

**SUPREME COURT OF CANADA**

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| **Citation:** Infineon Technologies AG *v.* Option consommateurs, 2013 SCC 59, [2013] 3 S.C.R. 600 | **Date:** 20131031  **Docket:** 34617 |

**Between:**

**Infineon Technologies AG and**

**Infineon Technologies North America Corp.**

Appellants

and

**Option consommateurs and Claudette Cloutier**

Respondents

- and -

**Canadian Federation of Independent Grocers**

Intervener

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

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| **Joint Reasons for Judgment:**  (paras. 1 to 155) | LeBel and Wagner JJ. (McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

Infineon Technologies AG *v.* Option consommateurs, 2013 SCC 59, [2013] 3 S.C.R. 600

Infineon Technologies AG and

Infineon Technologies North America Corp. Appellants

v.

Option consommateurs and Claudette Cloutier Respondents

and

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**Indexed as: Infineon Technologies AG *v.* Option consommateurs**

2013 SCC 59

File No.: 34617.

2012:  October 17; 2013:  October 31.

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

on appeal from the court of appeal for quebec

*Civil procedure — Class actions — Jurisdiction of Quebec court — Application for authorization to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips — Whether Quebec courts have jurisdiction over dispute between international manufacturers and group consisting of direct and indirect purchasers located in Quebec given that alleged wrongdoing that forms basis of claim occurred outside Quebec — Civil Code of Québec, S.Q. 1991, c. 64, art. 3148(3).*

*Civil procedure — Class actions — Conditions for authorizing action — Direct and indirect purchasers — Application for authorization to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips — Proposed group consisting of direct and indirect purchasers who suffered losses by absorbing, in whole or in part, inflated portion of price — Whether common questions arise — Whether cause of action can be rooted in passing on of artificially inflated prices resulting from anti‑competitive practices — Whether it is sufficient to prove aggregate loss at authorization stage — Whether representative and designated member are qualified to adequately represent members of proposed group — Whether class action should be authorized — Code of Civil Procedure, R.S.Q., c. C‑25, arts. 1003, 1048.*

The appellant companies are manufacturers of DRAM, which is a microchip that allows information to be electronically stored and rapidly retrieved. DRAM is commonly used in a wide range of electronic devices. The appellants sell DRAM through a number of distribution channels to original equipment manufacturers (“OEMs”), such as Dell Inc. OEMs insert the chips into various electronic products they manufacture, which are in turn sold either to intermediaries in the distribution chain or directly to final consumers. The appellants have acknowledged their participation in an international conspiracy to suppress and eliminate competition by fixing the prices of DRAM to be sold to OEMs. They were heavily fined both in the United States and in Europe for their respective roles in the conspiracy.

Option consommateurs applied to the Superior Court for authorization to institute a class action against the appellants in order to recover damages in this regard on behalf of the members of the affected class. The group comprises direct and indirect purchasers who suffered losses by absorbing, in whole or in part, the inflated portion of the price of DRAM sold in Quebec. Its claim is based upon allegations that the appellants failed to discharge statutory obligations under the *Competition Act* and that their conduct amounted to a fault giving rise to civil liability under the *Civil Code of Québec* (“*C.C.Q.*”). In its motion for authorization of the class action, Option consommateurs designated C as a member of the group. C is a resident of Montréal who purchased a personal computer containing DRAM on Dell’s website with her credit card. The motion judge held that the Superior Court did not have territorial jurisdiction to hear the class action. In any event, he would have dismissed the motion for authorization on the merits, because he was of the view that the requirements of arts. 1003(*b*), 1003(*d*) and 1048 of the *Code of Civil Procedure* (“*C.C.P.*”) were not satisfied. On appeal, the Court of Appeal set that decision aside and granted the motion for authorization to institute the class action.

*Held*: The appeal should be dismissed.

On the basis of the facts as alleged, the Quebec courts have jurisdiction to decide whether the class action should be authorized under art. 1003 of the *C.C.P.* Article 3148(3) of the *C.C.Q.* confers jurisdiction on a Quebec authority in a personal action of a patrimonial nature where “a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec”. Damage suffered in Quebec is an independent connecting factor: the damage does not need to be tied to the locus of the injury or of the fault. Also, the plain language of art. 3148(3) does not preclude economic damage from serving as a connecting factor, nor is the recovery of a purely economic loss prohibited in Quebec civil law.

In the instant case, the economic damage was allegedly suffered by C — not merely recorded — in Quebec. More specifically, the damage was allegedly suffered as a result of the contract between Dell and C. Although the contract is not in fact the source of the cause of action in this case, which is extracontractual in nature, it is a juridical fact that establishes where the alleged economic damage occurred: the conclusion of the contract is the event that fixes the “*situs*” of the material damage suffered in Quebec. As a result, the contract is relevant, regardless of the fact that none of the appellants were parties to it, to the determination of whether the Quebec courts have jurisdiction in this case. C’s pecuniary loss flowed directly from her contract with Dell, which is deemed under Quebec’s *Consumer Protection Act* to have been made in Quebec. The resulting economic damage did not merely have a remote effect on C’s patrimony in Quebec; rather, she suffered it in Quebec upon entering into the contract in that province, and this brought her claim within the scope of art. 3148(3) of the *C.C.Q.*

At the stage of authorization of a class action, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in art. 1003 of the *C.C.P.*, bearing in mind that the threshold provided for in that article is a low one. The authorization process does not amount to a trial on the merits. Although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law. In this case, the motion for authorization alleges sufficient facts to demonstrate the elements required under art. 1003 of the *C.C.P.*

Option consommateurs has met the requirement that there be sufficient common questions for the purposes of art. 1003(*a*). There are no differences between the members of the proposed group at the authorization stage that adversely affect the unity of the group. All the members, regardless of their individual circumstances, have a common interest both in proving the existence of a price‑fixing conspiracy and in maximizing the amount of the resulting unlawful overcharge. Any disparity between the direct purchasers’ relationships with the appellants and those of the indirect purchasers does not alter the fact that they have a collective interest in the questions of fault and liability. Any conflicts of interests can be addressed at trial.

With respect to the requirement of art. 1003(*b*) of the *C.C.P.* that “the facts alleged seem to justify the conclusions sought”, Option consommateurs has made out an arguable case in support of its claim of the appellants’ extracontractual liability. It has discharged its burden with respect to the demonstration of fault, injury and causation. The allegations set out in the motion for authorization are sufficient to support an inference of fault, given the relatively low standard to be met at the authorization stage. Although the allegations and supporting documentation do not explicitly establish the commission of wrongful behaviour in Quebec, they certainly do point to the international nature of the conspiracy to fix the price of DRAM and to the suffering of damage outside the United States. It is not unreasonable to infer that anti‑competitive practices in the United States that have an impact on large multinational corporations and on a DRAM market that is international in scope might — indeed are likely to — affect consumers in Quebec. Further, Option consommateurs does not need to prove liability under s. 45 of the *Competition Act* at this stage of the proceedings, given the nature of the claim and the evidence that has already been adduced. Its claim of undue economic impact under s. 45 is relevant only to the extent that a violation of the statutory scheme can give rise to extracontractual liability under art. 1457 of the *C.C.Q.*

Option consommateurs has also discharged the burden of demonstrating that C and the other members of the proposed group suffered an injury as a result of the appellants’ anti‑competitive conduct. The passing on of price increases can ground a class action where the members of the group include direct purchasers. The policy considerations that militate against the defence of passing on at common law should favour, in the civil law of Quebec, compensation for a loss that has been passed on to a plaintiff. In the instant case, there is no risk of double recovery, since the direct and indirect purchasers would be combined in a single group that would make a single collective claim of an aggregate loss. It is not necessary at the authorization stage to prove that each member of the group suffered a loss. As well, the evidentiary standard for demonstrating passing through is no different than the one for demonstrating an aggregate loss. The applicant must establish an arguable case that losses were passed on. Given this low threshold, the applicant is neither expected nor required to adduce expert testimony and advance a sophisticated methodology. At this early stage, the aggregate loss alleged by Option consommateurs and supported by the exhibits is enough to meet the burden of an arguable case. If at trial Option consommateurs is unable to demonstrate how the loss was passed on to the indirect purchasers and how it is to be calculated, the action might fail at that stage.

To establish causation under art. 1457 of the *C.C.Q.*, the damage must be shown to be a direct consequence of the injurious act, but the plaintiff need not be the immediate victim of that act in order to recover. At the authorization stage, the applicant needs only to present an arguable case that the loss was a direct result of the alleged misconduct. In this case, although the indirect purchasers may be indirect victims, the injury they allegedly suffered was a direct result of the appellants’ anti‑competitive conduct.

Finally, regarding the requirement of adequate representation, it would be contrary to the spirit of art. 1003(*d*) of the *C.C.P.* to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and C are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss. Much like art. 1003, art. 1048 of the *C.C.P.* is intended to be a flexible gatekeeper. Where a legal person applies to represent a class, art. 1048 directs that its mission be connected not with the interests of all members of the class, but merely with those of one of the members. Since C is a member of Option consommateurs and of the proposed group, art. 1048 does not prohibit Option consommateurs from representing the interests of the members in this case.

**Cases Cited**

**Distinguished:** *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII); *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; **approved:** *Hubert v. Merck & Co. Inc.*, 2007 QCCS 3291 (CanLII); **referred to:** *Quebecor Printing Memphis Inc. v. Regenair Inc.*, [2001] R.J.Q. 966; *Banque de Montréal v. Hydro Aluminum Wells Inc.*, 2004 CanLII 12052; *Thompson v. Masson*, [1993] R.J.Q. 69; *Royal Bank of Canada v. Capital Factors Inc.*, [2004] Q.J. No. 11841 (QL); *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Sterling Combustion inc. v. Roco Industrie inc.*, 2005 QCCA 662 (CanLII); *Option Consommateurs v. British Airways PLC*, 2010 QCCS 140 (CanLII); *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Nault v. Canadian Consumer Co. Ltd.*, [1981] 1 S.C.R. 553; *Comité régional des usagers des transports en commun de Québec v. Quebec Urban Community Transit Commission*, [1981] 1 S.C.R. 424; *Comité d’environnement de La Baie Inc. v. Société d’électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655; *Château v. Placements Germarich Inc.*, [1990] R.D.J. 625; *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500; *Nadon v. Ville d’Anjou*, [1994] R.J.Q. 1823; *Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437 (CanLII); *Martin v. Telus Communications Co.*, 2010 QCCA 2376 (CanLII); *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Berdah v. Nolisair International Inc.*, [1991] R.D.J. 417; *Breslaw v. Montreal (City)*, 2009 SCC 44, [2009] 3 S.C.R. 131; *Option Consommateurs v. Novopharm Ltd.*, 2008 QCCA 949, [2008] R.J.Q. 1350; *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826 (CanLII); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Guilbert v. Vacances sans Frontière Ltée*, [1991] R.D.J. 513; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Pro‑Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Sun‑Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Croteau v. Air Transat A.T. inc.*, 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black v. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181; *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin v. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); *Rosso v. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61; *Sun‑Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 (CanLII); *Association des résidents riverains de la Lièvre inc. v. Canada (Procureur général)*, 2006 QCCS 5661 (CanLII).

