CORAM: **BLAIS C.J.**
          GAUTHIER J.A.
          MAINVILLE J.A.

BETWEEN:

**PLANIFICATION-ORGANISATION-
PUBLICATIONS SYSTÈMES (POPS) LTÉE
and
ELIZABETH POSADA**

Appellants

and

**9054-8181 QUÉBEC INC.
and
PHILIPPE CHAPUIS
and
BENOÎT BAZOGE**

Respondents

Heard at Montréal, Quebec, on March 18, 2014.

Judgment delivered at Ottawa, Ontario, on July 25, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: BLAIS C.J.
                                                  MAINVILLE J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1]   This is an appeal from a judgment of Chief Justice Crampton of the Federal Court (judge), dated April 25, 2013, and amended on June 17, 2013 (2013 FC 427) dismissing the

action for damages of PLANIFICATION-ORGANISATION-PUBLICATIONS SYSTÈMES (POPS) LTÉE (POPS) and Elizabeth Posada for infringement of their copyright on software that is described in more detail below (paragraph 13) and called Ceres, Omega, Epsilon and Comex.

[2]   POPS and Elizabeth Posada (the appellants) dispute most of the judge's findings and, in particular, the amendments to the reasons for judgment made on June 17, 2013, following a motion by the appellants pursuant to subsection 397(1) of the *Federal Courts Rules*, SOR/98-106 (Rules).

[3]   Among other things, according to the appellants, the judge granted 9054-8181 Québec Inc. (IDP) a licence that goes far beyond what was requested in the respondents're-re-amended statement of defence and counterclaim dated January 11, 2013.

[4]   For the following reasons, I would dismiss the appeal except with regard to the scope of IDP's licence because, in my view, the judgment indeed granted a broader licence than that sought by IDP.

I.   FACTS

[5]   The facts in this case are complex and many were disputed. The judge described them in detail in his amended reasons (reasons). In my opinion, it will suffice, for the purposes of this appeal, to note the following facts (some of which were not disputed while others had to be determined by the judge on the basis of contradictory evidence).

[6]   As stated by the judge in paragraph 1 of his reasons, the action "has its roots in an apparent misunderstanding that has had a sad outcome for the three individuals" involved, that is, Elizabeth Posada, Philippe Chapuis and Benoît Bazoge, "who were once very dear friends".

[7]   Around 1984, Elizabeth Posada, then a student, developed simulation software that allowed users, generally university students or business executives, to vary certain inputs to produce marketing, sales, financial, production, inventory and other reports, or outputs. It permitted users to learn business concepts in an interactive manner (reasons at paragraphs 16 and 17).

[8]   To do so, Elizabeth Posada used a program known as Business Game, which was developed by Andrew Szendrovits, a professor at McMaster University (reasons at paragraph 18). This program was circulating widely in academic circles in Ontario and Quebec (reasons at paragraph 15).

[9]   Given that all of Andrew Szendrovits' mathematical formulas and calculation routines were programmed in Fortran for use on mainframe computers, Elizabeth Posada developed an interface in DOS so that the software could be used on microcomputers (reasons at paragraphs 12, 15 and 16). She called this version Ceres.

[10]   In 1985, POPS, the company incorporated by Elizabeth Posada in December 1984 and for which she is the sole officer and shareholder, entered into an agreement entitled "Contrat de promotion", which may be translated as "Promotion Contract", with the authors described in the

said document: Andrew Szendrovits, Elizabeth Posada, Jérôme Doutriaux and Jean-Paul Sallenave (reasons at paragraph 20). They conferred upon POPS a very broad and exclusive licence to, among other things, distribute, market, sell and adapt Ceres (reasons at paragraph 54). In 1998, Andrew Szendrovits wrote a letter clarifying and adding to the agreement (reasons at paragraphs 58 to 61). However, it was not until October 28, 2008, that POPS was assigned the copyright of Andrew Szendrovits' copyright from his successors (reasons at paragraphs 62 to 71). On October 29, 2008, POPS obtained confirmation that McMaster University had only a user licence and was not claiming to be the owner of any copyright in Ceres (reasons at paragraphs 72 to 82).

[11]   The main actors in this case, that is, Elizabeth Posada, Philippe Chapuis and Benoît Bazoge, met each other in 1987, at a time when they were doctoral students (reasons at paragraph 23). They became close friends. All three of them used the Ceres software as part of their duties as professors or lecturers at the Université du Québec à Montréal (UQAM). In 1989, Benoît Bazoge purchased a licence to use Ceres on behalf of UQAM for $2,000 and Philippe Chapuis did the same on behalf of the École Supérieure de Commerce in Tours in 1990 (reasons at paragraph 24).

