

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000426-086

DATE: MAY 29, 2009

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**IN THE PRESENCE OF:  
THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.**

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**ALBERT STIEBER**  
Petitioner  
v.  
**JOSEPH ÉLIE LTÉE**  
Respondent

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## **RECTIFICATION OF JUDGMENT (ARTICLE 475, C.C.P.)**

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[1] The original judgment was rendered on May 28, 2009. The parties have brought to the Court's attention that an error of inadvertence requires correction.

[2] The Court is making these corrections pursuant to Art. 475, C.C.P.

### **FOR THESE REASONS, THE COURT:**

**RECTIFIES** paragraph 21 of the Conclusions of the judgment dated May 28, 2009 as follows:

[21] **DECLARES** that this exclusion will take effect if the necessary notification is received within thirty (30) days of the present Judgment, the postal stamp making proof of the date of receipt;

[21A] **DECLARES** that a special Notice will be published in the beginning of September, 2009 in the same newspapers and in the same manner as the prior newspaper publication in this proceeding, in order to advise Class Members who have not been located and who have not received their Individual Indemnities, that they must submit a claim within the Claim Period in order to receive the Individual Indemnity that is due. The parties will seek the Court's approval for the form of the notice prior to Wednesday, July 15, 2009 and will provide proof of publication for the Court file;



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MARK G. PEACOCK, J.S.C.

*Me. Michael H. Kay*  
*Me. Robert Kugler*  
KUGLER KANDESTIN L.L.P.  
Attorneys for Petitioner

*Me. François Fontaine*  
*Me. Éric Dunberry*  
OGILVY RENAULT S.E.N.C.R.L., s.r.l.  
Attorneys for Respondent

Date of hearing: April 2, 2009

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000426-086

DATE: MAY 29, 2009

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**IN THE PRESENCE OF:**  
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**ALBERT STIEBER**  
Petitioner

v.

**JOSEPH ÉLIE LTÉE**  
Respondent

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## RECTIFIED REASONS FOR JUDGMENT

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[1-A] In view of the Rectification of Judgment of May 29, 2009 for reasons of inadvertence, the Conclusions have been rectified.

[1] The Court is seized with a "Motion to Approve a Class Action Settlement Agreement and Transaction, and to Approve the Payment of Legal Fees by the Class" (the "Motion"). Unless otherwise defined herein, the same defined terms will be used as in the Motion and the *Settlement Agreement*.

[2] The original "Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative" was taken by the Applicant on January 21, 2008.

[3] The relevant facts are as follows. Government authorities found that two independent contractors that were hired by the Respondent to deliver heating oil to its customers had tampered with the measuring meters on their delivery trucks so as to

divert heating oil charged to the customers (the "diversion") during the period from January 5, 2006 to March 27, 2007 (the "Period").

[4] Specific trucks from these two contractors were found to have had their meters tampered with. Measurement Canada performed three tests on each of the suspect delivery trucks in order to determine the percentage degree of error of the tampered meters that had been involved in the diversion during the Period.

[5] The results of the Measurement Canada Tests were filed into Court.<sup>1</sup>

[6] For settlement purposes, the Respondent compiled records of every delivery made by each of these trucks during the Period (the "Records"). These Records indicate, amongst other things, the date of each delivery, the truck that made the delivery, the volume of heating oil that was to have been delivered for each delivery and the price charged by the Respondent for the volume of heating oil that was alleged to have been delivered for each delivery, plus taxes.

[7] The quantum of the *Settlement Agreement* was essentially worked out as follows. The total amount paid for each of the Respondent's clients during the Period was established. This was done by computer program. A representative example using the Applicant as a case in point was provided to the Court.<sup>2</sup>

[8] The Measurement Canada Tests essentially showed three slightly different test results for each of the trucks. The parties agreed to take the highest percentage diversion found by Measurement Canada and then apply this to the actual deliveries to arrive at an amount that would be a close approximation of the actual loss suffered by each customer as a result of the diversion.

[9] Using this method, it was calculated that the customers paid collectively a maximum of \$4,461,046.68 for heating oil that was probably diverted during the Period.

[10] Under the *Settlement Agreement*, the Respondent will reimburse to the Members of the Group, collectively, the sum of \$4,461,046.68, representing the maximum amount that the Respondent's customers likely paid for heating oil that was not delivered during the Period, inclusive of taxes, based on the Measurement Canada Tests and the Records (the "Total Indemnity").