**Statutes and Regulations Cited**

*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1385 to 1388, 1457, 1607, 3148(3), 3168.

*Code of Civil Procedure*, R.S.Q., c. C‑25, arts. 93, 999, 1002 [am. 2002, c. 7, s. 150], 1003, 1010, 1031 to 1033, 1048.

*Competition Act*, R.S.C. 1985, c. C‑34, ss. 36, 45.

*Consumer Protection Act*, R.S.Q., c. P‑40.1, ss. 20 [rep. 2006, c. 56, s. 3], 21 [*idem*], 54.1, 54.2.

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L’Heureux, Nicole, et Marc Lacoursière. *Droit de la consommation*, 6e éd. Cowansville, Qué.: Yvon Blais, 2011.

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APPEAL from a judgment of the Quebec Court of Appeal (Forget, Pelletier and Kasirer JJ.A.), 2011 QCCA 2116, [2011] Q.J. No. 16769 (QL), 2011 CarswellQue 12645, SOQUIJ AZ‑50805798, setting aside a decision of Mongeau J., 2008 QCCS 2781, [2008] R.J.Q. 1694, [2008] J.Q. no 5796 (QL), 2008 CarswellQue 5729, SOQUIJ AZ‑50498459. Appeal dismissed.

*Yves Martineau*, for the appellants.

*Daniel Belleau*, *Maxime Nasr* and *Violette Leblanc*, for the respondent Option consommateurs.

No one appeared for the respondent Claudette Cloutier.

*David Sterns* and *Jean‑Marc Leclerc*, for the intervener.

The judgment of the Court was delivered by

LeBel and Wagner JJ. —

I. Introduction

1. At issue in this appeal is whether a proposed class action based on allegations that the appellants conspired to inflate the price of a broadly used product, the dynamic random-access memory chip (“DRAM”), and caused damage to consumers should be authorized under the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 (“*C.C.P.*”).The Quebec Superior Court said no. The Court of Appeal disagreed and said yes. For the reasons that follow, we agree with the Court of Appeal and would dismiss the appeal.

II. Background

1. The appellant[[1]](#footnote-1) companies are manufacturers of DRAM, which is a microchip that allows information to be electronically stored and rapidly retrieved. DRAM is commonly used in a wide range of electronic devices such as personal computers, GPS equipment, cellular telephones and digital cameras.
2. The appellants sell DRAM through a number of complex distribution channels to original equipment manufacturers (“OEMs”), such as Dell Inc. and the Hewlett-Packard Company. OEMs insert the chips into various electronic products they manufacture, which are in turn sold either to intermediaries in the distribution chain or directly to final consumers.
3. For our purposes, individuals or companies that acquired DRAM directly from the appellants are referred to as “direct purchasers”. The term “indirect purchaser” is used to refer to individuals and companies that acquired DRAM, or products containing DRAM, either from a direct purchaser or from another indirect purchaser at a different level in the distribution chain.
4. The appellants have acknowledged their participation in an international price-fixing conspiracy in the multi-billion dollar DRAM market during the relevant period, from 1999 to 2002. They and their co-conspirators, with the exception of Micron Technology, Inc., pleaded guilty in 2004, in the United States District Court for the Northern District of California, to the following charges:

. . . participating in a conspiracy in the United States and elsewhere to suppress and eliminate competition by fixing the prices of Dynamic Random Access Memory (“DRAM”) to be sold to certain original equipment manufacturers of personal computers and servers (“OEMs”) from on or about July 1, 1999, to on or about June 15, 2002, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. [A.R., vol. II, at p. 130]

1. The OEMs affected by the impugned sales were Dell Inc., Compaq Computer Corporation, Hewlett-Packard Company, Apple Computer Inc., International Business Machines Corporation and Gateway Inc.
2. All the conspirators were heavily fined for their respective roles in the price-fixing conspiracy except for Micron Technology, which was granted clemency because it had co-operated with the authorities. However, Micron Technology also acknowledged that the U.S. Department of Justice investigation had revealed that its employees had been involved in price-fixing in the DRAM market.
3. In 2010, the appellants also acknowledged their participation in a cartel to fix the prices of DRAM in Europe. They paid a fine in a settlement of proceedings that had been undertaken against them there.
4. The respondent Option consommateurs alleges that this price-fixing conspiracy artificially inflated the prices of DRAM and products containing DRAM sold in Quebec between April 1999 and July 2002. Its claim is based upon allegations that the appellants failed to discharge statutory obligations under the *Competition Act*, R.S.C. 1985, c. C-34, and that their conduct amounted to a fault giving rise to civil liability under the *Civil Code of Québec*, S.Q. 1991, c. 64(“*C.C.Q.*”).
5. Option consommateurs claims that, as a result of the alleged price inflation, both the direct and the indirect purchasers suffered damage in that they overpaid on purchases of DRAM or products containing DRAM.
6. Option consommateurs applied to the Superior Court for authorization to institute a class action against the appellants in order to recover damages in this regard on behalf of the members of the affected class. The group comprises direct and indirect purchasers who suffered losses by absorbing, in whole or in part, the inflated portion of the price of DRAM sold in Quebec. The group was described as follows in the respondent’s motion:

[translation] Any person who purchased, in Quebec, dynamic random-access memory (DRAM) and/or one or more products containing dynamic random-access memory (DRAM) . . . between April 1, 1999 and June 30, 2002, inclusively.

However, a legal person established for a private interest, a partnership or an association may be a member of the group, but only if at all times since October 5, 2003, not more than fifty (50) persons bound to it by contract of employment were under its direction or control, and if it is dealing at arm’s length with the applicant. [A.R., vol. II, at p. 57]

1. The class action applies to all devices containing DRAM, including computers, servers, printers, hard drives, cellular telephones, digital cameras and MP3 players.
2. In its motion for authorization of the class action, Option consommateurs designated the respondent Claudette Cloutier as a member of the group pursuant to art. 1048(*a*) of the *C.C.P.* Ms. Cloutier is a resident of Montréal who purchased a personal computer containing DRAM from Dell Computer Corporation (“Dell”) on October 9, 2001. She accessed Dell’s website and made the purchase by credit card from her home in Montréal.
3. The standard-form terms for the online purchase indicated that the sale was deemed to have occurred in Ontario and was subject to Ontario law. The invoice indicated that Dell’s address for payment was in Toronto, Ontario.
4. The appellants have their head offices in other countries. Neither of them has a place of business in the province of Quebec.

III. Judicial History

A. *Quebec Superior Court (Mongeau J.), 2008 QCCS 2781, [2008] R.J.Q. 1694*

1. The motion judge of the authorization proceeding held that the Superior Court did not have territorial jurisdiction to hear the class action, because no damage had been suffered in Quebec. Having found that there was no contract between Ms. Cloutier and the appellants, that the fault had been committed in the U.S. and that the appellants did not have a place of business in Quebec, he concluded that a real and substantial connection with Quebec that would be sufficient to ground jurisdiction did not exist.
2. The motion judge adopted the reasons of the Quebec Court of Appeal in *Quebecor Printing Memphis Inc. v. Regenair Inc.*, [2001] R.J.Q. 966, and in *Banque de Montréal v. Hydro Aluminum Wells Inc.*, 2004 CanLII 12052, in holding that the concept of damage under art. 3148(3) of the *C.C.Q.* cannot be stretched to the point that the fact that the person who suffered damage is domiciled in Quebec would suffice to confer jurisdiction on the Quebec courts.
3. The judge then considered how he would have ruled on the merits of the motion had he held that the Superior Court had jurisdiction. In his opinion, Option consommateurs and Ms. Cloutier had not shown that they met all the conditions set out in art. 1003 of the *C.C.P.* for authorizing a class action.
4. Although the judge conceded that the motion adequately established the existence of questions of law or fact common to the group for the purposes of art. 1003(*a*) of the *C.C.P.*, he held that the motion failed on art. 1003(*b*) because the facts alleged did not support the conclusions being sought. More specifically, he found insufficient evidence that the appellants had breached s. 36 of the *Competition Act* or that an injurious act, damage and a causal connection had been shown for the purposes of s. 45 of the *Competition Act*. In any event, the judge found that the action was barred by the limitation period provided for in s. 36 of the *Competition Act*.
5. The motion judge also held that the requirements of arts. 1003(*d*) and 1048 of the *C.C.P.* were not satisfied. In his view, the interests of Option consommateurs and Ms. Cloutier conflicted with those of the non-consumer members of the proposed group.
6. The motion judge accordingly dismissed the motion for authorization to institute a class action. Option consommateurs appealed to the Court of Appeal.

