

CANADA

SUPERIOR COURT  
(Class Action)

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PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No.: 500-06-000500-104

VIRGINIA NELLES

Plaintiff

vs.

ROYAL BANK OF CANADA

Defendant

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**DEFENDANT'S MOTION FOR PERMISSION TO EXAMINE  
MEMBERS OF THE CLASS AFTER PLEA  
(Arts. 398(1) and 1019 C.C.P.)**

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**TO THE HONOURABLE JUSTICE ROBERT MONGEON OF THE SUPERIOR COURT  
OF QUEBEC, DISTRICT OF MONTREAL, THE DEFENDANT ALLEGES THE  
FOLLOWING:**

1. On July 14, 2010, the Plaintiff was authorized to bring a class action on behalf of the following group of persons:

All persons, and estates of deceased persons, trustees, es qualité trusts and corporations whose funds were deposited to the account "Earl Jones In Trust, number 00361-5266622" (the "Earl Jones In Trust Account") at the Royal Bank of Canada, Beaconsfield Branch, between the period October 22, 1981 and August 28, 2008, and who did not receive reimbursement of the total funds deposited therein.

2. The principal questions of law or fact to be dealt with collectively (hereinafter the "common questions") were set for determination by the Court:

- a) Did Respondent commit a fault by allowing the Earl Jones In Trust Account to be operated as the personal account of Earl Jones, when it knew that the funds in the account belonged to and were to be administered on behalf of third parties?

- b) Did Respondent commit a fault by failing to make verifications as to the authenticity of endorsements in respect of cheques deposited into the Earl Jones In Trust Account?
  - c) Did Respondent commit a fault by permitting Earl Jones to operate a trust business, which entailed co-mingling funds belonging to numerous third parties, estates and trusts, out of a single "personal" account?
  - d) Did Respondent commit a fault by facilitating Earl Jones to hold out to the members of the Class that their funds had been deposited into a true trust account?
  - e) Did Respondent fail to act as a prudent, vigilant and reasonable banker would have in the circumstances?
  - f) Was Respondent negligent and/or wilfully blind in allowing Earl Jones to perpetrate a ponzi scheme, using the Earl Jones In Trust Account, for approximately 27 years?
  - g) Did Respondent fail to put an end to the irregular operation of the Earl Jones In Trust Account in a timely manner?
  - h) Did the Respondent fail to make appropriate verifications throughout the operation of the Earl Jones In Trust Account in respect of knowing its client and his business?
  - i) Did the Respondent fail to consider that there was a conflicted situation between Earl Jones's personal interests and those of the beneficiaries of the funds deposited to the Earl Jones In Trust Account?
  - j) Did Respondent act in a wrongful manner in August 2008, knowing the funds deposited in the Earl Jones In Trust Account belonged to members of the Class and constituted funds from a "Trust Business", by requesting and allowing Earl Jones to transfer the balance of funds in the Earl Jones In Trust Account to a new account opened in the name of Earl Jones Consultant & Administration Corporation?
  - k) If the answer to any of the foregoing questions is "yes", is the Respondent liable for the damages sustained by the members of the Class, collectively, as a result of the ponzi scheme?
  - l) What is the amount of damages sustained by the Class, collectively, as a result of the fault(s) of the Respondent?
3. On August 17, 2010, the Plaintiff filed a Motion Introductory of Class Action Proceedings (hereinafter the "Motion to Institute Proceedings");

4. The Plaintiff alleges in her Motion to Institute Proceedings that the Defendant is liable for the total amount of money deposited into the Earl Jones In Trust Account, which was not fully reimbursed to the class members:
  33. The Royal Bank of Canada is liable to the members of the Class, collectively, for the sum of money deposited to the Earl Jones In Trust Account which was not fully reimbursed to the members of the Class (the "Collective Loss");
5. The Plaintiff seeks, inter alia, the following conclusions in her proceedings:
  - (A) **MAINTAINING** the Motion Introductive of Class Action Proceedings;
  - (B) **CONDEMNING** the Royal Bank of Canada to pay damages in the amount of \$40,000,000.00, to compensate the Class for the Collective Loss, the whole with interest at the legal rate as well as the additional indemnity provided by law, to be calculated from and as of February 5, 2010;
  - (C) **DECLARING** that the Royal Bank of Canada is liable for the costs of judicial and extrajudicial fees and disbursements, including fees for expertise incurred in the present matter for and in the name of the Plaintiff and the members of the Class;
  - (D) **ORDERING** collective recovery of the total amount of the claims herein; in the event that the Final Judgment also provides for the individual liquidation of the claims of the members, the personal claim of the Plaintiff is \$250,000.00, plus interest at the legal rate as well as the additional indemnity provided by law, to be calculated from and as of February 5, 2010;
  - (E) **ORDERING** that the claims of the members of the Class be the object of individual claims in accordance with Articles 1037 to 1040 C.C.P. or, if impractical or inefficient, order the Respondent to perform any remedial measures that this Honourable Court deems to be in the interests of the members of the Class;
6. In accordance with Article 1031 C.C.P., the Court can order collective recovery only if the evidence produced establishes with sufficient accuracy the total amount of the claims of the members;
7. Thus, a request for collective recovery presupposes that all the elements of extracontractual liability (fault, damage and causality) can be determined on a collective basis. It is only under such circumstances that the common questions k) and l), reproduced above, could be determined on a collective basis;
8. Moreover, common question d), reproduced above, addresses the extent to which the alleged conduct of the Defendant facilitated Earl Jones in holding out that he was depositing the class members' funds into a true trust account;