[12]   The business relationship between POPS and IDP, the company incorporated by Philippe Chapuis and Benoît Bazoge to develop and give seminars in conjunction with their university career, evolved over the years (reasons at paragraphs 26 and 108 to 122). Prior to the dispute that led to the action brought before the Federal Court by the appellants, Elizabeth Posada became a shareholder in IDP and, for all practical purposes, ceased POPS' commercial

operations and even granted IDP the right to use POPS' trade name (long and short version) (reasons at paragraph 100) (A.B., Vol. II, Tab 23, page 273). Even though she continued to carry out her duties at UQAM, Elizabeth Posada was paid as an employee of IDP starting in early 2007 to develop the adaptations of Ceres and the enhancements sought by IDP. Her responsibilities included completing work on the software called Omega that the parties had jointly pursued since at least 1998 and developing the software that would become known as Comex and Epsilon (reasons at paragraph 103).

[13]   Furthermore, to respond to the many technological changes since the early 1990s, several versions and products derived from Ceres were developed. Omega is the Windows version of Ceres that the parties have been collaborating to develop since at least 1998. Omega enables users to conduct simulations in four markets. Epsilon (also known as Epsilon 2) is a scaled-down version of Omega, which only permits users to conduct simulations in two markets, while Comex (also known as Epsilon 1) is a further scaled-down version confined to a single market. Comex and Epsilon were developed for use in relation to small and medium sized businesses. Each of these versions was developed to work with IDP's pedagogical approach (reasons at paragraph 113).

[14]   After Elizabeth Posada stopped collaborating with IDP as a result of a dispute concerning her compensation and resigned as a shareholder (reasons at paragraph 27), counsel for POPS and for POPS' director, Elizabeth Posada, demanded, on October 20, 2008, that IDP cease using Ceres, Epsilon and Comex. In addition, counsel maintained that IDP had publicly stated that it was the owner of the copyright in Ceres and the other above-mentioned products and that IDP

did not have and has never had any right to use that software (A.B., Vol. I, Tab 8, pages 151 to 152).

[15]   Because the parties were unable to amicably resolve their dispute, the appellants commenced their action before the Federal Court on April 14, 2009. The dispute on the terms of Elizabeth Posada's exit from IDP is also the subject of a proceeding before the Superior Court of Quebec (reasons at paragraph 27).

[16]   After the proceeding was filed in the Federal Court, POPS obtained, on July 29, 2010, a Certificate of Registration of Copyright in respect of Omega. And, on August 24, 2010, POPS obtained a Certificate of Registration of Copyright in respect of the work entitled "Epsilon a.k.a Comex".

[17]   The Federal Court hearing took place in January 2013 and the judgment was rendered on April 25, 2013. As I have indicated, further to a motion by the appellants, the judge held a teleconference with the parties and the judgment was amended in accordance with the joint proposal submitted by the parties. Indeed, the judge had asked them to submit the amendments required to give full effect to the formal judgment dated April 25, 2013.

II.   FEDERAL COURT DECISION

[18]   In his reasons, the judge examines the contradictory evidence submitted by the parties in detail. He summarizes his main findings as follows in paragraph 5 of his reasons:

i) copyright subsists in the above-mentioned software products;

ii) POPS is at least one of the rightful owners of copyright in those products;

iii) [the respondent] [IDP] has at least an implied licence to use those products;

iv) the [appellants] were not entitled to revoke that licence;

v) the [respondents] did not infringe the [appellants'] copyright and therefore are not liable to pay any damages, or to account for any profits, to the [appellants];

vi) the [respondents] have not demonstrated that the [appellants'] conduct warrants the imposition of punitive and exemplary damages, or an award of solicitor-client costs;

vii) apart from what is mentioned in subparagraphs 3(i) and 3(ii) above, the [appellants] are not entitled to any of the other relief that they sought in this proceeding;

viii) the [respondents] are entitled to all of the fixed lump sum amount of $20,000 that the parties agreed should be the legal costs awarded in this proceeding.

[19]   The judge also struck POPS' Certificate of Registration of Copyright in respect of "Epsilon a.k.a. Comex" bearing registration number 1079833 from the Register of Copyrights (reasons at paragraph 144).

