

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

N° : 500-06-000500-104

DATE : 24 October 2011

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

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**Virginia Nelles**  
Plaintiff

v.

**Royal Bank of Canada**  
Defendant

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## REASONS FOR JUDGMENT RENDERED VERBALLY ON OCTOBER 6, 2011

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[1] Article 1019 C.c.p., which governs examinations on discovery before or after plea, reads as follows:

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

(emphasis added)

[2] This rule somewhat limits the application of the general rule of examination of third parties prior to trial and although I am fully aware of the necessity to give broad interpretation and application to applications for examinations on discovery, article

1019 C.c.p. obliges the Court to determine whether such examinations will be of use in the determination and adjudication of collective issues as opposed to individual matters.

[3] I have indicated in my comments throughout this hearing that if I was of the view that a refusal to authorize the examination of other members of the Class would close the door to the right of the Defendant to allege, at some later stage of the proceedings, matters which would go to the determination of contributory negligence or liability of the Class Members on an individual basis, including contributory negligence of Earl Jones, my decision would be different. My understanding of the procedure is that what I am not prepared to agree to today is not closing the door, it merely is postponing the issue to a later stage.

[4] Defendant did raise the same question (Motion to Examine Third Parties Before Plea) prior to filing its Statement of Defence. I dismissed this first Motion on May 31<sup>st</sup>, 2011. Although my judgment of May 31<sup>st</sup>, 2011 does not constitute estoppel to the present motion from a procedural point of view (Defendant is asking for the same right but After Plea), the substantive question remains the same: will the examination of other members of the Class help the Court to determine and adjudicate upon the common question already established by the judgment on authorization of the exercise of the Class Action?

[5] While it is true that the Court of appeal did not consider the judgment of May 31<sup>st</sup>, 2001<sup>1</sup>, it did consider my decision on objections rendered on May 12<sup>th</sup>, 2011. The position of Mr. Justice Dalphond, while dismissing the Defendant's Motion for Leave, appears to be in line with what I wrote on May 31<sup>st</sup>, 2011 on the issue of whether or not the Defendant should be entitled to pursue the proposed lines of examination after plea, as alleged in its present Motion. I also insist upon the fact that although the frame of the present motion may be different than the last one (because we are now after plea and we do have the benefit of the Defendant's theory of the case), the principal reasons why I was not in agreement with Defendant's position to examine third parties remains the same: I do not think that these examinations will permit or will help the Court to deal with the common questions, as established by the judgment of authorization of the Class Action.

[6] If some of or all of the common questions are decided in favour of the Plaintiff, then there will be a second step. That second step will be to apply the common principles established by positive answers to the common questions to the individual claims and to determine, having regard to all other individual issues to be considered (which may include contributory negligence of the various parties). It is at that stage that the Court will have to consider these matters and, of course, the Bank will then

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<sup>1</sup> A Motion for Leave to Appeal was filed, then withdrawn by the Defendant. Consequently, my findings of May 31<sup>st</sup>, 2011 are binding upon the parties.

be entitled to investigate these matters before judgment is rendered on such individual claims.

[7] I am advised that Mr. Justice Dalphond was given the transcript of my comment on objections of May 12<sup>th</sup>, 2011, pages 71 to 94 while dismissing the Defendant's Motion for Leave to Appeal on such objections. He found that there was no reason to grant leave on those decisions on objections because they would not, in his view, help the determination and adjudication of the common issues in this case. That situation still prevails today.

[8] With great respect for the contrary view, the Bank is, I believe, mistaken as to the true ambit of the recourse instituted by the Class. The issue is whether the Bank committed a fault in allowing Earl Jones to transact upon the funds entrusted to him by the Class Members through a "trust account". The question therefore has nothing to do with the manner in which the funds were obtained by Earl Jones from his victims. The issue is limited to the fact that certain funds, wherever or however obtained, were given to Jones by Class Members, who deposited the said funds into a Royal Bank trust account and, thereafter, it would appear that Jones mishandled the trust funds and eventually misappropriated these funds for his own benefit by transacting through the said trust account.

[9] The Bank's liability may therefore be triggered only with respect to the trust funds deposited in the said trust account. In other words, the Bank cannot be liable for any monies which did not transit through the trust account. The Bank's liability may also be triggered only as a result of the Bank's errors and/or omissions in the administration of the trust account or as a result of allowing Earl Jones to hold himself out as the beneficiary of an RBC trust account, or, finally, by allowing Earl Jones to operate the trust account in the matter in which it was operated.

[10] The Bank's liability cannot find its source nor can the Bank reduce, diminish or otherwise exculpate its liability generally by looking into the manner in which Earl Jones obtained the funds from his victims or by what stratagem he was able to convince his victims to transfer their funds to him. These issues may only arise upon the determination of individual claims against the Bank. My understanding of the proposed examination of additional members of the Class goes to these issues. It does not go to establishing:

- a) what principles govern the administration of a trust account;
- b) what are the facts which may amount to a violation to these principles and whether or not the Bank has committed a fault.

[11] Once this is determined through the determination of the common questions, there will be a series of additional trials which will, of course, apply the findings of the common questions but add to these common questions or answers all issues which

may have to be considered and relating to the behaviour of other parties involved into the loss suffered by the individual claimants. Again, if I were to think one for one minute that I am closing the door to the Bank's line of defence on these issues at a later stage, my decision today would be different.

[12] Once we have a judgment on the merits of the Class Action, article 1030 C.c.p. will come to play. Article 1030 reads as follows:

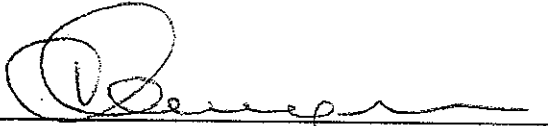
**When the final judgment acquires the authority of *res judicata*, the court of first instance orders the publication of a notice.**

**The notice contains a description of the group and indicates the tenor of the judgment.**

**If the final judgment provides that a member may file his claim, the notice also indicates the questions remaining to be determined, the information and documents that must accompany the claim and any other information the court deems it useful to include in the notice.**

(emphasis added)

[13] Consequently, I do not believe that granting the motion of the Bank at this stage is appropriate and, accordingly, the Motion will be **DISMISSED WITH COSTS**

  
ROBERT MONGEON, J.C.S. *jm*

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 d'audience : 6 October 2011