Translated from the original French

9085-4886 Québec inc. c. Bank of Montreal **2019 QCCA 1301**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-027461-185
(500-06-000549-101)

DATE: July 25, 2019

CORAM: THE HONOURABLE JEAN BOUCHARD, J.A.
GENEVIÈVE MARCOTTE, J.A.
GENEVIÈVE COTNAM, J.A.

9085-4886 QUÉBEC INC.
APPELLANT – Plaintiff
v.

BANK OF MONTREAL
BANK OF NOVA SCOTIA
CANADIAN IMPERIAL BANK OF COMMERCE
ROYAL BANK OF CANADA
TORONTO-DOMINION BANK
RESPONDENTS – Defendants

JUDGMENT

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[1] The appellant appeals from a judgment rendered on February 22, 2018, by the Superior Court, District of Montreal (the Honourable Chantal Corriveau),[1] authorizing it to institute a class action against the respondents while refusing to allow it to submit the

1 *9085-4886 inc. c. Bank of Montreal*, 2018 QCCS 3730.

questions alleged therein concerning the application of sections 45 and 49 of the *Competition Act*[2] and section 234 of the *Consumer Protection Act*.[3]

[2] For the reasons of Bouchard, J.A., with which Marcotte and Cotnam, JJ.A. agree, **THE COURT**:

[3] **ALLOWS** the appeal in part;

[4] **REVERSES** the judgment of the Superior Court in part;

[5] **AUTHORIZES** the appellant to submit the questions concerning the application of sections 45 and 49 of the *Competition Act* to the Superior Court;

[6] **AMENDS** subparagraph 138(3) of the judgment so that it reads as follows:

> 3) Did the defendants' conduct violate section 45 of the *Competition Act*, as worded until March 12, 2010, and after that date, or section 49 of the Act, during the period covered by the class action?

[7] The whole with legal costs.

JEAN BOUCHARD, J.A.

GENEVIÈVE MARCOTTE, J.A.

GENEVIÈVE COTNAM, J.A.

2 R.S.C. 1985, c. C-34.
3 CQLR, c. P-40.1.

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For the Respondents

Date of hearing: May 8, 2019

REASONS OF BOUCHARD, J.A.

INTRODUCTION

[8] The appellant operates a restaurant. It allows its clients to pay with Visa and MasterCard credit cards. This means that it must pay fees, which are deducted from the amount paid by the client.

[9] The appellant, who is of the view that these fees are too high, was authorized to institute a class action against the respondents, which it alleges has conspired to maintain these fees at anti-competitive levels.[4]

[10] It was also authorized to submit certain questions of fact and law,[5] except for those concerning the application of sections 45 and 49 of the *Competition Act*[6] and section 234 of the *Consumer Protection Act*,[7] which the trial judge found disclosed no valid cause of action given the lack of factual basis in the proceeding.[8] It is this last conclusion that the appellant appeals. It submits that the grounds that were struck from its class action satisfy the requirements set out in article 575(2) C.C.P., that is, "the facts alleged appear to justify the conclusions sought."

[11] That being said, and to properly understand the remarks that follow, the functioning of the credit card payment system operated by the banks should first be set out.[9]

PAYMENT BY CREDIT CARD

[12] The system requires the participation of five players:

4 *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at para. 136.
5 *Ibid*. at para. 138.
6 R.S.C. 1985, c. C-34.
7 CQLR, c. P-40.1.
8 *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at paras. 96 to 103.
9 Nicole L'Heureux & Marc Lacoursière, *Droit bancaire*, 5th ed. (Montreal: Yvon Blais, 2017) at 741, No. 1002.

- the networks: the Visa and MasterCard networks provide clearing and settlement services;

- the issuers: the banks authorized to issue Visa or MasterCard credit cards to cardholders as payment instruments;

- the acquirers: the entities that play the pivotal role in the payment transaction, providing the merchant with the technology and hardware necessary to accept credit cards;

- the cardholders: the clients or consumers who have and use credit cards;

- the merchants: who accept credit cards as a method of payment for goods or services rendered.[10]

[13] As stated by authors Nicole L'Heureux and Marc Lacoursière, while credit cards are payment instruments for the cardholders, they are also the undertakings of the issuers towards the merchants. This is so because the payment process is such that a buyer does not pay a merchant directly; rather, payment is made by the issuer, whom the buyer has undertaken to reimburse:[11]