B. *Quebec Court of Appeal (Forget, Pelletier and Kasirer JJ.A.), 2011 QCCA 2115, 2011 QCCA 2116 (CanLII)*

1. The Court of Appeal rendered two concurrent judgments. In one, it granted in part a motion of Option consommateurs to introduce new evidence in the appeal. More specifically, this decision authorized the filing of evidence that the appellants had participated in anti-competitive practices in Europe and had agreed to pay fines in a settlement with the competent European authorities.
2. In the other judgment, the Court of Appeal overturned the Superior Court’s judgment and authorized the class action. Kasirer J.A., who wrote the Court of Appeal’s reasons, noted that the claims of the direct and indirect purchaser group members were not rooted in distinct contractual or extracontractual sources. Rather, he pointed out, the class action was grounded on an allegation of a precontractual fault of conspiring to artificially inflate the price of DRAM through a price-fixing scheme, which gave rise to extracontractual liability under art. 1457 of the *C.C.Q.*
3. On the jurisdiction issue, Kasirer J.A. found that the Quebec courts had jurisdiction over the claim pursuant to art. 3148(3) of the *C.C.Q.* Under that provision, Quebec courts have jurisdiction in personal actions of a patrimonial nature where “a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec”. The fact that a Quebec resident’s patrimony is located in that province is not sufficient to ground jurisdiction.
4. Kasirer J.A. held that the damage was connected with a contract that had been concluded in Quebec. Under ss. 20 and 21 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, a remote-parties contract is deemed to be concluded at the consumer’s address if the parties are not in one another’s presence at the time of the offer or of acceptance, and the offer was not solicited by the consumer.
5. Kasirer J.A. found that these criteria were met and that a remote-parties contract had in fact been formed between Ms. Cloutier and Dell. Accordingly, the jurisdiction of the Quebec courts did not rest merely on the existence of a Quebec patrimony, since the loss was suffered in Quebec as the result of a material event that occurred in Quebec. This was enough to ground jurisdiction pursuant to art. 3148(3) of the *C.C.Q.*
6. Having recognized the jurisdiction of the Quebec courts, Kasirer J.A. turned to the requirements for authorization of a class action set out in art. 1003 of the *C.C.P.* He held that the motion satisfied each of the criteria.
7. On art. 1003(*a*) of the *C.C.P.*, Kasirer J.A. agreed with the Superior Court’s finding that there were sufficient common questions of law or fact.
8. On art. 1003(*b*), he found that the allegations of the motion for authorization adequately established fault, the harm suffered, and causation.
9. In Kasirer J.A.’s opinion, the allegations of violations of s. 45 of the *Competition Act*, which gave rise to extracontractual liability under art. 1457 of the *C.C.Q.*,were sufficient. Kasirer J.A. held that Option consommateurs was “far from having established its case on the merits” (para. 84), but that the evidence of plea agreements in the United States sufficed to discharge the low evidentiary burden Option consommateurs faced at this stage in respect of its allegations of undue restraint of trade. In his view, the lack of extraterritorial reach of s. 45 of the *Competition Act* was not a bar to the class action. It would not affect an action in civil liability under art. 1457 of the *C.C.Q.*,the provision on which the claim was based (paras. 86-88).
10. Kasirer J.A. held that the alleged aggregate loss suffered by the different members of the group constituted a sufficient *prima facie* demonstration of the loss for the purposes of art. 1003(*b*) of the *C.C.P.* In drawing this conclusion, he found that the losses of the direct purchasers and those of the indirect purchasers need not be distinguished at this stage. This issue would be properly resolved if and when the class action succeeded on its merits.
11. Kasirer J.A. also found that at this stage, Option consommateurs could ground its cause of action on the passing on of inflated prices through the various layers of the distribution chain without there being a risk of double recovery, since the group comprised both the direct and the indirect purchasers of DRAM. Mindful of policy concerns in the area of consumer protection, Kasirer J.A. stated that precluding an action where price increases have been passed on could lead to the unjust enrichment of direct purchasers should indirect purchasers fail to take legal action against perpetrators of price-fixing conspiracies.
12. Significantly, Kasirer J.A. held that it is not necessary to advance a sophisticated methodology of proof of loss at this preliminary stage of the class action. It would be wrong to impose an overly onerous evidentiary burden and prevent Option consommateurs from having its case heard on its merits.
13. Kasirer J.A. found that the allegations relating to causation were sufficient to satisfy the requirements of the authorization stage, given the nature of the claim and the structure of the proposed group. Proving that the price-fixing conspiracy had led to increased prices for DRAM and products containing DRAM was a task to be undertaken at the trial itself.
14. Kasirer J.A. then found that the requirements of art. 1003(*d*) were satisfied and that Ms. Cloutier could carry on as the designated member of the proposed group. He held that Ms. Cloutier had standing to represent the group on the basis of her online purchase of a computer containing DRAM. What was relevant was not the type of device she had purchased, but the fact that it contained DRAM that had been purchased at an inflated price.
15. Finally, Kasirer J.A. found that neither Ms. Cloutier nor Option consommateurs was in a conflict of interests with the direct purchasers at this stage, since all members of the group had a common objective of maximizing the total damages award.
16. The Court of Appeal accordingly allowed the appeal, granted the motion for authorization to institute the class action and let that action proceed to trial.

IV. Issues

1. There are two primary issues before the Court. The first is whether a Quebec court has jurisdiction under art. 3148 of the *C.C.Q.* to authorize a class action in the circumstances of this case. If it does, the second issue is whether Option consommateurs meets the threshold requirement for authorization under art. 1003 of the *C.C.P.*

V. Analysis

1. Before we delve into the substantive legal issues, the standard of review must be addressed. The appellants submit that the Court of Appeal erred in overturning the motion judge’s decision and finding that Option consommateurs met the threshold requirement for authorization under art. 1003 of the *C.C.P.*
2. Contrary to the appellants’ arguments, the Court of Appeal did not need to find that the motion judge had made a “palpable and overriding error” or that his reasons were “patently wrong” in order to intervene. As will be seen in the reasons that follow, the motion judge misapprehended the law as it relates to key components of the art. 1003 analysis: namely, the passing on of price increases as the basis for a cause of action, the demonstration of an aggregate loss at the authorization stage, the evidentiary and legal threshold requirements for authorization, and the need to satisfy the criteria for a successful action under ss. 36 and 45 of the *Competition Act*. These errors enabled the Court of Appeal to apply the appropriate legal standards to the motion judge’s findings of fact and to draw the correct legal conclusions from them.

A. *Jurisdiction*

1. The first issue is whether the Quebec courts have jurisdiction over this dispute between international DRAM manufacturers and a group consisting of direct and indirect purchasers located in Quebec, given that the alleged wrongdoing that forms the basis of the claim — a conspiracy to reduce competition and inflate the price of DRAM — occurred outside Quebec. The appellants are challenging the jurisdiction of the province’s courts to hear the claim at the earliest stage, that of the motion for authorization of the class action.
2. According to a well-established jurisprudence of the Quebec courts, challenges to Quebec’s jurisdiction can properly be made and dealt with at the outset of a proceeding for authorization of a class action. The judgment rendered at this stage will determine, on the basis of the allegations, whether the matter appears to be properly before the court (see *Thompson v. Masson*, [1993] R.J.Q. 69 (C.A.)). However, this does not mean that a judgment dismissing a jurisdictional challenge at the authorization stage ends the debate over the territorial jurisdiction of the Quebec courts. This issue could be raised again later, because the judgment rendered at this stage is only an interlocutory decision (art. 1010 of the *C.C.P.*). The court may subsequently reconsider the issue in light of all the evidence, and decline jurisdiction, at the trial on the merits (*Thompson*,at p. 73).
3. On the basis of the facts as alleged, we conclude that the Quebec courts have jurisdiction over this matter under art. 3148 of the *C.C.Q.* Article 3148 defines the scope of the jurisdiction of the Quebec courts under private international law by providing for certain connecting factors in respect of the jurisdiction of Quebec authorities. More specifically, art. 3148(3) confers jurisdiction on a Quebec authority in a personal action of a patrimonial nature where “a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec”.
4. As we mentioned above, Option consommateurs argues that every member of the group on behalf of which it intends to act has suffered economic damage as a result of the manufacturers’ unlawful price-fixing scheme for DRAM. Ms. Cloutier, the designated member of the group, is domiciled in Quebec. When she purchased a computer from Dell over the Internet from her home in Montréal, she entered into a contract of sale that required her to pay more than she should have for the computer on account of the alleged conspiracy. Option consommateurs argues that the contract is deemed to have been entered into in Quebec under the *Consumer Protection Act* and that Ms. Cloutier accordingly suffered damage in Quebec. The appellants counter that economic damage alone is not sufficient to ground jurisdiction and, moreover, that the contract was not entered into in Quebec.
5. Damage suffered in Quebec is an independent factor under art. 3148(3): the damage does not need to be tied to the locus of the injury or of the fault, unlike in the case of art. 3168, to give one example. Any one of the four individual factors listed in art. 3148(3) would constitute a sufficient connection with the province to ground jurisdiction (see *Royal Bank of Canada v. Capital Factors Inc.*, [2004] Q.J. No. 11841 (QL) (C.A.), at para. 2; *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 56). In terms of the type of damage covered by art. 3148(3), there is no principled reason to exclude purely economic damage from its scope. The plain language of art. 3148(3) does not preclude economic damage from serving as a connecting factor, nor is the recovery of a purely economic loss prohibited in Quebec civil law (see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at pp. 116-18). It is clear from the Quebec jurisprudence that economic damage can serve as a connecting factor under art. 3148(3) (see, e.g., *Sterling Combustion inc. v. Roco Industrie inc.*, 2005 QCCA 662 (CanLII); *Option Consommateurs v. British Airways PLC*, 2010 QCCS 140 (CanLII)).
6. *Quebecor Printing*, a case the appellants rely on, should not be read so broadly as to systematically exclude a purely economic loss as a type of damage to which art. 3148(3) applies. Rather, that case indicates that where financial damage is merely *recorded* in Quebec, that fact is not sufficient to ground jurisdiction under art. 3148(3). To satisfy the requirement of art. 3148(3), the damage must be *suffered* in Quebec. As Kasirer J.A. explained in the judgment of the Court of Appeal in the case at bar, there is a distinction between damage that is substantially suffered in Quebec and damage that is simply recorded in Quebec on the basis of the location of the plaintiff’s patrimony:

[*Préjudice*] is to be distinguished from the “*dommage*/damage” that is the subjective consequence of the injury relevant to the measure of reparation needed to make good the loss. As a result, in specifying “damage was suffered in Québec/*un préjudice y a été subi*” as the relevant connecting factor, article 3148(3) seeks to identify the substantive *situs* of the “bodily, moral or material injury which is the immediate and direct consequence of the debtor’s default” (article 1607 C.C.Q.) and not the *situs* of the patrimony in which the consequence of that injury is recorded. [para. 65]