[11] On Wednesday, March 18, 2009, a "Notice of Proposed Settlement" which gave the date of the approval hearing of April 2, 2009 was published in English in the Montreal Gazette and in French in La Presse. The Court determines that the notices met all legal requirements.

[12] Thereafter, the approval hearing was held on April 2, 2009 when the Court received representations from counsel for both parties. No one else came forward to make other representations.

[13] The role of the Court at this stage requires a three step analysis:

- 1- the determination by the Court that the criteria of art. 1003, *C.C.P.* have been met so that the Court can authorize the bringing of the class action and ascribing the status of representative to the Petitioner for the purposes of considering the settlement;
- 2- the determination of whether the proposed *Settlement Agreement* should be accepted; and
- 3- the demand to approve the legal fees and disbursements of Class Counsel.

#### A- AUTHORIZATION OF THE CLASS ACTION

[14] The Court will now consider whether this proceeding meets the four tests of art. 1003 (a)-(d), *C.C.P.* The headings will be the actual wording of each of those sub-sections.

**a) *The Recourses of the Members Raise Identical, Similar or Related Questions of Law or Fact***

[15] The identical, similar or related questions of fact to be decided for all Members of the Group are:

- a) whether and how much money the Respondent was paid by the Members of the Group collectively for heating oil not delivered;
- b) over what period of time; and
- c) whether the Respondent was at fault in not verifying whether its independent contractors could and did temper with the measurement meters on their delivery trucks.

[16] Identical, similar or related questions of law to be decided on the merits for all Members of the Group include:

- a) whether the Respondent is liable to compensate its customers for money they have overpaid for heating oil that was not delivered; and
- b) whether this sale is covered by the *Consumer Protection Act* ("C.P.A.") and if so, whether punitive damages may be claimed pursuant to the C.P.A.

[17] The main question that must be dealt with individually is the amount that each Member of the Group is entitled to recover from the amount of damages that the Respondent may be required to pay collectively.

[18] In view of the similarity of the questions of fact and law involved in this proceeding, the Court determines that this first criterion has been met.

**b) *The Facts Alleged Seem to Justify the Conclusions Sought***

[19] Without needing to characterize whether the contract falls under the C.P.A. or not, the fact remains that if the Petitioner is able to prove the allegations made, the Members of the Group would be entitled to collect certain compensatory damages on the basis of the Respondent's fault.

[20] Accordingly, the Court finds that the second criterion is met.

**c) *The Composition of the Group Makes the Application of Art. 59 or 67, C.C.P. Difficult or Impracticable***

[21] A review of Exhibit R-7, a partial list of the Respondent's customers during the Period, shows the large number of individuals involved. Clearly, only the Respondent possesses the exact details of all the Members of the Group's names, whereabouts and transactions.

[22] Given the amounts in issue as shown by Exhibit R-7, it is clear that the wrongs alleged by the Petitioner would, although important, not make it worthwhile for each of the customers to sue individually. Examples of such amounts are: \$41.00 and \$24.70.

[23] These figures demonstrate just how useful and necessary the class action is in such circumstances.

[24] On this basis, this third criterion is met.

**d) *The Member to Whom the Court Intends to Ascribe the Status of Representative is in a Position to Represent the Members Adequately***

[25] The Court is satisfied that the Petitioner is particularly well-qualified for this purpose. In addition to being a customer of the Respondent, he is retired and has had the time to devote to the case. He also has experience and expertise in the heating oil industry, having held a senior position at another Montreal heating oil company for many years. He attended with Class Counsel at numerous court appearances.

[26] Accordingly, the Court determines that the fourth criterion is met.

[27] Therefore, the Court is satisfied that all four criteria of art. 1003, C.C.P. have been met.

**B- APPROVING THE SETTLEMENT**

[28] The original proceeding was undertaken on January 21, 2008 and the *Settlement Agreement* was signed on March 20, 2009.

[29] The criteria that the Court must apply to approve a settlement in class action matters are well-known.<sup>3</sup>

[30] The Court determines that the most important criteria for the facts of this case are:

- a) the nature of the evidence available;
- b) the levels of compensation for the victims and the means of reaching those victims;
- c) the terms and conditions of the settlement; and
- d) the absence of any objections to the settlement.

[31] The evidence filed in the Court from Measurement Canada<sup>4</sup> notes clearly the percentage of oil delivered that was under-calculated by the oil measurement meters.