> [TRANSLATION]
>
> **1004. *Payment instrument*** – Credit cards allow cardholders to purchase goods or obtain services, for which payment is not made immediately by the buyer but is deferred to a later date. It is not the buyer who pays the merchant directly, but rather the issuer, whom the buyer has undertaken to reimburse. Credit cards are thus used as payment instruments in regard to merchants. …
>
> Credit cards allow merchants to obtain the proceeds of their sales not from the hands of the buyer/cardholder, but from the hands of the issuer. How should the issuer's undertaking be explained? The issuer's payment is a prepayment, a cash advance, which it must recover from the hands of its client on behalf of the seller or supplier of goods and services. The issuer therefore plays the role of intermediary between the merchant and the cardholder. The cardholder, as a result of the contract between the issuer and the merchant, does not pay immediately for his or her purchase. The cardholder has credit from the issuer, but also from the merchant, who participates in the transaction.

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10 *Ibid.* at 747–748, No. 1009; see also *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at paras. 9 to 20.

11 N. L'Heureux & M. Lacoursière, *supra* note 9 at 744, No. 1004 and at 758, No. 1022. It should be noted, however, that there are cases where the issuer may refuse to pay: missing signature, the cardholder's dissatisfaction with the goods or services, failure to seek authorization for a bill exceeding the merchant's limit, duplicate claims, fraud, expired card, etc. See N. L'Heureux & M. Lacoursière, *supra* note 9 at 757, No. 1022 and at 765, No. 1034.

[Emphasis added.]

[14] In addition, each time a consumer uses his or her credit card to purchase a good or service, the merchant must pay a certain percentage to the acquirer as a "card acceptance fee." The acquirer then deposits into the merchant's account the amount billed to the cardholder less the card acceptance fee (or "merchant discount fee"), which may be divided into three categories: network fees paid to Visa or MasterCard, acquirer service fees and interchange fees paid to the issuing bank.[12]

[15] These last fees, which represent 80% of the card acceptance fee, are at the heart of this class action. According to the appellant, they are artificially maintained at a high percentage by the respondents.

[16] That being said, it should be noted that these fees result from an agreement between the acquirer and the merchant, although they serve to finance the various services offered by the issuer. In this regard, it is again useful to cite authors L'Heureux and Lacoursière:[13]

> [TRANSLATION]
>
> **1014.** ***Interchange fees*** **–** … Concretely, the interchange fee (or commission) represents an amount determined by the network and expressed as a percentage that the acquirer (or the merchant's bank) must remit to the issuer and that is subsequently paid by the merchant. These fees help finance various services offered by the issuer, like the grace period (payment with no interest), losses on bad debts, fraud prevention, the various steps involved in processing transactions (terminal rental, authorization, verification), insurance services, the acquirer's profit margin, and loyalty programs.
>
> [Emphasis added.]

[17] There is no doubt that it is a complex system, in which all the participants are interrelated.[14]

[18] Let us now return to the case before us.

PROCEEDINGS

[19] On December 17, 2010, the appellant filed an application for authorization to bring a class action against the Visa and MasterCard networks. It was subsequently

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12 *Ibid.* at 749, No. 1011.
13 *Ibid.* at 749–750, No. 1014.
14 *Ibid.* at 749, No. 1010.

authorized to amend its application to add several banks, i.e., the respondents, as defendants.[15] Then, on June 13, 2012, the trial judge, with the consent of all parties, suspended the action undertaken in Quebec because of a similar action instituted in British Columbia. According to the judge: [TRANSLATION] "It is undeniable that the judgment to be rendered in British Columbia will be relevant to the possible continuation of this action before the Quebec courts."[16]

[20] Speaking of the action brought in British Columbia, it should be noted that the appellant's argument based on sections 45 and 49 of the *Competition Act* was dismissed twice by the Court of Appeal of that province on the ground that the facts alleged disclosed no cause of action.[17] It also appears that the application for leave to appeal to the Supreme Court was dismissed.[18] It is not surprising that the respondents now object to resuming a debate in Quebec that seems to have been definitively settled, considering that the credit card networks and relevant contracts are the same throughout the country.