1. This application of the *C.C.Q.* is not, as the appellants assert, a novel, or undue, extension of Quebec’s jurisdiction. Rather, it is based on the language of art. 3148(3) and on the jurisprudence. As this Court stated in *Spar Aerospace*,at para. 58, “[t]here is abundant support for the proposition that art. 3148 sets out a broad basis for jurisdiction.”
2. In the instant case, the economic damage was allegedly suffered by Ms. Cloutier — not merely recorded — in Quebec. More specifically, the damage was allegedly suffered as a result of the contract between Dell and Ms. Cloutier. Although the contract is not in fact the source of the cause of action in this case, which is extracontractual in nature, it is a juridical fact that establishes where the alleged economic damage occurred: the conclusion of the contract is the event that fixes the “*situs*” of the material damage suffered in Quebec. As a result, the contract is relevant, regardless of the fact that none of the appellants were parties to it, to the determination of whether the Quebec courts have jurisdiction in this case. As we will explain below, Ms. Cloutier’s pecuniary loss flowed directly from her contract with Dell, which is deemed under Quebec’s *Consumer Protection Act* to have been made in Quebec. The resulting economic damage did not merely have a remote effect on Ms. Cloutier’s patrimony in Quebec; rather, she suffered it in Quebec upon entering into the contract in that province, and this brought her claim within the scope of art. 3148(3).
3. The contract between Ms. Cloutier and Dell for the sale of a computer is a “remote-parties contract” within the meaning of the former ss. 20 and 21 of the *Consumer Protection Act* (repealed S.Q. 2006, c. 56, s. 3; now called a “distance contract” in ss. 54.1 and 54.2). These provisions read as follows at the time Ms. Cloutier and Dell entered into their contract:

**20.** A remote-parties contract is a contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer, which is addressed to one or more consumers, nor at the time of acceptance, provided that the offer has not been solicited by a particular consumer.

**21.** The remote-parties contract is deemed to be entered into at the address of the consumer.

1. On the facts as alleged, the offer was not solicited by Ms. Cloutier when she visited Dell’s website and purchased the computer online. Although it will be up to the trial judge to consider the specifics of Dell’s website and the details of the interaction between Ms. Cloutier and Dell, nothing currently on the record indicates that anything other than an ordinary online purchase occurred.
2. A standard online sales page typically includes a merchant’s “offer to contract . . . which contains all the essential elements of the proposed contract” (art. 1388 of the *C.C.Q.*; see also arts. 1385 to 1387). As N. L’Heureux and M. Lacoursière write in *Droit de la consommation* (6th ed. 2011), at p. 146, [translation] “[t]he online offer thus contains the traditional elements of the offer to contract: to be binding on the consumer, it must therefore be firm and unequivocal”.
3. There is little apparent difference between an Internet transaction such as the one between Dell and Ms. Cloutier and the type of transaction that occurs when a consumer walks into a traditional neighbourhood store, sees an item for sale on a shelf and purchases that item from the merchant. Of course, the Internet transaction is conducted remotely, or virtually, and the “store” is not “in the neighbourhood” in a concrete sense. Nevertheless, given the global reach of the Internet, the online store is, in a way, even closer than a neighbourhood store, as the consumer does not need to leave home to shop.
4. The Superior Court came to a similar conclusion in *British Airways*, holding that ss. 20 and 21 of the *Consumer Protection Act* applied to a contract entered into over the Internet by a consumer who sent an email request to purchase airline tickets on a merchant’s website. The court wrote the following, at paras. 57 and 59:

[translation] Indeed, it would be possible to say that the server, when products are advertised on it, proceeds systematically, and in every case, to make an offer.

. . .

Likewise, if information in a catalogue constitutes an offer by the merchant and a sale by catalogue constitutes a sale at a distance within the meaning of the C.P.A. [*Consumer Protection Act*], can it be said that the C.P.A. does not apply to a sale over the Internet?

1. On the facts of the instant case as alleged, an offer to contract appears to have been made by Dell on its online sales page, as opposed to being solicited by Ms. Cloutier, which means that ss. 20 and 21 of the *Consumer Protection Act* apply. By virtue of s. 20, Ms. Cloutier’s contract with Dell is a remote-parties contract, and s. 21 provides that a remote-parties contract is deemed to be entered into at the consumer’s address. This contract was accordingly entered into in Quebec.
2. The appellants argue that such an interpretation of online sale transactions would inappropriately subject all transaction sites from around the world to the jurisdiction of the Quebec courts. However, a merchant’s online sales page would have to contain all the essential elements of contract formation for the *Consumer Protection Act* to apply. Moreover, merchants who post their online sales pages on the Internet and do not block access to their websites are aware that people from various jurisdictions may visit their sites and consent to their offers. Consumers purchase many large, expensive items online nowadays. Why should they fall outside the scope of the legislation when they shop online in their homes as opposed to driving to a store or picking up the telephone to make a purchase? To interpret the *Consumer Protection Act* too narrowly would be incompatible with the legislature’s protective intent and with contemporary commercial realities.
3. In sum, we find that Ms. Cloutier, a Quebec resident, suffered economic damage in Quebec as a result of a contract entered into in that province. The principles of comity, order and fairness that underlie private international law require that jurisdiction be properly assumed. Under Quebec law, if any one of the four factors listed in art. 3148(3) of the *C.C.Q.* is proven, a sufficient connection to the province is established (see *Spar Aerospace*, at paras. 55-56). The Quebec courts therefore have jurisdiction under art. 3148(3) to decide whether the class action in the case at bar should be authorized under art. 1003 of the *C.C.P.*

B. *Authorization of a Class Action Under Article 1003 of the C.C.P.*

1. The question at this stage of the analysis is simply whether Option consommateurs meets both the evidentiary and the legal threshold requirements for authorization of a class action under art. 1003 of the *C.C.P.*  Article 1003 reads as follows:

**1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(*a*) the recourses of the members raise identical, similar or related questions of law or fact;

(*b*) the facts alleged seem to justify the conclusions sought;

(*c*) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(*d*) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

1. When undertaking an analysis with respect to the authorization of a class action, it is essential not to conflate or confound the authorization process with the trial of an authorized action on its merits. Each of these stages serves a different purpose, and any review must be conducted accordingly.
2. At the authorization stage, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in art. 1003 of the *C.C.P.*, bearing in mind that the threshold provided for in that article is a low one. The authorizing court’s decision is procedural in nature, as it must decide whether the class action may proceed.
3. As this Court pointed out in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 22, the requirements for authorization of a class action have on a consistent basis been interpreted and applied broadly both by it and by the Quebec Court of Appeal. As was noted in that case, the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation (see also *Nault v. Canadian Consumer Co. Ltd.*, [1981] 1 S.C.R. 553; *Comité régional des usagers des transports en commun de Québec v. Quebec Urban Community Transit Commission*, [1981] 1 S.C.R. 424; *Comité d’environnement de La Baie Inc. v. Société d’électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.); *Château v. Placements Germarich Inc.*, [1990] R.D.J. 625 (C.A.); *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.)). The Court of Appeal astutely summarized this as follows in *Nadon v. Ville d’Anjou*, [1994] R.J.Q. 1823, at pp. 1827-28:

[translation] . . . the courts have generally held that the conditions of article 1003 must be interpreted broadly, that they leave a court little discretion when they are met, and that the court is not to rule on the legal merits of the conclusions in light of the alleged facts.

1. At this stage, the court’s role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003. The objective is not to impose an onerous burden on the applicant, but merely to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims. The Court of Appeal described the threshold requirement as follows: “*le fardeau en est un de démonstration et non de preuve*” or, in English, [translation] “the burden is one of demonstration and not of proof” (*Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437 (CanLII), at para. 25; see also *Martin v. Telus Communications Co.*, 2010 QCCA 2376 (CanLII), at para. 32).
2. More specifically, in the context of the application of art. 1003(*b*), this Court and the Court of Appeal have used varying vocabulary, both in English and in French, to describe and characterize the filtering function of a court hearing a motion for authorization to institute a class action. In 1981, Chouinard J. wrote that, at the authorization stage, the issue is “whether . . . the allegations support the conclusions *prima facie* or disclose a colour of right” (*Comité régional des usagers*,at p. 426). In his opinion, the court is “to reject entirely any frivolous or manifestly improper action, and authorize only those in which the facts alleged disclose a good colour of right” (p. 429).
3. In a later case, Gonthier J. explained that an applicant at the authorization stage must establish “a good colour of right”, “a *prima facie* right” or, in French, “*une apparence sérieuse de droit*”, “*un droit prima facie*” (*Guimond v. Quebec (Attorney General)*,[1996] 3 S.C.R. 347, at paras. 9-11). He pointed out that the Court of Appeal had been using the same expressions, requiring that the applicant establish a [translation] “good colour of right” or “*prima facie* right” (*Berdah v. Nolisair International Inc.*,[1991] R.D.J. 417 (C.A.), at pp. 420-21, *per* Brossard J.A.), or a “serious colour of right” (*Comité d’environnement de La Baie*,at p. 661, *per* Rothman J.A.).
4. A few years ago, in *Marcotte*,the majority and the dissent agreed that the applicant had to meet a threshold test of a “*prima facie* case”, of a “good colour of right” or, in French, of an “*apparence de droit sérieuse*”,of a “*preuve à première vue*” (para. 23, *per* LeBel J., and paras. 90 and 94, *per* Deschamps J.; see also *Breslaw v. Montreal (City)*, 2009 SCC 44, [2009] 3 S.C.R. 131, at para. 27; *Option Consommateurs v. Novopharm Ltd.*,2008 QCCA 949, [2008] R.J.Q. 1350, at paras. 8 and 23).
5. As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the *C.C.P.* can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a “good colour of right”, an “*apparence sérieuse de droit*”, or a “*prima facie* case” implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.
6. A review of legislative intent also confirms this low threshold. It is clear from successive amendments to the *C.C.P.* that Quebec’s legislature intended to facilitate class actions. For example, art. 1002 of the *C.C.P.* formerly required that the applicant file affidavit evidence in support of the motion for authorization, which meant that he or she had to submit to examination as a deponent at the authorization stage under art. 93. The fact that the requirement of filing an affidavit was eliminated and examinations were strictly limited at the authorization stage in the latest reform of the class action provisions (S.Q. 2002, c. 7, s. 150) sends a strong signal that it would be unreasonable to require an applicant to establish anything more than an arguablecase.
7. At the authorization stage, the facts alleged in the applicant’s motion are assumed to be true. The applicant’s burden at this stage is to establish an arguable case, although the factual allegations cannot be [translation] “vague, general [or] imprecise” (see *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII), at para. 44).
8. Any review of the merits of the case should properly be left for the trial, at which time the appropriate procedures can be followed to adduce evidence and weigh it on the standard of the balance of probabilities.
9. The appellants’ position is that Option consommateurs’ motion for authorization fails to allege sufficient facts to demonstrate the elements required under art. 1003(*a*), (*b*) and (*d*) of the *C.C.P.* This position is untenable on the facts before this Court, as our analysis will show. In our opinion, all the criteria of art. 1003 are met.