[32] The fact that the independent contractors pleaded guilty in Court to the diversion is convincing evidence that the diversion took place. It is important to underscore that there is no proof whatsoever before this Court linking the Respondent in any way to the misfeasance committed by the independent contractors.

[33] The Court is satisfied that the methodology for calculating the damages provides the victims with an exceptional recovery of almost the full value of the probable loss they suffered.

[34] Moreover, the cooperation of the Respondent with the Petitioner to providing the computer printout for all customers showing the highest probable value of their loss is extremely helpful to ensure that Class Counsel:

- a) knows the names of all Members of the Group; and
- b) knows their addresses and can see the calculations showing the highest probable loss they would have suffered which collectively is only 7.5% less than the full amount that has been agreed to be paid by the Respondent. Furthermore, the Respondent has undertaken to contact each of those customers directly and provide the option of either receiving the full amount of the Individual Indemnity by cheque or by receiving an equivalent credit on future oil delivery. This approach will be followed with those clients that suffered a loss during the Period and have remained customers to this day or have agreed to return as customers of the Respondent.

[35] For those customers during the Period who suffered losses and who do not wish to be customers of the Respondent, these individuals will be provided with a cheque in payment for the loss.

[36] The Respondent has undertaken to do all of this work itself thereby eliminating additional costs of administration.

[37] For those clients which suffered losses but who can no longer be traced, they will be provided with a special notice, in both the Montreal newspapers previously involved, of their right to make a claim within the Claim Period. Any balance that remains after such claims have been paid will be put into an account and dealt with under art. 1036, C.C.P.

[38] The final advantage of this settlement is that compensation will be received by the Members of the Group without them having to take any positive action even as far as making a claim is concerned. The Respondent will communicate with each Member of the Group who is still a client by way of a letter which has been approved by the Court.

[39] The Respondent will contact the Inactive Accounts (those accounts that have become inactive between January 5, 2006 and the date of this judgment) and the Respondent will contact those persons Individually by telephone to invite them to

become a customer of the Respondent once again. A letter following up on the telephone call will be sent advising them of the amounts they are entitled to pursuant to the *Settlement Agreement*. Those Inactive Accounts who decide to become customers shall be paid their Individual Indemnity in the form of credits in the same way as the active accounts unless they request in writing to receive a cheque. Those Inactive Accounts who chose not to become customers of the Respondent, again, shall be paid their Individual Indemnity by cheque.

[40] The Respondent shall regularly provide Class Counsel with a CD Rom containing the updated Records to include a column which indicates those Members of the Group entitled to reimbursement and who have received their Individual Indemnity and those who have not. Class Counsel will perform spot checks to ensure that the Members of the Group entitled to reimbursement have received their Individual Indemnity.

[41] The Court will retain jurisdiction – which the parties have also agreed to – to resolve any issues regarding the interpretation of the *Settlement Agreement*, to ensure that all payments are properly made, and as required, to interpret and enforce the terms, conditions and obligations arising under the *Settlement Agreement*.

[42] The Court is satisfied for the reasons above-noted that the *Settlement Agreement* is just, equitable, reasonable and in the best interest of the Group. An overview of the Court's reasons are:

- a) the Total Indemnity provides for almost full recovery for all victims;
- b) the Respondent is paying all the costs of administration and it is far from clear that even if this matter went to trial that the Members of the Group would be likely to obtain any more than they would through this settlement, all the while achieving the substantial saving of legal fees achieved through a settlement; and
- c) the Respondent does not require that any undisbursed balance be returned to it.

[43] Had this matter gone to trial, a major debate would have been whether the Respondent committed a fault by not knowing or not investigating earlier the actions of these two independent contractors. The *Settlement Agreement* specifically notes that the Respondent makes no admission of liability in this area.

[44] That said, the Respondent has acted as a responsible corporate citizen in indemnifying its customers in circumstances where it never received any economic benefit from the illegal acts of its independent contractors but, on the contrary, is paying

for the consequences of those illegal acts through the *Settlement Agreement*. Counsel for the Respondent indicated that the Respondent was a victim in this process.

### C- THE LEGAL FEES

[45] The Petitioner signed a "Mandate and Fee Agreement" dated January 21, 2008<sup>5</sup> in which he agreed to pay 20% of the value of any amounts received prior to a judgment authorizing a class action.

