

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Action)

NO.: 500-06-000500-104

VIRGINIA NELLES,

Plaintiff

-VS-

ROYAL BANK OF CANADA

Defendant

**PLAINTIFF'S OUTLINE OF ARGUMENT REGARDING
RBC'S MOTION TO EXAMINE CLASS MEMBERS
ON DISCOVERY**

1. The Timetable governing this matter required the Defendant to notify Motions to Examine other class members on discovery within 10 days of the Notice of Presentation of the Introductory Lawsuit (**August 30, 2010**).
2. The Defendant served its Motion to Examine other members of the Class on **May 11, 2011**, 9 months after the Deadline.
3. The Motion states that the examinations are **necessary** in order for the Defendant to prepare its Defence, yet **there is no affidavit filed in support of the Motion** (Paragraph 8 of the Defendant's Motion; Article 88 C.C.P.).

4. It is clear that the Defendant does not need to proceed to further examinations in order to prepare its Defence for the following reasons:
 - a. The subjects of the requested examinations are set forth in Paragraph 11 of the Defendant's Motion to Examine;
 - b. The Introductory Lawsuit does not contain any allegations concerning the subjects enumerated in paragraph 11 of the Defendant's Motion to Examine; rather, in accordance with the Authorization Judgment, the Introductory Lawsuit alleges facts concerning the conduct of the Royal Bank;
 - c. Objections to questions pertaining to each of the subjects enumerated in Paragraph 11 of the Defendant's Motion were maintained by Your Lordship on May 12, 2011, when adjudicating the objections raised during the examination of Ms. Nelles;
 - d. If the subjects in question were not relevant during Ms. Nelles' examination, how can it be necessary to ask other members of the Class questions pertaining to such subjects in order to file a Defence?
5. The Defendants' Motion is made pursuant to Article 1019 C.C.P.

*"1019. A party **cannot, before the final judgment**, submit a member other than a representative or an intervener to an examination on discovery ... unless the court considers the examination on discovery ... **useful to the adjudication of the questions of law or fact dealt with collectively.**"*

6. If the purpose of an examination on discovery is to permit the Defendant to prepare a Defence, why would the Legislator give Defendants the right to examine a Class member on discovery only **AFTER the Final Judgment**? Why would a Defendant even want the right to examine a Class member on discovery after the Final Judgment?
7. The answer to the foregoing questions is because "final judgment" in a class action has a different meaning than "final judgment" in an ordinary case. Whereas in an ordinary case, the Final Judgment puts an end to the case, in a class action, it does not.
8. Article 999 (b) C.C.P. defines "final judgment" in a class action as "the judgment which decides the questions of law and fact dealt with collectively".
9. What are the questions of law and fact dealt with collectively?
10. They are the questions set forth in the Judgment authorizing the class action (**SEE TAB 5**):
 - 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 willfully 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' 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**?
11. In the Final Judgment, Your Lordship will decide if the preponderance of the evidence has established affirmative answers to some or all of the collective questions.

12. If they are answered in the negative, then the Action will be dismissed and the case will be over. The Class members will **never** submit individual claims, they will never need to be examined, nor provide details regarding their potential individual claims.
13. However, if some or all of the questions of law and fact dealt with collectively are answered in the affirmative, then the Final Judgment will maintain the Action, in whole or in part, and after all appeals have been exhausted (Article 1041 C.C.P.), the case will proceed to a subsequent stage – the Recovery Phase.
14. Once, **and only once**, the Final Judgment acquires the authority of *res judicata*, does the case proceed to the **3rd stage**. During the **3rd stage of the Class Action**, either collective recovery is proceeded with or judgment may be rendered on individual claims (Articles 1044, 1030 and 1038 C.C.P.).
15. It is only during the Recovery Phase – i.e., **after the Final Judgment** – that the Defendant may urge a preliminary exception which it could not urge before (Article 1012 C.C.P.), and the Defendant may examine members of the Class **other than the representative** on discovery, which it could not do prior to the Final Judgment (Article 1019 C.C.P.).
16. Thus, in its wisdom, the Legislator made a distinction in Article 1019 C.C.P. between the class representative and other members of the class, as well as a distinction between prior to Final Judgment, and after Final Judgment.