THE TRIAL JUDGMENT

[21] The judge first noted that the respondents did not object to granting authorization for the allegations of unlawful agreements that violated the former version of section 45 of the *Competition Act*[19] and article 1457 C.C.Q.[20] She then considered the weight to be given to the British Columbia judgments, concluding that the application for authorization should be assessed in light of the applicable principles of Quebec law,[21] even if, in her view, the debate and the arguments are the same.[22]

Conspiracy	**Complot**
45 (1) Every one who conspires, combines, agrees or arranges with another person	**45 (1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une

15 *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at para. 6.
16 *9085-4886 Québec inc. c. Bank of Montreal*, 2012 QCCS 2572 at para. 23.
17 *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 108–116; *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2017 BCCA 202 at paras. 32, 40 and 41.
18 *Coburn and Watson's Metropolitan Home v. BMO Financial Group et al*., leave to appeal to SCC refused, 37709 (8 February 2018).
19 As worded until March 12, 2010:
It should be noted that the judge referred to the date March 10, 2012. That was an error. The *Budget Implementation Act, 2009*, S.C. 2009, c. 2, received royal assent on March 12, 2009. The new section 45 set out in that Act came into force on year after its assent (on March 12, 2010) pursuant to s. 444 of the *Budget Implementation Act, 2009*.
20 *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at para. 37.
21 *Ibid.* at para. 59.
22 *Ibid.* at para. 57.

amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

(*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;

(*d*) to otherwise restrain or injure competition unduly,

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[…]

[22] Before we continue to review the judge's reasons, it is worth reproducing the following excerpts from sections 45[23] and 49 of the *Competition Act*, and section 234 of the *Consumer Protection Act*:

Competition Act

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à

[23] In force since March 12, 2010: *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 444.

respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

…

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 $, ou l'une de ces peines.

[…]

Agreements or arrangements of federal financial institutions

49 (1) Subject to subsection (2), every federal financial institution that makes an agreement or arrangement with another federal financial institution with respect to

(a) the rate of interest on a deposit,

(b) the rate of interest or the charges on a loan,

(c) the amount or kind of any charge for a service provided to a customer,

Accords bancaires fixant les intérêts, etc.

49 (1) Sous réserve du paragraphe (2), toute institution financière fédérale qui conclut avec une autre institution financière fédérale un accord ou arrangement relatif, selon le cas:

a) au taux d'intérêts sur un dépôt,

b) au taux d'intérêts ou aux frais sur un prêt,

c) au montant ou type de tous frais réclamés pour un service fourni à un client,

(d) the amount or kind of a loan to a customer,	**d)** au montant ou type du prêt consenti à un client,
(e) the kind of service to be provided to a customer, or	**e)** au type de service qui doit être fourni à un client,
(f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld,	**f)** à la personne ou aux catégories de personnes auxquelles un prêt sera consenti ou un autre service fourni, ou auxquelles il sera refusé un prêt ou autre service,
and every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence and liable to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding five years or to both.	et tout administrateur, dirigeant ou employé de l'institution financière fédérale qui sciemment conclut un tel accord ou arrangement au nom de l'institution financière fédérale commet un acte criminel et encourt une amende maximale de dix millions de dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

[…]

Consumer Protection Act

234. No person may refuse to enter into an agreement with a merchant, or terminate an agreement binding between him and a merchant, by reason of the fact that such merchant grants a rebate to the consumer who pays him cash or by negotiable instrument.	**234.** Nul ne peut refuser de conclure une entente avec un commerçant ou mettre fin à une entente qui le lie à un commerçant en raison du fait que ce commerçant accorde un rabais à un consommateur qui le paie en argent comptant ou par effet de commerce.

[23] It is also worth reproducing paragraphs 6.0.1, 16.0.2 and 16.1.1 of the action brought by the appellant with respect to section 45 of the *Competition Act*:

> 6.0.1. Contrary to s. 45 of the *Competition Act*, the Respondents conspired, agreed, and/or arranged to fix, maintain, increase or control Interchange Fees. The Interchange Fee is a charge of a service provided to the Class by the Issuing Banks, being the provision of credit card network services and in particular the credit card and access to the cardholder, and the provision of a payment guarantee from the Issuing Banks to the merchants;

> 16.0.2 Within each credit card network, the Issuing Banks compete with each other with respect to issuing credit cards to cardholders, and but for the alleged conspiracy, the Issuing Banks would compete with each other with respect to merchants by reducing Interchange Fees in order to increase and maintain their merchant market share. The Default Interchange Rule and the Merchant Restraints, as described below, eliminate competition among the Issuing Banks in relation to Interchange Fees and allow the Issuing Banks to profit from supracompetitive Interchange Fees;
>
> 16.1.1. Credit card network services are supplied to merchants by the networks, the Issuing Banks, and the Acquirers. The networks provide the network infrastructure, the Issuing Banks issue credit cards to cardholders and provide a payment guarantee to merchants …, and the Acquirers provide point-of-sale services (Exhibit R-6);
>
> [Emphasis added.]

