

Federal Court



Cour fédérale

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Docket: T-941-13

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[ENGLISH TRANSLATION]

Ottawa, Ontario, September 12, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

LAINCO INC.

Plaintiff

and

**COMMISSION SCOLAIRE DES
BOIS-FRANCS**

and

PLURITEC LTÉE

and

LEMAY CÔTÉ ARCHITECTES INC.

and

CONSTRUCTIONS GAGNÉ ET FILS INC.

Defendants

PUBLIC JUDGMENT AND REASONS

(Confidential judgment and reasons issued September 12, 2017)

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I. Introduction

[1] Since October 1, 2013, students in the Bois-Francs region of Quebec have had the great pleasure of having access to a new and modern indoor soccer stadium, built in Victoriaville [the Victoriaville Complex] by their school board, the Commission scolaire des Bois-Francs [CSBF] and its partners in the project, the engineering firm of Pluritec [Pluritec], the architectural firm of Lemay & Côté [Lemay Côté] and the general contractor, Construction Gagné & Fils [Construction Gagné].

[2] While users of the sports complex enjoy their favourite activities, a match of another kind takes place in another arena, that of the courts, between the CSBF and its partners and Lainco Inc. [Lainco], a business specializing in the design and manufacture of steel structures. In fact, the Court is asked here to determine whether the design, manufacture and installation of the steel structure of the Victoriaville Complex were carried out, as claimed by Lainco, in infringement of the rights that it feels it holds under the *Copyright Act*, RSC 1985, c C-42 [the Act] to the structural plans—and the structure itself—of an indoor soccer stadium built in Granby in 2011 [the Artopex Complex] and to determine, as applicable, the amount of damages to which it is entitled as a result of that infringement.

II. Background

A. *The Victoriaville Complex project*

(1) Its genesis

[3] According to the evidence on record, the idea of equipping the City of Victoriaville and the Bois-Francs region with an indoor soccer stadium first came up in the late 2000s. The project was then led by the CÉGEP de Victoriaville, in cooperation with the City of Victoriaville and the CSBF. At the time, Pluritec provided technical support to the parties in the project. The sports complex that was being considered included three (3) soccer fields and its budget was estimated at \$12 million. Due to a lack of government subsidies, however, the project was abandoned.

[4] The project was revived in the fall of 2011, this time with a more modest budget. Pluritec again provided technical support for the project. To prepare the design documents, representatives from the CSBF and Pluritec, Frédéric Gagnon and Louis Viens, respectively, visited two sports complexes at some time in late 2011 or early 2012, i.e. the “Stinger Dome” at Concordia University in Montreal, with a removable structure, and the Bois-de-Boulogne multisport complex in the City of Laval, with a wood-arch structure.

[5] On March 29, 2012, a visit was organized at the Artopex Complex at the request of the Mayor of Victoriaville, a dedicated soccer fan who was already familiar with that sports facility. The Mayor wanted the representatives of CSBF and Pluritec to be able to visit that complex, in particular to learn more about its construction and operating costs.

[6] In addition to Mr. Gagnon and Mr. Viens, the Victoriaville delegation also included the Mayor, three (3) municipal employees and another CSBF representative. The manager of the Artopex Complex and a representative from the builder of the Complex, Syscomax, were also on-site for the visit. No one from Lemay Côté, whose services had not yet been solicited, attended the meeting.

[7] The Agreed Statement of Facts and Admissions, submitted in the Court record by the parties in preparation for the trial, recounts that visit to the Artopex Complex as follows:

[TRANSLATION]

64. The two main elements of the Artopex Complex that Mr. Gagnon found particularly interesting during his visit were:

The functionality of the locker rooms; and

The amount of clearance in the playing fields.

65. The visit lasted approximately 45 to 60 minutes.

66. In relation to the visit:

Mr. Viens took handwritten notes and drawings (Exhibit TX-176);

Mr. Gagnon took personal notes (not submitted);

Mr. Viens took photographs (Exhibit TX-229); and

Mr. Viens prepared a report dated April 23, 2012 (Exhibit TX-177).

67. [TRANSLATION] Mr. Gagnon did not take any photographs or prepare any drawings of the inside the Artopex Complex during the visit.

68. No one present at the visit obtained any copies of the structural plans of the Artopex Complex.

[8] Again according to the Agreed Statement of Facts and Admissions, on returning from the visit to the Artopex Complex, the Mayor of Victoriaville, the Director General of the CSBF and Mr. Gagnon agreed to seriously resume the Victoriaville Complex project in the form of a complex with two (2) “2/3” fields, for which the CSBF would be the principal contractor. To that end, “pre-concept” drawings and plans for the future complex were prepared by Mr. Gagnon and CSBF technical services. Mr. Gagnon also performed some preliminary calculations regarding construction and operating costs for the future complex.

[9] The Artopex Complex is the only indoor soccer stadium with two (2) “2/3” fields, i.e. designed for soccer matches of seven (7) players against seven (7), visited by the CSBF and Pluritec in preparing the design documents for the Victoriaville Complex.

(2) Launch and preparation of plans and specifications

[10] The CSBF seriously launched the Victoriaville Complex project on or around April 18 (2012) when Quebec’s Ministère de l’Éducation, du Loisir et du Sport [the Ministère] announced that it would receive applications for financial assistance for projects related to the development of sports and physical activities. The deadline for submitting such an application to the Ministère was May 18, 2012.

[11] The CSBF immediately retained the services of Pluritec and Lemay Côté to prepare the preliminary and final plans and specifications, including the structural plans and specifications. Lemay Côté was also responsible for coordinating the eventual invitation to tender. In support of

its application for financial assistance, the CSBF had to be able to submit the preliminary plans for the project.

[12] Three (3) coordination meetings, involving representatives from the CSBF, including Mr. Gagnon, Mr. Viens and Pluritec, and representatives from Lemay Côté, were held before the deadline of May 18, 2012. Those meetings were held on April 18 and 30 and on May 7, 2012.

They are important. For now, it is enough to note the following:

- a. The purpose of the first coordination meeting was, in particular, [TRANSLATION] “to present the project to the professionals,” for which Mr. Gagnon [TRANSLATION] “gave the main elements.” In that regard, paragraph 1.2.2 of the report from that first coordination meeting (Exhibit TX-127) states, among other things, the following:

[TRANSLATION]

Thus, the new construction will include:

Two playing areas measuring 95 ft by 180 ft (budget 1) or 100 ft by 200 ft (budget 2).

...

A steel superstructure covering a large area and providing space above the playing area (2 beams per field with a 35-ft clearance below the beams and a 50-ft clearance below the crossbeams). Mr. Viens will work with the *Canam* company to develop the simplest, most effective and most economical structural design. The free space between the columns supporting each beam will be filled in the exterior envelope with curtain-wall windows. The lighting and heating equipment will also be integrated into the beams.

...

[Emphasis added]

- b. According to paragraph 1.2.7 of that report (Exhibit TX-127), Mr. Viens from Pluritec must, as an action item from that meeting, (i) [TRANSLATION] “quickly provide the architect with the photos from the various visits to similar completed projects for the purposes of this project” and (ii) [TRANSLATION] “also forward the structural plans to the architect no later than Wednesday, April 25, 2012, so he can include the structural axes in his plans and the structural elements in his wall sections”;
- c. Following the meeting on April 18, Mr. Viens sent the various stakeholders the photos that he had taken at the Artopex Centre during the visit on March 29, 2012. He also developed the preliminary plans for a structure consisting of open-work crossbeams, such as those designed by Pluritec for the Alphonse Desjardins sports complex in Trois-Rivières;
- d. At the second coordination meeting, held on April 30, 2012, Mr. Viens presented his structure consisting of open-work crossbeams. The report from that second meeting (Exhibit TX-128) reiterates that the new construction will include, among other things, [TRANSLATION] “a steel superstructure covering a large area and providing space above the playing area (2 beams per field with a 35-ft clearance below the beams and a 50-ft clearance below the crossbeams).” That report also notes the following regarding the work performed by Mr. Viens:

. . . [TRANSLATION] Mr. Viens is currently working with the *Canam* company. He is submitting a traditional system of repetitive crossbeams that, although economical, does not provide space above the playing area. He will therefore develop the desired superstructure and assess the related costs for the next meeting.

[Emphasis added]

- e. Again according to the report from the coordination meeting on April 30, 2012, Mr. Viens committed to providing [TRANSLATION] “his revised structural plans, including the desired superstructure, as soon as possible” (Exhibit TX-128, at paragraph 1.2.7).
- f. The report from the third coordination meeting, held on May 7, 2012 (Exhibit TX-131), notes that Mr. Viens [TRANSLATION] “is currently working with the *Canam* company and that the superstructure that the owner wanted was able to be designed and estimated with them.”
- g. In early May 2012, Pluritec issued the preliminary structural plans required to present the CSBF’s application for financial assistance. A few days later, Lemay Côté sent the CSBF two perspectives—one of the interior, the other of the exterior—of the future complex. Those perspectives would also be used in presenting the CSBF’s application for financial assistance. The interior perspective, as we will see, is important in this case.

[13] On October 16, 2012, with the required approvals and funding, the CSBF called a new coordination meeting, the first since the one on May 7. Over the following weeks, Pluritec and Lemay Côté worked together to complete a detailed estimate of the project and prepare the various plans and specifications for the invitation to tender.

[14] The invitation to tender was published on January 21, 2013. Bids were scheduled to be opened on February 18, 2013.

(3) The arrival of Lainco

[15] In the days following the publication of the invitation to tender, after having had access to the plans and specifications, Lainco contacted the CSBF, finding that the steel structure of the future complex reproduced that of the Artopex Complex. On February 14, 2013, four (4) days before bids were to be opened, Lainco sent a notice to the general contractors who had bid on the project, advising them of its copyrights and inviting them to subcontract with it on the design, manufacture and installation of a steel structure for the new complex (Exhibit TX-45).

[16] In that notice to bidders, Lainco included a copy of the copyright certificates that it had registered as part of the design and construction, in 2009, of the steel structure for the Antony-Carola indoor soccer stadium at the St-Jean-Vianney school in Montreal [the Antony-Carola Complex]. The two certificates were related to the plans and the structure itself.

[17] With the notice to bidders, Lainco also included the plans for the steel structure that it was proposing for the complex to be built based on two options: a structure with an arched roof and another with a flat roof. It also advised the bidders of its price for manufacturing and erecting both structures. In the few days after that notice was sent, following informal discussions with representatives from the CSBF, whose proposed complex involved a “monopitch” roof, Lainco reconsidered and withdrew its offer to the bidders regarding the option of the arched roof.

[18] Again as part of informal discussions with CSBF representatives, in particular Mr. Gagnon, Lainco proposed resolving the impasse by granting a licence to use its structural design [the Lainco Design] for a price of [REDACTED].

[19] In the meantime, the CSBF sought an opinion from Pluritec on the merits of Lainco's claims regarding its copyrights. On February 15, 2013, Pluritec refuted Lainco's allegations in writing (Exhibit TX-148). In particular, it assured that it had never had access to the structural plans used in the construction of the Artopex Complex or that it copied that structure, and stated that the design used for the structure of the Victoriaville Complex is an original design, in that it is the result of research, analyses, calculations, computer modelling and drawings as part of the mandate given it by the CSBF, and takes into account local seismic and meteorological conditions, which differ from those in Granby.

[20] On February 18, 2013, the CSBF asked the bidders to disregard the notice from Lainco, to proceed as usual with the analysis of the subcontracting bids, and to use the subcontractors of their choice (Exhibit TX-47).

[21] The same day, the contract for the construction of the Victoriaville Complex was awarded to Construction Gagné, in the amount of \$4,147,886 (Exhibit TX-151). The manufacture and erection of the structure for the new complex was later awarded by Construction Gagné to the Aciers Solider company, which in turn subcontracted the manufacture of the structure to the Canam company.

[22] The Victoriaville Complex was inaugurated on October 1, 2013. According to the Agreed Statement of Facts and Admissions, its steel structure includes, in particular, the following four elements:

- a. Four (4) triangular master trusses;
- b. “Gerber” secondary beams (chords);
- c. Steel columns on the periphery of the building; and
- d. X-braces.

[23] The playing area in this Complex, like the one at the Artopex Complex, meets the regulations of FIFA, the international federation that governs soccer worldwide, which requires clearance of 35 feet between the playing area and the ceiling above it. As I understand it, this allows for certain levels of soccer competitions to be presented.

B. *The legal proceedings*

[24] Lainco commenced this proceeding on May 27, 2013. It amended its Statement of Claim first in May 2013 and again in August 2016. Lainco argues, in essence, that it holds copyrights on the plans that it designed, between 2009 and 2011, for the steel structures of the Antony-Carola Complex, the hangar for the Air Inuit airline in Montreal and the Artopex Complex, as well as on each of the three structures themselves, manufactured and erected in accordance with those plans.

[25] More specifically, it claims that the plans for the steel structure of the Antony-Carola Complex, designed in 2009, are not only original, but also innovative compared with what is

currently done in the market and that, in particular, they allow for [TRANSLATION] “a structure with a limited number of trusses, thus optimizing aesthetics while reducing costs” (Reamended Statement, at paragraph 7). It adds that the structural plans for the Air Inuit hangar and the Artopex Complex are a variation of the same innovative design, the only difference being, in the case of the Air Inuit hangar, that it is designed with a flat roof to allow for water retention whereas, in the case of the Artopex Complex, they reflect the reduced dimension of the space occupied by the soccer fields. Lainco argues that those plans and structures are not only original and unique in the industry, but that they have also become distinctive of the goods and services that it offers. It also notes that it won the “2012 Award of Excellence” awarded by the Canadian Institute of Steel Construction (CISC) for the steel structure of the Artopex Complex.

[26] Lainco alleges that, as owner of the copyrights on those plans and structures, which it collectively refers to as the “Lainco Plans” and the “Lainco Architectural Works” and for which it was issued certificates of registration of copyright under subsection 53(2) of the Act, only it can produce or reproduce all or a substantial part of the “Lainco Plans” and “Lainco Architectural Works,” or authorize anyone else to do so.

[27] It argues, however, that the plans for the steel structure of the Victoriaville Complex prepared by Pluritec and Lemay Côté and provided by the CSBF to the parties interested in building that Complex, as well as the steel structure built from those plans by Construction Gagné, are an unauthorized reproduction of all or a substantial part of the Lainco Design included in the “Lainco Architectural Works” and the “Lainco Plans” that, in its opinion, is a breach of sections 3 and 27 of the Act.

[28] Lainco thus feels that it is entitled to receive damages corresponding to the profits that it would have earned by providing and building the structure for the Victoriaville Complex, which only it could do or authorize a third part to do. It is also seeking an amount of \$50,000 as punitive and exemplary damages, as well as solicitor-client costs in this action, including all applicable taxes and expert fees.

[29] The defendants are asking that the action by Lainco be dismissed. In particular, the CSBF argues that the “Lainco Architectural Works” are not protected by the Act because they are not the result of the exercise of the author’s intellectual skills and efforts. It submits that, in any event, the plans used in the construction of the Victoriaville Complex are original and in no way constitute a reproduction of all or a substantial part of the Lainco Design. Finally, based on section 64.1 of the Act, the CSBF alleges that the Lainco Design is not protected under the Act because the elements that make it up are useful articles integrated into that Design solely for utilitarian functions.

[30] For its part, Pluritec argues that the plans that it prepared for the Victoriaville Complex are original and do not in any way reproduce any original, innovative or unique aspect specific to the Lainco Design.

[31] Lemay Côté defends itself in the action by Lainco by arguing that the Lainco Design does not include any characteristics that were previously unknown or that constitute innovation and is therefore not a work within the meaning of the Act. Like the CSBF and Pluritec, it also feels that the plans that it prepared for the Victoriaville Complex are original and do not in any way

constitute a reproduction of all or a substantial part of the Lainco Design. Alternatively, Lemay Côté argues that, if it is found that there was an infringement of the copyright in this case, the responsibility for that infringement must lie solely with the CSBF and Pluritec, as it was not involved in preparing the plans used to erect the steel structure of the Victoriaville Complex.

[32] Finally, Construction Gagné, which was represented by the same counsel as the CSBF, reiterates substantially the same means of defence as the CSBF. It also argues that it cannot be found at fault in anything as it was in no way involved in the preparation of the plans for the structure of the Victoriaville Complex and only followed instructions from the CSBF, including those contained in the notice to bidders dated February 18, 2013 (Exhibit TX-47), in which the CSBF refuted the allegations by Lainco and invited bidders to choose subcontractors as usual.

[33] Moreover, the defendants find the damages sought by Lainco to be grossly exaggerated.

[34] At trial, Lainco called, as its main witness, one of its two main officers and shareholders, Éric Lachapelle, an engineer by training. It also called two expert witnesses, Vadim Siegel, an architect, and Martin Fafard, a chartered professional accountant and specialist in investigative and forensic accounting. Mr. Siegel's mandate was to compare the plans for the structure of the Victoriaville Complex and the structure itself with the plans designed—and with the structures built—by Lainco, in particular for the Antony-Carola Complex, the Air Inuit hangar and the Artopex Complex, and to identify significant similarities, if any. Mr. Fafard's mandate was to quantify the damages suffered by Lainco, in particular its lost profits, from the alleged infringement of its copyrights.

[35] Pluritec called four (4) witnesses. On questions of fact, it first offered the testimony of its project leader for the Victoriaville Complex project, Mr. Viens, and then that of its financial controller, Gilles Cousineau, who testified regarding the profits that it made from that project. On technical questions and regarding the quantification of damages, it also called two expert witnesses, Norman Kadanoff, a structural engineer, who offered an opinion on the differences and similarities between the structure of the Victoriaville Complex and those designed by Lainco, including the elements of the Lainco Design, and Alain David, also a certified professional accountant and specialist in investigative and forensic accounting, who responded to Mr. Fafard.

[36] Alain Côté, an architect by training and project leader with Lemay Côté for the Victoriaville Complex project, testified on behalf of that firm, as did Jacques Côté, who is also an architect and who also offered his opinion, based on common architectural practices, regarding the role of Lemay Côté in that project, more specifically regarding the insertion of the structural plans in the architectural plans for the project.

[37] Finally, the CSBF called one expert witness, Thomas Egli, an engineer. Mr. Egli's mandate was to determine whether, in his opinion:

- a. the structural plans developed for the Victoriaville Complex reproduce all or a substantial part of the plans developed by Lainco for the Antony-Carola Complex, the Air Inuit hangar and the Artopex Complex;

- b. the structure itself of the Victoriaville Complex reproduces all or a substantial part of the structures of the Antony-Carola Complex, the Air Inuit hangar and the Artopex Complex, erected from the plans prepared by Lainco;
- c. the Lainco Design can be deemed to be the product of the exercise of its author's skill and judgment; and
- d. the elements of the Lainco Design are useful articles and whether the characteristics attributed to them are solely the result of their utilitarian function.

[38] Moreover, the CSBF did not call any representatives and Construction Gagné called no witnesses.

[39] During the trial, the parties also submitted as evidence excerpts of discoveries held in this matter, namely those of Mr. Lachapelle (Lainco), Mr. Viens (Pluritec), Alain Côté (Lemay Côté), Mr. Gagnon (CSBF), and Michel Dalcourt (Construction Gagné).

[40] Finally, it is important to mention that a confidentiality order was issued in this matter on March 26, 2014, and renewed on October 12, 2016, a few days before the proceedings began. That order primarily limited the disclosure of financial information. During the proceedings, it required an in-camera hearing for certain testimonies or portions of testimonies. Two versions of these reasons, one public, the other confidential, will therefore be issued simultaneously.

III. Issues

[41] In my view, this action raises the following four issues:

- a) Is the Lainco Design, as seen in the Lainco Architectural Plans and Works, particularly those related to the Artopex Complex, an original work within the meaning of the Act?
- b) If so, does paragraph 64.1(1)(a) of the Act nonetheless defeat Lainco's claim?
- c) If not, did the defendants, through their participation in the design, manufacture and installation of the steel structure of the Victoriaville Complex, infringe on the Lainco Design, as seen in the Lainco Architectural Plans and Works, particularly those related to the Artopex Complex? and
- d) If so, is Lainco entitled, in whole or in part, to the damages that it is seeking, including the punitive damages to which it feels it is entitled under the Act?

IV. Analysis

A. *Is the Lainco Design protected under the Act?*

(1) Legal framework

[42] In Canada, the rights and remedies of someone claiming to hold a copyright are set out in the Act. That system, statutory in origin, is exhaustive (*Théberge v Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 at paragraph 5, [2002] 2 SCR 336 [*Théberge*]; *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at paragraph 9, [2004] 1 SCR 339 [*CCH*]). It is constructed in a way that establishes “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward

for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)” (*Théberge*, at paragraph 30; *CCH*, at paragraph 10).

[43] Accordingly, and as noted by all parties in this case, a copyright does not protect the ideas behind the work, but strictly their expression in the work (*CCH*, at paragraph 8). The idea is therefore public property and its use is not subject to any monopoly. It is the work, in which the idea is expressed, that belongs to the author and that, as long as it is fixed in a material form, provides the rights and protections set out in the Act (*CCH*, at paragraph 8, citing *Moreau v St. Vincent*, [1950] Ex. C.R. 198, page 203).

[44] In other words, the need to strike an appropriate balance between giving protection to the skill and judgment of authors in the expression of their ideas, and leaving ideas from the public domain free for all to draw upon forms the “background” against which the Act must be interpreted and the arguments of the parties considered (*Cinar Corporation v Robinson*, 2013 SCC 73 at paragraph 28, [2013] 3 SCR 1168 [*Cinar SCC*]; *HCC*, at paragraph 10).

