the decision to invest 166376's money through Triglobal was made, Ms. Thompson had developed by then a good relation with Papadopoulos. She did not expect [Mr.] Salomon to provide her with investment strategies because she did not ask him to attend the meeting scheduled to discuss how the proceeds of the real estate sale should be invested.

Furthermore, when Ms. Thompson received the wire instruction, she testified that she realized that the money was to be transferred to an offshore fund named Focus. Even though she was sceptical, Ms. Thompson, who was an educated business woman, transferred the funds without consulting anyone, including [Mr.] Salomon. The Court is of the view that she is the one who made an imprudent decision at the time. [Emphasis added; footnote omitted; paras. 210-11 and 288-89.]

[206] I am satisfied that there is no palpable error in these findings. This does not amount to “blaming the victims” as the respondents put it (R.F., at para. 97). Rather, the trial judge found that Mr. Salomon could not be held liable for investment decisions he had not taken part in, at least not on the basis that he had recommended *another* investment vehicle three years earlier. Yes, the record shows that he believed Focus to be “less risky” than iVest (C.A. reasons, at paras. 131-32), but he did not *say* so to the respondents. In short, the trial judge did not see how giving wrongful investment advice regarding iVest could be a direct cause of losses occurring years later in Focus.

[207] More specifically, the trial judge rejected the claim — espoused by the Court of Appeal (at para. 130) and by my colleague (at para. 87) — that Mr. Salomon's recommendation of Manulife and iVest induced an erroneous “climate of

confidence” in all of Triglobal’s products: “The Court fails to see how [Mr.] Salomon’s reassurance in 2003 could lead to a general responsibility towards all the investment decisions taken without him” (paras. 212-13). While it is true that Mr. Salomon’s reassurances with respect to iVest were not strictly limited to 2003, the fact remains that there was no reviewable error in that broad conclusion.

[208] Simply put, there is no evidence that Mr. Salomon’s recommendation of iVest caused the respondents to invest in Focus. While my colleague asserts that Ms. Matte-Thompson relied on Mr. Salomon’s “professional judgment concerning the investments she was contemplating” (para. 87), he cannot — nor could the Court of Appeal before him — pinpoint any oral or documentary evidence showing that the specific recommendation of iVest induced or encouraged the respondents to invest in Focus or, more generally, with Triglobal. In fact, it seems that Mr. Salomon’s recommendation was not determinative even of Ms. Matte-Thompson’s decision to invest in iVest itself (trial reasons, at para. 51).

[209] At most, the Court of Appeal pointed to a passage from Ms. Matte-Thompson’s cross-examination in which she explained that her “total mindset was that [she] was investing with Triglobal. . . . Whether the heading is Focus, whether the heading is iVest, whether the heading is Manulife, it was Triglobal” (C.A. reasons, at para. 76). In my view, this passage suggests that the key recommendation, the one that mattered to her, was the initial recommendation of Triglobal itself. But, as I explained above, that recommendation was neither wrongful nor close enough to

have directly caused the losses. By contrast, Mr. Salomon's recommendation of iVest seemed to have been of secondary importance to Ms. Matte-Thompson.

[210] Overall, my understanding is that the Court of Appeal merely assumed, as does my colleague, that there was a direct causal link between Mr. Salomon's fault concerning iVest and the respondents' losses in Focus (C.A. reasons, at paras. 74, 75 and 140). Accordingly, I cannot accept that the trial judge's rejection of the "climate of confidence" theory is grounded in a palpable and overriding error. Once again, all I see is a disagreement with the trial judge's assessment of the evidence and impermissible interference with her inference-drawing process.