[24] The judge first concluded that these allegations did not support the appellant's submission that the interchange fee is a charge for a service provided to merchants by the banks that issue credit cards.[24]

[25] In the judge's view, the issuer lends the consumer the funds to make payments using his or her card, up to the authorized credit limit. The card is therefore a payment instrument. The merchant benefits from the payment it receives. This payment is not a service rendered to the merchant, however, but the performance of an obligation by the buyer. The acquirers make the payment system available to the merchants, in exchange for a card acceptance fee ("merchant discount fee"). The interchange fee is paid by the acquirer to the card issuer. Thus, contrary to what the appellant alleges, the card issuers are not in competition to sell "payment guarantees" to merchants in exchange for fees. The judge therefore concluded that this statement could not be sustained.[25]

[26] The judge also found that the same was true in regard to section 49 of the *Competition Act*, which, like section 45, involves a conspiracy related to a service or product provided to a customer, which, in her view, is not the case here.[26]

[27] Finally, because the cause of action regarding section 234 of the *Consumer Protection Act* is not alleged anywhere in the proceedings instituted by the appellant,

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24 *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at para. 83.
25 *Ibid.* at paras. 84–97.
26 *Ibid.* at paras. 101–103.

the judge had no difficulty rejecting it, especially since, in her view, there is no connection between that provision and the underlying facts of this case.[27]

THE APPELLATE STANDARD OF REVIEW

[28] Article 575 C.C.P., formerly 1003 C.C.P., sets out four cumulative conditions[28] for the authorization of a class action:

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that	**575.** Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:
(1) the claims of the members of the class raise identical, similar or related issues of law or fact;	1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;
(2) the facts alleged appear to justify the conclusions sought;	2° les faits allégués paraissent justifier les conclusions recherchées;
(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and	3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;
(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.	4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[29] The general principles underlying the assessment of these different requirements are well known. The authorization procedure is a filtering mechanism that serves merely to set aside frivolous applications.[29] The threshold of evidence required is low.[30] It is

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27 *Ibid.* at paras. 111–115.

28 *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3, 2014 SCC 1 at paras. 2 and 35; *Baratto c. Merck Canada inc*., 2018 QCCA 1240 at para. 45, leave to appeal to SCC refused, 38338 (28 March 2019).

29 *Infineon Technologies AG v. Option Consommateurs*, [2013] 3 S.C.R. 600, 2013 SCC 59 at para. 61.

said to be a burden of demonstration.[31] In short, the action will be authorized if the applicant has an arguable case in light of the facts and the applicable law.[32]

[30] Moreover, the judge hearing an application for authorization has significant discretion.[33] This Court has reiterated on several occasions that it must show deference to the authorizing judge's decision.[34] Only an error of law or a clearly unfounded assessment of the authorization requirements will justify this Court's intervention.[35]

ANALYSIS

[31] Although the trial judge said that the application for authorization should be assessed in light of the applicable rules of Quebec law,[36] she also relied on the second judgment rendered by the British Columbia Court of Appeal to conclude that there was no valid cause of action under the new version of section 45 of the *Competition Act*.[37] That is what leads the appellant to say that the judge committed the first error, because, it alleges, the burden of proof at the authorization stage is less onerous in Quebec than in British Columbia.

[32] That argument cannot be accepted. Here is why.