[45] The Act protects four (4) main categories of works: artistic, dramatic, literary and musical. The category of works cited by Lainco is that of artistic works, which includes architectural works. These two expressions are defined in the Act as follows:

artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of

œuvre artistique Sont compris parmi les œuvres artistiques les peintures, dessins, sculptures, œuvres architecturales, gravures ou photographies, les œuvres artistiques dues à des artisans ainsi que les

artistic works; (*œuvre artistique*)

graphiques, cartes, plans et compilations d'œuvres artistiques. (*artistic work*)

architectural work means any building or structure or any model of a building or structure; (*œuvre architecturale*)

œuvre architecturale Tout bâtiment ou édifice ou tout modèle ou maquette de bâtiment ou d'édifice. (*architectural work*)

[Emphasis added]

[46] However, for the copyright to exist on a work that falls into one of these four (4) categories of works, the work must still be “original” under section 5 of the Act. The concept of original work is not defined in the Act, a task that is left to the courts. The subject of contradictory jurisprudence until the Supreme Court of Canada decided the issue in *CCH*, an original work is, in general terms, a work by an author that is not a copy of another work. However, to meet the bar of originality, it is not enough for it to simply be from the author if it is not also the product of the author’s skill and judgment and if that exercise of skill and judgment is so trivial as to be a purely mechanical exercise (*CCH*, at paragraph 16). Skill is a matter of aptitude, proficiency, know-how, knowledge and practical experience, and judgment is a matter of wisdom and the ability to assess or compare various possibilities in order to choose from them (*Construction Denis Desjardins Inc. v Jeanson*, 2010 QCCA 1287, at paragraph 6 [*Construction Desjardins*]).

[47] However, that bar is met even if that exercise of skill and judgment does not produce a novel and unique work (*CCH*, at paragraphs 16 and 25). In fact, the originality set out in the Act “does not expect or require that a work be novel, unheard-of, unique or inventive” (*Construction Desjardins*, at paragraph 6).

[48] I note in passing that, since 1988, the Act has not required that an architectural work, previously referred to by the legislator as an “architectural work of art,” possess an “artistic quality or character” to be protected by the Act. That therefore means that there is no longer any reason to be stricter toward architectural works or plans than toward other types of works protected by the Act (*Construction Desjardins*, at paragraph 14). Moreover, this is not contested.

(2) Parties’ positions

[49] Lainco argues that the Lainco Design meets the definition of an architectural work and artistic work, and that it is a work that presents the level of originality needed to be protected under the Act, as the evidence shows that it is the product of the author’s skill and judgment. It noted during the trial that particular attention should be paid to that Design, as adapted at the Artopex Complex, as that is the work that was allegedly infringed upon.

[50] Citing the work by Stéphane Gilker, *La protection des œuvres architecturales par le droit d’auteur au Canada*, (1991), 3:3 CPI 241, part 1, [Gilker], Lainco notes that the courts previously considered a broad range of works and structures as architectural works, such as commercial buildings, single and row dwelling houses, a plan for a boutique facade, a railroad loading dock, a half tennis court made of concrete paving blocks marked with play lines and posts for holding a net, landscaping consisting of a pond, a jetty, a stairway and a walkway, a squash centre, a telecommunications tower, and the interior design for an architectural work (Gilker, at pages 268–269).

[51] Lainco continues by stating that this list also includes the steel structure of the former Ottawa Civic Centre, which allowed for the layout, within the same sports complex, of a football stadium and an arena (*Netupsky et al v Dominion Bridge Co. Ltd.*, 5 DLR (3d) 195, at p 196 [Netupsky]), as well as the design of the interior and exterior layout of a grocery store chain seeking to offer a new customer experience (2426-7536 *Québec inc. v Provigo Distribution inc.*, [1992] Q.J. No. 2565, EYB 1992-75117).

[52] The defendants argue that the Lainco Design does not have the degree of originality needed to be protected under the Act, for two reasons. First, the Lainco Design is allegedly imprecise, as the evidence shows that it sometimes has four key components, sometimes three, and sometimes two, meaning that it is impossible to accurately determine what makes it original and, as such, what is protected and protectable by copyright.

[53] The defendants also argue that the Lainco Design is simply the result of combining structural elements that are already well known (master trusses, Gerber secondary chords and columns on the periphery of the building), an exercise that, in their view, does not require any particular skill or judgment.

(3) Discussion and conclusions

a) *The Lainco Design*

[54] The defendants argue that, since a copyright gives its owner a form of monopoly on the production or reproduction, in any material form, of all or a substantial part of the work in question, what makes it original must be clearly defined, which allegedly is not the case here.

[55] They find that the definition of the Lainco Design has evolved, in all senses, depending on the various stages of this case. They thus note that:

- a. In its Statement of Claim, Lainco presents it as [TRANSLATION] “having a structure with a limited number of trusses, thus optimizing aesthetics while reducing costs,” without specifying the number of trusses needed and without mentioning the presence or contribution of secondary chords, peripheral columns or braces;
- b. In discovery, its representative, Éric Lachapelle, stated that the Lainco Design included main trusses close to each other with the use of Gerber beams or chords as secondary elements;
- c. Its expert, Mr. Siegel, in turn, sees four main elements: (i) steel columns on the periphery of the building; (ii) triangular master trusses supporting the chords in a cantilever assembly; (iii) secondary chords attached to the cantilever chords in the roof bridging; and (iv) X-bracing;
- d. During the proceedings, Mr. Lachapelle testified that the use of Gerber chords is not essential and that the Lainco Design can use any form of master truss, while Mr. Siegel is

of the view that, in the end, neither the columns on the periphery of the building nor the cross braces truly contribute to the aesthetic aspect of the Lainco Design.

[56] For its part, Lainco argues that the evidence on record shows that the design that it developed is characterized by the presence of a limited number of long triangular master trusses that are intentionally visible, imposing (approximately 200 feet in length by 15 feet in height) and spaced out, Berber secondary beams with the benefit of being low-profile, even hidden, and double columns supporting the master trusses, as well as, and in particular, the unique choice and layout of these three elements.

[57] This description seems to me to effectively reflect what is shown by the evidence. The Lainco Design, as I understand it from the evidence, seems to me to be the result of the specific layout, in order to give a distinctive aesthetic appeal to the playing area structure, which is clear, of two main elements: the triangular master trusses, preferably arched, which to some extent are the main appeal of the design and that, since the completion of the Artopex Complex, are two per field, and the Gerber secondary beams that serve to highlight the master trusses. To a lesser degree, the Lainco Design also includes the presence of double columns used to support the master trusses.

[58] In my view, this is clear from Mr. Lachapelle's testimony at the trial (Transcripts, vol. 1, at pages 65, 76, 154, 155, 190, 191, 195 and 196). Moreover, it is not exactly accurate to say that, during his discovery, Mr. Lachapelle referred only to the master trusses and the Gerber

beams in describing the Lainco Design. Although more discreet than during the trial, we also see a reference to the double columns (Exhibit D-15A, at pages 105–106).

[59] It is also inaccurate to say that Mr. Siegel finally admitted that the double columns did not make any contribution to the Lainco Design. Under cross-examination, he stated that the said columns contributed to the Lainco Design through their configuration (Transcripts, vol. 2, at pages 177–178), although he admitted that, on their own, unless windows were integrated into them, they did not contribute to the creation of an atmosphere inside the structure, as users are not inclined to specifically notice the layout of the columns (Transcripts, vol. 2, at page 186). I do not see that as a repudiation of the double columns' involvement in or contribution to the Lainco Design. Once again, neither Mr. Lachapelle nor Mr. Siegel claimed that the double columns played a key role.

[60] As for the statements attributed to Mr. Lachapelle that the use of Gerber chords is not essential or that the Lainco Design can accommodate any form or configuration of master trusses, nuances must be pointed out. First, I understand from Mr. Lachapelle's testimony that other types of beams could always be installed rather than Gerber beams, or crossbeams, which he considered at one point. However, I also understood that that would result in a secondary chord that would cost more if beams other than Gerber were used, or that would be less appealing if crossbeams were used, thus altering the Lainco Design. In other words, there is no aesthetic and business logic, according to Mr. Lachapelle, in modifying the design in that way (Transcripts, vol. 1, at pages 192–193). He also explained why continuous beams were used instead of Gerber beams for the Air Inuit hanger, a much larger structure with a flat roof to retain

water (Transcripts, vol. 2, at pages 20–22). Mr. Lachapelle testified that using those beams nonetheless maintained the distinctive aesthetic appeal of the Lainco Design (Transcripts, vol. 2, at page 20).

[61] Moreover, regarding the form of the master trusses, it is true that Mr. Lachapelle admitted that the Lainco Design did not depend on a single configuration of master trusses. However, he noted that it is the presence of the master trusses, grouped in a certain manner, that is at the heart of the Lainco Design and not their configuration, which in no way, in his opinion, changes the general aesthetic aspect associated with the Design (Transcripts, vol. 1, at pages 190–192).

[62] I would add the following. I agree with counsel for Lainco that what is first and foremost at issue in this case is the Lainco Design as adapted to the Artopex Complex, as the plans for that Complex, and the structure built according to those plans, were allegedly infringed upon by the defendants. The plans are precise and the structure exists. The work that must ultimately be examined in this case is therefore that one and it includes triangular master trusses, as does the Antony-Carola Complex and the Air Inuit hangar. The Act does not prohibit a work from being adapted, as long as the adapted work, to be protected under the Act, reproduces an important part of the original work (*Théberge*, at paragraph 73).

[63] In this case, I am satisfied that the Lainco Design is characterized by the presence of a limited number of long triangular master trusses that are intentionally visible, imposing and

spaced out (two per field in the case of the indoor soccer stadiums), Gerber secondary beams and double columns supporting the master trusses. The X-braces are not part of it.

[64] A 3D axonometry of the structure of the Artopex Complex clearly shows the various elements of the Lainco Design (Exhibit TX-70):



b) *Is the Lainco Design the product of its author's skill and judgment?*

[65] To be able to conclude that the Lainco Design is original, it must now be determined whether that choice and that layout are the result of its author's skill and judgment, or simply the result of a purely mechanical intellectual exercise.

[66] I repeat, the defendants argue that the Lainco Design is simply the result of a combination of structural elements that are already well-known (master trusses, Gerber secondary chords and columns on the periphery of the building), an exercise that does not require any particular skill or judgment. They add that the selection of those elements was guided first and foremost by

financial considerations, which tends to even further demonstrate the lack of originality in the Lainco Design.

[67] The defendants' position is based primarily on reports and testimonies by Mr. Kadanoff and Mr. Egli, both engineers. On behalf of Pluritec, Mr. Kadanoff gave the opinion that long prismatic master trusses, such as those in the Lainco Design, are a variation of the Warren trusses that have been used for more than 100 years for railroad bridges, such as the Victoria Bridge in Montreal. Since then, he stated, the use of prismatic trusses, which can have a rectangular, trapezoidal or triangular configuration, has expanded to other types of structures, such as the Eugène Lalonde arena in Sherbrooke, the Robin Hood Airport in Doncaster, England, the Hamburg Airport in Germany, the Calgary Airport and the pedestrian and cyclist bridge on the Lachine Canal in Montreal (Exhibit D-7, at page 6).

[68] As for the Gerber secondary beams, which he describes as cantilever beams with a Gerber system, according to Mr. Kadanoff, they owe their name to their designer, Heinrich Gerber, who first used that design and construction method in 1866. He states that, today, it is the most widely used method in roof construction because of its simplicity and low cost (Exhibit D-7, at page 6).

[69] On behalf of the CSBF and Constructions Gagné, Mr. Egli expressed the opinion that the Antony-Carola, Air Inuit, Artopex and Victoriaville complexes all share a common structure with a "steel beam-and-purlin system," a type of structure that has existed since the late 18th century and that is used today in the construction of warehouses, air terminals, factories,

aircraft hangars and sports complexes. That structure consists of five elements, according to Mr. Egli: a steel deck, beams, purlins, columns and cross-bracing.

[70] He states that well-known “design-build and turnkey contractors,” such as Butler Buildings Canada, in Burlington, Ontario, and Rigid Global Buildings, in Houston, Texas, design and build a large number of steel beam-and-purlin structures each year (Exhibit D-9, at page 10).

[71] Mr. Egli also notes that Gerber chords are not something new, stating that they are an important element of the Firth of Forth bridge in Edinburgh, Scotland, built in 1882. Although Gerber chords are used primarily as main beams in a steel beam-and-purlin system, he states that it is not unusual for them to be used as secondary beams, as is the case, for example, in the construction of floors (Exhibit D-9, at pages 13–14). As for the beams in such a system, he indicates that they can, as is the case here, be in the form of prismatic trusses, particularly when they must cover a distance of more than 60 feet. As examples of the use of this type of truss in a steel beam-and-purlin system, he also cites the Hamburg and Calgary airports (Exhibit D-9, at pages 15–16). As for the columns, he sees them simply as utilitarian and states that a prismatic truss would normally be supported by not one, but two columns (Exhibit D-9, at page 17).

[72] The expert for the CSBF and Constructions Gagné concluded that the choice of prismatic master trusses and Gerber secondary beams for the structures of the Antony-Carola and Artopex complexes, as well as the choice of “combining prismatic trusses as beams with a Gerber system as purlins,” does not require any “skill, judgment or intellectual effort.” He reaches the same

conclusion regarding the choice of columns to support the prismatic trusses and “combining W-section columns with prismatic trusses and a Gerber system” (Exhibit D-9, at pages 15–17).

[73] In his report and testimony, on behalf of Lainco, Mr. Siegel acknowledged that, when considered individually, the various elements of the Lainco Design are not new. However, he noted that what makes the Lainco Design original is the [TRANSLATION] “combination of those elements to create the structure as a whole . . . for a sports complex that meets the needs of users (particularly in terms of the clearance needed for soccer) in addition to being more economical and, in our opinion, visually appealing” (Exhibit P-3, at paragraph 66). Mr. Siegel continued:

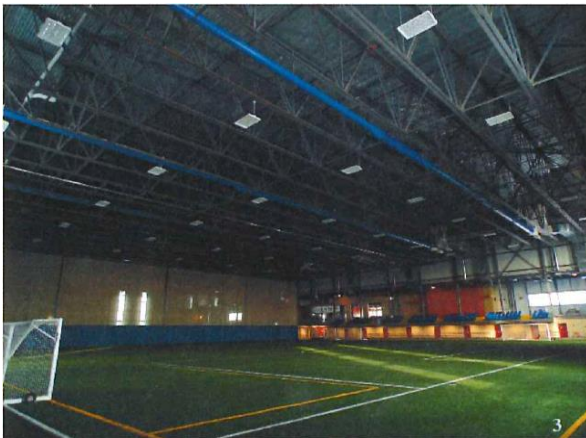
67. [TRANSLATION] In our opinion, one of the architectural principles of the Lainco Design is to propose a structure that is appealing from within. The presence of the structure is unmistakable in the sports complexes that were analyzed. The designers chose, in our opinion, to develop indoor spaces to make the structural elements visible. Those elements help create a distinctive atmosphere in those spaces.

[74] Following is what Mr. Lachapelle’s testimony reveals about the genesis and development of the Lainco Design.

[75] This Design was born, so to speak, from the loss of a contract when Lainco bid unsuccessfully to build the structure for the playing area (or, in industry terms, the “rear” part of the building) for a sports complex in Saint-Eustache, near Montreal (Transcripts, vol. 1, at page 57). That was in 2005. At that time, the most common structures for sports complexes, at least in Quebec, were (i) the conventional structure of “Canam” open-work beams [Canam]; (ii) the “Honco” monocoque structure [Honco]; (iii) the arched “Steelway” structure [Steelway]; and (iv) the Nordique structure, made of wood [Nordique] (Transcripts, vol. 1, at pages 79, 84, 83

and 86). Lainco then proposed a Canam structure, but the client preferred a Steelway structure (Transcripts, vol. 1, at page 57).

[76] Photos submitted during the trial (exhibits TX-35 to 38) show the interior aspect of these four competing structures:



Conventional structure of “CANAM” open-work beams
(Terrebonne soccer centre – TX-35)



“HONCO” monocoque structure
(Rosemère multisport centre – TX-36)



Wood structure
(Laval multisport complex – TX-37)



Arched “STEELWAY” structure
(St-Eustache multisport complex –TX-38)

[77] Determined to never again lose this type of contract, Mr. Lachapelle then began working to find a solution that would make it possible to [TRANSLATION] “achieve something that would

look good inside, where it would be possible to enter the sports centre and have the impression that there is nothing there, that it is very open and high” (Transcripts, vol. 1, at page 58). He thus sought to compete not only with Steelway, but with [TRANSLATION] “everyone, including the wood structure” (Transcripts, vol. 1, at pages 58 and 60).

[78] He recounts as follows the work done to be able to develop the Lainco Design:

[TRANSLATION]

MR. LACHAPELLE:

Thus, the idea was to achieve a design that I would . . . the interior look is nice, but in addition, you need to ensure that you have the cost, because it’s fine to make something that is really nice, but if it costs 20 percent, 30 percent more, you still won’t get it.

So, what I did then, given that we do everything with respect to the design, installation, manufacture, well, it would allow me, as an engineer, to also have my brother, who was with me, so that, as I tried different options, we evaluated each of my options . . . I’ll tell you how I went about it.

MR. GUAY: Mm-hmm.

[TRANSLATION]

MR. LACHAPELLE:

Roughly, and I will show you that, as I did my tests to provide the things that were more appealing, but when we “costed,” when we verified the execution, it was too expensive. Because you need to understand that, in St-Eustache, I knew roughly what the costs behind it were because I had proposed a Canam solution and my client told me that it was about the same cost as Steelway, but that, even at the same price, he would not have given it to me.

So, I started with that budget envelope and I did three fields that way, and the first thing I tried to do was that I said that I would use trusses because, traditionally, what we see there are main trusses with crossbeams, which act as a secondary element, that are perpendicular to the main trusses and that would run the width of the field.

So, I started with that. I started from there. I placed them every 30-40 feet, and I placed beams going the other way, then when we did the assessment, we realized that the main trusses, one, were very costly because of the height and the loads that I was putting on them Another thing that we realized was that, during installation, they were hard to install because, when you install a master truss that way with crossbeams running the other way, it takes girths like that on each side for the stability of the lower chords . . .

So, I began with that and it didn't work. Then, finally, what I did was I began putting them closer. I tried various options, and I reached the point in an option where I had trusses every 20 or 25 feet. That made more sense. It made it look full inside, but it didn't help it.

That is when, at one point, the idea came to us, I'm not sure how, we said we'd put them closer, which seemed a bit ridiculous because it was like you were putting two at once, but moving them closer meant that we were grouping them together. They stabilized themselves. So, with respect to erection, we could assemble them on the ground because, as I said, everything I did in terms of engineering and calculations, I had it validated by Martin, who monitored installation and manufacturing.

And we realized that those large trusses, although they were costly to build, that cost could be recovered through the installation, thus staying within our budget. And by moving them closer together, they stabilized themselves. And in the beginning, by putting them straight like that, I had to add "Xs" in the centre, and that added to the time and we found that it was not attractive because it created, like --- because I also modelled all that in my software, which we'll present later, SAFI, to check the calculations. And once I had it in 3D, we were able to see somewhat what it would look like once ---

...

--- installed, that's it. So, we realized that it didn't make sense and then, it was me or Martin, we had the idea, we said we'd lean them this way and they would stabilize themselves. And when I did my calculations, it worked well. I no longer needed to add "Xs" in the centre.

And at the beginning, we moved them closer like that, and we installed crossbeams. We installed crossbeams because, essentially, OK, crossbeams cost less than beams. Engineers

always prefer crossbeams. That's why you have crossbeams everywhere in warehouses. It makes no sense to use beams.

...

But the first design that we created, we had installed crossbeams that way. Now, since the beams were closer, the main trusses were closer, we tried putting crossbeams at the top and we found that it made no sense. The span was too small, and it was hard to install, and crossbeams, you can't have compression loads in traction. So, we said during installation that we would break everything.

So, when we reached that point, we decided we would use beams. We installed secondary beams, which are type "I" steel beams that work really well in traction compression traction . . .

We put crossbeams in the middle because we had spans of -- we had small spans in the centre, and the larger spans were 40 feet. So, we installed them according to what we considered logical. That meant using crossbeams because they are less expensive.

But when we looked at the design, there were two things we didn't have in it. First, the effect of losing -- because we'll explain shortly the -- we're talking about three or four elements. Basically, it's three. The fourth is a coincidence. I always put them in the same places. It's a coincidence.

JUSTICE LEBLANC: Which one?

MR. LACHAPELLE: It's the "X."

JUSTICE LEBLANC: The X-braces?

MR. LACHAPELLE: That's right, that's right. The three are the truss. The secondary beams, then the columns.

The secondary beams, when I was using crossbeams, the crossbeams were such that, when we looked at them, it wasn't a good "look" because it looked like there was a big roof. In addition, when you use crossbeams, you need to put spacers everywhere. So, the roof starts to become a bit denser, and the disadvantage -- in terms -- in monetary terms, well it's -- it was almost the same price.

But then we had the idea, since I was already using beams on top, I said I'll try beams -- I'll try Gerber beams. On the market,

engineers use Gerber beams primarily as main beams because the functionality . . .

It's mostly for warehouses. If you go look at Costco stores, look at the ceiling. You'll see Gerber beams, and you'll see the beams – the secondary beams are crossbeams. That's the most economical. That's what engineers will tend to do.

But in this case, it made a certain amount of sense to use Gerber secondary beams because we said we already needed them on top. What we did is that I removed them, I made Gerber beams. I changed all the crossbeams to put in Gerber beams, and then we looked at how it looked. And that – that was closer to what we wanted.

Then we found that, when you looked at the roof, you had the impression somewhat, as we said in the introduction, when it's painted, you almost don't notice them. It's like they merge into the wall, and the only thing you see are the large trusses every 40 feet. You get the impression that the large trusses are supporting the flat roof.

...

. . . So, by default, a beam is normally more expensive than a crossbeam but, in this case, we were able to stay within the same costs and provide something that looked better.

So, we opted directly for the Gerber beams, and – well, that's it

(Transcripts, vol. 1, at pages 60 to 67)

[79] Mr. Lachapelle stated that, for the purposes of architectural aesthetics, the goal was to install master trusses of the same height, regardless of the loads involved. He also stated that, after completing the structure of the Antony-Carola Complex, Lainco decided to limit the number of master trusses to two per field (Transcripts, vol. 1, at pages 75 to 77).

[80] Regarding the columns, Mr. Lachapelle indicated that he considered the option of putting only one support column on the master trusses to control costs because [TRANSLATION] “the

more steel you have, the more erection is needed, and the more it increases costs” (Transcripts, vol. 1, at page 75). He explained as follows the decision to nonetheless go ahead with two columns:

[TRANSLATION]

. . . So, it was not naturally logical to put two columns six feet apart.

Except that, in this case, we found that it was a much better look. Afterward, our clients even put windows in them. So, we decided to go with double columns. And for the double columns, to reduce installation costs, what we did was we manufactured them and assembled them at the plant, knowing that, with two columns six feet apart, you can transport them normally.

