

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000500-104

DATE : 31 May 2011

UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.C.S.

VIRGINIA NELLES
Plaintiff

v.

ROYAL BANK OF CANADA
Defendant

**TRANSCRIPT OF REASONS FOR JUDGMENT
(ON DEFENDANT'S MOTION FOR PERMISSION TO EXAMINE MEMBERS
OF THE CLASS BEFORE PLEA)
GIVEN ORALLY ON 25 MAY 2011**

[1] I think that the situation, after this morning's presentation by both sides, has now crystallized. The purpose of the Defendant's Motion for Permission to examine members of the Class before Plea is now clearly stated and, although two weeks ago, when you argued the objections before me and after we had briefly discussed the Motion, I was of the view that I would take the matter under advisement, I am now in a position to render my decision, given that I now have the benefit of the written submissions and authorities of both parties.

[2] On May 12th last, I decided a series of objections to questions put to Virginia Nelles during her examination on discovery before plea by the Defendant Royal Bank of Canada. All, or substantially, all the questions dealing with Virginia Nelles' personal conduct of her affairs or the affairs of the Estate of her father and dealing with her personal contacts with Earl Jones were maintained.

[3] The basis for the maintenance of these objections was that these questions did not relate to any of the common questions listed in the judgment of authorization of the Class Action.

[4] One question was left in abeyance: objection no. O-33 follows a request by the Royal Bank for the communication of the list of the Class Members. That question was left in abeyance pending the argument and decision on Defendant's Motion. Obviously, if I were to grant that Motion, then I would have to allow the communication or find a way to ensure that the Defendant is given a list of the members of the Class because the conclusion of the Defendant's Motion is for the Royal Bank to choose three members at random, from that list, in order to proceed with three additional specific Examinations on Discovery Before Plea.

[5] So, before I can really rule on objection no. O-33, I must decide whether I grant the Motion or not.

[6] I am satisfied that the Royal Bank's Motion raises similar questions of fact and law as were raised in *St-Ferdinand*¹, one of the basic cases in matters of class actions in Quebec, more specifically, the judgment of the Court of Appeal which is found at tab 6 of Plaintiff's Book of Authorities. I do not wish to do a comparative analysis of the present case with the issues raised in *St-Ferdinand*, I believe that this was done in argument quite properly. This issue is also outlined in the written submissions of the Plaintiff² against the Motion and I will simply refer to those comments.

¹ *Syndicat national des employés de l'hôpital St-Ferdinand -et- La Fédération des affaires sociales et al -et- La Confédération des syndicats nationaux -et- le Curateur public*, A2-50387563

² See paragraph 35 of Plaintiff's written argument of 25 May 2011. See also the comments of Rothman J.,: "*The class action provisions of the Code, however, prohibit a defendant in a class action from urging preliminary exceptions save those exceptions which are common to a substantial proportion of the members of the group and which bear on a question dealt with collectively.*"

...
"In the present case, the particulars requested relate specifically to the individual circumstances of the patients, their individual illnesses and the care required by each of them. These details might be relevant to the individual claims that the patients may have against appellants but they do not bear on any question to be dealt with collectively and they are not common to a substantial number of the patients, except, of course, in the broad sense that all of them are chronically ill and all have mental problems."

...
"In short, the action, as framed, seeks collective recovery (Article 1031 C.C.P.) of damages common to all of the patients and it does not contain any conclusion for judgment on any individual claims the patients might have (Article 1037 C.C.P.). In the event that it were found to be expedient to render judgment on the individual claims of the patients – and that is not even requested in the proceedings at this stage – then, at that stage, appellants would have the right under Article 1040 C.C.P. to urge the preliminary exceptions which Article 1012 C.C.P. prevents them from urging at this sage."