[33] While some of the authorization requirements set out in section 4 of the *Class Proceedings Act* (C.P.A.)[38] are distinguishable from those set out in article 575 C.C.P., the requirement that "the facts alleged appear to justify the conclusions sought" is similar to paragraph 4(1)(a) of the C.P.A.:

> **4.** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
> (b) …

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30 *Ibid.* at para. 59.
31 *Ibid.* at para. 61.
32 *Ibid.* at para. 65. For a recent overview of these principles, see *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at paras. 56–62.
33 *Vivendi Canada Inc. v. Dell'Aniello*, *supra* note 28 at para. 33.
34 *Ibid*. at para. 34
35 *Ibid*. See also: *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra* note 32 at paras. 10–12.
36 *9085-4886 Québec inc. c. Bank of Montréal*, *supra* note 1 at para. 59.
37 *Ibid*. at paras. 91–97.
38 *Class Proceedings Act*, RSBC, 1996, c. 50.

[34] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, Rothstein, J. explained what this requirement involves:[39]

> [63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta Elders*, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158, at para. 25).
>
> [Emphasis added.]

[35] The British Columbia Court of Appeal added the following in a recent judgment:[40]

> [20] The evidentiary burden is not an onerous one. The plaintiff need show only a "minimum evidentiary basis": *Hollick* at paras. 24-25; *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312 at para. 91, (leave to appeal to SCC refused). The court is not to make a determination of the merits of the action, recognizing that it is ill-equipped to resolve conflicting facts and evidence at the certification stage. The focus is on the form of the action to determine whether the action can appropriately go forward as a class proceeding: Hollick at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys Consultants v. Microsoft*]; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 65, leave to appeal ref'd [2010] S.C.C.A. No. 32 [*Pro-Sys Consultants v. Infineon*].
>
> [Emphasis added.]

[36] This requirement is very similar to article 575(2) C.C.P., which will be considered met if the facts alleged in the application present an arguable case in light of the facts and the applicable law.[41]

[37] Because the British Columbia Court of Appeal refused to authorize the class action on the basis of a similar requirement, it strikes me as incorrect to conclude that the judge applied a more onerous requirement than the one set out in article 575(2) C.C.P. and committed an error.

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39 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, 2013 SCC 57 at para. 63.
40 *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 20.
41 *Infineon Technologies AG v. Option consommateurs*, *supra* note 29 at para. 65.

[38] The appellant essentially submits that the facts it alleges support an arguable case, in particular under sections 45 and 49 of the *Competition Act*. In its view, the judge erred in rejecting at the outset the possibility that the issuing banks could provide a service to merchants in the form of a payment guarantee and fix the interchange fees.

[39] I will begin by dealing with section 45.

[40] As we have seen, for the judge, a credit card is a payment instrument for the benefit of its holder. She categorically refused to accept that it could also constitute a payment guarantee for the merchant.[42] In so doing, she relied on, *inter alia*, the second judgment rendered by the British Columbia Court of Appeal.[43] She forgot to note, however, that, contrary to this case, it was not alleged in the British Columbia proceedings that the banks were offering the merchants a payment guarantee service:[44]

> [27] First, the proposed amended pleading does not, at any point, state that the product provided to merchants is a "payment guarantee". Those words appear in the plaintiff's factum:
>
> > 28 (a) … the Issuing Banks guarantee payment to the merchant, Acquirers and Network, net only of their Interchange Fees. The Issuing Banks are therefore responsible for the receivables…The Issuing Banks deliver a payment guarantee to merchants (part of the "credit card network services" provided by the Issuing Banks to the merchants) ...

[41] In my view, to the extent that the appellant alleges that the issuing banks offer a payment guarantee, it seems premature at the authorization stage to exclude the possibility that a credit card may constitute such a guarantee for the merchants because the holder uses it as a credit instrument. One does not necessarily exclude the other.

[42] Authors L'Heureux and Lacoursière, cited above,[45] when explaining the functioning of the credit card payment system, clearly indicate that credit cards also constitute an undertaking by the issuer towards the merchant:[46]

> [TRANSLATION]
>
> The merchant undertakes to provide the goods and services to any holder of a valid card approved by the system, that is, a card that has not been revoked and

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42 *9085-4886 Québec inc. c. Bank of* Montreal, *supra* note 1 at paras. 82–96.
43 *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, *supra* note 17.
44 *Ibid.* at para. 27.
45 Above at para. 6 of these reasons.
46 N. L'Heureux & M. Lacoursière, *supra* note 9 at 764, No. 1034.