(1) Article 1003(*a*) — Common Questions

1. Article 1003(*a*) of the *C.C.P.* requires that “the recourses of the members raise identical, similar or related questions of law or fact”.
2. According to the appellants, the only question common to the members of the proposed group is whether the appellants committed a fault. They argue that, given the range of products containing DRAM, the large number of distribution chains and their complexity, the inherent differences between the direct and indirect purchasers, and the nature of the aggregate claim, it would be impossible for the trial judge to establish an injury or a causal connection on a group-wide basis.
3. This perspective is flawed. There is no requirement of a fundamental identity of the individual claims of the proposed group’s members. At the authorization stage, the threshold requirement for common questions is low. As the Court of Appeal noted in *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît* *du Centre de santé et de services sociaux du Suroît*,2011 QCCA 826 (CanLII), at para. 22, even a single identical, similar or related question of law would be sufficient to meet the common questions requirement set out in art. 1003(*a*), provided that it is significant enough to affect the outcome of the class action.
4. There is no requirement that each member of a group be in an identical or even a similar position in relation to the defendant or to the injury suffered. Such a requirement would be incompatible with the concern for judicial economy which the class action serves by avoiding duplicated or parallel proceedings (see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 27). The Court of Appeal summarized this as follows in *Guilbert v. Vacances sans Frontière Ltée*, [1991] R.D.J. 513:

[translation] The fact that the situations of all members of the group are not perfectly identical does not mean that the group does not exist or is not uniform. To be excessively rigorous in defining the group would render the action useless . . . in situations in which claims are often modest, there are many claimants and dealing with cases on an individual basis would be difficult. [p. 517]

1. In applying these principles to the case at bar, the motion judge and the Court of Appeal correctly held that there are no differences between the members of the proposed group at the authorization stage that adversely affect the unity of the group as regards the common questions requirement. All the members, regardless of their individual circumstances, have a common interest both in proving the existence of a price-fixing conspiracy and in maximizing the amount of the resulting unlawful overcharge. Any disparity between the direct purchasers’ relationships with the appellants and those of the indirect purchasers does not alter the fact that they have a collective interest in these questions of fault and liability. Any conflicts of interests can be addressed at trial.
2. We agree with the motion judge’s finding that [translation] “[t]he existence of the cartel, the alleged ‘fraud’, civil liability, the effect of the cartel on the prices charged, the overall loss and costs are obviously similar or related common questions” (para. 149). Mongeau J. also correctly highlighted the procedural benefits that would flow from the authorization of the class action, which would make it possible “to avoid duplication of fact-finding or legal analysis” (para. 147). The respondent has met the requirement that there be sufficient common questions. We will now turn to the second requirement, that the alleged facts seem to justify the conclusions sought.

(2) Article 1003(*b*) — Sufficiency of the Alleged Facts

1. Article 1003(*b*) of the *C.C.P.* requires that “the facts alleged seem to justify the conclusions sought”.
2. The class action proposed by Option consommateurs is rooted in the alleged extracontractual liability of the appellants under art. 1457 of the *C.C.Q.* Article 1457 reads as follows:

**1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

. . .

1. Under this general provision governing delictual and quasi-delictual liability in Quebec law, Option consommateurs must establish the elements of civil liability. These elements are (i) that the appellants committed a fault; (ii) that Ms. Cloutier and the other members of the group suffered an injury; and (iii) that a causal connection exists between the fault and the injury.
2. In his decision on the motion for authorization, the motion judge found that the alleged facts were not sufficient to establish these three elements. That decision was overturned on appeal. We agree with the Court of Appeal that Option consommateurs had met the threshold requirement for art. 1003(*b*) of the *C.C.P.* by making out an arguablecase in support of its claim of the appellants’ extracontractual liability. Let us consider the three elements required by art. 1457 of the *C.C.Q.*

(a) *Fault*

1. The first requirement to meet in order to successfully establish extracontractual liability in Quebec under art. 1457 of the *C.C.Q.* is that of fault.For the purposes of the authorization of a class action under art. 1003 of the *C.C.P.*, the applicant must allege facts that are sufficient to ground an arguable case that a fault has been committed. To make this determination, the allegations of Option consommateurs must be fully and well understood.
2. In para. 2.5 of the motion, the respondent made a general allegation of a breach of the *Competition Act*:

[translation] The Respondents generally failed to discharge their obligations, both legal and statutory, and in particular their obligations with respect to competition under the *Competition Act* (R.S.C. (1985), c. C‑34); [A.R., vol. II, at p. 58]

1. In para. 2.6 of the motion, the respondent specified that the provisions that had allegedly been violated were ss. 36 and 45 of the *Competition Act*. Under s. 36, any person may bring a civil action with respect to any loss suffered as the result of the commission of any of the criminal offences provided for in s. 45, which prohibits any agreement to unduly prevent or lessen competition.
2. Although Option consommateurs has since then abandoned its claim under s. 36, the allegation set out in para. 2.7 remains. In it, the respondent alleged that [translation] “the Respondents also failed to discharge their general obligations under the *Civil Code of Québec* and, more specifically, those related to their obligation to act in good faith”. As Kasirer J.A. correctly pointed out in his reasons, at para. 78, even though the claim is no longer rooted in the alleged commission of an offence under s. 45 of the *Competition Act*, a violation of that section remains relevant insofar as it might support the claim of extracontractual liability under art. 1457 of the *C.C.Q.*
3. In para. 2.7.1 of the motion, the respondent provided greater detail about the alleged civil faults relied upon in support of authorization of the class action in Quebec by referring to the criminal proceedings undertaken against the appellants in the United States. While not explicitly advancing any meaningful connection between the U.S. proceedings and a civil action in Quebec, the respondent filed 13 exhibits comprising various articles and documents that attested to the appellants’ involvement in a price-fixing conspiracy in the United States. Kasirer J.A. succinctly summarized these exhibits, at para. 79:

They include press releases from the Antitrust Division of the U.S. Department of Justice in which it is announced that named respondents agreed to plead guilty to participating in an “international conspiracy” to fix prices in the DRAM market and to pay fines; “informations” which set forth the charges brought against certain of the respondents in United States District Court; and “plea agreements” in which certain of the respondents agreed to plead guilty to charges of “participating in a conspiracy in the United States and elsewhere”. The exhibits contain no specific reference to Quebec.

1. It is noteworthy that, as we mentioned above, the respondent applied to the Court of Appeal for — and was granted — leave to adduce additional evidence in the form of a European Commission press release dated May 19, 2010 that outlined a settlement with 10 producers of DRAM, including the appellants in this case, for violations of European antitrust laws and for anti-competitive conduct in the European DRAM market.
2. In paras. 2.14, 2.15 and 2.15.1 of the motion, the respondent went on to allege specific losses suffered by Ms. Cloutier and the other members of the group:

[translation]

2.14 The Cartel had the effect of unduly restricting competition, artificially inflating the price of DRAM sold in Quebec and, in so doing, artificially inflating the sale prices of products containing DRAM sold in Quebec;

2.15 As a result, throughout the period of the Cartel, purchasers of DRAM sold in Quebec paid an artificially inflated price;

2.15.1 The same is true of subsequent purchasers of DRAM and/or products containing DRAM sold in Quebec to whom the original purchasers allegedly passed on the artificially inflated portion of the price of DRAM in whole or in part; [A.R., vol. II, at p. 69]

