CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000500-104

SUPERIOR COURT
(Class Action)

**VIRGINIA NELLES**

Plaintiff

vs.

**ROYAL BANK OF CANADA**

Defendant

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## DEFENDANT'S MOTION FOR PERMISSION TO EXAMINE MEMBERS OF THE CLASS BEFORE PLEA
(Arts. 397(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 Introductive 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;
   >
   > (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. In order to properly prepare its defence *en toute connaissance de cause*, the Defendant must be in a position to examine additional members of the class to identify those issues surrounding liability and damages with respect to common questions k) and l), which the Court should take into consideration in determining whether collective recovery is possible and appropriate;

9. In particular, 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;

10. 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. The Defendant must be allowed to examine class members concerning the representations made to them by Earl Jones in this respect and what documentation or information emanating from the Defendant, if any, was provided to them;

11. 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.

12. In fact, 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), disclosed herewith *en liasse* as Exhibit R-1;

13. Moreover, her testimony was indicative of the apportionment of any potential liability but may or may not be representative of other class members' situation, in that Plaintiff Virginia Nelles:

    a. acknowledged having made no enquiries into Jones' activities or credentials prior to entrusting $200,000 with him from her father's estate (pp. 28 to 33, of the Examination of December 17, 2010, Exhibit R-1);

b. acknowledged that one of the first things she did following the death of her father was to terminate Scotia Trust as liquidator designated by her late father in order to appoint Jones as "agent" to the liquidators of her father's estate (pp. 36 and 44 of the Examination of December 17, 2010, Exhibit R-1);

c. admitted having made no verifications or inquiries as to the investment vehicle by which Earl Jones would be managing and investing her funds (p. 45 of the Examination of December 17, 2010, Exhibit R-1);

d. acknowledged that she knew Jones was receiving the estate funds, that she was fully apprised of the ins and outs of the account and that she was at the time satisfied with Jones' administration of her father's estate (p. 48 of the Examination of December 17, 2010, Exhibit R-1);

e. admitted that she directed that all cheques from her father's estate be sent to Jones, or even gave him the cheques herself (p. 52, 71 and 72 of of the Examination of December 17, 2010, Exhibit R-1);

f. gave Jones cheques made out to her order without ever endorsing same and knew Jones was negotiating and depositing them (pp 98, 99 and 169 of the Examination of December 17, 2010, Exhibit R-1);

g. admitted having never filled out any RBC account opening documentation having never made any verifications as to Jones' relationship with RBC, having never questioned how Jones would open an account in her name and having never authorized him to open an account on her behalf, (pp. 27 and 46 and following, and 95, 96, 109, 155 and 156 of the Examination of December 17, 2010, and p.69-70 of the Examination of January 7, 2011, Exhibit R-1);

h. admitted having held investment portfolios in the past that required her to sign account and investment documentation with such brokerage houses as BMO Nesbitt Burns and RBC Dominion Securities (pp 79, 93 and 94 of the Examination of December 17, 2010 Exhibit R-1);

i. having met with her father's broker and understood that her father had a "conservative" investor profile, prior to instructing BMO Nesbit Burns to cash out her late father's portfolio and entrusting the proceeds to Jones (p. 73 of the Examination of December 17, 2010, Exhibit R-1);

j. acknowledged that, prior to entrusting Jones with the proceeds from her late fathers investment portfolio, amounting to over $200,000, she had no agreement, understanding or document setting out the terms of the investments Jones would be making, either as to interest, the type of investments or the fees he would charge, despite acknowledging that she knew she was receiving 12% interest from Jones (pp. 86 to 94 of the Examination of December 17, 2010, Exhibit R-1);

k. acknowledged having signed a cheque drawn on her father's account on his behalf, dated two days before his death, for $100,000, made out to Earl Jones in trust, (pp. 49 and following of the Examination of December 17, 2010, Exhibit R-1);

l. admitted to having received cash payments from Jones, at least as to those listed on her Earl Jones monthly statements (pp. 110, 111 and 217 of the Examination of December 17, 2010, Exhibit R-1);

m. testified that upon Jones' suggestion, she (along with her brother and mother) accepted to terminate the trust set up by her late grandfather in 1952 at Royal Trust so that funds totalling close to $600,000 from the liquidation of this portfolio would be remitted to Earl Jones (p. 123 of the Examination of December 17, 2010, Exhibit R-1);

n. urged Royal Trust to disburse the funds from her grandfather's estate promptly to Earl Jones on the premise that her and her brother had "made personal investment commitments" to Jones (pp. 152 and 153 of the Examination of December 17, 2010 Exhibit R-1);

o. Directed Royal Trust to send all proceeds from her grandfathers's trust to Earl Jones, knew he was receiving, negotiating and depositing the cheques on her behalf, gave no instructions as to the type of investment, the returns or the interest to be generated, made no verifications whatsoever with RBC and had full access to the funds at all times (pp. 165 to 185 of the Examination of December 17, 2010 Exhibit R-1);

p. Admitted to having received some 90 "monthly remittances" and additional payments "as requested" from Earl Jones, generally in increments of between $2,000 and $6,000 for herself and for her mother Wendy Nelles between August 2005 and May 2009, totalling over $300,000 from what she understood to be her Earl Jones in trust Canadian dollar "account" which was initially only credited with the $191,965.53 in Canadian funds received from her father's inheritance from his BMO Nesbit Burns portfolio (pp 206 to 227 of the Examination of December 17, 2010,Exhibit R-1);

q. Could not quantify her personal loss with any other accuracy than "it's close to $250,000" (p. 203 of the Examination of December 17, 2010, Exhibit R-1);

14. This examination clearly demonstrates that examinations of additional class members will be useful to the adjudication of the questions of law or fact dealt with collectively;

15. The Defendant submits that a reasonable number of examinations of class members must be conducted in order to determine whether the Plaintiff's circumstances with respect to the above-mentioned issues can be extrapolated

to the rest of the class members or are particular to her personal circumstances or to investors like her;

16. 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;

17. 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;

18. As such, the Defendant is entitled to request and hereby seeks leave of the Court to examine a total of three (3) class members before Plea, to be chosen by the Defendant from a list of class members known to class counsel;

19. The present Motion is well-founded in fact and in law;

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

**GRANT** the present motion;

**ORDER** the Plaintiff and her attorneys to provide to the Court, within 30 days following the present judgment, under confidential seal, the complete list of known class members targeted by the class action;

**AUTHORIZE** the Defendant to conduct examinations on discovery before Plea of three (3) members of the class chosen from the list of known class members provided by Plaintiff's attorneys;

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

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

**MONTREAL,** May 11, 2011

**Borden Ladner Gervais LLP**
Attorneys for Defendant
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## NOTICE OF PRESENTATION

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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 May 12, 2011.

**DO THEREFORE GOVERN YOURSELVES ACCORDINGLY.**

**MONTREAL,** May 11, 2011

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