[7] I am also satisfied that this Motion raises similar issues as were raised before Riordan J. in the current "tobacco case" which is properly identified as *Conseil québécois sur le tabac et la santé -et- Jean-Yves Blais et al v. J.T.I. McDonald Corp.*³ *et al*, also its sister case *Cécilia Létourneau v. J.T.I. McDonald Corp et al*. In both of these instances, applications for further examination of members of the Class were not allowed; the decision of Mr. Justice Riordan was confirmed by the Court of

See also LeBel J.: *"Le Code de procédure civile, dans sa rédaction actuelle, a cherché à décourager l'usage excessif des moyens préliminaires à l'égard des recours collectifs. Il a voulu, dans toute la mesure du possible, faire en sorte que ces procédures se rendent à procès le plus rapidement possible. La complexité même de ces procédures les rend, d'ailleurs, extrêmement vulnérables à: la multiplication des procédures préliminaires et une faveur législative ou judiciaire trop marquée à l'égard de celles-ci risquerait de rendre impraticable ce moyen de procédure. De cette attitude législative, témoignent d'abord la prohibition de l'appel du jugement autorisant le recours collectif et ensuite, la restriction des moyens préliminaires à ceux qui sont communs à une partie importante des membres et qui portent sur des questions traités collectivement.*

En l'espèce, le moyen préliminaire a pour objet de forcer le demandeur non seulement à individualiser et à prouver prématurément tous les recours individuels. La requête pour précision est formulée, à mon avis, sans nécessité, la déclaration délimitant, avec suffisamment de clarté, le cadre de la contestation et permettant aux défendeurs de plaider en connaissance de cause. Il n'y a pas lieu d'ordonner la production des précisions réclamées par les appelants, dans la mesure où la procédure écrite, telle qu'elle se trouve d'ailleurs complétée par l'ordre de fournir des précisions à certains paragraphes qu'a donné le premier juge, respecte les règles fondamentales de la procédure écrite et ne prive pas les appelants du droit de se défendre ni de connaître ce qu'on leur reproche. Elle ne lèse pas non plus leurs droits éventuels.

En effet, l'intimé qui demande le recouvrement collectif, devra établir de façon suffisamment exacte, conformément à l'article 1031 C.p.c., le montant total des réclamations de ses membres, pour que le tribunal puisse l'ordonner. Par ailleurs, si l'intimé ne fait pas une preuve suffisante à cet égard, la procédure de réclamation individuelle peut jouer. C'est véritablement à ces deux étapes de procédures que pourra être vérifiée l'existence de préjudices communs ou individualisés. Dans l'un et l'autre cas, les appelants conserveront leurs droits à une défense pleine et entière. Ils n'ont toutefois pas le droit de forcer l'intimé à faire sa preuve complète, dans sa déclaration, à l'égard de chaque réclamation individuelle ni à mener un recours collectif comme un faisceau de recours individuels."

³ 2009 QCCS 830:

[1] *Dans un recours collectif, une partie ne peut, avant le jugement final, soumettre un membre du groupe autre qu'un représentant ou un intervenant à un interrogatoire préalable. C'est la règle de base et le point de départ de toute analyse de la question. L'article 1019 C.p.c. l'édicte.*

[2] *Il existe néanmoins une soupape de sûreté dans le même article qui permet à un tribunal d'ordonner de tels interrogatoires s'il les considère "utiles à l'adjudication des questions de droit ou de faits traitées collectivement.*

...
[9] *Cependant, ce ne sont pas les moyens de défense à toutes les réclamations possibles qui peuvent faire l'objet de l'interrogatoire d'un membre avant le jugement final. Seuls ceux ayant trait aux questions communes sont éligibles. Les moyens pertinents aux aspects individuels ne peuvent être explorés qu'après le jugement final, soit dans le cadre des réclamations individuelles.*

[10] *La logique derrière une telle règle nous apparaît incontestable. Permettre au défendeur d'entrer dans le détail des réclamations individuelles avant le jugement final entraînerait le dossier dans un processus sans fin n'ayant aucune pertinence à cette étape de l'action. Pour se prévenir contre une telle éventualité, le législateur crée un double test d'éligibilité: utilité et lien avec les questions communes.*

Appeal in its dismissal of the Motion for Leave to Appeal⁴ which is also to be found at tab 8 of Plaintiff's book of authorities.

[8] I see no reason to proceed on the issues put forward by counsel for the Royal Bank in its Motion for permission to examine and, more particularly, the points which are listed at paragraph 11 of his Motion because I do not believe that further investigation of these issues will enlighten the Court in its determination and its eventual adjudication of the common questions listed in the judgment of authorization.⁵

[9] Consequently, without further comment but relying on the reasoning of Messrs Justice Rothman and Lebel in *St-Ferdinand* and in the reasons for judgment of Mr. Justice Riordan in *J.T.I. McDonald*, and also relying on the comments of Mr. Justice Doyon of the Court of Appeal and dismissing the Application for Leave to Appeal from Riordan's judgment, I have no alternative but to dismiss the Royal Bank's Motion, with costs.