1. The appellants argue that these allegations fail to meet the requirement that the respondent demonstrate fault, since the evidence proffered in support of the claim is restricted to events and outcomes that occurred in the United States and Europe. They submit that proof of an offence committed outside Canada does not give rise to a right of civil action under the *Competition Act* absent a “real and substantial” connection with Canada. Accordingly, they argue, the exhibits show only that guilty pleas were entered in relation to agreements to fix the price of DRAM in the United States, which had an impact on the prices of products sold in the United States and Europe. Absent a “real and substantial” connection with Canada, the appellants maintain that fault cannot be demonstrated under ss. 36 and 45 of the *Competition Act*.
2. The appellants further submit that the alleged facts do not demonstrate liability under s. 45 of the *Competition Act*,since violations of the *Sherman Act* in the United States are not equivalent to undue restraint of competition under Canadian law. They cite *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, for the proposition that Canadian law requires an analysis of market structure and market share, and this in turn requires evidence of commercial power capable of having a palpable impact on the market in question. They add that, without sufficient allegations and proof of market power and of the impact of a price-fixing conspiracy reaching into Canada, the “undue” economic effect required under the *Competition Act* was not established.
3. The appellants’ position is wrong, and the Court of Appeal was right to reject these arguments. In our view, the respondent’s allegations are sufficient to support an inference of fault, given the relatively low standard to be met at the authorization stage. It must be borne in mind that the applicable standard is that of showing an arguable case, not the more onerous one of proof on a balance of probabilities.
4. The exhibits on which the respondent relies demonstrate that the appellants participated in a price-fixing conspiracy. Admittedly, the criminal charges and plea agreements were rooted in events in the United States that had no explicitly demonstrated connection with Quebec. But this does not attenuate the apparent international nature and impact of the appellants’ anti-competitive conduct.
5. As Kasirer J.A. pointed out, at para. 84, “the cartel was sufficiently powerful to shake the American market and to affect major manufacturers such as Dell, IBM and Apple”. And the impact of the anti-competitive price-fixing scheme was also felt in Europe, as can be seen from the guilty pleas entered and settlements reached under European antitrust laws. The European evidence is integral to the respondent’s case in that it reveals the international ramifications of the cartel’s actions.
6. Although the respondent’s allegations and supporting documentation do not explicitly establish the commission of wrongful behaviour in Quebec, they certainly do point to the international nature of the conspiracy to fix the price of DRAM and to the suffering of damage outside the United States. Indeed, the respondent’s motion alleges that the effects of the conspiracy — which, according to the information issued by the U.S. Department of Justice (quoted in para. 2.10 of the motion (A.R., vol. II, at p. 61)), took place “in the United States and elsewhere” — were felt in Quebec. It is not unreasonable to infer that anti-competitive practices in the United States that have an impact on large multinational corporations and on a DRAM market that is international in scope might — indeed are likely to — affect consumers in Quebec.
7. Failure to specifically allege a market structure that would make an “undue” economic impact possible does not adversely affect the claim at the authorization stage. The appellants correctly stress that this Court has held that a detailed analysis of market structure is needed in order to prove conduct restricting competition under the *Competition Act*. A defendant that lacks sufficient market power cannot be found to unduly affect competition or market pricing (see *Nova Scotia Pharmaceutical Society*, at pp. 652-55).
8. However, the appellants’ argument disregards the nature of a proceeding for authorization of a class action. The respondent does not need to present absolute proof of the allegation, nor do they even need to prove it on a balance of probabilities. At this stage, all it needs to do is demonstrate an arguable case by means of allegations and supporting evidence. The bare allegation of undue economic impact set out in para. 2.14 of the motion for authorization, combined with the exhibits demonstrating the impact of conduct in the United States on prices of DRAM in the international market, gives rise to an inference of an impact on the Canadian market that satisfies this low threshold requirement. Although it is unclear whether the respondent will eventually be able to meet the standard of proof on a balance of probabilities at trial, we cannot deny it the opportunity to do so given the possibility of fault to which the exhibits attest.
9. Further, the respondent does not need to prove liability under s. 45 of the *Competition Act* at this stage of the proceedings, given the nature of the claim and the evidence that has already been adduced. As we mentioned above, its action is rooted in art. 1457 of the *C.C.Q.*, not s. 45 of the *Competition Act*. Since the respondent abandoned its right to bring a civil action under the *Competition Act*, its claim of undue economic impact under s. 45 remains relevant only to the extent that a violation of the statutory scheme can give rise to extracontractual liability under art. 1457 of the *C.C.Q.*
10. The appellants are correct in asserting that compliance with statutory duties can inform questions with respect to civil law duties. However, compliance with statutory obligations is not always determinative of the issue of civil fault. As Kasirer J.A. rightly stated at para. 88 of his reasons, “[c]are must be taken . . . not to conflate the notion of civil fault and the violation of a statutory norm, whether in a commercial setting or elsewhere.” He correctly pointed out that just because a failure to discharge a statutory obligation leads to a demonstration of fault in all but the most exceptional cases, it does not follow that a civil fault is absolved where there is no such failure. As J.-L. Baudouin and P. Deslauriers state in *La responsabilité civile* (7th ed. 2007), vol. I, at No. 1-188:

[translation] In principle, a failure to discharge a specific obligation imposed by a statute or a regulation, especially if it is intentional or serious, constitutes a civil fault, since it amounts to the breach of a mandatory standard of conduct established by the legislature. Nevertheless, adhering to such a standard does not in itself exempt one from liability.

1. They go on to state the following, at No. 1-189:

[translation] . . . the mere fact that in a given case the defendant adhered to statutory or regulatory standards does not automatically rule out the possibility that he or she will nevertheless be held liable on the basis of the general law. Statutory provisions therefore do not have the effect of limiting the general obligation of good conduct in one’s relations with others, and this means that it is not necessary to prove the violation of a statutory or legal rule for another person to be held liable.

1. Applying this principle, we cannot accept that the appellants are exempt from civil liability because their liability has not been proven under s. 45 of the *Competition Act*. The Court must consider the liability of the appellants under the broad standards of art. 1457 of the *C.C.Q.*,not the narrower standards of s. 45 of the *Competition Act*, a penal provision.
2. Perhaps more importantly, to accept the appellants’ argument on this point would be to import the standard of proof applicable to a trial into this preliminary stage of an authorization proceeding and permit a logical absurdity to win the day. As we mentioned above, the respondent does not need to satisfy the criteria of s. 45 of the *Competition Act* on a balance of probabilities, and a criminal standard of proof is even less appropriate. It would be fallacious to conclude that the respondent’s failure to meet the trial standard in advance leads to the conclusion that the appellants did not contravene the *Competition Act*. An absence of definitive proof of a violation does not constitute absolute proof of compliance. Accordingly, we need not determine at this stage, that of authorization, whether the appellants actually breached s. 45.
3. In our opinion, the respondent has presented an arguable case that the appellants committed a civil fault. We will now turn to the analysis of the injury allegedly suffered under art. 1003(*b*) of the *C.C.P.*

(b) *Injury Suffered*

1. In order to justify the conclusions of civil liability sought by Option consommateurs, the motion for authorization must demonstrate an arguable case that Ms. Cloutier and the other members of the proposed group suffered a loss as a result of the appellants’ anti-competitive conduct.
2. We have already outlined paras. 2.14, 2.15 and 2.15.1 of the respondent’s motion, which are reproduced above. The allegations of the motion asserted that the cartel artificially inflated the prices paid by Quebec purchasers for DRAM and for products containing DRAM as a result. In paras. 2.16 and 2.17, the respondent provided further information on the injury allegedly suffered:

[translation]

2.16 As a result of the foregoing, each and every one of the members of the group suffered injury in that they assumed, in whole or in part, the artificially inflated portion of the price of DRAM;

2.17 When all is said and done, the injury collectively suffered by the Designated Person and the other members of the group is equal to the artificially inflated portion of the sales price of DRAM sold in Quebec and/or contained in products sold in Quebec; [A.R., vol. II, at p. 69]

1. Essentially, the respondent is claiming that the loss suffered by the direct purchasers was equivalent to the amount by which the price of DRAM was artificially inflated. It argues that the indirect purchasers’ losses were equal to the price increase passed on either by direct purchasers or by other indirect purchasers higher up in the distribution chain. The subgroup of indirect purchasers includes the designated member, Ms. Cloutier, who, the respondent alleges, suffered a loss in paying the inflated price passed on to her by Dell, from whom she purchased her computer. Thus, the respondent claims that each member of the proposed group suffered an injury by paying all or a portion of the amount by which the price of DRAM or of products containing DRAM sold in Quebec was artificially inflated.
2. By setting out a single claim that the whole of the impugned price increase was absorbed collectively by the members of the proposed group, para. 2.17 points to the aggregate nature of the alleged injury. The respondent seeks to prove a single loss amount for both the direct and the indirect purchasers without distinguishing between these subgroups or between individuals within each of these subgroups as regards the nature or the degree of the loss they have suffered. The respondent would wait until a subsequent stage of the proceedings to divide this aggregate loss amount amongst the members of the proposed group on a yet-to-be-determined basis that would reflect each individual’s loss.
3. These allegations by the respondent raise two distinct issues with regard to the demonstration of injury. *First*, since the respondent has included the indirect purchasers in the proposed group, the question arises as to whether a cause of action can be rooted in the passing on of artificially inflated prices resulting from anti-competitive practices. *Second*, the Court must determine whether the respondent has discharged the burden of demonstrating that each member of the group suffered an injury in light of the complexity of the distribution channels. This second issue requires the Court to inquire into whether it is sufficient to prove an aggregate loss at this stage of the proceedings. The Court must also consider the nature of the respondent’s evidentiary burden with regard to any methodology advanced to prove the effects of the alleged misconduct. In other words, to what extent must the respondent prove at the authorization stage that the direct purchasers suffered and retained a portion of the loss and that a portion of the loss was passed on to the indirect purchasers?
4. In our opinion, passing on can result in a finding of a compensable injury in an action for extracontractual damages. We are also of the view that the respondent has discharged its evidentiary burden in respect of the loss resulting from the alleged passing on of the price increases caused by the appellants’ anti-competitive conduct.

(i) Passing On as the Basis of a Cause of Action

1. The question whether the passing on of price increases can ground a class action where the members of the group include direct purchasers is a threshold question. If the answer is no, the action cannot be authorized and the respondent’s motion must fail.
2. The appellants submit that the indirect purchasers cannot recover the losses that allegedly resulted from the passing on of overcharges by the direct and subsequent indirect purchasers, since those losses were not a direct consequence of the appellants’ actions, and that the indirect purchasers accordingly lack standing. In support of this position, the appellants rely on a number of decisions from both Canada and the United States, and they raise the same arguments with regard to passing on as the respondents in the cases of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, which were heard together with this appeal.
3. The root of this argument is the proposition that passing on cannot be raised as a defence. The United States Supreme Court explicitly accepted this proposition in the seminal decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which it rejected the passing-on defence. The appellants contend that this same principle applies in Canadian law, citing *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, and *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, in which this Court criticized the theory of passing on when raised as a defence, stressing the policy consideration of ensuring that the twin goals of deterrence and victim compensation are not eroded.
4. The appellants argue that if the defence of passing on is not accepted in Canadian law, the corollary is that passing on should not be accepted as the basis for a cause of action. They rely in support of this position on the United States Supreme Court’s decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which that court explicitly rejected passing on as the basis for a cause of action, citing concerns of an excessively onerous burden of proof for plaintiffs and a risk of multiple liability for defendant manufacturers against which direct and indirect purchasers pursue separate claims.
5. We do not agree with the appellants. The policy considerations that militate against the defence of passing on at common law should favour, in the civil law of Quebec, compensation for a loss that has been passed on to a plaintiff. In reaching this conclusion, we must point out that the rejection of passing on as a defence does not preclude passing on as a factual occurrence. The defence has been rejected not because passing on does not exist, but primarily for policy reasons. In the instant case, acceptance of the passing-on defence would adversely affect the *Competition Act*’s objectives of deterrence and compensation. It might enable wrongdoers to keep ill-gotten gains if they could successfully demonstrate that artificial price increases had not been absorbed by direct purchasers and if indirect purchasers were unable or unwilling to mount their own action.
6. Courts were also concerned that acceptance of the passing-on defence would unduly increase the evidentiary burden of direct purchaser plaintiffs by requiring that they prove not only that they had suffered a loss, but also that they would not be benefiting from a windfall after having passed that loss on. This concern is particularly relevant since, as Professor Waddams points out in *The Law of Damages* (5th ed. 2012), at p. 15-38, direct purchasers can suffer losses even where anti-competitive price increases are passed on, since, owing to market dynamics, higher prices can have an impact on sales volumes and profitability. In order to preserve a direct purchaser’s cause of action, it is necessary to crystallize the loss by holding that the action against the defendants vests in the direct purchaser at the time of the purchase.
7. By contrast, to reject the possibility, in the Quebec law of civil liability, of claiming compensation for a loss that has been passed on would be inconsistent with the twin objectives — deterrence and compensation — of extracontractual liability. To allow for recovery of such a loss would be compatible with those objectives.
8. The risk of double recovery for a single loss should be assessed in light of the facts and circumstances specific to each case, as opposed to being dealt with in the abstract by means of a blanket application of inflexible rules. Every case will raise distinct evidentiary issues, and these issues are appropriately addressed on a case-by-case basis.
9. In the instant case, there is no risk of double recovery, since the direct and indirect purchasers would be combined in a single group that would make a single collective claim of an aggregate loss. This case does not involve separate claims, so there is quite simply no risk of multiple liability for a single loss.
10. The appellants submit that a notional risk of double recovery results from the application of art. 999 of the *C.C.P.*, which precludes legal persons with more than 50 employees from participating as members in a class action, thereby opening up the possibility of double recovery should a larger corporation bring a separate action. However, this risk is exactly as described: notional. There is no evidence before the Court that a separate action has been filed. In light of the flexible approach we have outlined above, a potentially valid action should not be barred on the basis of a theoretical concern that has not in fact materialized.
11. In summary, therefore, passing on can serve as a sword under the civil law of Quebec even though it cannot serve as a shield. Accordingly, what remains for the respondent is to meet the threshold requirement for the demonstration of passing on that applies at the authorization stage.