[81] Mr. Lachapelle said that he worked on this project on weekends and on weekday evenings, as well as during regular work hours, with his brother Martin, who is a joint shareholder and joint director of the company. He stated the following:

[TRANSLATION]

It was really a market that we wanted to break into. So, we put a lot of energy into it. I spent many hours, on many models. All the scenarios, all the options I told you about, of course I had to design it each time.

So, I did modelling each time, each time I gave that to Martin. Martin did an estimate. . . .

So, I’d say that we did all that until 2006 when my—my design was pretty well stopped because, at that point, that’s when someone called me to ask if I could do a soccerplex

(Transcripts, vol. 1, at page 68).

[82] That first soccerplex project was postponed. The Lainco Design was first chosen for the Antony-Carola Complex project, an indoor soccer stadium with three fields, built in 2009. Mr. Lachapelle said that, to obtain the contract for that structure, the Lainco Design had to beat

out the four usual “players”: Canam, Honco, Steelway and Nordique (Transcripts, vol. 1, at pages 82–83). Lainco obtained the contract without being the lowest bidder. He feels that it was the interior perspective of the Lainco Design, prepared by a graphic artist for the invitation to tender, that made the difference (Transcripts, vol. 1, at page 87).

[83] Is all this enough to make the Lainco Design an original architectural work within the meaning of section 5 of the Act? In my opinion, it is.

[84] On one hand, the use of previously known elements on which the author of the work does not hold a copyright does not constitute an estoppel on the originality of the work. For example, a work created by compiling elements produced or designed by others can be protected by copyright as long as the arrangement produced by the author stems from the exercise of the his or her skill and judgment. In other words, the Supreme Court states that one may have copyright “in the form represented by the compilation” because what is covered by copyright is not the various components from which the compilation is made, but rather “the overall arrangement of them which [the author] through his industry has produced” (*CCH*, at paragraph 33; see also: *Robinson v Films Cinar inc.*, 2009 QCCS 3793 [*Cinar CSQ*], at paragraph 410, citing *Productions Avanti Ciné-Video Inc. v Favreau*, [1999] RJQ 1939 (CA), at pages 8–13).

[85] This same principle was adopted in *Construction Desjardins*, in which the Quebec Court of Appeal reiterated that “work resulting from the simple arrangement of components can in and of itself be copyrighted, notwithstanding the fact that the author of the compilation holds no copyright over the components in question” (*Construction Desjardins*, at paragraph 10). That

case is even closer to the reality of the case at hand as it dealt with the infringement of architectural plans developed for a single-family dwelling.

[86] What must be retained from that judgment, for now, is that an architectural work, and the related plans, can pass the test for originality even if, as the defendants claim in this case, TRANSLATION “the components chosen and put together are, hypothetically, without any particular artistic value, ordinary, or result in something that could be qualified as lacking in aesthetic value or simply consistent with current trends” (*Construction Desjardins*, at paragraph 17). In this regard, citing Chief Justice McLachlin in *CCH*, the Court of Appeal noted that originality, within the meaning of the Act, requires no “minimal degree of creativity” or the presence of particular artistic qualities. It is enough for the work to be the product of the author’s skill and judgment (*Construction Desjardins*, at paragraph 17).

[87] In this case, Lainco clearly is not claiming copyrights on the prismatic master trusses, the Gerber beams or the steel columns, elements that, as Lainco and its experts acknowledged, are not new in the world of engineering and architecture. What it is claiming is recognition of copyrights on its arrangement, or choice and combination, of them that is seen in what became the Lainco Design. In this regard, Lainco feels that it has shown that the arrangement is the result of the skill and judgment of its two shareholders and officers, the Lachapelle brothers.

[88] This leads me to my second point, that of the intellectual effort behind the Lainco Design. Was it a purely mechanical effort or an effort that required skill and judgment? On this point, I cannot agree with the opinion of Mr. Egli, who, as we have seen, does not see the choice and

combination of prismatic trusses, Gerber beams and columns as the exercise of any particular skill, judgment or intellectual effort. I cannot agree for a number of reasons.

[89] First, this point of view does not seem to consider an important and relevant factor, namely the possible aesthetics of a steel structure when it is visible. Indeed, Mr. Egli's report and testimony give the impression that engineering and architecture are two parallel worlds that never cross paths. In this regard, the following submission contained in the reported submitted by Mr. Siegel in response to those of Mr. Egli and Mr. Kadanoff (Exhibit P-4) seems accurate:

[TRANSLATION]

For the purposes of preparing our First Report as part of this case involving the infringement of copyrights on architectural works, we understood that the mandate given to us by Smart & Biggar was to analyze the presence of architectural and aesthetic similarities between the structural plans and the steel structure of the Victoriaville Complex and the various works designed by Lainco (Antony-Carola stadium, Air Inuit hangar, Artopex Complex and Académie Lafontaine).

In that sense, the reports by Thomas Egli and Norman Kadanoff do not seem to directly respond to our First Report because they do not really address the architectural and aesthetic similarities of the projects in question, but instead the technical aspects of the structures (e.g. engineering calculations) and originality (in the sense of newness) of the main elements of the "Lainco Design" (as defined in our First Report).

[90] When questioned by counsel for Lainco, Mr. Kadanoff, the Pluritec expert, clearly acknowledged, after having identified a certain number of projects for which the firm that employs him (SDK) received awards and distinctions, particularly from the CISC, that engineering and aesthetics are not mutually exclusive—far from it:

[TRANSLATION]

MR. GUAY:

I say that as a joke, not to offend you, but despite the fact that you are an engineer, you are nonetheless interested in aesthetics, are you not?

MR. KADANOFF: Always.

(Transcripts, vol. 5, at page 113)

[91] Moreover, one need simply look at the photos of some of those projects submitted as evidence (Exhibit P-12) to be convinced. All cases involve visible structures with distinctive designs. I reproduce the photos here: (i) the monumental staircase in the Science and Health Technologies Building at John Abbott College, (ii) the bridge on Notre-Dame Street/Faubourg Québec, and (iii) the interior of the Centre CPD, all located in Montreal:

i. Monumental staircase in the Science and Health Technologies Building at John Abbott College



ii. Bridge on Notre-Dame Street/Faubourg Québec



iii. Interior of the Centre CDP



[92] I note that the CISC is the same organization that gave Lainco its Award of Excellence in the Commercial-Institutional Projects category for the construction of the Artopex Complex structure (Exhibit TX-23). That award, for that project category, recognizes, among other things, “the architectural expression of the work and/or technical challenges that were overcome” (Exhibit TX-22). It is also interesting to note that an article published on May 15, 2013, in the daily newspaper *La Nouvelle Union*, from Victoriaville, during the construction work on the Victoriaville Complex (“Un spectaculaire chantier pour Aciers Solider au Complexe multisport,” Exhibit TX-122), quotes representatives from Aciers Solider, the subcontractor that was awarded the contract to build the Canam structure, the master truss supplier, among others: the first refers

to [TRANSLATION] “the scope and gigantism of these self-supporting structures and the engineering challenge of their design,” and the second to “the ‘beauty’ of these steel structures.”

[93] An attempt was made to diminish the value of that award of excellence by having Mr. Lachapelle admit that Lainco had contributed financially to the awards gala. However, I note that Lainco was one of several corporations and companies, about twenty in fact, to contribute financially to the event (Exhibit TX-24). In my view, that has no impact on the value and significance of the award.

[94] During the trial, counsel for Lainco stated, and it is important to note it at this stage, that if the structure related to the Lainco Design was not visible, this dispute would probably not have occurred. He added that it is its effect on the aesthetics and interior appearance of the building of which it is an element that makes it distinctive and original.

[95] The result of a choice and combination of well-known structural elements, the Lainco Design is not a feat of engineering prowess as such. In that sense, Mr. Egli is not wrong. However, as we have seen, he does not need to be. Without saying that the Lainco Design is one, it is useful to reiterate that the courts have recognized original work status in relatively simple works such as case summaries (*CCH*, at paragraphs 29–36), a tax form designed for employee training (*U&R Tax Services Ltd. v H&R Block Canada Inc.*, (1995) 62 CPR (3d) 257, at page 265 (FC)), an automobile purchasing guide listing private and retail sales (*Éditile Inc. v Automobile Protection Assn. (APA)* (2000), 6 CPR (4th) 211 at page 220 (FCA)), as well as a

telephone directory and a dictionary (John S McKeon, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th Edition, Thomson Carswell, Loose-leaf Edition, at pages 7–15 [*Fox*]).

[96] The evidence in this case shows that the Lainco Design was developed first and foremost to stand out from the competition and to create a niche in a competitive market, with the primary objective of offering a distinctive “look” that clearly met the safety, performance and sustainability specific to structural engineering, as stated by Mr. Kadanoff in his report (Exhibit D-7, at page 4). It had to be thought out. That objective, in my view, could only be achieved through the exercise of the designer’s skill and judgment, not through a simple mechanical application of their knowledge and experience.

[97] Once again, as we have seen, the evidence shows that the Lainco Design was developed through modelling and trial and error with various choices of elements and combinations, including their spacing, their dimensions, their number and the overall aesthetic result. Clearly, there is the matter of costs, which is omnipresent, as alleged by the defendants. However, insofar as Lainco was determined to conquer the market, so to speak, or at least position itself advantageously, it had to find a balance between the planned structure, i.e. one offering a perspective of the desired openness and aesthetics, and what it would cost to manufacture and install it. In my view, that added to the challenge.

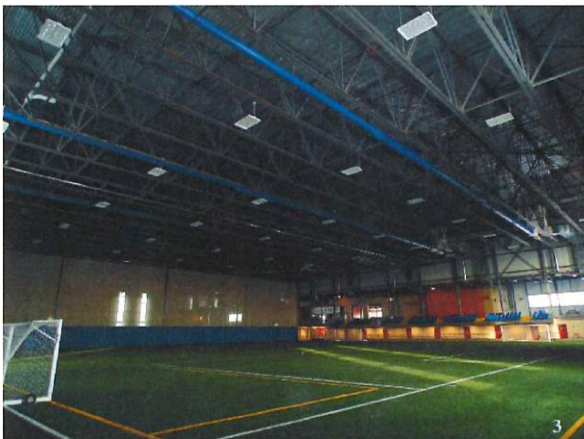
[98] Moreover, Lainco was able to create a structure with a distinctive aesthetic appearance that stood out from its main competitors at the time. These photos show this eloquently:



Antony-Carola Complex



Artopex Complex



Conventional structure of “CANAM” open-work beams
(Terrebonne soccer centre – TX-35)



“HONCO” monocoque structure
(Rosemère multisport centre – TX-36)



Wood structure
(Laval multisport complex – TX-37)



Arched “STEELWAY” structure
(St-Eustache multisport complex – TX-38)

[99] The photos of sports complexes built here in Canada and in the United States submitted during the cross-examination of Mr. Egli, in which the structure was built by Butler Buildings Canada or Rigid Global Systems who, according to Mr. Egli, design and build a large number of structures each year with a steel beam-and-purlin system, show that those various structures all differ significantly from the Lainco Design, in terms of how they look. Those photos (Exhibit P-14, tabs 2 and 3) are reproduced in the Appendix to this judgment.

[100] Finally, I note that the initial reflex of Pluritec was first seen in this case when the invitation to tender was underway for the contract to build the Victoriaville Complex. Invited by the CSBF to comment on the notice dated February 14, 2013, which Lainco had sent to the companies that had bid on the project, Pluritec, through Mr. Viens, insisted that the design used for the Victoriaville Complex as part of the mandate that it had been given was [TRANSLATION] “an entirely original design” resulting from “research”, “analyses”, “computer modelling”, “calculations”, and “drawings” (Exhibit TX-175). According to Mr. Egli, since the Victoriaville Complex had a steel beam-and-purlin system, like the Artopex Complex and, before that, the Antony-Carola Complex, I find it hard to reconcile the idea that the creation of such structures, which are common, does not require any particular skill, judgment or intellectual effort, with what Pluritec claimed at the time, and still claims today, regarding the effort put into developing the structure of the Victoriaville Complex.

[101] To paraphrase the Quebec Court of Appeal in *Construction Desjardins*, if arranging judgments in a compendium (compilation) meets the originality test under the Act, it would be difficult to see how the Lainco Design would not, both in its “plan” version and its “built”

version (*Construction Desjardins*, at paragraph 17). In my view, again paraphrasing the Quebec Court of Appeal, it could equally be said that the Lainco Design is the result of the personal effort of its designer in that it combines various architectural and structural elements (volume, combinations, spacing, dimensions) that were chosen and put together thanks to the skill and judgment of the designer (*Construction Desjardins*, at paragraph 16).

[102] The following passage from *Construction Desjardins* perfectly illustrates, in my view, the nature of the intellectual effort behind the Lainco Design:

[16] . . . “The intellectual contribution to the product is not purely mechanical, quite the opposite: a choice was made, the designer assessed and weighed the different components that could potentially be integrated into his plans, he melded these components into what was intended to be an aesthetic perspective, and throughout there is the expression of both skill and judgment.”

[103] The defendants placed considerable emphasis on *Betaplex inc. v. B&A Construction ltée*, 2006 QCCA 886 [*Betaplex*], a Quebec Court of Appeal decision relied on by the trial judge in *Desjardins Construction* to conclude that there was no originality in the plans in question in that case on the ground that they did not include any elements that were innovative or particular, i.e. novel, unusual or distinctive. Also at issue, in *Betaplex*, were the plans for a single-family dwelling.

[104] Without repudiating its previous decision in *Betaplex*, the Court of Appeal drew the following distinction in *Desjardins Construction*:

[26] *Betaplex inc.* does not propose to add to the criteria established by the Supreme Court with regard to originality. If the work originates from its author in that it was not copied and is the product of the author’s skill and judgment, there is no need to

venture further and demonstrate the novel, unusual, or distinctive aspect of the work. In *Betaplex inc.*, the layout of the rooms at issue did not meet the criteria of skill and judgment, because it was work that, in truth, resulted from a rather mechanical arrangement, not having required any particular intellectual effort.

[27] It is from this perspective that paragraphs 61 and 62 of the judgment must be understood:

[61] [TRANSLATION] If the respondent were right, none of his competitors, even in good faith, could, for decades to come, place three bedrooms and a bathroom in a similar arrangement as the one chosen by the respondent. Supposing that the appellants had wanted to lay out the bedrooms, the bathroom, the wardrobes and the linen closets differently from the layout in the respondent's model home, wouldn't they have "plagiarized" the plans of some other builder somewhere? Essentially, I do not see in the plans for the model home any feature that would be unknown to builders or that stems from a creative effort.

[62] The development of the respondent's model was also regulated by specifications, budgetary constraints, fashion trends, and the relevant physical and regulatory environments. In that context, designing architectural plans is better described as an exercise in reconciling various constraints than a creative effort or the demonstration of an architect's skill.

[28] These passages must be read through the lens of *CCH*, which the Court quotes extensively for that matter. In this sense, the [TRANSLATION] "creative effort" mentioned in no way refers to the idea of creativity or novelty expressly set aside by the Supreme Court in *CCH*, but rather to the fact that the layout of the rooms at issue in that case did not require any particular skill, that is to say any knowledge, developed aptitude, or practised ability (essentially, know-how), and had not in any way solicited, in the words of Chief Justice McLachlin, "one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work."

[105] *Betaplex* is thus distinguished by the facts. As the Court of Appeal noted, the layout of the rooms in question in that case resulted from a rather mechanical layout that did not require any particularly intellectual effort. As we have just seen, that is not the case here, as is shown, in my view, by all evidence.

[106] The defendants' position is somewhat reminiscent of the position put forth in *Netupsky*, in which the defendant in that case, Dominion Bridge, claimed that the structural plans for that dual-purpose stadium (football and hockey arena) served a purely technical purpose and were devoid of any artistic aspect. The British Columbia Court of Appeal found otherwise:

[TRANSLATION]

On behalf of the respondent, it was argued that the plans were not the subject of copyright as they were, in effect, neither drawings nor plans within the meaning of those words as used in the definitions of "artistic work" and "literary work", but were analogous to tools for use in construction, that is, tools on or of paper, and had no artistic functions. In short, it was argued that the plans were of a technical nature whose purpose and use were merely diagrammatic indicia of processes and methods of construction. . . .

Alternatively, it was suggested that if there is any copyright associated with the plans, it must be limited to those parts that have artistic character.

I cannot accept these submissions. In my view, it is clear that engineers' structural design plans are of an architectural and design nature and cover the same field and are for the same purposes and uses as if they had been devised and prepared by an architect. Structural engineers are obviously architectural specialists insofar as their work involves the design and construction of structural work. Their drawings and plans, both general and detailed, must be treated as the equivalent of architects' plans.

(*Netupsky*, at page 214)

[107] That decision was overturned by the Supreme Court of Canada, but on another point, as Dominion Bridge was no longer challenging the characterization of the plans as works of architectural art (*Netupsky et al v Dominion Bridge Co. Ltd.*, [1972] SCR 368). It is true that *Netupsky* was rendered under the former definition of architectural work but, as we have seen, that definition was more demanding than the current definition in that the work had to present an artistic character or aspect and that the protection under the Act was limited to that aspect or character. This is no longer the case.

[108] The defendants' position is also reminiscent of the one adopted by the appellants in *Cinar SCC*. It was argued that the work by the plaintiff, Mr. Robinson, was not a reproduction of the generic elements of a story repeated for centuries, i.e. that of a man marooned on an island interacting with animals, native inhabitants and the environment of that place (*Cinar SCC*, at paragraph 44). The Supreme Court rejected that argument, finding that the work was not only the reproduction of generic elements that everyone is free to draw upon for inspiration, but also a reproduction of the particular and distinct combination of those elements, which represents a substantial part of the skill and judgment of the author (*Cinar SCC*, at paragraph 46).

[109] Without obviously claiming that the Lainco Design presents the same creative depth as that of Mr. Robinson, a literary work bringing characters, a place and a story to life, I believe that it can be said that this Design is not only the reproduction of known generic elements, but also the reproduction of the particular combination of those elements, which gives the overall structure thus created a distinctive aesthetic appearance.

[110] Finally, the defendants also placed considerable emphasis on the fact that the Lainco Design is in no way innovative, and therefore original, as it was already present in the structure of two existing buildings when it was developed: the Hamburg and Calgary air terminals. In other words, the Lainco Design is allegedly a copy of pre-existing works.

[111] I cannot accept that argument. On one hand, as we have seen, the originality set out in the Act “does not expect or require that a work be novel, unheard-of, unique or inventive” (*Construction Desjardins*, at paragraph 6; *CCH*, at paragraphs 16 and 25). On the other hand, the issue is not whether the structures seen in the Hamburg and Calgary air terminals existed prior to the development of the Lainco Design plans. It is instead whether Lainco copied either of those structures because, as we have also seen, a work may not be original if it is not from its author, i.e. because it was copied from another structure (*CCH*, at paragraph 25).

[112] Thus, for there to be an infringement, the work must have been de facto copied. In other words, if the presumed infringer arrived at the same result using his or her own skill and judgment, which Pluritec is arguing in this case, there is no infringement, no breach of the Act (*Desjardins Construction*, at paragraph 29). Addressing the distinction between the nature of a copyright and the rights allocated to a patent holder, *Fox* states the following:

[TRANSLATION]

The right to produce or reproduce the work is quite different and does not grant a monopoly. If it were shown that two precisely similar works, which are the subject-matter of copyright, were produced independently of one another, the author of the work published first would not be entitled to restrain the publication by the subsequent author of that author’s independent original work.

(*Fox* at pages 22–11)

[113] Apart from the observable differences between the Lainco Design and that of the two structures in question, as seen in the photos below (in Hamburg, the master trusses of the air terminal are in the form of Vs, not trapezoids, the entire structure gives a less refined appearance, the secondary chords are in wood, not steel, the windows are in the ceiling, not between the columns supporting the master trusses, and the columns supporting the structure do not have the same form; in Calgary, the master trusses are supported by single columns on which the upper end changes to a fork and the secondary chords seem to be covered with a decorative covering, as seen in the photos below), I have no evidence before me that Lainco had access to the plans for those structures, that it visited either location or that it drew inspiration from them in developing the Lainco Design.



Artopex Complex



Hamburg Airport Terminal 1



Artopex Complex



Hamburg Airport Terminal 2



Artopex Complex



Calgary Airport

[114] In other words, I have not been convinced that the Lainco Design is not an independent work, i.e. a work resulting solely from the exercise of its designers' skills and judgment.

[115] While aware of the need to interpret the Act in a way that strikes a fair balance between the protection of the author's skills and judgment in expressing his or her ideas, and leaving ideas in the public domain for everyone to draw upon for inspiration, I am of the view, particularly in light of the type of architectural designs that have been recognized as original, as is seen in the examples listed at paragraphs 50 and 51 of these reasons, that Lainco has

discharged its burden of demonstrating that the Lainco Design is an original work within the meaning of section 5 of the Act.

[116] Before determining whether the defendants copied that work, however, I must first determine whether paragraph 64.1(1)(a) of the Act precludes Lainco's action.

B. *Does paragraph 64.1(1)(a) of the Act defeat Lainco's claim?*

[117] Paragraph 64.1(1)(a) of the Act states that applying to a "useful article" features that are dictated solely by a "utilitarian function" of the article does not constitute an infringement of the copyright or moral rights in a work. Subsection 64.1(1) reads as follows:

Non-infringement re useful article features

64.1 (1) The following acts do not constitute an infringement of the copyright or moral rights in a work:

- (a) applying to a useful article features that are dictated solely by a utilitarian function of the article;
- (b) by reference solely to a useful article, making a drawing or other reproduction in any material form of any features of the article that are dictated solely by a utilitarian function of the article;

Non-violation : caractéristiques d'objets utilitaires

64.1 (1) Ne constitue pas une violation du droit d'auteur ou des droits moraux sur une œuvre le fait :

- a) de conférer à un objet utilitaire des caractéristiques de celui-ci résultant uniquement de sa fonction utilitaire;
- b) de faire, à partir seulement d'un objet utilitaire, une reproduction graphique ou matérielle des caractéristiques de celui-ci qui résultent uniquement de sa fonction utilitaire;

(c) doing with a useful article having only features described in paragraph (a), or with a drawing or reproduction made as described in paragraph (b), anything that the owner of the copyright has the sole right to do with the work; and

(d) using any method or principle of manufacture or construction.

c) d'accomplir, avec un objet visé à l'alinéa a) ou avec une reproduction visée à l'alinéa b), un acte réservé exclusivement au titulaire du droit;

d) d'utiliser tout principe ou toute méthode de réalisation de l'œuvre.