[10] There is one additional comment which I should have included in my reasons before dismissing the Motion and, if you will permit me, although my conclusions have been given, I would add the following: it is important to note that we are at a very early stage of this case; we are at a stage where examinations before plea are

⁴ EYB 2009, 157978 (CA) (Doyon J.:

13. *Avec égards pour l'opinion des requérantes, je ne peux voir en quoi ces conclusions pourraient être déraisonnables ni en quoi le juge de première instance aurait mal exercé son pouvoir discrétionnaire. La nature et la formulation des questions devant être traitées collectivement et les conclusions identifiées par le jugement d'autorisation supportent les conclusions du juge de première instance en ce que rien ne permet de croire que les interrogatoires recherchés pourraient, à ce stade des procédures, aider à répondre à ces questions.*

⁵ Paragraph 11 of Defendant's Motion reads as follows:

"Accordingly, during the examinations of the selected class members, the Defendant would address, the following matters, useful to the adjudication of the common questions referred to above, for which the representative cannot answer on behalf of the other class members:

- a. Their degree of experience and sophistication regarding investing;*
- b. How they knew Earl Jones and the circumstances leading to their decision to invest with him;*
- c. The nature of their investments with Earl Jones;*
- d. How their funds were deposited into the Earl Jones in Trust Account;*
- e. The information and/or documentation given to them by Earl Jones or others regarding their investments and the Defendant;*
- f. The verifications and inquiries made by them regarding their investments with Earl Jones*

There is, in the opinion of the undersigned, no necessity to investigate those specific issues because the present Class Action seeks to establish the possible liability of the Royal Bank of Canada in the manner in which it dealt with Earl Jones as well as in the manner in which the Bank administered and managed the Trust account in question, and not the circumstances which have caused the victims to invest with Earl Jones. Consequently, an examination on the issues listed in paragraphs (a) to (f) of paragraph 11 above does not, at this stage of the case, serve any purpose.

still being sought. The Court does not have the benefit of the Royal Bank's theory of the case nor is the Court informed of the various arguments which will be put forward in the Royal Bank's defense. My decision, at this point, is based on the record as it now stands and not as the record may stand at a later stage of these proceedings or at trial.

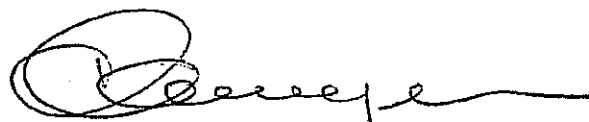
[11] In rendering an oral judgment, there is always the risk of being not as clear or as well structured as one would be if one were to write the opinion and reflect on every word and sentence, so obviously if a transcript of these reasons is necessary, I reserve the right to apply the rule in *Kellogg's*⁶ and re-arrange and develop further the reasons that I have given without, of course, changing the issue. Although I have to dismiss your motion, Mr. De Zordo, I must say that the debate was most stimulating and I thank both counsel for their careful preparation of the arguments, their notes and authorities submitted.

[12] Me De Zordo:

Is the objection O-33 maintained?

The Court:

The objection on O-33 is, of course, maintained given the results on the Motion... The objection on O-33 is maintained a) because it is not appropriate for that list to be communicated at this stage, based on the authorities cited by counsel for Plaintiff and, furthermore, it is not necessary to do so given the result of the Court's decision on the Motion.



ROBERT MONGEON, J.C.S.

Me Robert Kugler – *Kugler Kandestin*
Me Neil Stein – *Stein & Stein*
Attorneys for the Plaintiff

Me Alexandre De Zordo – *Borden Ladner Gervais*
Attorney for the Defendant

Date of hearing : 25 May 2011

⁶ Le jugement a été rendu séance tenante. Comme le permet *Kellogg's Company of Canada c. P.G. du Québec*, [1978] C.A. 258, 259-260, le Tribunal s'est réservé le droit, au moment de rendre sa décision, d'en modifier, amplifier et remanier les motifs. Le soussigné les a remaniés pour en améliorer la présentation et la compréhension