[46] Class Counsel have been able to negotiate that the Respondent pays 12.5% of the Total Indemnity (plus applicable taxes) on account of Class Counsel fees, disbursements and costs in addition to the Total Indemnity. Accordingly, only 7.5% of the Total Indemnity (plus applicable taxes) are to be paid on behalf of the Members of the Group to Class Counsel for their legal services.

[47] This amount of 7.5% of the Total Indemnity comes to \$334,578.50 without taxes and \$377,655.49 with taxes.<sup>6</sup>

[48] Contingency fees are well-known in the Province of Québec as is the principle of *quantum meruit*, wherein the amount of legal fees to be paid is based, amongst other things, upon the complexity of the file and the result obtained.

[49] It must be remembered that the Total Indemnity in this case is very close to 100% which is only reduced by the 7.5% of legal fees above-mentioned. This recovery is proportionate to the costs negotiated between the parties and for this reason will be approved.

### CONCLUSION

[50] For practical reasons, the conclusions of the judgment will be rendered under separate cover but will reflect these reasons.

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MARK G. PEACOCK, J.S.C.

*Me. Michael H. Kay*  
*Me. Robert Kugler*  
KUGLER KANDESTIN L.L.P.  
Attorneys for Petitioner

*Me. François Fontaine*  
*Me. Éric Dunberry*  
OGILVY RENAULT S.E.N.C.R.L., s.r.l.  
Attorneys for Respondent

Date of hearing: April 2, 2009

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- <sup>1</sup> Exhibit R-3.
  - <sup>2</sup> Exhibit R-7.
  - <sup>3</sup> Yves LAUZON, *Le recours collectif, Points de droit*, (Cowansville, Qc: Yvon Blais, 2001) at 62.
  - <sup>4</sup> Exhibit R-3.
  - <sup>5</sup> Exhibit R-4.
  - <sup>6</sup> Exhibit R-5, invoice from Class Counsel to Petitioners dated March 24, 2009.

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000426-088

DATE: MAY 29, 2009

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IN THE PRESENCE OF:  
THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

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ALBERT STIEBER  
Petitioner

v.

JOSEPH ÉLIE LTÉE  
Respondent

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## RECTIFIED CONCLUSIONS

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[1-A] In view of the Rectification of Judgment of May 29, 2009 for reasons of inadvertence, the Conclusions are rectified as follows.

- [1] **CONSIDERING** the Motion to Approve a Class Action Settlement Agreement and Transaction, and to Approve the Payment of Legal Fees by the Class (the "Motion");
- [2] **CONSIDERING** the parties' agreement to modify Section 5.3.3 of the *Settlement Agreement* (the *Settlement Agreement*, dated March 20, 2009) to provide for the payment to the Fonds d'aide aux recours collectifs (the "Fonds d'aide") of the lesser of i) \$20,000.00 or ii) 20% of the unpaid amount of the Net Indemnity, if any;
- [3] **CONSIDERING** the letter dated March 30, 2009 from Me Louise Ducharme, confirming the consent of the Fonds d'aide to the Motion;

[4] After having examined the *Settlement Agreement* and heard counsel for the parties, the Court will render these conclusions, with reasons to follow under separate document;

[5] **THEREFORE, THE COURT:**

[6] **GRANTS** the Motion;

[7] **DECLARES** that the *Settlement Agreement* is fair and reasonable;

[8] **DECLARES** that the terms used in the present judgment have the same meaning as in the *Settlement Agreement*;

[9] **ORDERS** that the present class action be authorized solely for the purposes of settlement and for which the members of the group (the "Members of the Group") are described as follows:

*"All natural persons and all legal persons with no more than 50 persons bound to them by contract of employment who purchased heating oil from Joseph Élie Ltée during the period from January 5, 2006 to March 28, 2007 (the "Class Period");*

[10] **ASCRIBES** the status of representative to Mr. Albert Stieber (the "Representative") on behalf of the Members of the Group and **AUTHORIZES** Mr. Albert Stieber to institute a Class Action against Joseph Élie Ltée for the sole purposes of seeking Court approval of the *Settlement Agreement*;

[11] **DESIGNATES** the law firm of Kugler Kandestin L.L.P. ("Class Counsel") as attorneys for the Members of the Group;

[12] **IDENTIFIES** the following question as the principal question to be dealt with by this Court:

*"During the Class Period, was a volume of heating oil diverted before entering the Respondent's customers' oil tanks but after being counted on billing meters in the delivery trucks of independent contractors? Did the Respondent bill and receive payment from its customers for this diverted heating oil and if so, what is the quantum of damages that the Respondent is liable to pay the Members of the Group collectively?"*