(ii) Evidentiary Burden With Respect to Injury

1. The appellants argue that the allegations made in the respondent’s motion are not sufficiently detailed and specific to discharge the burden of demonstrating that the loss was passed on to the indirect purchasers. Their position is that if the artificially inflated prices cannot be shown to have reached the indirect purchasers, those purchasers can have suffered no loss and for that reason cannot form part of the class. They claim that the respondent relies entirely on “speculative and unspecified allegations” and that the class action should accordingly not be authorized.
2. In support of their position, the appellants cite *Toyota* and *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859. In the latter case, the Court of Appeal stated, at para. 32, that [translation] “the allegations of fact set out in a motion for authorization to institute a class action must be sufficiently specific and precise to support *prima facie* the right the applicant wishes to assert”.
3. These assertions raise two challenges which the respondent must overcome in order for the class action to be authorized. *First*, it must satisfy the courts that the claim of an aggregate loss is sufficient to meet the requirements of art. 1003(*b*) of the *C.C.P.* at this preliminary stage. *Second*, it must present a sufficient arguable case that the artificial price increases passed through the complex distribution channels and were absorbed, at least in part, by the indirect purchasers. Both these issues are intertwined with questions related to the evidentiary threshold requirement to be met at this stage.

1. *Aggregate Loss*

1. As we mentioned above, the appellants argue that the respondent’s allegations that the indirect purchasers suffered a loss are vague and imprecise. More specifically, they submit that the motion does not clearly state what injury the indirect purchasers suffered, how the alleged injury can be identified and quantified, or how misconduct in other jurisdictions can cause an injury in Quebec. The appellants add that the allegations set out in the motion are couched in language that is so vague as to be of no help in determining whether any injury was in fact suffered. They assert, citing *Toyota*, that allegations of loss which are [translation] “vague, general and imprecise” are not sufficient.
2. Furthermore, the appellants submit that the respondent, by alleging an aggregate loss, has failed to discharge the burden of showing *prima facie* that all members of the group had suffered an injury. They again cite *Toyota* for this proposition, and more specifically the following comment made by the Court of Appeal in that case, at para. 54:

[translation] It is in effect essential to demonstrate the collective nature of the injury suffered, and a class action is not appropriate if it would give rise, at the hearing on the merits, to a multitude of small trials and if a major aspect of the dispute does not lend itself to collective determination because of a multiplicity of subjective factors.

1. The appellants also cite *Bou* *Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, for the proposition that an aggregate loss is not sufficient to meet the requirement for authorization and that each member of the proposed group must be proven to have sustained a loss for the claim to succeed. In that case, Deschamps J. stated, at para. 53:

As I mentioned above, for a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group . . . . [Emphasis added.]

1. We do not accept the appellants’ arguments. In our opinion, the respondent has met the low evidentiary threshold requirement for demonstrating an injury at this preliminary stage of the proceedings.
2. At the risk of being repetitive, we wish to stress that the evidentiary burden applicants must discharge at the authorization stage is that of establishing an arguable case. This means that the respondent must show that the members of the group suffered an injury. While it is true that a judge hearing a motion for authorization is responsible for weeding out frivolous cases, a class action alleging an aggregate loss is not, *per se*, frivolous. No provision of the *C.C.P.* bars such claims, which meet the twin objectives of deterrence and compensation that animate the class action system. Moreover, the *C.C.P.* itself provides for collective recovery (arts. 1031 to 1033). If both indirect and direct purchasers have in fact suffered losses, it would run counter to the legislative intent with respect to the class action not to allow the case to proceed to trial, where the merits can be appropriately weighed.
3. At this preliminary stage, allowing the demonstration of an aggregate loss will provide flexibility for the proceedings without requiring applicants to establish each member’s individual loss, which would be an overly onerous burden. How the loss might be allocated and compensated for can be left to the review of the merits of the case and to the stage of execution of an eventual judgment. Moreover, we cannot accept any argument that this would open the door to frivolous actions. If an aggregate loss can be demonstrated, the question how that loss is to be divided among the members of the proposed group does not change the fact that a loss was indeed suffered. As a result, the demonstration of an aggregate loss is sufficient to meet the requirements of art. 1003(*b*) of the *C.C.P.* at the authorization stage, provided that the evidentiary threshold requirement is met.
4. The threshold requirement for art. 1003 is that the applicants present an arguable case that an injury was suffered. Although more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities.
5. This evidentiary burden is less demanding than the one that applies in other parts of Canada. As evidenced by this Court’s decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, indirect purchasers in other Canadian jurisdictions would, to obtain certification of a class proceeding, have to show that their claim has a sufficient basis in fact. An applicant in one of those jurisdictions would be required to produce expert testimony and advance a methodology capable of demonstrating an aggregate loss that would apply to both direct and indirect purchasers. However, presentation of expert evidence is not the norm at the authorization stage in Quebec. A requirement that applicants adduce such evidence and advance a sophisticated methodology capable of demonstrating an aggregate loss and how that loss was passed on through complex distribution channels would be more onerous than the threshold requirement for art. 1003.
6. With regard to the appellants’ reliance on *Toyota* for the proposition that an aggregate loss is not sufficient at the authorization stage, we agree with Kasirer J.A. that the appellants have given an overly broad reading to that case. The reasons of Baudouin J.A. in *Toyota* do nothing to persuade us that the burden should be more onerous at the authorization stage than the one we have outlined above. In fact, Baudouin J.A. reiterated this point himself in *Toyota*, at paras. 43-44. Rather than laying down sweeping principles that would apply to the case at bar, *Toyota* was based on unique circumstances that are easily distinguished from those of this case. In comments with which we agree, Kasirer J.A. aptly summarized the relevant distinctions from that case as follows, at para. 99:

It was the very particular character of the price-maintenance scheme, which put an end to price negotiation by new car buyers, that explained why the motion for a class action failed in that case. For able negotiators contending with the price-maintenance scheme in *Toyota*, the fixed price created a loss. But for poor negotiators in the same class, the fixed price resulted in a gain. There was accordingly no way of knowing, based on the allegations made, whether losses outweighed gains and, importantly, how the foregone opportunity to negotiate was to be quantified as a loss. Contrary to *Toyota*, it cannot be said in the present case that the allegations create an uncertainty as to whether there is an aggregate loss to direct and indirect buyers of DRAM. The allegations are precise in that respect. This is not a case that runs the risk, at trial, of disintegrating into the multiple trials Baudouin, J.A. warned against in *Toyota*. Indeed the motions judge himself recognized at paragraph 153 of the judgment *a quo*.

1. We will now turn to the appellants’ assertion that an injury must be made out for each member of the proposed group, a proposition for which they cite *Malhab*. Much like the appellants’ argument with respect to *Toyota*, this argument is based on an overly broad interpretation of the principles laid down in *Malhab*. Although *Malhab* did address the issue of proof of injury for each individual member of the group, it did so in the context of a trial on the merits. The plaintiffs in *Malhab* therefore faced a much stricter burden of demonstrating an injury across the group. In the instant case, which is at the authorization stage, the respondent is merely required to establish an arguable case of an injury suffered. It is therefore not necessary at this preliminary stage to prove that each member of the group suffered a loss. As we indicated above, the demonstration of an aggregate loss may be enough at the authorization stage.
2. Even if the difference between the stages of the proceedings is disregarded, the requirements with respect to an aggregate injury that were established in *Malhab* were adopted in a context distinct from that of the case at bar. In that case, the Court had to determine whether an entire ethnic group had suffered an injury from defamatory comments made in the media. The tort of defamation is unique in that it balances freedom of expression against the protection of reputation. Establishing damage to reputation on a collective basis would require an extraordinary set of circumstances. As Deschamps J. explained, at para. 66, “the imputing of a single characteristic to all members of a group that is highly heterogeneous, has no specific organization or has flexible, broadly defined admission criteria would make an allegation of personal injury implausible”. On the other hand, claims of losses resulting from artificially inflated prices do not require an examination of the characteristics of individual members aside from their having purchased a particular product and paid an inflated price. Questions about visibility in the community, historical stigmatization, the type and tone of defamatory comments, societal perceptions, and the impact of a myriad of other traits of the group on the alleged injury are irrelevant to the demonstration of losses in a case involving an anti-competitive price-fixing scheme.
3. These marked differences limit a court’s ability to draw inferences about injuries suffered on an individual basis. As Deschamps J. explained, “the plaintiff must prove an injury shared by all members of the group so the court can infer that personal injury was sustained by each member” (*Malhab*, at para. 54).
4. On the nature of the specific allegations in the instant case, we agree with the Court of Appeal’s conclusion that the respondent has presented an arguable case of loss that is sufficient to meet the requirements of art. 1003(*b*) of the *C.C.P.* As we mentioned above, the respondent alleged the following in its motion for authorization: (a) a price-fixing conspiracy had artificially inflated the price of DRAM sold in Quebec (para. 2.14); (b) direct and indirect purchasers of DRAM had collectively overpaid as a result of this anti-competitive conspiracy (paras. 2.15 and 2.15.1); (c) all members of the group had assumed the inflated portion of the price, either in whole or in part (para. 2.16); and finally (d) the collective injury suffered by the entire group was equivalent to the total overpayment by the direct and indirect purchasers (para. 2.17).
5. On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant’s allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants’ alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.
6. Accordingly, we agree with Kasirer J.A.’s conclusion that on the facts of this case, the aggregate loss alleged by the respondent is sufficient in Quebec law to demonstrate an injury in accordance with the evidentiary standard applicable at the authorization stage. The arduous task of actually proving this loss for each member of the group is one that would be more appropriately undertaken at trial.