[20]   To avoid repetition, I will discuss some of the judge's other relevant findings in my analysis. However, it is important to immediately note his comments on the weight he generally attached to the testimony of the three main actors. At paragraph 86 of his reasons, he stated the following:

> In my view, the evidence establishes the [respondents'] version of events in relation to this and other issues addressed below, except where otherwise indicated. Where there are inconsistencies between, on the one hand, the testimony of Ms. Posada and, on the other hand, the testimony of Messrs. Chapuis and Bazoge, I have generally accepted the latter over the former, because I found Messrs. Chapuis and Bazoge to be much more straightforward, forthcoming and generally reliable than Ms. Posada, who was sometimes evasive, at other times unable to recollect specific facts and on occasion took positions that strained credulity.

III.   ISSUES

[21]   As previously stated, the appellants are disputing practically all of the judge's conclusions that are not in their favour. For the purposes of this appeal, I will summarize the issues raised as follows:

a)   Did the judge err by confirming that IDP has a licence on the software identified and all future adaptations and that said licence gives it access to the source code and includes the right to modify it?

b)   Did the judge err by finding that the appellants did not validly repudiate that licence? Did the judge err by finding that the implied licence granted to the respondents was non-revocable? If the Court responds in the affirmative to the questions stated above, what compensation are the appellants entitled to?

c)   Did the judge err by striking the Certificate of Registration of Copyright bearing number 1079833 dated August 24, 2010, from the Register?

d)   Did the judge err by awarding costs in the amount of $20,000 to the respondents even though the appellants obtained confirmation that there was copyright in the products at issue and that POPS was the owner at least in part of the said copyright in Ceres?

[22]   At the hearing, the appellants confirmed that they are no longer disputing that IDP had a licence to use the products known as Ceres, Omega, Epsilon and Comex before the end of the collaboration between IDP and Elizabeth Posada in October 2008. It is the conditions of the right to use those products that are at issue. Indeed, the damages that the appellants are seeking are limited to the use of the products after that date.

IV.   ANALYSIS

[23]   There is no issue regarding the applicable standard of review. The judge's conclusions with respect to questions of law are subject to the standard of correctness. To intervene on questions of mixed fact and law (except with respect to an extricable question of law) or

questions of fact, the appellants must establish a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

A.   *The scope of the licence with respect to future adaptations and access to the source code*

[24]   At the hearing, the appellants insisted that the judge made two fundamental errors warranting the intervention of this Court with respect to the judge's conclusions on the scope of the licence for future adaptations and access to the source code (formal judgment as amended on June 17, 2013, paragraphs ii) and viii); see paragraph 31 below).

[25]   First, the appellants argue that the judge erred in the interpretation of the rights granted by POPS or Elizabeth Posada to IDP. The appellants submit that the judge did not apply the correct principles of law to determine the scope of the implied licence granted to IDP. They insist that the judge should have followed the systematic approach (five conditions) adopted in English case law, such as the English Court of Appeal's decision in *Griggs Group Ltd. v. Evans*, [2005] EWCA Civ. 11 at paragraph 13, which, even though not yet expressly followed in Canada, is consistent with the general principles adopted by the Supreme Court of Canada in cases like *Bishop v. Stevens*, [1990] 2 S.C.R. 467 and *Netupsky et al. v. Dominion Bridge Co. Ltd.*, [1972] S.C.R. 368. According to the appellants, if the judge had adopted this approach, he would have had no choice but to conclude that IDP only had a licence on the software products as they existed before the collaboration between IDP and Elizabeth Posada ended.

[26]   Furthermore, by adopting such an approach, the judge could not have concluded that the appellants had granted a licence that allowed access to the source code of these products and the right to modify it.

[27]   Second, the appellants submit that the judge nonetheless acted *ultra petita* because the respondents had only requested a licence to use the products in question, namely, Ceres, Omega, Epsilon and Comex. In their view, the respondents never requested to have access to the source code or to have the right to modify the aforementioned products. I will deal solely with the appellants' second argument, as it is determinative of the issues raised under the present heading.