- [13] **DECLARES** that the Members of the Group were properly informed of the proposed *Settlement Agreement* by way of Notice (Exhibit R-2);
- [14] **APPROVES** the form and content of the Letter to Members (Exhibit R-6);
- [15] **APPROVES** the *Settlement Agreement* including all that forms part thereof and **ORDERS** that the parties comply with the terms thereof;
- [16] **DECLARES** that the *Settlement Agreement* is incorporated into and forms part of the present Judgment;
- [17] **DECLARES** that the present judgment and *Settlement Agreement* bind the Respondent and also bind the Representative of the Group and all of the Members of the Group who do not exclude themselves using the procedure provided by this judgment;
- [18] **ORDERS** that each Member of the Group who is not excluded is subject to the jurisdiction of this Court and **ORDERS** that the Respondent is fully released and forever discharged from the obligations arising under the settled claims as appears from the *Settlement Agreement*, upon due performance of those obligations;
- [19] **DECLARES** that the extra-judicial fees, judicial costs and applicable taxes for Class Counsel (Exhibit R-5) are equitable and reasonable, must be paid forthwith from the Settlement Funds, and consist of, \$377,655.49 (which includes all disbursements and applicable taxes);
- [20] **DECLARES** that certain Members of the Group may be excluded from the Group for the purposes of the present class action proceedings by sending to Class Counsel a notification to that effect in either French or English to the address of Class Counsel:
- KUGLER KANDESTIN L.L.P.  
Attention of Robert Kugler or Michael H. Kay  
1 Place Ville Marie, Suite 2101  
Montreal Quebec, Canada H3B 2C6  
Telephone: 514-878-2861  
Fax: 514-875-8424  
E-mail: rkugler@kugler-kandestin.com  
E-mail: mkay@kugler-kandestin.com
- [21] **DECLARES** that this exclusion will take effect if the necessary notification is received within thirty (30) days of the present Judgment, the postal stamp making proof of the date of receipt;

[21A] **DECLARES** that a special Notice will be published in the beginning of September, 2009 in the same newspapers and in the same manner as the prior newspaper publication in this proceeding, in order to advise Class Members who have not been located and who have not received their Individual Indemnities, that they must submit a claim within the Claim Period in order to receive the Individual Indemnity that is due. The parties will seek the Court's approval for the form of the notice prior to Wednesday, July 15, 2009 and will provide proof of publication for the Court file;

[22] **ORDERS** that any person who is excluded from the Group in the context of the present class action will not be bound by the *Settlement Agreement* and cannot participate in any further proceeding under this class action or by way of modification of the class action or settlement thereof;

[23] **ORDERS** in a delay of thirty (30) days following the deadline for exclusions that Class Counsel provide the Court and the Respondent with the names of those persons who are excluded from being Members of the Group in the present class action;

[24] **ORDERS** that, under reserve of a subsequent judgment of the Court, that the Claim Period ends at 17:00 hours on Friday, November 27, 2009;

[25] **CONFIRMS** that the representative of the Group, Class Counsel, and the Respondent and its counsel may seek directives from the Court at any time concerning the functioning of the *Settlement Agreement* or concerning any other related question;

[26] **ORDERS** that the *Settlement Agreement* is hereby approved on behalf of incapable parties as defined by the *Civil Code of Québec*;

[27] **ORDERS** that the Respondent pay to the *Fonds d'aide aux recours collectifs* a percentage of 20% up to a maximum of \$20,000.00 from any balance remaining after all of the claims have been paid out and after the Claim Period has expired;