2. *Passing On*

1. At the authorization stage, the evidentiary standard for demonstrating passing through is no different than the one for demonstrating an aggregate loss. The applicant must establish an arguable case that losses were passed on.
2. Given this low threshold, the applicant is neither expected nor required to adduce expert testimony and advance a sophisticated methodology. Indeed, at this stage, the applicant need not even propose a possible methodology for the trial. But the representative of the class will need to be able to prove that losses were passed on to the indirect purchasers in order to succeed at trial. The Court of Appeal set these principles out succinctly in *Pharmascience*, at para. 52:

Although the legal argument described in the proceedings is easily stated, there is still a marked want of proof behind the allegations in the motion for authorization. At this stage, however, the apparent complexity of the case is irrelevant under Quebec’s *Act respecting the class action*. It does not fall to the judge hearing the motion for authorization to assess the risks and pitfalls faced by the applicant. Indeed, even if the judge did find that some of the claims were without merit, she would not be authorized to immediately exclude them from the debate because the motion for partial dismissal has been struck out of the *Code of Civil Procedure*.

1. At this early stage, the aggregate loss alleged by the respondent and supported by the exhibits referred to above is enough to meet the burden of an arguable case. As Kasirer J.A. noted, the “challenge will be a substantial one at trial but it would be inappropriate, once damage is alleged, to say that the class action should not proceed past the authorization stage because the challenge is too great” (para. 117). If at trial the respondent is unable to demonstrate how the loss was passed on to the indirect purchasers and how it is to be calculated, the action might fail at that stage.
2. Subject to these reservations, we agree that the respondent has met the threshold requirements of art. 1003 of the *C.C.P.* in respect of the alleged injury. We will now turn to the problem of the causal connection between the fault and the injury.

(c) *Causation*

1. To establish causation under art. 1457 of the *C.C.Q.*, it is necessary to show that the injury suffered was an immediate and direct consequence of the fault. As stated in art. 1607 of the *C.C.Q.*:

**1607.** The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor’s default.

1. The appellants argue that any losses suffered by indirect purchasers fail to meet this requirement of directness, because the alleged injury is a “*dommage par ricochet*” ([translation] “indirect damage”). They assert that each direct purchaser and each upstream indirect purchaser made the decision to pass on some, all or none of the overcharge that allegedly stemmed from the appellants’ anti-competitive conduct. According to the appellants, this choice to pass on or absorb a price increase is enough to break the chain of causation, since they did not retain control over the price of DRAM throughout the distribution chain. They submit that the indirect purchasers cannot be said to have suffered damage directly, since the actions of other parties determined the price paid for DRAM by end users.
2. While the appellants correctly state that Quebec civil law does not permit compensation for indirect damage, they fail to make an important distinction between indirect damage and the “*victime par ricochet*” ([translation] “indirect victim”). The indirect victim is someone who suffers an autonomous injury after the commission of a fault, where the damage suffered was the logical, direct and immediate result of the fault. This is contrasted with indirect damage where the damage itself is indirect, because its source is not the immediate fault. Baudouin and Deslauriers comment on the application of this distinction, at No. 1-327:

[translation] In our opinion, the debate should focus not, as has been the case, in a formalistic and artificial manner on whether a broad or a narrow interpretation should be given to the word *another*, but on the real issue, that of the causal connection. The courts must therefore determine, in each case, independently of the claimant’s personality, whether the *injury* being claimed is a direct consequence of the fault, rather than trying to determine whether the *applicant* is the *immediate victim*.

1. This distinction was ably explained by a Superior Court judge in *Hubert v. Merck & Co. Inc.*, 2007 QCCS 3291 (CanLII), a judgment on a motion in an authorization proceeding that involved indirect victims, at paras. 12-13:

[translation] At law, an indirect victim can have a cause of action against the person who caused the injury if he or she can prove that the person in question committed a fault.

The indirect victim’s injury, although distinct from that of the direct victim, is an immediate and direct result of that fault.

1. We agree with this reasoning and accept the distinction between an indirect victim and indirect damage. Thus, the damage must be shown to be a direct consequence of the injurious act, but the plaintiff need not be the immediate victim of that act in order to recover. But at the authorization stage, the applicant needs only to present an arguable case that the loss was a direct result of the alleged misconduct. In the instant case, it would be wrong at this stage to find that only the direct purchasers suffered a direct injury. Although the indirect purchasers may be indirect victims, the injury they allegedly suffered was a direct result of the appellants’ anti-competitive conduct.
2. In light of this distinction, we agree with the Court of Appeal that the appellants’ argument based on art. 1607 of the *C.C.Q.* must fail and that the demonstration of causation is sufficient to meet the requirements of the authorization stage. Whether causality — a direct link between the fault and the injury — can be proved on a balance of probabilities is a question best addressed at trial.

(d) *Article 1003(b) — Conclusion*

1. In our opinion, the respondent has discharged its burden with respect to the demonstration of fault, injury and causation at the authorization stage. We will now turn to arts. 1003(*d*) and 1048 of the *C.C.P.* to determine whether Ms. Cloutier and Option consommateurs are in a position to adequately represent the members of the proposed group.

(3) Articles 1003(*d*) and 1048 — Adequate Representation of the Group’s Members

1. The appellants make two arguments as to why Ms. Cloutier does not meet the requirements for representing the members of the proposed group under art. 1003(*d*) of the *C.C.P.* First, they submit that Ms. Cloutier cannot represent a group whose members purchased DRAM or products containing DRAM in Quebec, because she purchased her computer in Ontario. As we mentioned above in discussing the issue of jurisdiction, however, Ms. Cloutier’s computer is deemed under the *Consumer Protection Act* to have been purchased in Montréal under a remote-parties contract.
2. Second, the appellants argue that there is an inherent conflict of interests between Ms. Cloutier, as an indirect purchaser, and the direct purchasers. More specifically, the appellants assert that the direct and indirect purchasers have opposing interests in that each of these subgroups will argue that its members absorbed the full amount of the overcharge resulting from the price-fixing conspiracy. This argument has no valid basis.
3. Article 1003(*d*) of the *C.C.P.* provides that “the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately”. In *Le recours collectif comme voie d’accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [translation] “. . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . .” (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(*d*), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.
4. Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [translation] “[i]n the event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member.” Given that the purpose of the authorization stage is merely to screen out frivolous claims, it follows that the purpose of art. 1003(*d*) cannot be to deny authorization if there is only a possibility of conflict. This position is supported by the case law, as authorization appears to have been denied under art. 1003(*d*) on the basis of a conflict of interests only where prospective representative plaintiffs had failed to disclose material facts or were undertaking the legal proceedings purely for personal gain. (See *Croteau v. Air Transat A.T. inc.*, 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black v. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181 (Que. C.A.); *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin v. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); and *Rosso v. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61.)
5. It would accordingly be contrary to the spirit of art. 1003(*d*) of the *C.C.P.* to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and Ms. Cloutier are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss. As the British Columbia Supreme Court astutely pointed out in its decision at trial in *Sun-Rype*, “[t]he only parties at this time that have an interest in having the direct and indirect purchasers in a conflict of interest are the defendants” (2010 BCSC 922 (CanLII), at para. 194).
6. The appellants also submit, on the basis of art. 1048 of the *C.C.P.*, that Option consommateurs should not be permitted to represent both the direct and the indirect purchasers, because its mandate of advocating for consumers runs counter to the interests of the direct purchasers. Article 1048 reads as follows:

**1048.** A legal person established for a private interest, partnership or association defined in the second paragraph of article 999 may apply for the status of representative if

(a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and

(*b*) the interest of that member is linked to the objects for which the legal person or association has been constituted.

. . .

1. We see no reason to prevent Option consommateurs from continuing to represent the interests of both the direct and the indirect purchasers at this stage of the litigation. Much like art. 1003, art. 1048 is intended to be a flexible gatekeeper. As the Superior Court pointed out in *Association des résidents riverains de la Lièvre inc. v. Canada (Procureur général)*, 2006 QCCS 5661 (CanLII), at paras. 180-81, the purpose of art. 1048 is to enable a legal person with no direct interest in an action to be granted the status of representative. And as Kasirer J.A. correctly pointed out in his reasons in the case at bar, at para. 133, “[t]he Code does not direct that the legal person who applies to represent the class have a mission connected to all the members of the class, but merely to the interest of one of its members.” Since Ms. Cloutier is a member of Option consommateurs and of the proposed group, art. 1048 does not prohibit Option consommateurs from representing the interests of the members in this case.
2. In summary, we see no conflict between the direct and indirect purchasers at this stage of the proceedings that would bar either Ms. Cloutier or Option consommateurs from representing the interests of the class. It would be more appropriate to deal with any actual conflict between the direct and indirect purchasers at subsequent stages of the proceedings, once any aggregate loss has been established.

VI. Disposition

1. For these reasons, we would dismiss the appeal. Costs should be awarded in this Court against the appellants Infineon Technologies AG and Infineon Technologies North America Corp. The motion to strike part of the factum of the intervener Canadian Federation of Independent Grocers is dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellants:  Stikeman Elliott, Montréal.

Solicitors for the respondent Option consommateurs:  Belleau Lapointe, Montréal.

Solicitors for the intervener:  Sotos, Toronto.

1. Micron Technology, Inc., Hynix Semiconductor Inc., Samsung Electronics Co., and Samsung Semiconductor Inc., which were originally parties to this case, have discontinued their appeals. The Court has been advised of settlements agreed to by some of them. We have taken this into account in our conclusion. [↑](#footnote-ref-1)