[211] It was also open to the trial judge to reject the claim that Mr. Salomon's failure to verify the propriety of investing in iVest had directly caused the losses in Focus (C.A. reasons, at paras. 117-19; Gascon J.'s reasons, at paras. 88-89). As I understand it, the idea here is that, had Mr. Salomon conducted due diligence and warned the respondents that offshore hedge funds such as iVest were not appropriate investment vehicles for the preservation of capital, the respondents would have doubted the competence of Triglobal and looked for other — presumably more trustworthy — financial advisors. For one thing, this view does not account for the facts that Mr. Salomon was not even qualified to provide investment advice and that it was not his role to provide such advice. Perhaps more importantly, such a finding would amount to substituting mere speculation for evidence of an actual direct causal link (see *Waxman*, at para. 306). We do not know what might have happened had Mr.

Salomon criticized Triglobal's iVest proposal. Triglobal might well have responded by proposing other investment options, which the respondents might have accepted. In this regard, it should be borne in mind that Ms. Matte-Thompson initially invested her largest amounts in Manulife, another product recommended by Triglobal which was an appropriate investment vehicle for her and was not part of the fraud (trial reasons, at paras. 51, 200 and 208-9). In short, the trial judge was certainly not required to draw the inference that Mr. Salomon's failure to perform due diligence concerning iVest had *directly caused* the respondents' losses.

(c) *Other Alleged Faults*

[212] I would like to add a quick word on the duties of loyalty and confidentiality. Even if it were assumed that Mr. Salomon committed faults with respect to them, I note that the Court of Appeal did not — nor does my colleague — point to any evidence of a causal link between such faults and the respondents' losses. Put simply, it is unclear how the alleged breaches of the duties of loyalty and confidentiality — such as Mr. Salomon's sharing of emails from the respondents with Mr. Papadopoulos — might have caused the losses. Yet proving breaches of a lawyer's professional duties does not suffice to establish civil liability in the absence of a causal link to an injury (see by analogy *Côté*, at para. 18; Baudouin, Deslauriers and Moore, at Nos. 1-666 and 2-143).

[213] Moreover, as I have mentioned a number of times in these reasons, if I were to conclude that Mr. Salomon did commit additional faults related to his duty to

advise and his duties of loyalty and confidentiality *after* he had become aware of the May 2007 *La Presse Affaires* article, the outcome would be the same. The trial judge found that, on a balance of probabilities, the funds were no longer recoverable by that time. This inference is based on the fact that, by June 2007, the respondents were already asking for a partial redemption of the funds, but to no avail (trial reasons, at paras. 312-13). Hence, any faults occurring after that date had no consequence on the losses. Such finding of fact is entitled to deference.

(d) *Conclusion on Causation*

[214] To sum up, I am satisfied that there is no reviewable error in the trial judge's findings on causation. The Court of Appeal's intervention was based on its preferred "global" approach to Mr. Salomon's conduct, which led it to completely reassess the evidence with respect both to potential faults and to their causal link to the respondents' losses. A difference of perspective — a preferred "lens" — is not enough to justify an appeal court's intervention in a trial judge's findings. It was open to the trial judge in this case to find that Mr. Salomon's actual faults — the recommendation of Manulife and iVest — had not caused the losses, at least not directly, given that the respondents had not relied on his recommendations when they invested in Focus. Likewise, even if it were assumed that the recommendation of Triglobal and Mr. Papadopoulos constituted a fault, the trial judge was entitled to find, on the facts of the case, that the only true cause of the losses was the fraud itself.

IV. Conclusion

[215] There is no doubt that lawyers should refrain from recommending other professionals lightly — especially given the trust and confidence they themselves may inspire in their clients. This does not mean, however, that the principles of civil liability should be relaxed so as to turn referring lawyers into guarantors of the recommended professionals. While I am sympathetic to the predicament in which the respondents find themselves, I am not convinced that Mr. Salomon is liable for their losses. Most importantly, I am satisfied that the Court of Appeal did not identify reviewable errors in the trial judgment. Rather, it erroneously reweighed the evidence as a whole simply because it preferred to look at the case through a different “lens”. Bearing in mind that the trial process must be afforded deference, this Court must intervene to restore the trial judge’s findings. I would therefore allow the appeal with costs in this Court and in the courts below.

Appeal dismissed with costs, CÔTÉ J. dissenting.

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