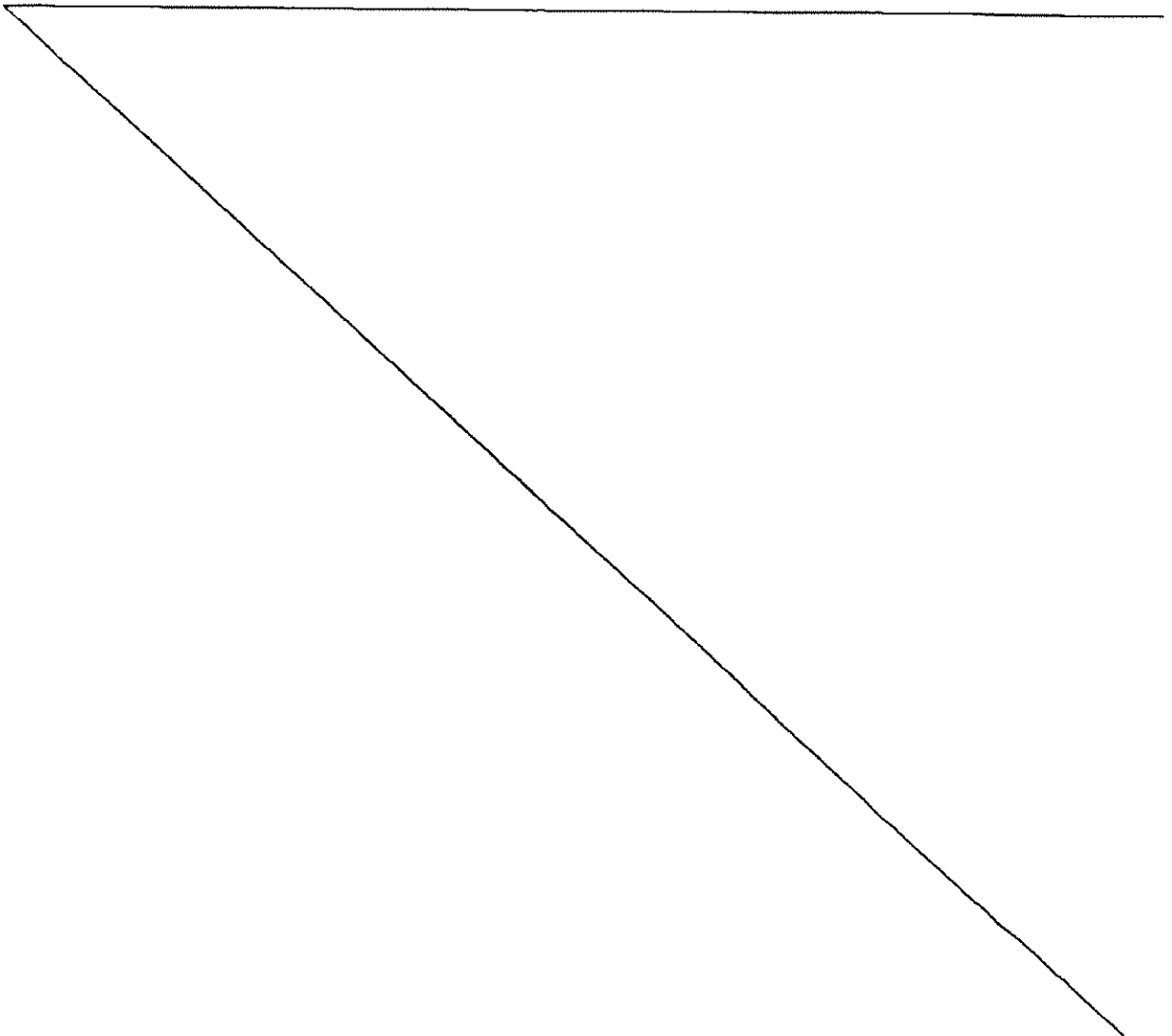
[28] At that time, the Respondent, through its attorneys, will advise the Court of the exact balance remaining at which time the exact amount to be provided to the *Fonds d'aide aux recours collectifs* will be determined and ordered;

[29] The Court reserves itself the jurisdiction once the balance has been determined after all claims have been paid to request submissions from counsel and potentially from third parties regarding to what NGO or charitable organization(s) the remainder of the monies should be paid. In keeping with the jurisprudence, the ultimate recipients must relate to the interests of the Members of the Group, in some way;

[30] **ORDERS** that the Respondent assumes responsibility for the payment of all expenses associated with the administration of the *Settlement Agreement* including, without limitation:

- i- the distribution of an Individual Indemnity to each Member of the Group based on the Respondent's Records;
- ii- the publication of notices and the special Notice to the Members of the Group; and
- iii- locating, and the communication with, the Members of the Group;

[31] **ALL WITHOUT FURTHER COSTS, except to the extent specified above.**





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MARK G. PEACOCK, J.S.C.

*Me. Michael H. Kay*  
*Me. Robert Kugler*  
KUGLER KANDESTIN L.L.P.  
Attorneys for Petitioner

*Me. François Fontaine*  
*Me. Éric Dunberry*  
OGILVY RENAULT S.E.N.C.R.L., s.r.l.  
Attorneys for Respondent

Date of hearing: April 2, 2009