[118] The terms “useful article” and “utilitarian function” are defined in subsection 64(1) of the Act:

useful article means an article that has a utilitarian function and includes a model of any such article; (*objet utilitaire*)

utilitarian function, in respect of an article, means a function other than merely serving as a substrate or carrier for artistic or literary matter. (*fonction utilitaire*)

objet utilitaire Objet remplissant une fonction utilitaire, y compris tout modèle ou toute maquette de celui-ci. (*useful article*)

fonction utilitaire Fonction d'un objet autre que celle de support d'un produit artistique ou littéraire. (*utilitarian function*)

[119] The CSBF and Construction Gagné are the only parties citing paragraph 64.1(1)(a) as a means of defence against Lainco's action. They argue that the structures of the complexes analyzed by Mr. Egli (Antony-Carola, Air Inuit, Artopex and Victoriaville) are useful articles within the meaning of that provision and that their component elements (the master trusses, the secondary chords and the columns) give them characteristics (configuration, length, height, inclination, slope and spacing of the elements) that are solely the result of the utilitarian function

of the said structures. They argue that that means that there cannot be an infringement of the copyright held by Lainco in the Lainco Design, as those same elements are found in the Victoriaville Complex because, there too, they fulfill a strictly utilitarian function.

[120] These two defendants cite the report by Mr. Egli, whose mandate was also to “[review] the specifics of the purlins, beams, columns and cross-bracing in order to determine whether their features were predicated solely by their utilitarian function”) (Exhibit D-9, at page 25).

[121] In each case, Mr. Egli found that “[t]he differences in the (purlins, beams, columns and cross-bracing) are not due to any architectural requirements or artistic interpretation, but rather to an optimization of the engineering design in response to the loads that are applied to them” (D-9, at pages 26–28).

[122] He concluded that the characteristics of each element of the four complexes in question resulted solely from their utilitarian function (“Based on the above, I am of the opinion that the features of the purlins, beams, columns and cross-bracing) of all four structures under consideration are predicated solely by their utilitarian function”) (D-9, at pages 26–28).

[123] Subsection 64.1(1) of the Act, enacted in 1988, creates a specific exception to the copyright protection system. That provision is found in Part VI of the Act (“Miscellaneous Provisions” / “Divers”), more specifically under the heading “Industrial Designs and Topographies” / “Dessins industriels et topographies.” That “Industrial Designs and Topographies” component consists of three sections (64, 64.1 and 64.2). Those provisions were

added to the Act to ensure better consistency between the Act and the *Industrial Design Act*, RSC 1985, c. I-9. At the time, the copyright system was considered to be too generous for articles that presented purely functional characteristics (*House of Commons Debates*, 33rd Parliament, 2nd Session, No. 5, at pages 7669, 7689 and 7692).

[124] This provision thus allows for the accomplishment of a limited number of acts that would otherwise constitute an infringement of the copyright (*Robic: Canadian Copyright Act Annotated (Carrière)*, Toronto, ON, Thomson Reuters 2015, at 64.1§5.0).

[125] I find that this exception does not apply in this case. As noted by Lainco, every architectural work has a certain functional or utilitarian character. A structure such as those of the Artopex and Victoriaville complexes is the main shell of those buildings and their design must, as noted by Mr. Kadanoff, satisfy the three requirements of structural engineering: security (resistance, balance and stability), performance (functioning and comfort) and durability (Exhibit D-7, at page 4). These requirements are necessarily functional and utilitarian in nature and, as we will see in more detail, suppose that each structure is designed based on a certain number of constraints, including local conditions at the site where it is built.

[126] Moreover, the evidence shows that the Antony-Carola and Artopex complexes could not be built in Victoriaville using the same plans, as their structure is not designed to resist local constraints that are greater than in Granby and Montreal. That is not the case for the Victoriaville Complex, which could be built at any of the locations using the same plans.

[127] However, the approach used by the CSBF and Construction Gagné totally discharges the aesthetic or architectural dimension that a structure may, in drawings, possess. As we have seen, that is the case here. It seems to me that adopting this approach could ultimately have the effect of eliminating most architectural works from the scope of the Act. Thus, if the choice and combination of structural elements that are otherwise utilitarian give the overall structure that they make up an architectural or aesthetic value, and if that choice and combination are the result of the author's skill and judgment, I do not see why the work should not benefit from copyright protection. That cannot have been the intention of Parliament when paragraph 64.1(1)(a) was enacted.

[128] I note that Lainco is claiming a copyright not on the elements with which the Lainco Design was developed, but on its choice and combination of those elements, which give the resulting structure, which is visible, an architecturally distinctive aesthetic appearance.

[129] I therefore find that the exception set out in paragraph 64.1(1)(a) of the Act does not apply in this case. This therefore leads us to ask whether the copyrights held by Lainco in the Lainco Design were infringed by the defendants.

C. *Did the defendants, through their participation in the design, manufacture and installation of the steel structure in the Victoriaville Complex, infringe on the Lainco*

Design, as seen in the Lainco architectural Plans and Works, particularly those related to the Artopex Complex?

(1) Legal framework

[130] According to subsection 3(1) of the Act, the copyright on a work includes the sole right, for the duration provided for in the Act, among other things, to produce or reproduce the work or any substantial part thereof in any material form whatever and, equally exclusively, the right to authorize such acts. Thus, under subsection 27(1) of the Act, it is an infringement for any person, without the consent of the owner of the copyright, to do anything that only the owner of the copyright has the right to do under the Act.

[131] Under subsection 34(1) of the Act, where a copyright has been infringed, the owner of the copyright is entitled to all remedies available under the Act, including remedy in damages. In civil proceedings launched to that end, when the defendant, as is the case here, puts in issue either the existence of the copyright or the title of the plaintiff to it, section 34.1 of the Act states that, unless the contrary is proved, the work is presumed to be protected by the copyright and the author is presumed to be the owner of the copyright.

[132] Section 2 of the Act defines the term “infringing” (“contrefaçon”) in relation to a work on which a copyright exists, as follows:

| | |
|--|---|
| any copy, including any colourable imitation, made or dealt with in contravention of this Act | toute reproduction, y compris l’imitation déguisée, qui a été faite contrairement la Loi ou qui a fait l’objet d’un acte contraire à la Loi |
|--|---|

[133] To establish the infringement of a work on which a copyright exists, if there is no direct proof, which is often impossible to obtain, the owner of the copyright must show that the party that it holds responsible for the infringement had access to the work and that there are similarities between it and the infringing work. If that burden is met, it shifts to the defendant, who must then show, in the hope of defeating the action of the copyright owner, that the similarities between his work and the work deemed to have been copied, are the result of an independent creation (*Cinar CSQ*, at paragraphs 246 to 249, citing *Canadian Copyright Act annotated*, vol 2, Toronto, Thomson Carswell, continuously updated, at pages 27-7 and 27-8; Normand TAMARO, *The Annotated Copyright Act*, 7th ed., Scarborough, Thomson Carswell, 2006, at page 596, and MCKEOWN, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed., Scarborough, Thomson Carswell, Loose-leaf Edition, at pages 24–54.5 et seq.; *Robinson v Films Cinar inc.*, 2011 QCCA 1361, at paragraph 104 [*Cinar CAQ*]; see also *Gilker*, (1991), 4:1 CPI 7, 2nd part, at page 27). It must be noted that, in *Cinar SCC*, access to the work was not at issue because the appellants were no longer challenging it (*Cinar SCC*, at paragraph 29).

[134] Infringement is not limited to an exact copy of the work, as it can be a colourable imitation as long as it reproduces, if not all, at least a substantial or important part of the work (*Cinar CAQ*, at paragraph 57). The concept of a “substantial part” of a work was discussed in detail by the Supreme Court in *Cinar SCC*. Moreover, all parties to this case referred extensively to it.

[135] The Supreme Court tells us that this is a “flexible” concept and primarily a matter of fact and degree. The Court continues by stating that what constitutes a substantial part of a work is determined “in relation to the originality of the work that warrants the protection of the [Act]” (*Cinar SCC*, at paragraph 26). In general, a substantial part of a work is that which “represents a substantial portion of the author’s skill and judgment expressed therein” (*Cinar SCC*, at paragraph 26). What is important in this regard is the qualitative, and thus quantitative, substantiality of the reproduction (*Cinar SCC*, at paragraph 26). This exercise requires a holistic approach (*Cinar SCC*, at paragraphs 35–36).

[136] In opting for this flexible and holistic approach, the Supreme Court dismissed the three-step approach proposed by the appellants. Under that approach, to determine the substantiality of the reproduction, the trial judge would have to: (1) determine what elements of the infringing work were original, within the meaning of the Act; (2) exclude non-protectable features of that work (such as ideas, elements drawn from the public domain, and generic elements commonplace in children’s television shows); and (3) compare what remains of the infringing work after this “weeding-out”, and determine whether a substantial part of it was reproduced (*Cinar SCC*, at paragraph 34).

[137] Comparing this method to the one used by the American courts to assess the substantiality of the reproduced part of a work in the case of computer software infringement (“abstraction-filtration-comparison”), a method that it refers to as “reductive” and poorly suited to many types of works, the Supreme Court noted that Canadian courts have generally adopted a qualitative and holistic approach, where emphasis is placed not on the examination of isolated passages of the works in question, but on that of the two works as a whole (*Cinar SCC*, at paragraph 35).

[138] According to the Supreme Court, it is therefore important to not “conduct the substantiality analysis by dealing with the copied features piecemeal”, but instead “the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of the [author’s] skill and judgment in his work as a whole”:

[36] As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal: *Designers Guild*, at p. 705, *per* Lord Hoffman. The approach proposed by the *Cinar* appellants would risk dissecting Robinson’s work into its component parts. The “abstraction” of Robinson’s work to the essence of what makes it original and the exclusion of non-protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson’s work is *individually* original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson’s skill and judgment expressed in his work as a whole.

[139] Moreover, for there to be an infringement, it is enough that something is done that, under section 3 of the Act, only the owner of the copyright has the right to do. That does not require

evidence of the infringer's knowledge of the existence of the copyright or of the fact that the action in question amounts to infringement (*Compo Co. Ltd. v Blue Crest Music*, [1980] 1 SCR 357, at page 375 [*Compo*]; *Fox*, at page 21-5).

[140] In conclusion in this overview of the applicable law, I note that the review of the issue of infringement must also strike an appropriate balance between protecting the skill and judgment exercised by the designers of the Lainco Design in the expression of their ideas and leaving ideas and elements from the public domain for all to draw upon (*Cinar SCC*, at paragraph 28).

[141] It is also appropriate to note the particular problems presented by the infringement of architectural work in relation to the frequent difficulty in invoking the protection offered by the Act. As noted in *Gilker*, this is an area [TRANSLATION] "in which physical constraints, as well as economical or legal constraints, can significantly limit the latitude that a creator has in risking, at the same time, repetitions in style, form or dimension that can be seen in works by different creators subject to the same constraints" (*Gilker*, 2nd part, at page 27).

[142] In addition to these constraints, he adds that there are those [TRANSLATION] "regarding stylistic traditions or modes and the quasi-requirement that an architect meet the client's aesthetic requirements that may, in many cases, be based on the appeal of pre-existing architectural works," which often places on the architect "an obligation to satisfy the client's current or potential wishes, while taking care, in doing so, to not only avoid exactly reproducing the work of a third party, but also to not be too close to a substantial reproduction or colourable imitation of such a work" (*Gilker*, 2nd part, at page 28).

[143] I understand from this that the author of an architectural work will often, despite himself, navigate [TRANSLATION] “troubled waters” (*Gilker*, 2nd part, at page 30) and that there will often be a fine line in this area between what constitutes an infringement of a work and what is not protected by copyright. I see no reason for not applying this finding to the architectural work designed by an engineer, particularly when it includes an aesthetic element (*Netupsky*, at page 214).

(2) Positions of the parties

[144] Lainco argues that, in visiting the Artopex Complex on March 29, 2012, less than a month before the first coordination meeting on April 18, 2012, that launched the Victoriaville Complex project, the CSBF and Pluritec had access to the Lainco Design. It notes that photographs were taken, including three playing fields, and that those photos were shown and discussed at that first meeting, attended by representatives of Lemay Côté. It states that those photos were sent the next day to those who were at the meeting. It adds that they are the only photos, from any visits to indoor soccer stadiums as part of the development of the Victoriaville Complex project, that were sent to the various stakeholders following that first coordination meeting.

[145] Lainco also argues that it has established that there are substantial similarities between the structures of the Artopex and Victoriaville complexes, when considered overall. Indeed, it states that it is clear from the axonometries and photographs of the two structures that anyone can recognize the Lainco Design, as adapted to the Artopex Complex, in the structure of the Victoriaville Complex, adding that this was also acknowledged by Mr. Kadanoff, the expert for

Pluritec. Lainco argues that the similarities between the structures of the two complexes show that a substantial part of the skill and judgment of the designers of the Lainco Design was reproduced.

[146] Having established, in its view, that there was access to the work and that there are substantial similarities between the structures of the Artopex and Victoriaville complexes, Lainco claims that the defendants have not discharged their burden of demonstrating that those similarities are the result of an independent creation.

[147] Lainco also argues in this regard that simply having to exercise a certain amount of skill and judgment to design the structure of the Victoriaville Complex is not relevant. What is relevant, in its view, is asking whether the structure of the Victoriaville Complex reproduces a substantial part of the structure of the Artopex Complex, i.e. a part that represents a substantial part of the skill and judgment of the designers of that structure.

[148] Lainco states that it was not the utilitarian or functional aspects that were copied in this case, as the geolocation of the two complexes in question required that the purely functional or utilitarian aspects of each structure be necessarily different because of differences in the loads to be considered in their design. It submits that it was instead the layout of the various elements of the Artopex Complex structure, which is protected under the Act, that was copied. Lainco notes in this regard that a wide range of options for fulfilling the same utilitarian functions were available to the designers of the two structures in question, but that the only two that are visually

similar, according to the evidence on record, are those of the Artopex and Victoriaville complexes.

[149] The defendants, for their part, argue that there is nothing unusual about drawing upon an existing work and that, regardless, there are no substantial similarities between the two structures in question. They submit that a comparison of the two structures and their respective plans reveals, as shown by Mr. Kadanoff and Mr. Egli, substantial differences. In this regard, they note that the structural elements that form the basis of the Lainco Design, i.e. the master trusses, the secondary chords and the columns supporting the master trusses, vary considerably between the two complexes in terms of configuration and design, as well as how they are interconnected. In particular, they state, the master trusses in the Artopex Complex have three different configurations, while the four trusses in the Victoriaville Complex have a uniform configuration.

[150] They also note that the roof of the Victoriaville Complex is flat, while that of the Artopex Complex is sloped and that that difference is crucial, as each roof form will dictate the rest of the structure, particularly the loads, as they are no longer the same, as with the heights and dimensions of the building housing the structure. The visual appearance also will not be the same, they argue. In particular, the structure will not have a flat roof, which is the main characteristic of the Lainco Design, i.e., according to Lainco's publicity, the presence of [TRANSLATION] "roof trusses that give an impressive, larger-than-life dome effect" (Exhibit TX-28).

[151] The defendants also ask the Court to place little probative value on the reports and testimony of Mr. Siegel, the expert for Lainco, because he did not conduct any measurements or comparisons of the structural elements in question and only visited the Artopex Complex after having submitted his report, while declaring in it that the two complexes in question give the same visual effect. They feel that Lainco cannot claim a copyright on the “look” of a structure without also considering the structural elements used to create that “look,” which Mr. Siegel failed to do.

[152] Pluritec and Lemay Côté also argue that they never had access to the structural plans for the Artopex Complex or those for the Antony-Carola Complex and the Air Inuit hangar. Pluritec adds that it spent considerable energy, in time and effort, on the development of the structural plans for the Victoriaville Complex.

[153] Finally, Pluritec warns the Court that allowing the action by Lainco and, in doing so, giving it a monopoly on the Lainco Design would risk paralyzing the steel structure industry, particularly in light of the stated intention of Lainco to expand the Design, as it has already done, moreover, to other types of sports complexes and buildings. It argues that doing so would go squarely against the teachings of the Supreme Court of Canada that it is important, in balancing the general policy objectives of the Act, to not only recognize the rights of the creator, but also to place the appropriate importance on the limited nature of those rights.

(3) Discussion and conclusions

a) *Access to the Lainco Design*

[154] There is clearly no doubt that, in visiting the Artopex Complex in late March 2012, the CSBF and Pluritec had a type of access to the Lainco Design. Photographs were taken, including three showing the interior of the structure of the Complex, and Mr. Viens prepared a hand-drawn sketch of a cross-section of the master trusses, indicating their height and the distance between the field and the lower portion of the trusses (exhibits TX-229 and TX-176). It is clear from the testimonies, even though Mr. Viens claimed the contrary at one point, that the photographs taken during that visit were then shown and discussed at the first coordination meeting on April 18, 2012, this time in the presence of representatives from Lemay Côté (Transcripts, vol. 4, page 8 and vol. 6, page 109). The next day, Mr. Viens emailed those photos, including the ones showing the structure of the Artopex Complex, to everyone who had attended that meeting, including Marjory Giroux from Lemay Côté (Exhibit TX-229).

[155] That visit certainly influenced the choice of the structure [TRANSLATION] “desired” by the client, the CSBF, for the Victoriaville Complex. The report from the first coordination meeting, the purpose of which was to [TRANSLATION] “present the project to the professionals,” states, I repeat, that the [TRANSLATION] “new construction will include . . . [a] steel superstructure covering a large area and providing space over the playing area (2 beams per field with 35 ft clearance below the beams and 50 ft clearance below the crossbeams)”, “curtain-wall windows” to fill in “[t]he space left between the columns supporting each of the beams” and “lighting and heating equipment . . . integrated into the beams” . . . (Exhibit TX-127).

[156] When Mr. Viens submits a structural design consisting of a [TRANSLATION] “traditional system of repetitive crossbeams”, he calls himself to order, to some degree. Instead, according to

the report from the second coordination meeting on April 30, 2012, he had to [TRANSLATION] “develop the desired superstructure and assess the related costs for the next meeting” [emphasis added] (Exhibit TX-128). Prior to that meeting, an email dated April 22, 2012, from Mr. Viens to Alain Côté of Lemay Côté and Mr. Gagnon of the CSBF, clearly refers to the Artopex Complex and the photos taken during the visit on March 29 (Exhibit TX-160). No one claimed that Mr. Viens was not referring to the Artopex Complex and to the photos from March 29. The email reads as follows:

[TRANSLATION]

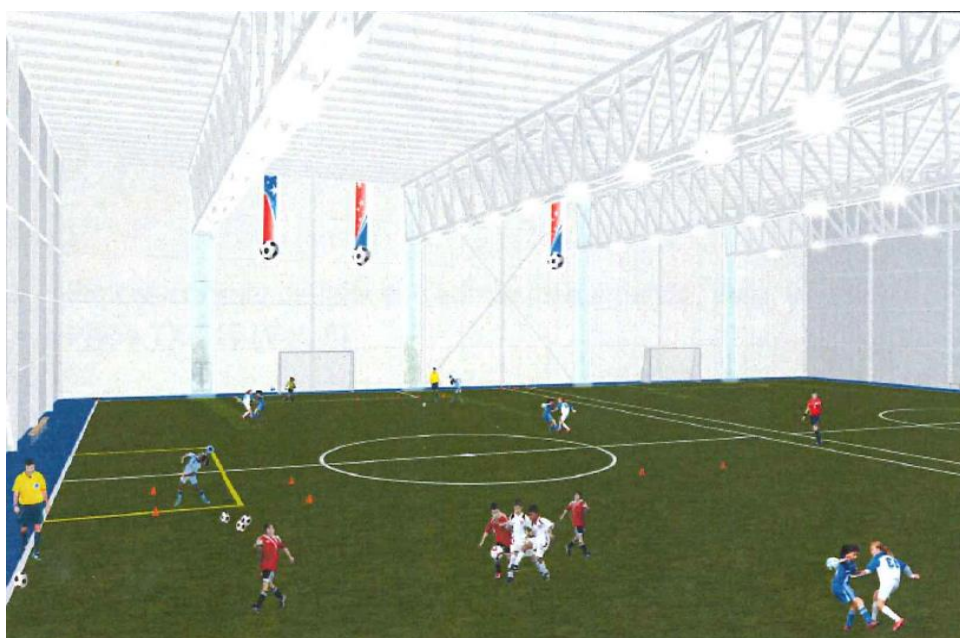
At the beginning of the week, I will review the alternative with the master trusses, as built in Granby (see photos sent on the FTP site).

[157] I reproduce here the three photos taken during the visit to the Artopex Complex, in which we can see the interior of the structure:





[158] Another event during the development stage of the Victoriaville project that took place prior to the May 2012 submission of the grant application to the Government of Quebec and that, in my view, does not lie about the impact of the visit to the Artopex Complex and the photographs taken there on the development of the project in question, is the interior perspective of the future complex prepared by Lemay Côté and sent to the people at the CSBF on May 14, 2012 (Exhibit TX-248). The resemblance to one of the photos taken of the Artopex Complex on March 29, 2012, is striking, to say the least. As the adage says, a picture is worth a thousand words:



[159] Even the small orange cones seen in the photograph, indicating the playing area, are in roughly the same places. Under cross-examination, Alain Côté, of Lemay Côté, stated that it was a coincidence (Transcripts, vol. 6, at pages 164–165). The quote from semiologist Umberto Eco, cited by Justice Auclair, J.S.C., in *Cinar CSQ*, seems appropriate in the circumstances:

[TRANSLATION] “Sit a monkey in front of a typewriter and by chance it may be able to write Romeo and Juliet by Shakespeare; however, it is unlikely” (*Cinar CSQ*, at paragraph 1).

[160] Added to this is the fact that Mr. Côté indicated that, as a [TRANSLATION] “precedent” in his [TRANSLATION] “architectural design work for the Victoriaville building”, apart from the photographs from the Artopex Complex, he examined images of the Terrebonne sports complex and the Agri-Sport complex in Victoriaville, the architectural plans for which were designed by Lemay Côté (Transcripts, vol. 6, at pages 113–114). Under cross-examination, however, Mr. Côté admitted that only the exterior appearance of the Terrebonne complex was of interest to him and that no documents showing that the Agri-Sport complex could have served as a reference in the development of the Victoriaville Complex project were submitted in this case by Lemay Côté, the CSBF or even Pluritec (Transcripts, vol. 6, at pages 151–152).