[28]   It is clear that it was not until January 11, 2013, namely, after the presentation of the evidence and prior to the final argument, that the respondents applied for leave to amend the latest version of their defence and counterclaim in order to make it conform to the evidence adduced before the judge. The relevant amendments read as follows:

> [TRANSLATION]
>
> 150. IDP's contribution through Philippe Chapuis and Benoît Bazoge and through staff hired and paid by IDP to develop and improve CÉRÈS, OMEGA, EPSILON and COMEX software surely constitutes sufficient contribution to confirm the granting of a perpetual licence to use said software;
>
> …
>
> CONFIRM that IDP, Benoît Bazoge and Philippe Chapuis benefit from a perpetual licence for the use of the CÉRÈS, OMEGA, EPSILON and COMEX software for all purposes related to IDP's pedagogical activities.
>
> (A.B., Vol. I, Tab 3, pages 139 and 140)

[29]   The appellants raised no objection to this late request for amendments, given that it involved merely a user licence, a subject on which they planned to make submissions before the judge on the basis of the evidence adduced at the hearing. Leave to amend was therefore granted.

[30]   Paragraphs 4(iv) and 142(ii) of the judge's reasons accurately reflect the scope of the conclusion sought by the respondents. At paragraph 120 of his reasons, the judge concludes:

> Given all of the foregoing, I am satisfied that Ms. Posada, on behalf of POPS, granted at least an implied, <u>non-exclusive, licence to IDP to use Ceres and the various variations and adaptations of Ceres that have been developed or partially developed by or on behalf of IDP, or in collaboration with IDP</u> …
>
> [Emphasis added.]

[31]   However, in the judgment as amended, the following conclusions appear:

> ii)   [The respondent] 9054-8181 QUÉBEC INC. (IDP) has a non-revokable licence to use Ceres, the adaptations of Ceres known as Omega, Epsilon 1, Epsilon 2 and Comex, and any future adaptations of those software products that may be developed by or on behalf of IDP, for all purposes related to IDP's pedagogical activities, <u>namely, pedagogical seminars. For greater certainty, pedagogical activities for this purpose do not include the assignment, licensing or other transfer of, or access to, such software to anyone other than IDP and those of its principals, managers, employees or independent contractors who need to have access to the aforementioned software products to give effect to this Order.</u>
>
> …
>
> viii)   The [appellants] shall provide to IDP within 30 days of the date of this Judgment copies <u>of the most recent</u> versions of Ceres, Omega, Comex and Epsilon, <u>including the source code</u>, that were developed <u>between 1998 and</u> the effective date on which Ms. Posada ceased to be an employee of IDP, <u>and any prior versions of such software that the [respondents] may identify and request in writing from the [appellants] within 30 days of the date of this Order, and that are reasonably available to the [appellants].</u>
>
> (Emphasis added to the amendments of June 17, 2013.)

[32]   The respondents' argument to the effect that the user licence sought necessarily included access to the source code is in no way supported by the evidence adduced at the hearing. The respondents concede in their memorandum that the judge did not indicate in his reasons that such access was a condition of the implicit user licence or that such access was necessary for the use requested. Although I agree that by submitting a joint proposal for amendments to the judgment, the appellants acknowledged that access to the source code was essential to give effect to the judgment as it was worded on April 25, 2013, this does not allow me to conclude that such access is also essential if the scope of the licence is limited to that which was requested in the re-re-amended defence and counterclaim dated January 11, 2013.

[33]   I understand that according to the respondents, this conclusion may pose difficulties if there are still "bugs" in the various existing versions and if the "cases" used for pedagogical purposes must or may change over time. However, neither the judge nor this Court can award more that what was sought in the proceeding by the respondents.

[34]   Indeed, as our Court stated in *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 at paragraphs 173 and 174, the *ultra petita* principle, namely, that a Court will not make a ruling beyond what is requested by the parties, is codified in article 468 of the *Quebec Code of Civil Procedure*. At common law, it is generally recognized by the case law.

[35]   I therefore find it necessary to reformulate the judgment to limit the scope of the licence to the use of all versions of Ceres, Omega, Epsilon and Comex existing at the end of the

collaboration between Elizabeth Posada and IDP and for all purposes related to IDP's pedagogical activities as described in the judgment. It is also necessary, in my view, to remove the reference to the source code from paragraph viii) of the judgment and to amend it so that it requires that only the versions described above be provided.

V.   REVOCABILITY OF LICENCE AND REPUDIATION

[36]   In their memorandum, the appellants address both of these issues under a single heading. Therefore, I will do the same (appellants' memorandum at paragraphs 70 and following).