> that is not expired. It agrees to provide the goods and services without requiring a cash payment from the buyer, as a result of the prior agreement binding it to the issuer. The agreement provides for the reimbursement of all valid invoices issued in connection with the credit card for goods and services provided, which reimbursement is deposited by the merchant with its banking institution, less a determined discount rate. The issuer is able to give the merchant this undertaking because of the agreement concluded with the cardholder. The merchant thus receives a guarantee that it will obtain the funds quickly, regardless of how much time the client takes to pay his or her debt to the issuer.
>
> [Emphasis added; references omitted.]

[43] Taking the facts alleged as true, as they should be, and without excluding the possibility at this stage that the issuing banks could offer merchants a payment guarantee, the question arises as to whether the respondent banks conspired together to fix the interchange fees charged to merchants in exchange for this service. That is what the appellant alleges, but the respondents dispute this, arguing that they could not have conspired in this way because it is the acquirers, pursuant to a contract for services with the merchants, who fix and charge the interchange fees.

[44] In my view, it is not that simple, at least at this stage of the proceedings. First, the appellant alleges that some of the respondent banks themselves act as acquirers or control acquirers:

> 16.4 Certain Issuing Banks, such as … CIBC, Settled Respondent Desjardins, RBC, and TD, and all Acquirers participate in both credit card networks. Certain Issuing Banks, including … BMO, Settled Respondent Desjardins, RBC, and TD are also Acquires or own large stakes in Acquirers, and in some cases, control the operations of those Acquirers. TD and Settled Respondent Desjardins are both Issuing Banks and Acquirers. BMO and RBC own and control Moneris as partners in a joint investment. CIBC and National have marketing alliances with Global, the whole as appears more fully from a copy of an extract from Respondent Visa's website at www.visa.ca and from a copy of an extract from Respondent MasterCard's website at www.mastercard.ca, produces herein *en liasse* as **Exhibit R-8**.

[45] Second, as noted by authors L'Heureux and Lacoursière, interchange fees help finance various services offered by the issuing banks.[47] What will the evidence on the merits reveal in this regard? I do not know. The fact remains that, at this stage, I do not think it is frivolous to claim that the banks, themselves or through intermediary legal persons, could have entered into one or more agreements among themselves or among themselves and others to fix the interchange fees charged to merchants.

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47 *Ibid.* at 750, No. 1014.

[46] The respondents object to this way of looking at things. In their view, to invoke section 45 of the *Competition Act*, the appellant would have to allege that the respondent banks alone fix the interchange fees among themselves.

[47] I will reiterate the appellant's basic theory. It alleges that there are two separate but related conspiracies among the five players involved. The first involves Visa, the issuing banks and the acquirers, while the second involves MasterCard, the issuing banks and the acquirers.

[48] It is alleged that for each of the conspiracies, the issuing banks entered into anti-competitive agreements among themselves and with the networks in regard to the interchange fees paid to them. The acquirers, for their part, are alleged to have entered into anti-competitive agreements among themselves, the issuing banks and the networks concerning the network operating rules. Pursuant to these agreements, the acquirers subsequently entered into service agreements with the merchants, which agreements contain anti-competitive conditions, including compliance with the network rules and the payment of unreasonable acceptance fees.

[49] The British Columbia Court of Appeal rejected a similar argument as follows:[48]

> [32] In summary, even if the pleading included a "payment guarantee" as a product, the competitor banks are not alleged to fix the Interchange Fee for that product on their own. Rather, the pleading alleges that it is the combined effect of agreements between and among issuers, networks and acquirers, and in particular the Network Rules and Merchant Restraints, that constrains competition and compels merchants to pay the supra-competitive Interchange Fee. In short, the pleading is deficient as far as establishing a conspiracy between issuing banks to fix the price of a service and, accordingly, does not disclose a cause of action for breach of current s. 45.
>
> [Emphasis added.]

[50] In that case, the Court understood that because fixing the interchange fee involves other players and not only the issuing banks, there cannot be a conspiracy within the meaning of section 45 of the *Competition Act*.

[51] With respect, I do not think we can be so unequivocal. The *Competitor Collaboration Guidelines*[49] in regard to section 45 of the *Competition Act* state:

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48 *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, *supra* note 17 at para. 32.

49 Competition Bureau Canada, *Competitor Collaboration Guidelines*, May 9, 2009, online: <https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/02987.html>, section 2.3(a).

> Where an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under section 45.