[161] In other words, I place no weight on Mr. Côté’s statement that the rather striking similarities between the interior perspective of the future Victoriaville Complex prepared by Lemay Côté in May 2012 (Exhibit TX-248) and the interior photo of the structure of the Artopex Complex, reproduced above, were random.

[162] The Artopex Complex is also the only indoor soccer stadium with two fields that was visited by the CSBF and Pluritec (Agreed Statement of Facts and Admissions, at paragraph 63). Under cross-examination, Mr. Viens also finally admitted that it was clear at the first coordination meeting on April 18, 2012, the meeting that, as I have already stated, served to [TRANSLATION] “present the project to the professionals” (Exhibit TX-127), that what Mr.

Gagnon from the CSBF wanted [TRANSLATION] “was master trusses like the ones built in Granby” (Transcripts, vol. 4, at pages 37–38). Previously, Mr. Viens had insisted on the importance of the first coordination meeting of any project, because that is when, in particular, [TRANSLATION] “we discuss the main issues” . . . and [TRANSLATION] “determine our client’s needs” (Transcripts, vol. 3, at page 110).

[163] Mr. Viens clearly tried to qualify his admission by stating that the reference to the master trusses, as built in Granby, was simply an example of what Mr. Gagnon wanted for the structure of the future complex, but in light of the interest of the Mayor of Victoriaville in the Artopex Complex, the visit on March 29, initiated by the Mayor, the photos taken during that visit, the wording of the coordination reports regarding the [TRANSLATION] “desired superstructure”, the email dated April 22 (Exhibit TX-160) and the interior perspective of the future complex produced by Lemay Côté (Exhibit TX-248), I do not place any weight on it.

[164] Moreover, Mr. Viens’s insistence on first focusing his energy on wanting to propose a Canam-style structure to the CSBF, i.e. a traditional structure of repetitive crossbeams, when that was clearly not the type of structure that the CSBF had in mind, is beyond comprehension. Mr. Viens tried to justify that counter-intuitive approach by his desire to offer his client a less costly option. He is [TRANSLATION] “stubborn” with respect to that type of thing, he responded when questioned about it under cross-examination (Transcripts, vol. 4, at page 35). He denied having done so because he was not comfortable with the idea of using a master truss structure in the future Victoriaville Complex [TRANSLATION] “like in Granby”, according to the wishes of

Mr. Gagnon from the CSBF, as counsel for Lainco suggested to him. In terms of plausibility, that theory fits well with the justification provided by Mr. Viens, given the circumstances as a whole.

[165] The defendants tried to minimize the CSBF's interest in the structure of the Artopex Complex by insisting on the fact that the visit to the playing field lasted only about 15 minutes, that the main goal of the visit was to inquire about construction and operating costs, that only 3 of the 17 photos taken during the visit show the structure of that Complex and that the synthetic surface and maintenance equipment are the most important part of an indoor soccer stadium.

[166] However, although neither Pluritec nor Lemay Côté, or the CSBF and Construction Gagné, had access to the plans for the Artopex Complex, I am satisfied that, as a result of the visit on March 29 and the photos taken at that time, at least the CSBF, Pluritec and Lemay Côté had access to the Lainco Design, as adapted to the Artopex Complex, which made its reproduction possible. Moreover, as I have just mentioned, the CSBF wanted

[TRANSLATION] "master trusses like the ones built in Granby." The interest in what was done at the Artopex Complex, at least in terms of the structure, seems to me to be omnipresent in all the work done by the CSBF, Pluritec and Lemay Côté between April 18, 2012, and May 18, 2012, the deadline for submitting the grant application. The general contractor who built the Artopex Complex was even asked for the name of the [TRANSLATION] "company that manufactured and supplied the master trusses for the soccer field" (Exhibit TX-162). There was no response to that request, which led Mr. Viens to state, when questioned by counsel for Pluritec, that [TRANSLATION] "we would probably not be here if I had received a response" (Transcripts, vol. 3, at pages 45-46).

[167] Infringing reproduction can be the result of the exercise of memory (*Gilker*, 2nd part, at page 30). In this case, there were also photos clearly showing what makes the Lainco Design original. Once again, there was enough access to the Lainco Design, in my view, to allow for the reproduction.

[168] Consideration must therefore now be given to whether the similarities between the structures of the Artopex and Victoriaville complexes are such that, despite their differences, they make it possible to conclude that a substantial part of the Lainco Design, as adapted to the Artopex Complex, was reproduced in the structure of the Victoriaville Complex.

b) *The similarities between the structures of the Artopex and Victoriaville complexes*

[169] I note that, in conducting a qualitative and holistic analysis to determine whether a substantial part of a work has been reproduced, the cumulative effects of the features reproduced from the work that has allegedly been infringed must be examined (*Cinar SCC*, at paragraph 36). In so doing, it must be determined whether the features reproduced constitute a substantial part of that work, not the work that is claimed to have reproduced those features (*Cinar SCC*, at paragraph 39).

[170] The Supreme Court notes that there can be infringement even if certain reproduced features were changed or integrated into a substantially different work from what is deemed to have been infringed, as infringement, within the meaning of the Act, includes any “colourable imitation” (*Cinar SCC*, at paragraph 39). That said, the Court adds that this does not mean that

“differences are irrelevant to the substantiality analysis.” They are relevant if they “are so great that the work, viewed as a whole, is not an imitation but rather a new and original work.” In such a case, there is no infringement of the copyright (*Cinar SCC*, at paragraph 40).

[171] Everything is “a matter of nuance, degree and context” (*Cinar SCC*, at paragraph 40, citing *Cinar CAQ*, at paragraph 66).

[172] In the case at hand, the evidence shows similarities as well as differences between the structures of the Artopex and Victoriaville complexes. There are no real contradictions to the evidence in this regard. In this case, it is all a matter of “nuance, degree and context” and, through all that, of perspectives, that of the architect and that of the engineer. In the end, it is a matter of determining which of those perspectives best aligns with the copyright, particularly in matters of architectural works, and the teachings of the Supreme Court in this regard.

[173] Appropriately, we will begin with the evidence from the expert for Lainco, Mr. Siegel, an architect. Although he also considered the plans and photographs of the steel structures for the Antony-Carola Complex and the Air Inuit hangar, the expert for Lainco, Mr. Siegel, stated that he focused more specifically on comparing the structures of the two complexes in question, Artopex and Victoriaville, in light of the similarity in their function and configuration—two indoor soccer stadiums with a large main field that can be divided into two seven-player fields—and their specific relevance to this case in light of the visit to the Artopex Complex by those involved in the Victoriaville Complex project shortly before that project was developed (Exhibit P-3, Siegel Report, at paragraphs 70–72).

[174] Mr. Siegel thus compared each of the main structural elements of the two complexes in question and the overall result, i.e. the combination of those elements, which, in his view, provides a better assessment of the scope of the similarities between those elements (Exhibit P-3, Siegel Report, at paragraph 81).

[175] Regarding the elements themselves, he noted:

- a. the similarity of the structural rhythm of the peripheral columns in the two complexes, and the presence of double columns supporting the master trusses (Exhibit P-3, Siegel Report, at paragraph 74);
- b. the presence of the same type of visible triangular master trusses creating optimal clearance in the playing areas and a distinctive atmosphere, with the only difference being that the master trusses in the Artopex Complex have an arched upper chord, which is not the case for those in the Victoriaville Complex, a difference that, in his view, has little impact on the aesthetic aspect and visual impact of the two structures overall, particularly from a pedestrian standpoint (Exhibit P-3, Siegel Report, at paragraphs 75–77); and
- c. the presence of the same type of secondary chords creating similar clearance for the playing areas and giving generally the same atmosphere (Exhibit P-3, Siegel Report, at paragraph 79).

[176] To illustrate these findings, I reproduce the graphics found at pages 31, 33 and 35 of Mr. Siegel's report, Exhibit P-3:

Steel columns on the periphery of the building



Fig. 17 – Steel columns on the periphery of the building (ABCP infographic on a photograph representing the Artopex Complex)



Fig. 18 – Steel columns on the periphery of the building (ABCP infographic on a photograph representing the Victoriaville Complex)

Triangular master trusses supporting the cantilever chords



Fig. 19 – Triangular master trusses supporting the cantilever chords (ABCP infographic on a photograph representing the Artopex Complex)



Fig. 20 – Triangular master trusses supporting the cantilever chords (ABCP infographic on a photograph representing the Victoriaville Complex)

Secondary chords fixed to the cantilever chords and roof bridging



Fig. 22 – Secondary chords fixed to the cantilever chords and roof bridging (ABCP infographic on a photograph representing the Artopex Complex)



Fig. 23 – Secondary chords fixed to the cantilever chords and roof bridging (ABCP infographic on a photograph representing the Victoriaville Complex)

[177] As for the overall result, Mr. Siegel assessed it using a comparison of both the schematic representations (pedestrian view) of the structures of the two complexes and the visual impact for users, an [TRANSLATION] “important consideration in the design of this type of sports complex” (Exhibit P-3, Siegel Report, at paragraph 83). A comparison of the schematic representations led him to find that the elements of the structure were combined in the same way and that the end result is practically identical, with just a few nuances. He states the following:

82. [TRANSLATION] . . . The spaces created and developed for the two sports complexes are defined by large buildings in which the four triangular master trusses cross the playing areas. Those master trusses support a very discreet secondary structure that is reduced to its simplest expression, thus contributing to the similarity of the two buildings.

[178] Once again, to illustrate these findings, I reproduce the axonometries and schematic representations examined by Mr. Siegel, found at pages 39 and 40 of his report, Exhibit P-3:

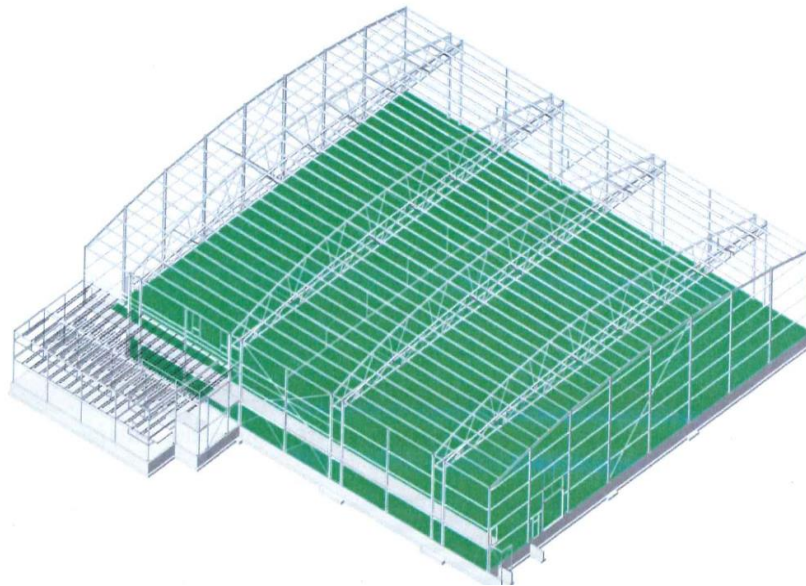


Fig. 26 – 3D axonometry of the structure of the Artopex Complex

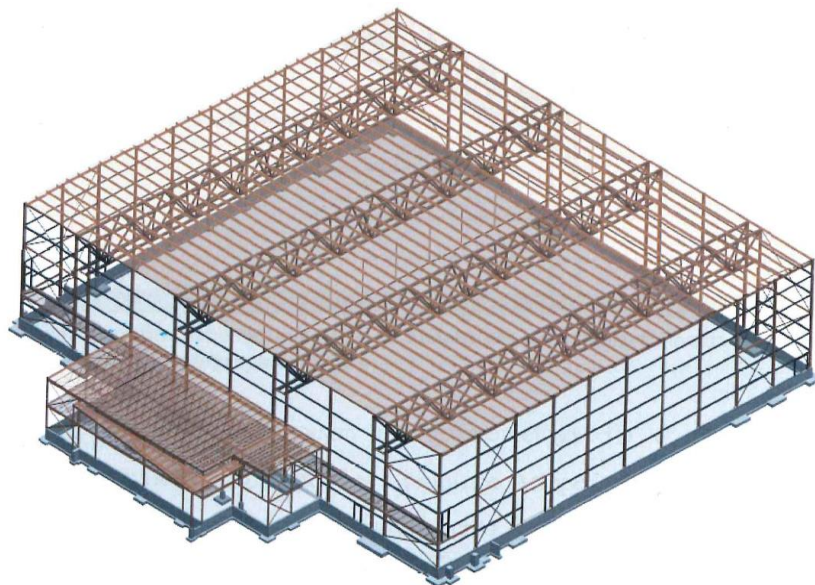


Fig. 27 – 3D axonometry of the structure of the Victoriaville Complex

[179] Finally, regarding the visual impact for users, which, he notes, does not necessarily pay any attention to the finer architectural and structural details, it seems to produce, in Mr. Siegel's view, essentially the same general effect in both complexes (Exhibit P-3, Siegel Report, at paragraph 84). He drew the following general conclusions:

- (a) The two complexes in question consist of a steel structure;
- (b) The two complexes present a similar structure;
- (c) The structure of the two complexes consists of four (4) triangular master trusses that provide optimal clearance for play and a distinctive atmosphere for the premises;
- (d) The elevations of the master trusses are similar, apart from the upper chord, which is arched in the case of the Artopex Complex;
- (e) The system of secondary chords in the two complexes is identical; and
- (f) The master trusses in the two complexes are supported by double columns on the periphery of the building.

(Exhibit P-3, Siegel Report, at paragraph 85)

[180] As I have already mentioned, the defendants accuse Mr. Siegel of having visited only the Victoriaville Complex in preparing his report, while he indicated in it, when comparing the visual impact of the two structures in question, that [TRANSLATION] “nothing beats a site visit to sense the volume of the building and its general atmosphere” (Exhibit P-3, Siegel Report, at paragraph 84). Not having visited the Artopex Complex, at least in preparing his report, they invite the Court to give little weight to that important finding in his report.

[181] I disagree. Under re-examination, Mr. Siegel stated that the review of the plans or photos of a project were more than enough for him to understand the project and that seeing a building is probably essential for someone not involved in the field of building design. He also stated that his visit to the Artopex Complex, after submitting his report, simply visually confirmed the photos and plans that he used in preparing his report (Transcripts, vol. 2, at pages 205–206). Moreover, I understand this passage of Mr. Siegel’s report as referring to the user’s perspective, i.e. what the user is likely to feel once at the site. Regardless, as we will see in more detail, Mr. Kadanoff acknowledged under cross-examination that the structures of the two complexes in question produce the same visual impact. This corroborates, to some extent, what Mr. Siegel found, in preparing his report, from his review of the photographs of the Artopex Complex. The Court simply cannot ignore those converging findings just because Mr. Siegel allegedly did not visit the Artopex Complex at the appropriate time.

[182] This leads me to discuss the evidence submitted by Mr. Kadanoff and Mr. Egli, two structural engineers, who compared the Victoriaville Complex with the Antony-Carola and

Artopex complexes and the Air Inuit hangar. Neither of them visited the complexes that they assessed.

[183] I note that Mr. Kadanoff, the expert for Pluritec, examined a wide range of comparators: identity of the designer, use of each building, land dimensions, orientation of tracks, types of trusses, types of roof, H/L trusses, span, depth, chords, orientation of diagonals, spacing, spacing of supports, strength of chords, clearance, roof joists, bridging, snow load, cross-braces, administration and dressing rooms and ground conditions.

[184] In fact, the results of this comparative exercise highlight the differences between each structure, as shown in Table 1 in his report, Exhibit D-7.

| Projet | Victoriaville | Stade Anthony Carola | Artopex Granby | Air Inuit |
|------------------------------|---|---|--|--|
| Concepteur | Pluritec | Lainco | Lainco | Lainco |
| Utilisation | 2 terrains de soccer | 3 terrains de soccer | 2 terrains de soccer | 2 hangars pour l'entretien des avions |
| Dimensions des terrains | 232'x202' 46,893 pi.ca. | 203'x334' 67,675 pi.ca. | 198'x218' 43,025 pi.ca. | 500'x275' +/- plus que 137,500 pi.ca. |
| Orientation des pistes | Parallèle aux fermes | Parallèle aux fermes | Parallèle aux fermes | non applicable |
| Type de ferme | 1 type - Prismatique | 1 type - Prismatique | 3 types - Prismatique | Plusieurs types - Prismatique |
| Forme du toit | Plat avec pente | Toit cambré | Toit cambré | Plat |
| Ferme H/L | 0 | 0.052 * | 0.058 * | 0 |
| Portée | 200.65 pieds | 201.3 pieds | 196.0 pieds | 174.0 pieds et autres |
| Profondeur | 15.0 pieds | variable 3.8' à 14.3' | variable 4.0' à 15.42' | 15.0 pieds |
| Membres | Haut et bas HSS356x356 ou HSS305x305 | Haut et bas HSS254x254x9.5mm | Haut et bas HSS254x245x12.7 ou HSS254x254x9.53 | Haut et bas HSS254x254 ou HSS305x305 ou W200, W310, W250 |
| Orientation des diagonales | 0 degré | 15 degrés | 15 degrés | 11.6 degrés |
| Espacement | 54.91 pieds c/c | 44.34 pieds c/c | 54.0 pieds c/c | 36.5 pieds c/c |
| Espacement des supports | 7.0 pieds | 5.90 pieds | 6.0 pieds | 12.0 pieds |
| Forces dans les membrures | Indiquées | Indiquées | Non indiquées | Indiquées |
| Hauteur libre | Variable 34 à 38 pieds | 40.08 pieds | 35.0 pieds | 50.0 pieds |
| Solives de toit | W360x51 et W310x28 | W200x22 et W200x19 | W360x33 et W250x33 | W200x33, W200x36 ou W150x22 |
| Pontage | 1 1/2 pouce | 1 1/2 pouce | 1 1/2 pouce | 1 1/2 pouce |
| Charge de neige | 55.8 lbs/pi.ca. | Variable 41.7 ** à 58.3 lbs/pi.ca. | 47 lbs/pi.ca. | 53.0 lbs/pi.ca. |
| Contreventements | 2 chaque côté sur 2 niveaux avec plaques | 2 chaque côté avec barres rondes sur la plein hauteur | 1 chaque côté avec HSS sur la plein hauteur | Plusieurs chaque côté sur 2 niveaux avec HSS |
| Administration et vestiaires | Centré | oui | Sur un côté | non applicable |
| Conditions de sol | Variables | | | |

[185] Mr. Kadanoff described as follows the differences, in terms of design and appearance, between the structure of the Victoriaville Complex and those of the Lainco Design:

- a. The form of the roof: flat at the Victoriaville Complex, arched at the Artopex and Antony-Carola complexes;
- b. The height of the master trusses: uniform at the Victoriaville Complex, variable at the Artopex and Antony-Carola complexes;
- c. The volume and appearance of the clearance inside the structure: they are much larger at the Victoriaville Complex;
- d. The design of the structure of the Antony-Carola Complex: the plans are also signed by another engineering firm, CIMA+;

- e. The strengths of the chords in the master trusses: they are not indicated in the plans for the Artopex Complex structure;
- f. The types of master trusses: only one at the Victoriaville Complex, three at the Artopex Complex; and
- g. The snow load bearing capacity: that of the Antony-Carola and Artopex complexes is not sufficient compared with that of the Victoriaville Complex.

(Exhibit D-7, Kadanoff Report, at pages 10–11)

[186] Mr. Egli, the expert for the CSBF and Construction Gagné, conducted a more in-depth analysis of the four complexes examined by Mr. Kadanoff. He first compared the buildings themselves, their respective indoor and outdoor heights, their length and depth, and the loads that had to be considered in the design of each building (Exhibit D-9, Egli Report, at pages 18–19). Next, he measured, in great detail, the five components of the structures in question, which he considers to be, as I have already mentioned, steel beam-and-purlin systems, i.e. the steel deck that covers the structure, the beams, the purlins, the columns and the cross-bracing.