17. The Legislator allows the Defendant to examine the class representative on discovery during the Final Judgment stage (but **not** during the Authorization stage), but the Legislator does not allow the Defendant to examine members of the class on discovery until after the Final Judgment stage, *le cas échéant*.
18. The Legislator vested the Court with limited discretion to make an exception to the rule prohibiting a Defendant from examining a member of the Class other than the representative prior to Final Judgment.
19. An exception may be made only if the Court considers the examination to be **useful** to the adjudication of **the** questions of law and fact dealt with collectively.
20. Your Lordship set out the questions of law and fact to be dealt with collectively in the Judgment authorizing the institution of the present class action (**SEE TAB 5**).
21. As Your Lordship already correctly noted during the Hearing on May 12, 2011, **all of the questions set forth in the Authorization Judgment relate to the conduct of the Royal Bank.**
22. Thus, an examination of a Class member may only be useful if it pertains to the conduct of the Royal Bank. Yet, the Defendant seeks to examine members of the Class regarding “how they knew Earl Jones and the circumstances leading to their decision to invest with him”, “their degree of experience and sophistication regarding investing”, etc.

23. The Defendant accordingly admits in its Motion to Examine and in its Plan of Argument that the subjects it wishes to cover in the requested examinations have **nothing to do with the conduct of the Royal Bank**.
24. Therefore, the Royal Bank's requested examinations cannot be useful to the questions of law and fact dealt with collectively, and the Motion pursuant to Article 1019 C.C.P. ought to be dismissed.
25. Page 2 of the Plan D'Argumentation submitted by the Defendant in support of its Motion to Examine states:
- "En résumé, l'interrogatoire sera essentiellement utile relativement à l'adjudication des questions communes (i) pour vérifier l'étendue des dommages réellement subis (ii) pour vérifier la possibilité d'un recouvrement collectif pour les dommages réclamés au nom des membres".*
26. With respect to the first subject – L'étendue des dommages réellement subis – this is expressly **excluded** in the Motion for Authorization as a question to be dealt with collectively (**SEE MOTION FOR AUTHORIZATION, PARAGRAPH 6.1**). Thus, such a subject cannot be useful to the questions of law and fact to be dealt with collectively, which were set forth in the Authorization Judgment (Article 1005 C.C.P.), and notified to the members of the Class (Article 1006 C.C.P.), in order to allow the members to decide whether to opt out of the class action (Article 1007 C.C.P.).
27. With respect to the second subject – vérifier la possibilité d'un recouvrement collectif – this cannot justify making an exception pursuant to Article 1019 C.C.P. either.

28. **Every class action which is maintained must determine whether there will be collective recovery or individual claims** (Article 1028 C.C.P.). Thus, if examinations of class members are permitted in order to vérifier la possibilité d'un recouvrement collectif, then the rule would be that a Defendant may examine class members other than the representative on discovery, before final judgment, in **every class action**. This is precisely the opposite of what the Legislator decided.
29. The Legislator could have, but expressly did not state in Article 1019 C.C.P. that the Defendant may submit a member of the class other than the class representative to an examination on discovery if it is useful to the questions of law and fact dealt with collectively **or if it is useful to determining whether or not to order collective recovery**.
30. Thus, the Legislator's clear intention is not to permit examinations on discovery of class members, merely in order to verify whether to order collective recovery in the Recovery Phase, le cas échéant.
31. In any event, we invite Your Lordship to consider how it can be useful to determine whether to order collective recovery for the Defendant to examine 1 or 2 or 3 more members on discovery regarding the subjects enumerated in paragraph 11 of the Motion to Examine? Or regarding their individual losses? The collective loss is being determined by experts; Your Lordship has already decided that the Defendant will be given access to the documents used by the Plaintiff's expert to compute the collective loss.
32. In a class action, the Legislator has decided that there are **3 distinct phases**, with different issues to be decided at each stage.

33. The Courts have unanimously held that a Defendant may not require the Plaintiff to combine all 3 stages into one, and may not force the Plaintiff to "mener un recours collectif comme un faisceau de recours individuels" (See Tabs 6, 10 and 11).
34. This is precisely what the Defendant has been trying to do in the present case (SEE TAB 1).
35. The Courts have repeatedly refused the requests of class action Defendants to obtain details, documents and information pertaining to the potential individual claims of the Class members, prior to the final judgment, including when the Introductory Lawsuit seeks collective recovery (SEE TABS 6, 7, 8, 9, 10 AND 11).
36. The Plaintiff respectfully requests that Your Lordship set a deadline for the Defendant to file its Defence. Throughout the adjudication of the objections, counsel for the Defendant purported to justify the relevance of his questions based on what the Defendant "will allege" in the Defence. It is time for the Royal Bank of Canada to file a Defence, so that examinations of the Defendant may take place, regarding the questions of law and fact to be dealt with collectively.

THE WHOLE RESPECTFULLY SUBMITTED.

MONTREAL, May 25, 2011.

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