[52] *A priori*, I therefore see no reason to set aside the application of section 45 because parties other than the banks are alleged to have also participated in an agreement or arrangement. All the players involved are interrelated in one way or another. In light of the allegations made in the proceedings, we cannot exclude, at this stage, the possibility that the issuing banks may have participated in an anti-competitive agreement or arrangement among themselves. In short, in view of the stage of the file, I believe the judge erred in not referring the analysis of this issue to the hearing on the merits.

* * * * *

[53] The reason given by the judge for also setting aside section 49 of the *Competition Act* is the same as that underlying her decision to set aside section 45: the issuing banks do not provide a service to the merchants.[50] Given the opposite conclusion I have reached, and also because the wording of section 49 is different than that of section 45, it is appropriate to repeat the analysis.

[54] It is appropriate to begin by citing paragraph 45(6)(b) of the *Competition Act*, which excludes conspiracies, agreements or arrangements among banks from the application of section 45:

Conspiracy	**Complot**
45 (1) …	**45 (1)** […]
Exception	**Exception**
(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement	**(6)** Le paragraphe (1) ne s'applique pas au complot, à l'accord ou à l'arrangement :
(*a*) is entered into only by parties each of which is, in respect of every one of the others, an affiliate; or	a) intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;
(*b*) is between federal financial institutions and is described in	b) conclu entre des institutions financières fédérales et visé au paragraphe 49(1).

[50] *9085-4886 Québec inc. c. Bank of Montreal*, *supra* note 1 at paras. 99–103.

subsection 49(1).

[…]

[55] Section 49 of the *Competition Act* thus specifically concerns agreements among financial institutions:

Agreements or arrangements of federal financial institutions	**Accords bancaires fixant les intérêts, etc.**
49. (1) Subject to subsection (2), every federal financial institution that makes an agreement or arrangement with another federal financial institution with respect to	**49. (1)** Sous réserve du paragraphe (2), toute institution financière fédérale qui conclut avec une autre institution financière fédérale un accord ou arrangement relatif, selon le cas :
(*a*) the rate of interest on a deposit,	a) au taux d'intérêts sur un dépôt,
(*b*) the rate of interest or the charges on a loan,	b) au taux d'intérêts ou aux frais sur un prêt,
(*c*) the amount or kind of any charge for a service provided to a customer,	c) au montant ou type de tous frais réclamés pour un service fourni à un client,
(*d*) the amount or kind of a loan to a customer,	d) au montant ou type du prêt consenti à un client,
(*e*) the kind of service to be provided to a customer, or	e) au type de service qui doit être fourni à un client,
(*f*) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld,	f) à la personne ou aux catégories de personnes auxquelles un prêt sera consenti ou un autre service fourni, ou auxquelles il sera refusé un prêt ou autre service,
and every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable	et tout administrateur, dirigeant ou employé de l'institution financière fédérale qui sciemment conclut un tel accord ou arrangement au nom de l'institution financière fédérale commet un acte criminel et encourt

offence and liable to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding five years or to both.	une amende maximale de dix millions de dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.
…	[…]
Definition of *federal financial institution*	**Définition de *institution financière fédérale***
(3) In this section and section 45, federal financial institution means a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act, a company to which the Trust and Loan Companies Act applies or a company or society to which the Insurance Companies Act applies.	(3) Au présent article et à l'article 45, institution financière fédérale s'entend d'une banque, d'une banque étrangère autorisée, au sens de l'article 2 de la *Loi sur les banques*, d'une société régie par la *Loi sur les sociétés de fiducie et de prêt* ou d'une société ou société de secours régie par la *Loi sur les sociétés d'assurances*.
	[…]

[56] The Competition Bureau's guidelines provide that where the agreement is among federal institutions, it will be assessed under section and not section 45:

> **1.2 Determining Between Strategic Alliance / Conspiracy Provisions or Other Provisions of the Act**
>
> As an initial step, the Bureau will determine whether to assess the collaboration between competitors under the conspiracy and civil provisions found in sections 45 and 90.1 of the Act or, alternatively, whether the collaboration should be assessed under other provisions of the Act, such as the merger provision in section 92. The Bureau applies the following principles in making this determination:
>
> …
>
> b. **Agreements Between Federal Financial Institutions:** Where the agreement is between federal financial institutions and is described in subsection 49(1) of the Act, the agreement will be assessed under section 49 and not section 45. Subject to the exception described below, agreements between federal financial institutions that are likely to substantially lessen competition may also be subject to review under the civil

> provision in section 90.1 of the Act. Subsections 49(2) and 90.1(9) contain certain exceptions, including an exception for agreements in respect of which the Minister of Finance has issued a certification for reasons of financial policy. [51]
>
> [Bold emphasis in original; underlining added]

[57] The authors consulted in the field of competition law also share this opinion. For example, author Antoni Di Domenico states:[52]

> Section 45(6)(b) provides an exception for federal financial institutions. Section 45(1) does not apply if the agreement is between federal financial institutions.
>
> [Reference omitted.]