[187] I reproduce here the five tables from Mr. Egli's report containing those data:

8.2. Steel decks

| | Victoriaville | Artopex | Carola | Inuit |
|--------------|-----------------|--------------------|--------------|------------------|
| Span | 1 800 mm | 6'-1 ½" (1 867 mm) | 1 918 mm | 62 ¾" (1 595 mm) |
| Type | Canam P-3606 | Not Indicated | Not Indicate | Not Indicated |
| Depth | 38 mm | 1 ½" (38 mm) | 38 mm | 1 ½" (38 mm) |
| Gauge | 0.76 mm | 22 (0.76 mm) | 0.76 mm | 22 (0.76 mm) |
| Slope | Single (925 mm) | Arched | Arched | Various |

8.3 Purlins

| | Victoriaville | Artopex | Carola | Inuit |
|----------------------------------|---------------|--|-------------------------------|---------------------|
| Spacing | 1 800 mm | 6'-1 ½" (1 867 mm) | 1 918 mm | 62 ¾" (1 595 mm) |
| Support Width | 2 135 mm | Varies from 6'-0" to 11'-11" (1 829 to 3 632 mm) | Varied from 1 800 to 3 508 mm | 12'-0" (3 658 mm) |
| W-Section over Support | W310x28 | W10x22 (W250x15) | W200x236 | Varies |
| Cantilever | 1 205 mm | Varies from 7'-0" to 6'-0" (2 133 to 1 829 mm) | Varies from 2 480 to 1800 mm | Not a Gerber System |
| Middle Span | 14 605 mm | 48'-0" (14 630 mm) | 11 720 mm | 24'-6" (7 315 mm) |
| W-Section for Middle Span | W360x51 | W360x33 | W200x22 | Varies |
| Drop-in Length | 12 195 mm | 34'-0" (10 363 mm) | 6 760 mm | Not a Gerber System |

8.4 Beams

| | Victoriaville | Artopex | Carola | Inuit |
|----------------------|----------------------|--|----------------------------------|----------------------------------|
| Span | 61 175 mm | 196'-0" (59 750 mm) | 61 360 mm | 209'-0" (63 805 mm) |
| Depth (c-c) | 4 575 mm | Varies from 4'-0" to 15'-5" (1 219 to 4 700 mm) | Varies from 1 188 to 4 347 mm | 14'-7 ¼" (4 4451 mm) |
| Width | 2 135 mm | Varies from 6'-0" to 11'-11" (1 829 to 3 632 mm) | Varies from 1 800 to 3 508 mm | 12'-0" (3 658 mm) |
| Upper Member | HSS356x356x16 | HSS10x10x1/2 (HSS254x254x12) | HSS2254x2549.5 | HSS12x12x1/2 (HSS305x305) |
| Lower Member | HSS356x356x16 | HSS10x10x1/2 (HSS254x254x12) | HSS254x254x9.5 | HSS12x12x1/2 (HSS 305x305x12) |
| Truss Incline | 5.72 degrees | 15.00 degrees | 15.00 degrees | 11.60 degrees |
| Lower Slope | 925 mm | None | None | None |

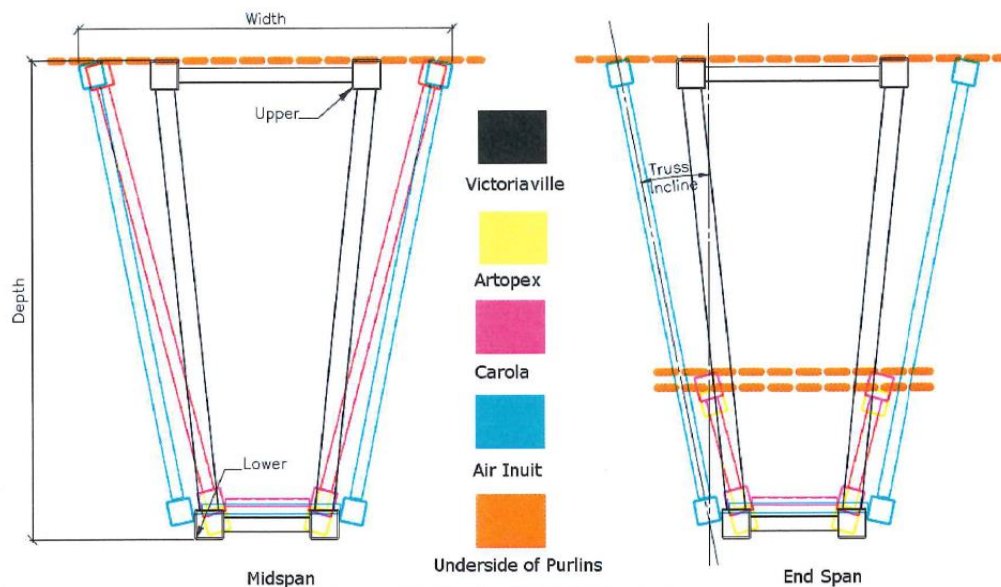
8.5. Columns

| | Victoriaville | Artopex | Carola | Inuit |
|----------------------|----------------------|-------------------------|---------------|-----------------------|
| Height | 15 850 mm | 40'-7 ½" (12 383 mm) | 14 072 mm | 62'-0" (18 897 mm) |
| Spacing (c-c) | 2 135 mm | 6'-0" (1 829 mm) | 1 800 mm | 12'-0" (3 658 mm) |
| W-Section | W310x86 | W12x27 (W310x107) | W310x107 | W12x65 (W310x97) |
| Flange Width | 254 mm | 12" (305 mm) | 305 mm | 12" (305 mm) |
| Web Depth | 306 mm | 12 ¼" (311 mm) | 311 mm | 12"-1/8" (308 mm) |

8.6. Cross-bracing

| | Victoriaville | Artopex | Carola | Inuit |
|-----------------------|---|----------------------------------|------------|-----------------------|
| Height (appr.) | 15 850 mm | 40'-1/2" (12 383 mm) | 13 550 mm | 62'-0" (18 897 mm) |
| Width (appr.) | 8 958 mm | 48'-0" (14 630 mm) | 11 720 mm | 26'-2" (7 976 mm) |
| Steel Element | 127x13 Plates | HSS6x6 (HSS150x150) | HSS127x127 | HSS4x4 HSS102X102 |
| Configuration | Stacked Xs | Single X | Single X | Stacked Xs |
| Drawings | S8, S9 | S-500, S-501 | S-5 | S-500, S501, S-502 |
| Photos | Vadim Seigel report Exhibit VS-6 Photo 12 | Vadim Siegel report Figure 13 | N/A | N/A |

[188] I also reproduce the graphic produced by Mr. Egli, illustrating the differences in the configuration of the master trusses on each structure (Exhibit D-9, page 23).



[189] As I mentioned earlier, these measurements are not contradicted or challenged, and they tell Mr. Kadanoff and Mr. Egli that the plans for the structure of the Victoriaville Complex do not reproduce all or even a substantial part of the plans for the Antony-Carola and Artopex

complexes and the Air Inuit hanger, nor does the structure itself reproduce all or even a substantial part of the structures of those three buildings.

[190] Must this narrow view of the structures in question, particularly those of the Victoriaville Complex, said to be the infringing work, and the Artopex Complex, said to be the infringed work, which highlights a series of differences between those structures, take precedence over Mr. Siegel's view, which focused more on the aesthetics of the structure? I do not believe so.

[191] Once again, the differences between the two structures in question, which are first and foremost related to the fine and precise dimensions and the combination of the elements of each structure, are undeniable. However, as we have seen, the analysis must not be limited to that, as I must also, and in particular, examine the cumulative effect of the features of the Artopex Complex structure that were reproduced in that of the Victoriaville Complex and consider whether the features thus reproduced constitute a substantial part of that work (*Cinar SCC*, at paragraphs 36 and 39).

[192] In this regard, there is no doubt that the structure of the Victoriaville Complex reproduces the choice and combination of the master trusses, the secondary chords and the peripheral columns supporting the master trusses found in the Artopex Complex and that it thus reproduces the distinctive aesthetic appearance. The visual impact inside the two structures is essentially the same. Once again, a picture is worth a thousand words:



Artopex Complex



Victoriaville Complex



Fig. 32 – Overall view of the Artopex Complex with comparison of similar structural elements (ABCP infographic)



Fig. 33 – Overall view of the Victoriaville Complex with comparison of similar structural elements (ABCP infographic)

[193] Moreover, Mr. Kadanoff acknowledged that he focused more on the plans than on the photographs of the two structures in question because of the nature of his mandate:

[TRANSLATION]

MR. GUAY: Okay. From what I understood, you were more—you focused more on the plans than on the photographs themselves when you did your comparison.

MR. KADANOFF: Yes, because, as you can see in my report, I examined them based on my experience as a structural engineer, and I examined those aspects of the construction, the structure.

MR. GUAY: And like you said this morning, using—if I can repeat, I believe you used these words, you said that you used your engineering point of view.

MR. KADANOFF: Yes.

(Transcripts, vol. 5, at page 80).

[194] As I noted above, Mr. Kadanoff also acknowledged, very candidly, that if someone went inside either of these structures, they would have the impression that what they were seeing was similar:

[TRANSLATION]

MR. GUAY: So, from a design standpoint, or, I'm sorry, from an architectural standpoint, setting aside the engineering point of view and accepting the fact that the dimensions are different, that the materials used may differ, if I examine these elements from a certain distance, not me, Norman Kadanoff, but me, François Guay, who is not an expert like you, I note four similarities. Not identities, but I see four similarities between the main elements of the architectural work in Granby and the one in Victoriaville.

Do you agree with me?

MR. KADANOFF: Well, certainly, there are similarities, but overall the—each of the similarities is—has its own characteristics.

MR. GUAY: I understand. However, from an architectural standpoint, particularly from a certain distance, if I enter those two buildings, I know that the structures will not be identical. I know that the calculations will not be identical, particularly after reading your report. I now know more, but simply by looking at what I see from an artistic standpoint, to a certain degree, I will see four similarities between the main elements.

MR. KADANOFF: I would agree that anyone—if someone were to enter either of the buildings, they would have the impression that what they are seeing is similar.

...

MR. KADANOFF: Well, the structural elements are not exactly the same.

MR. GUAY: But, do I see them in the same way?

MR. KADANOFF: From the inside face of the truss to the bottom, yes. From the top of the truss—

MR. GUAY: I'm not an engineer. I'm just the client.

MR. KADANOFF: Yes, but I admit that it's—there is a difference—a major difference in the two structural systems. As a truss, it is a truss, but as a structure, it has a different form, a different design, and the various elements and how they are interconnected are different. Even if we call them Gerber trusses, they have multiple functions in the Granby project, but not the same as in the Victoriaville project, but it is a matter of parts that are essential to any building. It is not necessarily a soccer complex.

So, the average person who enters the building will see—you know, when that person enters one building, and then the other, they may not remember which one they entered first.

MR. GUAY: That's exactly the point.

(Transcripts, vol. 5, at pages 93–94 and 100–101)

[Emphasis added]

[195] This corroborates the evidence from Mr. Siegel indicating that the visual impact for users in the two structures in question, who do not necessarily pay any attention to the finer architectural and structural details, is essentially the same. It was intended for the structure of the Lainco Design to be visible and, to that end, it was intended for it to project a distinctive aesthetic appearance. That is the at the heart of the Lainco Design in general and as adapted to the Artopex Complex. In this regard, I have no hesitation in finding that the structure of the Victoriaville Complex, through the choice and combination of the master trusses, secondary chords and peripheral columns supporting the master trusses seen in it, reproduces a substantial part of the architectural work that is the Artopex Complex. That choice and combination, I repeat, is the result of the exercise of the skill and judgment of the designers of the Lainco Design. The borrowing is clear. As I have already said, no sports complex structures built elsewhere in Quebec and Canada by companies other than Lainco, or built in the United States,

that we can see in the photographs entered in evidence at trial, closely or remotely resemble the Artopex and Victoriaville complexes.

[196] The differences in the finer details of the combination and configuration of the elements of each structure observed by Mr. Kadanoff and Mr. Egli change nothing in my view. I note that there can be infringement even if certain reproduced features were changed or integrated into a substantially different work from what is deemed to have been infringed (*Cinar SCC*, at paragraph 39). Indeed, it does not matter that the infringer added elements to the infringing work, as what is ultimately important is that the infringer did not reproduce in its work a substantial part of the infringed work (*Cinar CSQ*, at paragraph 668).

[197] In this regard, I note that, in *Cinar*, there were “notable differences” between the two works (*Cinar SCC*, at paragraph 9). Moreover, one of them, that of Mr. Robinson, was an unfinished project, while the other, the infringing work, was a finished product (*Cinar SCC*, at paragraph 54). Before the Superior Court, Mr. Robinson acknowledged that the infringing work did not reproduce his story, but instead the main characters of his story, their personality and certain drawings (*Cinar CSQ*, at paragraph 502). In *Netupsky*, the infringing plans were modified significantly by the defendant and, despite that, it was found that the copyright had been infringed (*Netupsky*, at page 216).

[198] In this case, the differences arise primarily from local conditions, which will necessarily affect the dimensions and design of the structural elements of a building so it can resist the usual loads, those being ground conditions, seismic conditions, wind strength and the accumulation of

snow (Kadanoff Report, at pages 4–5; Transcripts, vol. 1, at page 186 (Lachapelle); vol. 2, at pages 143–144 (Siegel); vol. 3 at page 71 (Viens); vol. 6, at page 13 (Egli)). They are also largely the result of the form of the roof—flat at the Victoriaville Complex and arched at the Artopex Complex—which, in all cases, will dictate the rest of the structure in terms of the form of the master trusses, the dimension of the building envelope, and the height of the columns (Transcripts, vol. 1, at page 156 (Lachapelle); vol. 5, at pages 33–34, 42 (Kadanoff)).

[199] In this latter regard, although the roofs are in different forms, that did not prevent Mr Kadanoff from stating, as we have seen, that a user of the two structures in question would not be able to differentiate between them. This is consistent with the opinion of Mr. Siegel, for whom this nuance has little impact on the aesthetic aspect and visual impact of the overall structure (Exhibit P-3, Siegel Report, at paragraphs 76–77). Mr. Kadanoff also did not say that the fact that the Artopex Complex has three types of master trusses and the Victoriaville Complex has only one changed anything from a visual point of view.

[200] In this sense, I see no reason to disregard the opinions of Mr. Siegel and Mr. Kadanoff regarding the issue of the visual impact of the structures in question, which is assessed from the user’s point of view, in favour of Mr. Egli’s opinion. Although the expert’s point of view must be considered when determining whether a substantial part of a work has been reproduced, the point of view of the user, or “of a lay person in the intended audience for the works at issue” is still useful, as it “has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works” (*Cinar SCC*, at

paragraph 51). In this case, in my view, there is no reason to not consider the user's point of view, as supported by Mr. Siegel.

[201] In this regard, I note that, in *Cinar SCC*, the Supreme Court found that the expert's point of view was needed for three reasons. First, the work was intended for an audience of young children, which according to the Court, unduly restricts the trial judge's ability to answer the question of whether a substantial part of the infringed work was reproduced simply from a lay person's point of view (*Cinar SCC*, at paragraph 53). Second, the nature of the works at issue made them difficult to compare because, in one case, the work was still in the project stage, in full development, and the other was a finished product that had aired on television (*Cinar SCC*, at paragraph 54). Finally, the presence of an expert was needed, in the Court's view, because the works at issue shared "perceptible" and "latent" or "intelligible" similarities. The first could be directly observed, while the latter—atmosphere, dynamics, motifs and structure—had only an indirect effect on the viewer's experience of the work and required an expert opinion to assist the trial judge in distilling and comparing the "intelligible" aspects of the works at issue (*Cinar SCC*, at paragraph 55).

[202] In the case at hand, we are clearly not dealing with the same type of difficulties that would justify disregarding the user's point of view.

[203] I thus find that the structure of the Victoriaville Complex reproduces a substantial part of that of the Artopex Complex and that the Lainco Design, as adapted to the Artopex Complex, is therefore deemed to have been infringed. To defeat that assumption, the defendants must show

that the structure of the Victoriaville Complex, although it reproduces a substantial part of that of the Artopex Complex, is the result of an independent creation.

- c) *Is the structure of the Victoriaville Complex the result of an independent creation?*

[204] Pluritec submits that it spent many hours on the design of the structure of the Victoriaville Complex. Three of its employees reportedly spent more than 100 hours on it between April 18 and May 19, 2012, although it must be noted that Mr. Viens spent much of his time at that time trying to develop a structural design that the CSBF did not want, i.e. a traditional system of repetitive crossbeams. It adds that, although it can be said that it drew inspiration from the structure of the Artopex Complex, that certainly did not reduce the time and effort that it put into the design of the structure of the Victoriaville Complex. That structure, it notes, is the result of [TRANSLATION] “research”, “analyses”, “computer modelling”, “calculations” and “drawings” (Exhibit TX-175).

[205] Pluritec thus submits that the structure of the Victoriaville Complex qualifies as an independent creation. I disagree. As argued by Lainco, simply having to exercise some skill and judgment to produce the infringing work is not relevant. In *Compagnie Générale des Établissements Michelin-Michelin & Cie v CAW-Canada et al.* (1996), [1997] 2 FC 306, 71 CPR (3d) 348 (FCTD) [*Michelin*], the defendant, a union seeking to become the bargaining agent for employees of Michelin plants located in Canada, was faulted for having infringed the plaintiff’s copyright by reproducing the famous Michelin Tire Man (or Bibendum) in the pamphlets for its recruitment campaign.

[206] In that case, the defendant claimed that there could be both substantial reproduction of the work and a finding of no infringement of the copyright as long as there was sufficient mental effort. That Court dismissed the argument as follows:

Second, during the course of oral argument, the Defendants mischaracterized the proper test for infringement in citing *Joy Music* to mean that there can be both reproduction of a substantial part and a finding of no infringement as long as there is sufficient mental effort.

...

Thus, the true test for infringement is whether the act complained of is only an act that the copyright owner could do under subsection 27(1), including reproduction of the original or a substantial part of the work. The expenditure of some mental labour is not enough to trump the fact that there has been reproduction of a substantial part of a work. Persons who adapt novels into musicals or films also expend mental effort but if there is reproduction of a substantial part of the original, there is still infringement if the consent of the copyright owner has not been obtained. To escape the charge of infringement, the Defendants' "Bibendum" must be an entirely new work, an "original result" in Justice McNair's phrase from *Joy Music*. In effect, it is immaterial if the Defendants have employed some labour and some originality if there is nonetheless reproduction of a substantial part of the original. In any event, I can find no merit in the Defendants' submission that the "Bibendum" on their posters and leaflets displayed sufficient mental labour and originality to constitute an entirely new result. It is true that the Defendant CAW did not simply photocopy an existing Michelin "Bibendum" and tack the identical corporate "Bibendum" on to its campaign literature. Counsel for the Defendants highlighted such ostensible points of difference between the "Bibendum" depicted on the leaflets and posters and the original copyright as the distinct smile, peculiar gleam in the eyes, upraised foot, bigger boots, the workers underneath this booted menace and the captioned dialogue. Despite all these subtle distinctions and Counsel's exacting critical acumen and appraisal, I cannot find sufficient mental effort and independent thought in the union's "Bibendum" such that it is an entirely new work.

(*Michelin*, at pages 375–376)

[207] In other words, the fact that Pluritec was able to use skill and judgment in the design of the structure for the Victoriaville Complex does not advance its case if, effectively, that structure reproduces a substantial part of that of the Artopex Complex. I have concluded that this was the case. We can very well imagine the skill, judgment and means used by the those who infringed Mr. Robinson's work, in *Cinar*, to create the infringing work, which included notable differences from Mr. Robinson's work and was a finished project, already aired on television.

[208] In the case at hand, it is the very appeal of the Artopex Complex structure and what distinguishes it from others that was reproduced by Pluritec. I am not saying that the design of the structure for the Victoriaville Complex did not require effort by Pluritec insofar as its various structural elements had to be designed based on loads and other local conditions and constraints. It also had to be designed based on a flat roof and it had to be ensured, based on all those parameters, that it was safe, effective and sustainable. All of this undoubtedly required research, analyses, computer modelling, calculations and drawings, but that was related first and foremost to the utilitarian or functional aspects of the future complex's structure. It was in that sense, I believe, that Mr. Kadanoff wrote in his report that [TRANSLATION] "the design of a building is unique in itself" (Exhibit D-7, Kadanoff Report, at page 5).

[209] However, the same cannot be said for the choice of the combination of the main elements that would make up the structure of the future complex, i.e. the master trusses, the secondary chords and the double columns on the periphery of the building. As I stated in addressing the issue of access to the work, it seemed a given from the outset that the future Victoriaville Complex would have a [TRANSLATION] "steel superstructure covering a large area and providing

space over the playing area (2 beams per field with 35 ft clearance below the beams and 50 ft clearance below the crossbeams)” (TX-127), i.e., with supporting photos, of “master trusses as built in Granby” (TX-229 and TX-160), in accordance with the wishes of Mr. Gagnon from the CSBF (Transcripts, vol. 4, at pages 37–38). There never seemed to be a desire to stray from that plan, as we have seen reflected in the reports from the coordination meetings on April 30 and May 7, 2012.

[210] In other words, all the evidence shows that, despite what Mr. Viens may have said, no other option was ever seriously considered other than the one of a structure with “master trusses, as built in Granby,” and that option was never seriously considered prior to the visit to the Artopex Complex just three weeks before the project for the future Victoriaville Complex was formally and resolutely launched.

[211] Pluritec argues that there is nothing unusual in the field of copyright in drawing inspiration from existing works. That is true, per se, except that when there is access to the infringed work a short time before the design of the infringing work begins and when the client expresses preference for what is clearly a substantial element of the infringed work, even more care must be taken to avoid reproducing all or a substantial part of that work. As mentioned in *Gilker*, I repeat, the quasi-requirement that an architect meet the client’s aesthetic requirements, often based on the appeal of pre-existing architectural works, which often places on the architect [TRANSLATION] “an obligation to satisfy the client’s current or potential wishes, while taking care, in doing so, to not only avoid exactly reproducing the work of a third party, but also to not be too close to a substantial reproduction or colourable imitation of such a work” *Gilker*, at

page 28). In this regard, they are navigating [TRANSLATION] “troubled waters” (*Gilker*, at page 30).

[212] Once again, I see no reason why this rule of prudence does not also apply to engineering, particularly when the client’s requirements are also aesthetic. In the case at hand, it is the appeal, the “look”, of the Artopex Complex structure that was reproduced. It may be possible to draw inspiration from a pre-existing work but, in doing so, a substantial part of the work cannot be reproduced without the authorization of its author.

[213] I agree that, in the field of architectural design, there may be a fine line between what constitutes an infringement and what is not protected by copyright due to the physical, economical and legal constraints identified by *Gilker*, which can significantly limit the designers’ flexibility and thus result in repetitions of style, form or dimension with pre-existing works (*Gilker*, at page 27). In this case, however, that line has been crossed, in my view.

[214] I therefore find that the assumption that the Lainco Design, as adapted to the Artopex Complex, was infringed has not been defeated.

[215] As the Act protects the owner of the copyright against any reproduction, material or otherwise, of all or a substantial part of a work, I am also of the view that the infringement of the structure itself of the Artopex Complex indirectly outweighs the infringement of the plans for that Complex. In other words, the infringing work can be in a material form other than that of the infringed work. Thus, plans can be infringed indirectly by reproducing a three-dimensional

object created from them, and vice versa (*Théberge*, at paragraphs 47 and 73; *King Features Syndicate, Incorporated v O. and M. Kleenan, Limited*, [1940] C. 523, at pages 531–532, affirmed by [1941] A.C. 417 (H.L.); *Bayliner Marine Corp. v Doral Boats Ltd* (1985), 5 CPR (3d) 289 (FC), at pages 305–306; overturned on appeal for other reasons, (1986) 10 C.P.R. (3d) 289 (FCA); *Fox*, at pages 21–19 to 21–22).

[216] Now, are all the defendants responsible for the infringement?

- d) *Is each and every defendant responsible for the infringement of the Lainco Design, as adapted to the Artopex Complex?*

[217] I repeat that the copyright on a work gives its owner the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever. It also gives the owner the right, equally exclusively, to authorize such acts. There is an infringement of the copyright when, as we have just seen, an act is carried out, without the owner’s consent, that only the owner of that right is entitled to do, under the Act.