9. The Plaintiff class representative was examined out of court on December 17, 2010 and January 7, 2011, and she could not answer (or was prevented so by way of objection) as to any of the other class members' situations, as appears more fully from the transcripts of the examination before Plea of Virginia Nelles held on December 17, 2010 and January 7, 2011 (*inter alia* at pp 234 and following of the Examination of December 17, 2010, and pp. 53, 59 of the Examination of January 7, 2011), the whole as appears from the Court record;
10. Moreover, as set out more fully in Defendant's Plea, her testimony was indicative of the apportionment of any potential liability but may or may not be representative of other class members' situation;
11. On May 31<sup>st</sup> 2011, the Honourable Justice Mongeon dismissed Defendant's Motion to examine additional members of the class action before plea, stating that this decision was based on the record as it then stood and not as it could stand at a later stage, the whole as appears from the Court record;
12. Following the above-mentioned Judgment, the Defendant filed its Plea on August 18, 2011, as appears from the Court record;
13. In its Plea, Defendant alleges a number of facts which relate specifically to issues surrounding liability and damages as well as representations made by Earl Jones to the class members, such that this Honourable Court will not only need to decide if there was fault, but in the affirmative if any fault was the determinative cause of the damages or whether there are other causes of the damages and whether collective recovery is feasible in the circumstances. These allegations are stipulated in the following paragraphs of Defendant's Plea:
  - 52: Earl Jones knowingly enticed people to give him money to invest with him through various means and stole from his clients under the cloak of an apparently legitimate and successful business operation; he never dealt exclusively with RBC and RBC has discovered that his purported investments were varied and went well beyond the In Trust Account;
  - 100: Although Plaintiff's involvement with Earl Jones may have begun with the administration of her late father's estate, she ultimately made the decision to invest the entire proceeds of her inheritance with Earl Jones beginning in 2005 when she was 38 years old such that she would be considered as an aggressive investor who entrusted Earl Jones with substantial funds in order to take advantage of the abnormally high and/or unusually consistent and even guaranteed returns that he was promising;
  - 132: In addition, the persons, estates of deceased persons, trustee, *es qualité* trusts and corporations comprising the class, as defined, had differing relationships with Earl Jones, different motivations for dealing with Earl Jones, different understandings as to his endeavours, intentions and means, and different degrees of contributory liability;

- 133: More particularly, RBC has learned that Earl Jones offered and received numerous investments that were completely extraneous to the In Trust Account and which included commercial and real estate ventures, mortgages, bridge loans to estates (sometimes over unusually lengthy periods), inter-client loans, private loans, partnerships, finder or referral fees, and others that were made principally on the strength of their relationship with and trust in Earl Jones.
14. The above allegations relate directly to common questions d), k) and l), which the Court should take into consideration in determining whether there is liability and in such case, whether collective recovery is possible and appropriate;
  15. The Defendant must be in a position to identify any potential evidence regarding causality and any apportionment of liability with respect to the class members in their own interactions with Earl Jones;
  16. Accordingly, Defendant must be allowed to examine class members concerning the facts alleged in the paragraphs of the Plea cited above on the following matters:
    - a) What they invested with Earl Jones;
    - b) How they invested with Earl Jones;
    - c) Why they invested with Earl Jones;
    - d) What representations were made to them by Earl Jones regarding an RBC in trust account;
    - e) What they received from Earl Jones;
    - f) Whether they remitted funds to Earl Jones in their capacity of liquidator to an estate or personally, and if personally, whether for an investment, a bridge loan, a commercial or real estate venture, a partnership, a private loan or other purpose.
  17. The examinations of additional class members will be useful to the adjudication of the questions of law or fact dealt with collectively, particularly in relation to the class, as defined, and/or any subclasses to be defined;
  18. In part as a result of statements made by Earl Jones in the context of his deposition under Section 163 of the *Bankruptcy and Insolvency Act* in the bankruptcy proceedings (docket number 500-11-037071-095), the Defendant has learned that there were roughly four categories of individuals whose funds were allegedly deposited to the Earl Jones In Trust account, namely: investors, estates, inter-investor lenders and mortgage debtors, as appears from that court record;

19. The Defendant therefore further submits that the class members to be examined should be chosen from among those different categories of individuals to ensure a suitable cross-section of the members will have been examined;
20. As such, the Defendant is entitled to request and hereby seeks leave of the Court to examine a total of three (3) class members after Plea, to be chosen by the Plaintiff's attorneys;
21. The present Motion is well-founded in fact and in law;

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the Defendant to conduct examinations on discovery after Plea of three (3) members of the class;

**RENDER** any other order to facilitate the examinations of class members;

**THE WHOLE** with costs to follow suit.

MONTREAL, September 8, 2011

*Borden Ladner Gervais*

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**Borden Ladner Gervais LLP**  
Attorneys for Defendant  
Royal Bank of Canada

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*Borden Ladner Gervais*  
**Borden Ladner Gervais S.E.N.C.R.L., S.R.L./LLP**

**NOTICE OF PRESENTATION**

**TO :** Me Neil H. Stein  
STEIN & STEIN INC.  
Professional Corporation  
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Montreal, Quebec H3Z 1A7

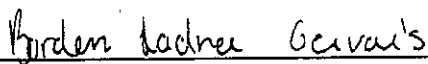
Me Robert Kugler  
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1 Place Ville-Marie, Suite 2101  
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**ATTORNEYS FOR PLAINTIFF**

**PLEASE TAKE NOTE** that Defendant's Motion for permission to examine members of the class before Plea will be presented for adjudication before the Honourable Justice Robert Mongeon on September 14, 2011.

**DO THEREFORE GOVERN YOURSELVES ACCORDINGLY.**

MONTREAL, September 8, 2011

  
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**Borden Ladner Gervais LLP**  
Attorneys for Defendant  
Royal Bank of Canada

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