[58] Authors Randal Hughes and Emrys Davis make a similar statement:[53]

> **§4.22** Subsection 45(6) outlines that a conspiracy, agreement or arrangement does not contravene section 45(1) where it is between affiliate entities or federal financial institutions, the latter of which is prohibited under section 49(1).

[59] We should therefore understand from all of this that sections 45 and 49 cannot apply at the same time. It is one or the other.

[60] Because the issuing banks are "federal financial institutions," one might think that section 49 applies. I note, however, that the agreement or arrangement in question in paragraph 49(1)(c) must concern "a service provided to a customer."

[61] As discussed above, the functioning of the credit card payment system involves an undertaking by the issuer towards the merchant. Can it then be argued that the merchant is a customer of the bank within the meaning of section 49?

[62] In my view, that is a tenable, although debateable, position because of the fact that section 49 creates an indictable offence and, in the event of doubt in regard to the interpretation to be given to legislation creating an offence, the interpretation that is

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51 Competition Bureau Canada, *Competitor Collaboration Guidelines*, *supra* note 49, section 1.2(b).

52 Antonio Di Domenico, *Competition Enforcement and Litigation in Canada* (Toronto: Emond, 2018) at 113.

53 Randal Hughes & Emrys Davis, "Criminal offences and prosecutions under the *Competition Act*" in Nikiforos Iatrou, ed., *Litigating Competition Law in Canada* (Toronto: LexisNexis, 2018) 83 at 89. See also: Brian A. Facey & Cassandra Brown, *Competition Act: Commentary and Annotation* (Toronto: LexisNexis, 2019), section 49 at. 116.

most favourable to the accused should be preferred.[54] In short, if the word "customer" is given its ordinary meaning, it is possible that the issuing bank's undertaking with respect to the merchant is ultimately found to be insufficient to characterize the merchant as a customer. That said, I find this issue to be closely connected to the consideration of the merits of the case. It is best to wait and see what the evidence will reveal, rather than try to answer it definitively at the authorization stage.[55]

* * * * *

[63] The remaining cause of action is based on section 234 of the *Consumer Protection Act*, which prohibits any person from refusing to enter into an agreement with a merchant or terminate an agreement binding that person and a merchant, by reason of the fact that the merchant grants a rebate to the consumer who pays cash or uses a negotiable instrument.

[64] The trial judge dismissed this cause of action because there is no reference to it in the application for authorization and there is no allegation supporting it.[56] She was correct on this point, and there is no reason to intervene.

CONCLUSION

[65] Before concluding, I find it worth repeating that this is a class action that has been authorized. In practice, this means that the respondents are already required to defend themselves against the allegations that the trial judge deemed tenable. Therefore, the argument that frivolous proceedings should be filtered out on the basis of judicial economy and the proper administration of justice carries little weight in the circumstances. The evidence will confirm whether the allegations of the class action based on sections 45 or 49 of the *Competition Act* are grounded and should not, in either case, be more onerous to administer.

[66] Accordingly, I would allow the appeal in part and amend subparagraph 138(3) of the judgment of the Superior Court so that it reads as follows:

> 3) Did the defendants' conduct violate section 45 of the *Competition Act*, as worded until March 12, 2010, and after that date, or section 49 of the Act, during the period covered by the class action?

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54 Gisèle Côté Harper, Pierre Rainville & Jean Turgeon, *Traité de droit pénal canadien*, 4th ed., (Cowansville, Qc.: Yvon Blais, 1998) at 142–146.

55 *Aimia Canada inc. c. Taillon*, 2018 QCCA 1133 at paras. 45–47.

56 *9085-4886 Québec inc. c. Bank of Montréal*, *supra* note 1 at paras. 110–115.

[67] The whole with legal costs.

JEAN BOUCHARD, J.A.