[218] In *CCH*, the Supreme Court clarified the meaning of the term “authorized”:

“Authorize” means “sanction, approve, and countenance”: *Muzak Corp. v. Composers, Authors, and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, page 193; *De Tervagne v. Belœil (Town)*, [1993] 3 F.C. 227 (FCTD). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: see *The New Shorter Oxford English Dictionary* (1993), vol. 1, p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812

(c. D.), at pages 823–824. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak*, above. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak*, above; *De Tervagne*, above. See also *J. S. McKeown, Fox Canadian Law of Copyright and Industrial Designs* (4th Edition (Loose-leaf Edition)), pages 21–104, and P. D. Hitchcock, “*Home Copying and Authorization*” (1983), 67 C.P.R. (2d) 17, pages 29-33.

(*CCH*, at paragraph 38)

[219] Moreover, the act of reproducing all or a substantial part of a work and of authorizing that reproduction, without the authorization of the owner of the copyright, are distinct offences under copyright law “rendering each wrongdoer liable to the owner of the copyright without reference to the actions and responsibilities of the other wrongdoer” (*Compo*, at page 373). And, as we have just seen, the unauthorized reproduction of a two-dimensional work, such as plans, in a three-dimensional form, such as a building, constitutes an infringement. The contrary is also true.

[220] Lainco accuses the defendants of the following copyright infringements.

[221] It accuses Pluritec of reproducing a substantial part of the structure of the Artopex Complex (architectural work) in the form of 30% preliminary structural plans (Exhibit TX-216), bid plans (Exhibit TX-40) and construction plans (Exhibit TX-220). It also accuses Pluritec of having authorized the reproduction, by Construction Gagné, of a substantial part of the structure

of the Artopex Complex by approving and allowing the construction of the Victoriaville Complex and by supervising the work to ensure compliance with the structural plans.

[222] Lainco accuses Lemay Côté of reproducing a substantial part of the structure of the Artopex Complex in the form of an interior perspective of the Victoriaville Complex (Exhibit TX-248) and in the form of architectural plans (exhibits TX-140 and TX-264) prepared from the infringing structural plans from Pluritec. According to Lainco, Lemay Côté also authorized the reproduction, by Construction Gagné, of a substantial part of the structure of the Artopex Complex by approving and allowing the construction of the Victoriaville Complex.

[223] According to Lainco, Construction Gagné reproduced, without its authorization, a substantial part of the structure of the Artopex Complex in the form of the Victoriaville Complex.

[224] Finally, Lainco accuses the CSBF of authorizing all these acts by approving, sanctioning, allowing and encouraging them, particularly by giving specific instructions on the type of structure to be designed and built.

[225] Lainco notes that the CSBF, Pluritec and Construction Gagné were informed of its copyright claim before the contract was awarded for the construction of the Victoriaville Complex, before the preparation of the construction plans and before the construction itself.

[226] There is no doubt in my mind that Pluritec is accountable for the infringement of Lainco's copyrights because, without Lainco's authorization, it reproduced, in the form of structural plans, a substantial part of the structure of the Artopex Complex and because it approved and allowed the construction of the structure of the Victoriaville Complex and supervised the work to ensure compliance with those plans.

[227] I also find that Construction Gagné is accountable for the infringement of Lainco's copyrights because, without Lainco's authorization, it reproduced a substantial part of the structure of the Artopex Complex in the form of the Victoriaville Complex. Construction Gagné argues that it was in no way involved in the preparation of the structural plans for the said Complex complex or in the development of the invitation to tender. It also argues that it was well founded, in fact and in law, in relying on the instructions from the CSBF to analyze the bids of structural subcontractors as usual and to deal with the bidder of its choice.

[228] The fact remains that Construction Gagné in fact reproduced a substantial part of the structure of the Artopex Complex in the form of the Victoriaville Complex. Construction Gagné cannot defend itself by arguing what amounts to invoking a lack of intent, especially because it was aware of Lainco's claims (*Fox*, at page 21-5). According to *Compo*, infringement "is the single act of doing something which 'only the owner of the copyright has the right to do'" (*Compo*, at page 375).

[229] In other words, only Lainco could reproduce a substantial part of the structure of the Artopex Complex in the form of the Victoriaville Complex or authorize a third party to do so.

Because it was not authorized by Lainco, Construction Gagné could not, in its work, reproduce a substantial part of the structure of the Artopex Complex in the form of the Victoriaville Complex, even if it had no intention of infringing Lainco's copyrights. In doing so, it committed an infringement.

[230] The CSBF is also accountable for the infringement of Lainco's copyright because, as the owner and client for the work, it authorized the acts of infringement committed by Pluritec and Construction Gagné. Its accountability is even clearer because it gave specific instructions, as noted by Lainco, regarding the type of structure to be designed, built and installed, which reproduced a substantial part of the structure of the Artopex Complex.

[231] This leaves the case of Lemay Côté. It notes that it is not the author of the structural plans for the Victoriaville Complex, and that it was not involved in their design and development. It states that if its name and logo appear in the title block of Pluritec's structural plans, it is for strictly informative purposes and that one could, therefore, infer some involvement on its part in the drafting of the said plans. It continues by stating that the architectural plans prepared by Lemay Côté for the Victoriaville Complex do not reproduce all or a substantial part of the Lainco Design plans. In its view, those plans are distinct and independent of the structural plans prepared by Pluritec. It states that, in fact, the preliminary architectural plans prepared by Lemay Côté for the project do not include any reproduction of any part of the Lainco Design plans, while the bid plans and construction plans do not reproduce all or a substantial part of the plans for that Design.

[232] The only part of the plans prepared by Pluritec that is reproduced in the architectural plans is allegedly a cross-section used to reproduce information appearing in the structural plans, according to the expert for Lemay Côté, Architect Jacques Côté, in accordance with an essential and common practice in preparing building plans in order to make them easier to understand for all parties involved (Exhibit D-13; Côté Report, at page 4; Transcripts, vol. 7 at page 20 (Jacques Côté)). Lemay Côté submits that that representation of the structural plans for the future complex does not reveal any elements of the Lainco Design.

[233] Regarding the interior perspective of the future Victoriaville Complex that it prepared for the grant application, Lemay Côté is of the opinion, if I were to find that it reproduces a substantial part of the structure of the Artopex Complex, that it falls under the exception set out in paragraph 32.2(b)(i) of the Act. That provision states, among other things, that reproduction of an architectural work in a drawing does not constitute an infringement of the copyright if that drawing is not in the nature of an architectural drawing or plan. In this case, it argues that that perspective is not in the nature of an architectural drawing or plan.

[234] Finally, Lemay Côté argues that it cannot be considered to have authorized the reproduction of all or a substantial part of the Lainco Design plans. It argues that it had no control over the CSBF's decision-making process or over the preparation of the structural plans, an act reserved for the engineer, Pluritec. It adds that its relationship with the CSBF, on one hand, and the relationship among the CSBF, Pluritec and Construction Gagné, on the other hand, does not support a finding that it had any control over decisions by the CSBF or its co-contractors, Pluritec and Construction Gagné.

[235] It states that it therefore could not allow or approve the construction of the Victoriaville Complex and submits that the chronology of events, between the start of its involvement in the project for the future Victoriaville Complex, on April 18, 2012, and May 9, 2012, when Pluritec submitted the 30% preliminary structural plans needed for the application for financial assistance, supports this.

[236] In my view, herein lies the problem. It must be said, at the outset, that Lainco is not accusing Lemay Côté of having authorized the reproduction of a substantial part of the Lainco Design plans. It instead accuses it of having authorized the reproduction, by Construction Gagné, of a substantial part of the structure of the Artopex Complex by approving and allowing the construction of the Victoriaville Complex.

[237] That accusation raises questions about the role of the architect. Lemay Côté claims that, although the architect is generally called upon to play a coordinating role, similar to that of an orchestra conductor, that is not systematic. It adds that, although it is not the standard, an architect is sometimes called upon to design the architecture of a building based on a structural design developed entirely and prepared independently by an engineer. It claims that this was the case here.

[238] In my view, Lemay Côté too easily absolves itself of all responsibility. In his report in response (Exhibit P-6), Mr. Siegel notes that, according to the 2009 edition of the *Canadian Handbook of Practice for Architects*, which is, according to him, the Canadian reference regarding professional practice by architects, the architect is the equivalent of the

[TRANSLATION] “orchestra conductor who acts as a generalist, integrating various elements of a project.” He continues by citing the following excerpt from that Handbook:

A significant part of the practice of architecture, therefore, involves the coordination of information, advice, and designs provided by consultants who are knowledgeable in various fields. The architect usually provides the leadership, as well as the management and coordination skills, to synthesize the services of various consultants.

. . . Architects are required to provide a wide range of services and expertise in the course of designing and coordinating a building project, and they usually do so with the help of consultants.

. . . the architect is expected to understand, assemble, and coordinate all of the building disciplines, whereas the engineer usually specializes in one discipline

(Siegel Report, response, at paragraph 14)

[239] Mr. Siegel concludes that it seems questionable to him to find, as did the Côté expert, that Lemay Côté was not at all involved in the design and coordination of the development of the structure for the Victoriaville Complex (Siegel Report, response, at paragraph 16). I agree. Moreover, unless it did not assume its role, it is inconceivable that it did not interact with Construction Gagné and did not have any control over the general contractor during the construction phase of the Complex’s structure, which is the main framework of the building.

[240] This situation differs from the one in *De Tervagne v Beloeil (Town)* (1993), [1993] 3 FC 227 (FCTD), cited by counsel for Lemay Côté to claim that his client could not have authorized the infringement committed by Construction Gagné. In that case, a theatre producer had rented a hall, owned by the Town of Beloeil, to present a play. He did not own the copyrights for that play and had not obtained authorization from the owner of the rights to produce the play in

Beloil. The owner of the copyrights had not only instituted proceedings against that producer and his theatre company, but also the Town of Beloil, as the non-profit theatre company in the Beloil area had served as an intermediary between the town and the producer for the rental of the hall and two artists deemed to be the producer's employees.

[241] The Court found that the town and the theatre company, which had only rented the hall to the play's producer, could not have authorized the infringement of the copyright, as they did not have any control over the producer and the play that he presented. As for the two artists, the Court was of the view that they could not be held responsible because, at all relevant times, they were under the authority of the producer. The Court added that only the producer had control over the play that he had presented.

[242] I do not believe that we can say the same thing here, in that Lemay Côté was a stakeholder on the same level as the co-defendants in the development of the Victoriaville Complex. Indeed, it was the only one to be able to understand, assemble, and coordinate all activities related to the development of that project, including the building of the structure. It therefore cannot be said, in my view, that it had no control over what happened at the site.

[243] Lemay Côté may not have produced the plans for the structure of the Victoriaville Complex, but it was well aware of it. It was present at the coordination meetings and it even had the mandate of preparing the coordination reports. It knew very well that the "desired superstructure" was heavily based on the structure of the Artopex Complex, as is seen in the interior perspective of the future Victoriaville Complex that it prepared in May 2012 based on

one of the photos taken by Mr. Viens during the visit to the Artopex Complex a few weeks earlier (Exhibit TX-248). His plans included each of the main elements of the future building, including structural plans, even though they were in schematic form.

[244] As such, Lemay Côté approved and allowed the reproduction, by Construction Gagné, of a substantial part of the structure of the Artopex Complex. There was a link, a professional relationship between them as part of a construction project, which cannot be ignored. The fact that it was unaware of any of Lainco's claims before these proceedings were launched does not advance its case because, as I have already stated, not knowing that an act constitutes an infringement does not release the person doing it from responsibility toward the copyright owner (*Fox*, at page 21-5).

[245] I therefore find that the defendants all infringed the copyright that Lainco owns in the Lainco Design, as adapted to the Artopex Complex. I was not asked to break down their respective responsibility. I will therefore not do so.

D. *What damages is Lainco entitled to as a result of the defendants' infringement of its copyright?*

[246] Under subsection 35(1) of the Act, a person who infringes a copyright is liable to pay damages to the owner of the infringed copyright, as well as such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

[247] In the case at hand, Lainco is seeking damages corresponding to the lost profits that it would have made from the development of the structure for the Victoriaville Complex. As I stated at the beginning of these reasons, two experts in forensic accounting debated this issue, Martin Fafard on behalf of Lainco, and Alain David on behalf of the defendants.

[248] Insofar as the Court is not awarding it full restitution of its lost profits, it is also claiming a fair proportion of the profits earned by Pluritec, Lemay Côté and Construction Gagné from the development of the Victoriaville Complex. In this latter regard, the amount of gross profits earned by Lemay Côté and Construction Gagné, respectively, was admitted. That is not the case for the profits earned by Pluritec.

[249] Finally, Lainco is seeking punitive damages, but only against the CSBF and Pluritec, to which the two defendants are vehemently opposed. Its claim in this regard is \$50,000.

[250] It is said that it is often hard to assess pecuniary losses resulting from a copyright infringement. That is why there is no specific method for doing so. Everything depends on the specific circumstances of each case. The Court has broad discretion in this area. To this end, it is therefore free to apply any method that it deems reasonable (*Leuthold v Société Radio Canada*, 2012 FC 748, at paragraphs 133 and 138; *Fox* at page 24-71).

[251] In the case at hand, there is no real debate about the nature of the pecuniary loss claimed by Lainco, i.e. lost profits related to the development of the Victoriaville Complex. The debate is instead related to the quantum of the claim.

[252] Regarding the restitution of profits, it “is not intended to compensate the plaintiff”, but instead “to prevent unjust enrichment, although it can serve a secondary purpose of deterrence” (*Cinar SCC*, at paragraph 86). As I have just stated, Lainco is waiving this component of its claim if I allow the entire claim for lost profits.

(1) The claim for lost profits

[253] On behalf of Lainco, Mr. Fafard established the lost profits from the development of the Victoriaville Complex at \$722,996, before considering projects that Lainco carried out instead of the project for that Complex and that it would not otherwise have carried out. When those projects are taken into consideration, this figure drops to \$647,085.

[254] For his part, Mr. David assesses Lainco’s lost profits at \$318,661, considering the projects that Lainco carried out instead of the project for that Complex and that it would not otherwise have carried out.

[255] The two forensic accounting experts used the same approach, the variable costs profit margin. Mr. Fafard defines it as follows in his report:

[TRANSLATION]

More specifically, lost profits as a result of the copyright infringement correspond to the amount by which the revenues that would have been generated by Lainco for the Victoriaville Complex project exceed the variable costs that would have been incurred to carry out that project (hereinafter “lost profits”). Only the variable costs from the Victoriaville Complex project were retained, as the fixed costs were incurred by Lainco even though the structure of the Victoriaville Complex was not carried out.

(Exhibit P-5, Fafard Report, at page 7)

[256] Using that method, the net lost profits are calculated as follows:

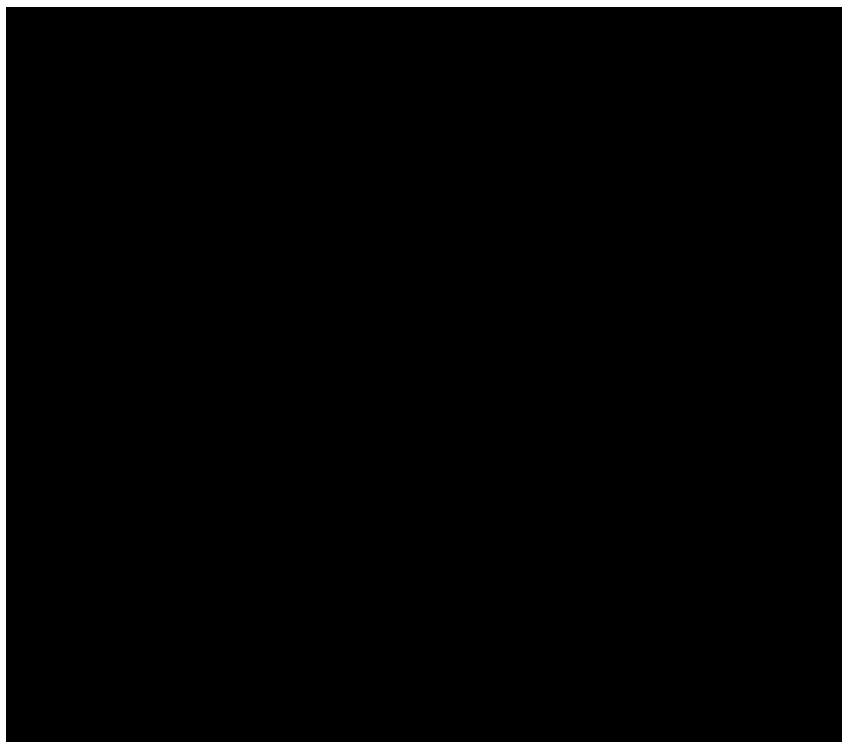
| | |
|-----------------|---|
| [TRANSLATION] | |
| | Lost sales |
| Minus: | Variable costs for developing the structure for the Victoriaville Complex |
| Subtotal | Lost profits |
| Minus: | Profits earned on projects that would not have been carried out |
| Total | Lost profits, net of projects that would not have been carried out |

(Exhibit P-5, Fafard Report, response, at page 8)

[257] The calculation of variable costs includes the cost of raw materials and manufacturing supplies, direct labour, subcontracting (white paint, steel deck, building the structure, transportation and project management), electricity, equipment repairs and maintenance, plant supplies, and amortization expenditures on plant equipment (Exhibit P-5, Fafard Report, response, at page 10).

[258] There are three discrepancies between the calculations performed by Mr. Fafard and Mr. David: the amount of lost sales, the direct labour costs and the profits earned on projects that would not have been carried out. The two experts arrive at essentially the same figures for all other expenditure items.

[259] The following table, taken from Mr. Fafard's memorandum report in response, summarizes the two experts' calculations:



[260] As we can see, the largest discrepancy is by far in the amount of lost sales. Mr. Fafard establishes it at \$1,650,000, which is the amount proposed by Lainco on February 14, 2013 (Exhibit TX-45), to develop the structure of the Victoriaville Complex, with a flat roof. For his part, Mr. David establishes it at \$1,395,000, which is the contract amount awarded to Aciers Solider by Construction Gagné to build the structure for the Complex. The difference is \$255,000.

[261] For Mr. David, this choice allowed for a [TRANSLATION] “fair comparison” (Exhibit D-5, David Report, page 9, at paragraph 37). In his testimony, he expressed the view that, in a competitive process, moreover governed by the rules for public contract invitations to tender, Lainco would never have received the contract for the Victoriaville Complex structure at the proposed price of \$1,650,000, although under cross-examination, he stated that he did not know

that the choice of steel structure subcontractors in the Victoriaville area was not subject to those rules when the Victoriaville Complex structure was built (Transcripts, in camera, vol. 4, at pages 40–44, 57 and 114; see also: Exhibit P-8, examination after defence, Mr. Gagnon (CSBF); Transcripts, vol. 4, at page 45 (Viens)).

[262] Mr. Fafard justified his choice by the assumption that, due to its copyrights, Lainco was the only one that could develop the structure for the Victoriaville Complex, as it appeared from the plans in the invitation to tender. According to him, the CSBF thus had the choice between paying more, i.e. the price quoted by Lainco, to have that very specific type of structure, because it could not obtain it elsewhere, or paying less for another type of structure. He accuses Mr. David of failing to consider that factor.

[263] In his report in response to the one by Mr. David, Mr. Fafard states:

[TRANSLATION]

Most of Lainco's projects are projects with no added value and allow it to cover a large part of its overhead and provide a production base for its plant employees, designers, technicians and engineers. Moreover, Lainco's strategy is to keep production time available for projects with added value or for projects that require rapid delivery, as those projects are much more profitable.

In retaining the bid price from the Solider bid, Accuracy calculates the damages associated with the copyright infringement using the price of a generic product with no added value as the starting point. Indeed, we understand that Solider did not need to invest resources in the development of the product and sold it as if there were no intellectual property.

...

The existence of intellectual property rights gives their owner exclusivity to market products, make decent profits to recover the time and amounts invested in developing the technology, and to

compensate the author for the risk of failure during the development of the product.

These reasons explain why Lainco was able to develop the Antony-Carola, Artopex, Académie Lafontaine and Air Inuit projects with average margins of more than [REDACTED], a substantially higher percentage than for projects that are not protected by intellectual property rights. It is in that context that Mareval retained the sale price of \$1,650,000 (as bid by Lainco) and not a sale price for a generic product.

In short, we disagree with Accuracy regarding the revenues of \$1,395,000 that it retained, for the following reasons:

- The revenues of \$1,395,000 retained by Accuracy are based on the sale price invoiced by Solider, which was not claiming an intellectual property right on the structure for the Victoriaville Complex;
- Lainco's \$1,650,000 bid amount was established according to a variable cost margin similar to the four other projects that it had carried out with the same intellectual property and that were paid by Lainco's clients; and
- The variable cost margin calculated at [REDACTED] in the First Mareval Report cannot be compared with the variable cost margin of [REDACTED] for all Lainco operations, as most of those revenues are not protected by intellectual property rights.

(Exhibit P-6, Fafard Report, response, at pages 4–5)

[264] I prefer Mr. Fafard's approach, which seems to be more compatible with the nature of the rights held by Lainco in the Lainco Design, as adapted to the Artopex Complex, and their commercial value, as demonstrated by the profit margins realized by Lainco on projects using that Design, which are about [REDACTED] on average. Among these value-added projects, the Antony-Carola and Artopex complexes and the Air Inuit hangar were already known, but Mr. Fafard also refers, as we have just seen, to the indoor soccer complex at the Académie Lafontaine in St-Jérôme, near Montreal.

[265] Early in the trial, counsel for the defendants objected to any evidence regarding that sports complex on the ground that Lainco did not cite it in its Statement of Claim. I took the objection under advisement and, under that advisement, allowed the questions regarding that complex, of which there were, moreover, very few. In the whole background of this dispute, the complex at the Académie Lafontaine is marginal. Moreover, this is the first time I have mentioned it in these reasons.

[266] However, the profit margin realized on that project seems to me to be relevant information. Mr. Fafard's report in response, in which this information appears, was submitted in November 2015, one year before the trial. I also note that the questions about that sports complex were asked during discovery and that documentary evidence regarding the complex was shared with the defendants under rule 222 of the *Federal Courts Rules*, SOR/98-106, as amended [the Rules]. Thus, in these circumstances, I cannot say that the sports complex at the Académie Lafontaine, although it was not discussed much during the trial, is completely foreign to this dispute. In other words, I am satisfied that the defendants were not placed in a position in which they were unable to verify that information. I therefore see no reason not to consider it.