[37]   With respect to the scope of the user licence, the appellants submit, at paragraph 71 of their memorandum that the judge erred in law in determining that it was non-revocable. In their view, in order for such a term to be implicitly included in the agreement, five conditions developed in English case law and to which I referred to earlier (see paragraph 25 above) would have to be met. Among other things, the appellants argue that such a term is neither reasonable nor equitable, as the respondents no longer collaborate with Elizabeth Posada and there is therefore no consideration. They add that such a term would also conflict with the fact that the licence was effectively conditional upon continued collaboration between the parties.

[38]   The appellants further argue that the judge erred in law because his conclusion is contrary to the principles enunciated in Sookman, *Computer, Internet and Electronic Commerce Law*, Thomson Carswell, 2014, Rel. 3 at pages 2-76.1. In this passage, the author indicates that if a software licence supported by consideration that does not expressly state the tenor of the licence,

may include an implied term that as long as the licensee does not misconduct himself, he can continue to use it.

[39]   I agree with the appellants when they indicate in their notice of appeal that the contractual relationships between the parties must be examined in light of the civil law even if certain aspects are also regulated by the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act). It should be noted, however, that the appellants (and the respondents) asked the judge to take into account various decisions issued in common law jurisdictions and that they continue to rely on those decisions in this proceeding. This explains the reference to such authorities in the judge's decision.

[40]   It is of little use to dwell on the possible application of English cases, particularly those that favour a step-by-step approach (five conditions), to determine the implicit terms of a contract. Indeed, I further note that at the hearing, the judge had specifically requested that the appellants submit to him the most relevant case law for determining the implicit terms of a licence. The English case law now cited by the appellants to say that the judge erred in his approach was not brought to his attention. This was confirmed at the hearing before us. Under such circumstances, the appellants' argument that the judge erred in law by failing to apply such case law and the five conditions set out therein is somewhat surprising.

[41]   I am not convinced that the judge committed an error of law that is extricable from his analysis concurring the true intention of the parties and the terms of the implicit licence.

[42]   The rules for interpreting contracts in civil law are well known. They are codified, *inter alia*, in articles 1426-1428 and 1432 of the *Civil Code of Quebec*. As the Supreme Court of Canada indicated recently in *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 at paragraphs 59 and 60, in Quebec, the interpretation of contracts is centred on the intention of the parties. Once a valid contract is concluded, it is recognized that there may be cases where the review of the elements generally relevant to determine the intention of the parties shows that there was no real common intention on a specific issue. Then, the Court has no choice but to adopt the interpretation that can best be reconciled with the rest of the contract and the circumstances in which it was concluded.

[43]   In this context and as consistently held by the Quebec Court of Appeal, the conclusions of a trial judge with respect to the interpretation of the intention of the parties is reviewable on the standard of palpable and overriding error: *Samen Investments Inc. c. Monit Management Ltd.,* 2014 QCCA 826 at paragraph 52; *Régie de gestion des matières résiduelles de la Mauricie c. Serres du St-Laurent Inc.,* 2013 QCCA 1607 at paragraph 64; *Primmum, compagnie d'assurances c. Société d'assurances collective Sodaco,* 2013 QCCA 1516 at paragraph 33; *Compagnie canadienne d'assurances générales Lombard c. CIT Financial Ltd.,* 2012 QCCA 1811 at paragraph 18; *Compagnie de chemin de fer du littoral nord de Québec et du Labrador Inc. c. Sodexho Québec Ltée,* 2010 QCCA 2408 at paragraph 81.

[44]   As he was required to do, the judge took into account the nature of the written argument, and their wording and the nature of the oral agreements throughout the relevant years during which the parties had collaborated. He clearly examined the circumstances in which these

agreements had been concluded and the interpretation that the parties had given to these by their conduct and in their exchanges (reasons at paragraphs 88, 89, 98 to 102, 108 to 120, 124, 128, 130 to 132).

[45]   In my opinion, there is no generally applicable rule of law that would preclude a non-exclusive user licence from being non-revocable when the licensee has provided consideration. Neither the law nor the Act restrict the parties' contractual freedom in this regard. In every case, it is for the trial judge to determine the terms that are implicit in the contract in light of all of the relevant contextual elements in civil law.

[46]   This is exactly what the judge did in this case and the appellants have not established the existence of any palpable or overriding error in this regard. Naturally, and as the appellants argue, the expression "non-revocable" must not be understood in its strictly narrow sense. It certainly means, as the judge indicated, that the appellants cannot repudiate the licence unilaterally or wantonly. It is not necessary to attempt to define the situations in which such a licence could be repudiated because in this case and for the reasons that follow I am satisfied that the appellants had no such right, whether the licence was revocable for misconduct or non-revocable.