[267] Mr. David acknowledged that the profit margins for value-added projects carried out by Lainco, which vary between [REDACTED] and [REDACTED] (Exhibit P-6, Fafard Report, response, at page 4), are not unreasonable (Transcripts, in camera, vol. 4, at page 80). He also acknowledged that a product with intellectual property or added value generally sells for more than a generic product (Transcripts, in camera, vol. 4, at pages 102–104). I agree with Mr. Fafard that, by

overlooking this factor, Mr. David made a choice, regarding the amount of lost sales, that cannot be retained.

[268] The second difference is related to what it would have cost Lainco, in terms of direct labour costs, if it had carried out the project for the future Victoriaville Complex. Based on the table reproduced at paragraph 259 of these reasons, there is a difference of \$30,169 between the two experts. To estimate direct labour costs, Mr. David applied a percentage of 11.7% to his lost sales price. That percentage represents all payroll for the “direct labour” item in relation to Lainco’s sales for the fiscal year ending February 28, 2014 (Exhibit D-5, David Report, at page 10).

[269] Mr. Fafard criticizes this approach that, in his view, does not take into consideration the higher profitability of Lainco’s value-added projects compared with the lower profitability of most projects carried out by Lainco in a year. This approach, he continues, incorrectly assumes that hours attributable to duties that are [TRANSLATION] “not attributable” to projects, which are accounted in the entire payroll for the “direct labour” item in Lainco’s financial statements, would have been higher if Lainco had carried out the Victoriaville Complex project. However, that is not the case, he concludes, as most non-attributable duties are carried out when there is no construction project underway. Thus, the more hours that are attributed by employees to construction hours, the fewer the unproductive hours (Exhibit P-6, Fafard Report, response, at pages 4–5).

[270] That is in fact what Mr. Lachapelle explained in his in-camera testimony. These non-attributable duties can be moved [TRANSLATION] “in any way” in a year, particularly to keep employees busy during periods in which there is less activity at the plant, as the business plan is to always have the highest possible productivity rate (Transcripts, in camera, vol. 1, at pages 13–15).

[271] For his part, Mr. Fafard estimated the reasonableness of the hourly rates estimated by Lainco for the Victoriaville Complex project according to a report compiling the hours and salaries of Lainco employees in the design, detailing (drawing), manufacturing (plant) and construction (management) departments. Based on that information, he calculated the average hourly rates, with and without payroll taxes, for each of those departments, taking into consideration the total amount of salaries and dividing it by the total number of hours worked by duty (Exhibit P-5, Fafard Report, at pages 13 and 14). This gave him a direct labour cost for the Victoriaville Complex project of [REDACTED], thus deeming the amount of [REDACTED] estimated by Lainco to be reasonable.

[272] Here too, I find that Mr. Fafard’s approach must be preferred, as it takes into consideration the higher profitability of value-added projects. Here, Mr. David based his calculations on 2014, in which the profit margin generated by Lainco was [REDACTED], whereas, as we have seen, its profit margin for value-added projects exceeds, on average, [REDACTED]. Mr. Fafard’s approach also gives greater consideration to the role of duties not attributable at Lainco.

[273] The third discrepancy is related to the profits earned on projects that would not have been carried out by Lainco if the Victoriaville Complex project had been. During the period in which the Victoriaville Complex project was carried out, Lainco did work for Zellers and manufactured structures for the construction of a school in Haiti. That latter project was charitable in nature. Lainco received no revenues from it and it was therefore not considered by either of the two experts in the calculation of profits earned by Lainco during that period. Mr. David is more generous toward Lainco than is Mr. Fafard regarding the profits earned from the Zellers contract. In other words, he would subtract less from the profits that Lainco would have earned if it had obtained the subcontracting contract for the Victoriaville Complex than Mr. Fafard does. The difference is \$6,502.

[274] However, he finds that, in addition to the profits from the Zellers project, an additional amount of \$54,163 must be deducted in profits that would not have been earned, because of production capacity, if Lainco had obtained the contract (Exhibit D-5, David Report, at pages 15–16).

[275] On this point, Lainco disagrees not only with Mr. David, but with its own expert. Its counsel argued, on one hand, that there is no authority regarding copyright that makes production capacity a relevant factor in the quantification of damages. He also argues that the production capacity factor is a form of damage mitigation specific to civil law, while the Supreme Court tells us that copyright is an independent law governed not by tort law or property law, but by legislation, the Act, which speaks for itself (*Compo*, at pages 372–373). I note, however, that neither the excerpt from *Compo* to which counsel for Lainco refers nor the judgment itself deals

with damages. In a more recent text in the Canadian Intellectual Property Review, we can read that the principles applicable to intellectual property damages “are generally consistent with a modern understanding of general tort principles” (*Damages Calculations in Intellectual Property Cases in Canada*, (2008), 24 C.I.P.R., 153, at page 155).

[276] The best argument in this regard seems to be that the issue of production capacity is theoretical in the circumstances of this case because, in light of Mr. Lachapelle’s testimony, the basic premise that Lainco could not have completed both the Victoriaville Complex project and another contract—or other contracts—seems to be incorrect. According to Mr. Lachapelle, Lainco would never have refused such a value-added contract. He added that, having a policy of always maintaining additional production capacity in the design department, the Victoriaville Complex project could have been carried out [TRANSLATION] “without any difficulty”, particularly since the plant was operating at that time with two work shifts. Today, it operates with three work shifts (Transcripts, in camera, vol. 1, at pages 7–9).

[277] Mr. David also acknowledged that, had he known when preparing his report that Lainco could have expanded to three work shifts, [TRANSLATION] “we would not have deducted the hours . . . the profit earned on the other projects, on Zellers, etc., we could have . . . we could have retained them, there” (Transcripts, in camera, vol. 5, at page 6). However, as we have just seen, that was possible, and there was a desire to do so.

[278] I am therefore satisfied that the downward adjustment of Lainco’s lost profits from the Victoriaville Complex based on the reproduction capacity factor was not necessary. I therefore

find that Lainco is entitled to full disgorgement of its lost profits, as calculated by Mr. Fafard before considering the production capacity factor.

[279] One last point. At the end of his report, Mr. David noted that, in a notice dated February 14, 2013 (Exhibit TX-45), Lainco advised the recipients of the notice that its price of \$1,650,000 included a licence to use the copyright. It thus proposed a method for assessing what the royalty amount could be for such a licence if I were to decide that this was the appropriate remedy in the circumstances of this case (Exhibit D-5, David Report, at pages 17–20). Certainly, that is not what Lainco is seeking as a remedy.

[280] Thus, based on an excerpt from the Government of Canada website entitled “Copyright and Intellectual Property”, Mr. David notes that, in general, royalties vary between 3% and 7%. Applying those rates to its lost sales, \$1,395,000, he finds that the royalty that Lainco could charge in this case would be somewhere between \$41,822 and \$97,584, depending on the rate applied, which varies between 3% and 7%. Mr. David takes care to note, however, that those royalty amounts [TRANSLATION] “could vary once more precise information is obtained from Lainco” (Exhibit D-5, David Report, at page 19).

[281] The defendants argue that the range of amounts proposed by Mr. David reflect the prices that Lainco could have hoped to obtain for the use of its copyright in this case and that that is the only damage that it can claim in this case.

[282] I disagree. On one hand, the percentages taken from the Government of Canada site are very random given the general and generic nature of the information on that site, its intended audience (those wishing to obtain a licence from a licensor) and the lack of information regarding the nature of the intellectual property rights that were the subject of the transactions on which the royalty rates indicated on the site were calculated.

[283] As well, under cross-examination, Mr. David acknowledged that he had not done any research to find comparables similar to Lainco's intellectual property rights, and that he had not consulted literature, which he agreed existed, regarding the negotiation of licences in various sectors of the industry, particularly in the construction field. He acknowledged that he had not pursued his analysis of the issue by examining such factors as the similarities and differences between intellectual property rights, the characteristics and size of the markets covered by the licences, the additional profitability generated by the intellectual property compared with that of a generic product, and the terms and conditions of the licences. He stated that an economist could have shed more light on the issue. Mr. David conceded that the sole objective of this part of his report was to provide information and acknowledged that, in fact, the situation could be different for a company like Lainco (Transcripts, in camera, vol. 5, at pages 7–15).

[284] In that context, I cannot give much weight to that evidence. In listening to the testimony by Mr. Lachapelle, I understood that Lainco does not grant licences to use a copyright. That is inconsistent with the company's business plan and philosophy. Questioned about the reason for that approach, Mr. Lachapelle replied as follows:

[TRANSLATION]

MR. GUAY: Could you explain why to the Court?

MR. LACHAPELLE: Well, I explained a bit earlier. In the end, all the research and development that we do with universities, all the courses, the training that I do when I go to the United States, the young people whom I send there, it's not to sell licences. Really, it's to supply a plant.

That type of contract is very lucrative for us. The reason is simple. It's because we also improve. We become more and more efficient in our projects.

You see, to estimate that, I took the same mock-up and I changed the snow loads, and it was still fairly quick.

So, we wouldn't have—we would have no interest in selling licences, particularly because our plant is expanding every year. We have—we are at 90 employees or more. If we began selling licences, we'd be shooting ourselves in the foot. It's not—

When Martin proposed it, it was really—better a bad agreement than a good process, end of argument.

(Transcripts, in camera, vol. 1, page 5

[285] Apart from this offer to Mr. Gagnon from the CSBF, during a telephone conversation, without the two Lachapelle brothers really being consulted, in an attempt to find some compromise during the discussions that followed the notice on February 14, 2013 (Exhibit TX-45), I have no evidence before me regarding what a licence to use a copyright in Lainco's industry could be worth for the type of intellectual property rights being claimed in this case. What I know, as I have just said, is that Lainco never grants licences on the basis of a sound business logic.

[286] This alternative to disgorgement of Lainco's lost profits was suggested—and defended—without much enthusiasm. It is dismissed.

[287] Lainco is therefore entitled to recover from the defendants, jointly and severally, its lost profits related to the Victoriaville Complex, the amount of which is set at \$722,996.

(2) Disgorgement of the defendants' profits

[288] Given my finding concerning the amount of damages related to the lost profits from the development of the Victoriaville Complex, there is no need to address the issue of the disgorgement of the defendants' profits, as it is waived by Lainco, having obtained full restitution of that loss.

(3) Punitive damages

[289] Lainco claims that, under copyright law in Quebec, punitive damages can be awarded when there is illicit and intentional infringement of a right guaranteed by the *Charter of Human Rights and Freedoms*, L.Q. c. C-12 [Charter], which, in particular, grants every person the right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

[290] It claims that the CSBF intentionally authorized the reproduction of the "desired superstructure", with the approval of Pluritec, even after it had informed them of its rights. It submits that the CSBF chose to ignore those rights, gambling that it would not dare institute legal proceedings to invoke them.

[291] As I indicated previously, Lainco is seeking the payment of an amount of \$50,000 in this regard. It's claim, however, is only against the CSBF and Pluritec.

[292] The Quebec Court of Appeal notes, in *Constructions Desjardins*, that although the Act does not in as many words provide for punitive damages, the possibility of awarding such damages in cases of intentional copyright infringement has been acknowledged in some judgments (*Constructions Desjardins*, at paragraph 47). However, it must still be shown that the infringer infringed the copyright "deliberately and intentionally, in bad faith" (*Constructions Desjardins*, at paragraph 48). Simply behaving in an offhanded manner does not justify the awarding of punitive damages (*Constructions Desjardins*, at paragraph 47).

[293] An infringement is intentional when the person who commits the unlawful interference "has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or . . . acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause" (*Cinar SCC*, at paragraph 118, citing *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211). The gravity of the fault remains the most important factor to be considered (*Cinar SCC*, at paragraph 137).

[294] In the case at hand, I am unable to find that the infringement of the copyright by the CSBF and Pluritec has that degree of gravity, i.e. that it implies a desire or intent to harm Lainco. The CSBF was certainly ill-advised to proceed as it did, but it cannot be accused of ignoring Lainco's rights and of having done so with a conscious intent to harm it. After all, the evidence

shows that, after considering the notice sent by Lainco on February 13, 2013, the CSBF consulted counsel, but received conflicting opinions. It then turned to Pluritec, its engineering consulting firm for the development of the Victoriaville Complex, which advised it that the structural plans for the future Complex were the result of an independent creation. Pluritec did not share Lainco's position.

[295] In my view, that is sufficient to find that the CSBF had no conscious intent to harm Lainco.

[296] I note once again that, in the field of architectural works, there is often a thin line between what constitutes infringement and what does not. Moreover, as was noted by counsel for Lainco at the beginning of argument, there are not many copyright cases in the field of architectural works (Transcripts, vol. 8, at page 14 (Mr. Guay)). We are in an area where there is little guidance. Competent and credible individuals, experts, presented with conviction two views of the facts. It was necessary to determine which was most consistent with the law. Two weeks of proceedings were needed to debate the issue.

[297] For these reasons, I am also not prepared to say that Pluritec was guilty of infringement in this case with an intent to harm Lainco. It had to meet the wishes of its client and deliver a product that was based on the Artopex Complex. The evidence, as we have seen, is clear in this regard. It led to a certain discomfort. However, it believed that, with the flat roof and the structural differences between the two complexes, it had legitimately created an independent work. I have found otherwise, but that is not sufficient to expose Pluritec, in addition to the order

for restitution of Lainco's lost profits, to the payment of punitive damages. That it was reckless is one thing; that, in doing so, it sought to intentionally harm Lainco is quite another. That is a step that I am not prepared to take in the circumstances of this case.

[298] This head of damages will therefore be dismissed.

V. Decision

[299] The action by Lainco is therefore allowed in part.

[300] In addition to the financial compensation that it seeks in this case, Lainco is also seeking declaratory conclusions concerning the plans and works of the Antony-Carola and Artopex complexes and the Air Inuit hangar. However, as I have already indicated, in his argument, counsel for Lainco insisted that only the Artopex Complex was relevant for the purposes of this case, as that was the complex that was visited by CSBF and Pluritec representatives and it was its plans and structure that were infringed. The other two constructions—the Antony-Carola Complex and the Air Inuit hangar—are not at issue, having been [TRANSLATION] “largely explained to give you background, on what brought them there” (Transcripts, vol. 9, at page 126 (Mr. Guay)).

[301] The declaratory conclusions will therefore be adjusted accordingly.

[302] In its reamended Statement of Claim, Lainco is seeking solicitor-client costs for this case, including all applicable taxes and expert fees. Before me, it is seeking partial reimbursement of

extrajudicial fees that it incurred in this case and is also asking that I reserve judgment on the reimbursement of disbursements.

[303] In support of its claims, Lainco cites *Louis Vuitton Malletier S.A. v Yang*, 2007 FC 1179 [*Louis Vuitton*], which was rendered in the context of trademarks and copyright. In that case, after noting that it had discretion to solicitor-client costs, the Court also noted that that type of cost should only be awarded “where a party has displayed reprehensible, scandalous or outrageous conduct” or when “reasons of public interest” justify it (*Louis Vuitton*, at paragraph 55). It found based on the evidence before it “the Defendants’ dismissive attitude toward this proceeding and past judgments of this Court and the continued flagrant infringement of the Plaintiffs’ intellectual property rights to be worthy of rebuke” [*Louis Vuitton*, at paragraph 59).

[304] No such evidence was submitted before me. On that basis, Lainco’s claim for reimbursement of a portion of the extrajudicial fees that it incurred in this case must fail.

[305] However, Lainco also cited the Federal Court of Appeal decision in *Philip Morris Products S.A. v Marlboro Canada Limited*, 2015 FCA 9 [*Philip Morris*], also a trademark and copyright case in which the Court of Appeal refers to a judicial trend, particularly in intellectual property disputes, to grant costs on a lump sum basis, calculated according to a percentage of all costs actually incurred by the party to whom costs are awarded. Lainco submits that that lump sum has previously been in the form of a percentage of extrajudicial fees without a need to prove reprehensible conduct by the other party in exercising its right to sue. I note that that trend to

grant costs on a lump sum basis is seen primarily in disputes involving “sophisticated commercial parties” (*Philip Morris*, at paragraph 4). There is no doubt that the parties involved in this case were such parties. There is nothing clearer in this case. In particular, I think of the CSBF, which is a public educational institution.

[306] In any event, that decision addresses first and foremost the power of the Court to award costs on a lump sum basis and, in so doing, depart from Tariff B of the Rules (*Philip Morris*, at paragraph 4). Normally, the lump sum will cover disbursements, including expert fees. In other words, in my view, in the context considered in *Philip Morris*, Lainco cannot claim both reimbursement of a portion of the extrajudicial fees that it incurred and ask that I reserve judgment on disbursements. The exercise must tend to resolve the issue of costs as a whole.

[307] I must say that the Lainco process in this regard lacks some clarity. Moreover, the defendants believed until the trial, as did the Court, that the application for solicitor-client costs was of the same nature as was dealt with in *Louis Vuitton*. However, it seems that that is not the case.

[308] In the circumstances, I will consider Lainco’s application on the issue of costs as an application regarding the appropriateness of awarding costs on a lump sum basis and, in doing so, departing from Tariff B of the Rules. As the trial judge did in *Philip Morris* (indexed as 2010 FC 1099), I am giving the parties 30 days from the date of these reasons and judgment to provide me with written submissions regarding this issue.

JUDGMENT in T-941-13

THE COURT:

1. **DECLARES** that there are valid copyrights in the work entitled
[TRANSLATION] “Structural Plans for the Artopex Sports Complex” indicated in
copyright registration certificate No. 1,103,943 from the Canadian Intellectual
Property Office, and that those rights are owned by the plaintiff;
2. **DECLARES** that there are valid copyrights in the work entitled
[TRANSLATION] “Artopex Sports Complex Structure” indicated in copyright
registration certificate No. 1,103,944 from the Canadian Intellectual Property Office,
and that those rights are owned by the plaintiff;
3. **DECLARES** that the production, reproduction or execution of the defendants’ plans
for the construction of an indoor sports complex in Victoriaville and the construction
of that sports complex by the defendants in accordance with those plans, or the
authorization of any of those acts, constitutes an infringement of the plaintiff’s
copyrights in the plans that it developed for the Artopex Sports Complex, in
contravention of section 27 of the *Copyright Act*;
4. **DECLARES** that the construction of the indoor sports complex in Victoriaville, or
the authorization of that act, by the defendants constitutes an infringement of the
plaintiff’s copyrights in the steel structure built by it from the plans that it developed
for the Artopex Sports Complex, in contravention of section 27 of the *Copyright Act*;

5. **ORDERS** the defendants to pay the plaintiff, jointly and severally, an amount of \$722,996, including interest payable under sections 36 and 37 of the *Federal Courts Act*, since the commencement of this action;

6. **RESERVES** its decision on costs, as the parties are required to make written submissions regarding this issue within 30 days of the date of these reasons and judgment.

“René LeBlanc”

Judge

Certified true translation
This 16th day of September 2020

Lionbridge

APPENDIX



Accelerate Sports

Location: Whitesboro, NY, United States

http://butlermfg.com/en/gallery/accelerate_sports



Buckhorn Sports Pad Cover

Location: Buckhorn, Ontario, Canada

http://butlermfg.com/en/gallery/buckhorn_sports_pad_cover



Monroe 33 Tennis Basketball and Sports Center
Location: Monroe Township, NJ, United States
http://butlermfg.com/en/gallery/monroe_33_tennis_basketball_and_sports_center



Boo Williams Sportsplex
Location: Hampton, VA, United States
http://butlermfg.com/en/gallery/boo_williams_sportsplex



Heminger Rec Center Tiffin University

Location: Tiffin, OH, United States

http://butlermfg.com/en/gallery/heminger_rec_center_tiffin_university



Woolwich Memorial Centre

Location: Waterloo, Ontario, Canada

http://butlermfg.com/en/gallery/woolwich_memorial_centre



South Sound Sports Ventures

Location: Tachoma, WA, United States

http://butlermfg.com/en/gallery/south_sound_sports_ventures



City of Oshawa Civic Complex and Fieldhouse

Location: Oshawa, Ontario, Canada

http://butlermfg.com/en/gallery/city_of_oshawa_civic_complex_and_fieldhouse



Tufts University - Gantcher Family Sports & Convocation Center

Location: Medford, MA, United States

http://butlermfg.com/en/gallery/tufts_university_gantcher_family_sports_convocation_center



City of Mississauga - Hershey Sports Zone

Location: Mississauga, ON, Canada

http://butlermfg.com/en/gallery/city_of_mississauga_hershey_sports_zone



Town of Settler Recreation Center

Location: Settler, AB, Canada

http://butlermfg.com/en/gallery/town_of_settler_recreation_center



Reims Tennis Center

Location: Ithaca (Cornell University), NY, United States

http://butlermfg.com/en/gallery/reims_tennis_center



New Orleans Saints Practice Facility

Location: New Orleans, LA, United States

http://butlermfg.com/en/gallery/new_orleans_saints_practice_facility



Mizzou Arena

Location: Columbia, MO, United States

http://butlermfg.com/en/gallery/mizzou_arena



University of Southern Maine

Location: Auburn, ME, United States

http://butlermfg.com/en/gallery/university_of_southern_maine



Southern Heights Baptist Church Legacy Center

Location: Russellville, KY, United States

http://butlermfg.com/en/gallery/southern_heights_baptist_church_legacy_center



University of Kansas Anschutz Sports Pavilion Indoor Athletic Practice and Training

Location: Lawrence, KS, United States

http://butlermfg.com/en/gallery/university_of_kansas_anschutz_sports_pavilion_indoor_athletic_practice_and_training



Harvey Dow Gibson Athletic Center & Ada Cram Wadsworth Arena

Location: Fryeburg, ME, United States

http://butlermfg.com/en/gallery/harvey_dow_gibson_athletic_center_ada_cram_wadsworth_arena



Columbus Chill

Location: Dublin, OH, United States

http://butlermfg.com/en/gallery/columbus_chill



Black Swamp Volleyball

Location: Tiffin, OH, United States

http://butlermfg.com/en/gallery/black_swamp_volleyball



<http://www.rigidbuilding.com/steel-buildings/institutional-steel-buildings/>

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-941-13

STYLE OF CAUSE: LAINCO INC. v COMMISSION SCOLAIRE DES
BOIS-FRANCS and PLURITEC LTÉE and LEMAY
CÔTÉ ARCHITECTES INC. and CONSTRUCTIONS
GAGNÉ ET FILS INC.

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: OCTOBER 17 TO 28, 2016

**JUDGMENT AND PUBLIC
REASONS:** LEBLANC J.

DATED: SEPTEMBER 12, 2017

APPEARANCES:

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