[47]   However, before discussing this issue, a few brief comments on the other two submissions of the appellants (see paragraph 37 above) are in order.

[48]   First, I cannot accept the appellants' submission that it is somehow unreasonable or unfair for IDP to no longer be providing consideration after the collaboration ended. There is nothing unusual about such an agreement, especially when one considers the price of the licences granted by POPS at that time (namely, $2,000 for licences that are, after all, perpetual (A.B., Vol. IV, Tab 42, pages 670-671)), and the fact that the parties had come to an understanding at the beginning of 2007 that POPS would wind up its activities or at least become dormant and would cease activities with respect to Ceres and its adaptations (reasons at paragraph 100).

[49]   The judge concluded that IDP had provided substantial consideration for the right to use all of the software products in question (reasons at paragraphs 107(ii), 118 and 119).

[50]   Given the obsolete nature of the DOS version of Ceres, the conditions set by the judge are perfectly reasonable in light of the evidence that it was initially a cross-licence: POPS or Elizabeth Posada could use IDP's didactic material and IDP could use the software for its training sessions and seminars.

[51]   As for the Windows version of Ceres (Omega), the judge was perfectly aware of the appellants' submission to the effect that the first written agreement in 1998 included the words "à titre gracieux", which the appellants interpret as "without consideration" (reasons at paragraphs 124 and 126). However, in my opinion, those words are not all that clear, given that IDP did commit to collaborate on developing the Windows version.

[52]   The judge indicated that this collaboration required a very significant investment of time and money (reasons at paragraphs 118 and 119). In my view, the judge's finding that IDP had provided consideration does not contravene the 1998 agreement. Indeed, the phrase "à titre gracieux", read in its context, merely indicates that, at that time, the parties were in agreement that no royalties or lump sum were payable for the right to use the software developed through this collaboration.

[53]   Moreover, as the judge explained, this first agreement was amended several times by means of subsequent agreements, which he describes in detail in his reasons. I am satisfied that the judge made no palpable or overriding error in concluding as he did at paragraph 107.

[54]   With respect to the second issue raised by the appellants, the judge also expressly dismissed as not credible the testimony by Elizabeth Posada that IDP's licence was conditional on her continued involvement in IDP (reasons at paragraph 130). He was satisfied that there had always been an understanding between the parties that the respondents would continue to have the right to use the programs (reasons at paragraphs 107i) and 112). Moreover, the judge indicated that from IDP's perspective, it would not have made sense, given its considerable investment in the development of Omega, Epsilon and Comex over the course of many years, to find itself vulnerable to the risk of having its user licence revoked by a unilateral decision on the part of Elizabeth Posada (reasons at paragraph 130).

[55]   I will now address the issue of the breach of the licence, whether it be a serious and egregious breach or even a fundamental one. Once again, in their written and oral submissions,

the appellants really ask this Court to substitute its own assessment of the evidence for that of the judge which is, as stated above, not the applicable standard of review. The appellants had to demonstrate a palpable and overriding error and, in my opinion, they failed to meet their burden in that respect.

[56]   First, at paragraph 131 of his reasons, the judge found that IDP respected the terms of its agreement. In my view, that finding is unassailable.

[57]   I am also satisfied that the judge did not commit a palpable and overriding error when he found that IDP was not guilty of "misconduct" before being demanded, on October 20, 2008, by counsel for the appellants to cease any and all use of the software (reasons at paragraphs 123 to 139).

[58]   To arrive at that conclusion, among other things, the judge rejected Elizabeth Posada's interpretation of an e-mail dated October 9, 2008, which, according to the evidence in the record, seems to have led to the intervention of counsel for the appellants. The judge's assessment based on the probative value of the testimonies heard and the documentary evidence before him is once again unassailable (reasons at paragraphs 133 and 134). That is surely why the appellants insisted on the judge's interpretation of an e-mail from Philippe Chapuis to Elizabeth Posada dated October 23, 2008.

[59]   First, I note that this e-mail was subsequent to the demand made on October 20, 2008, and that it was sent in response to an e-mail from Elizabeth Posada on that same date. In that

e-mail, Elizabeth Posada alleges that Philippe Chapuis [TRANSLATION] "publicly stated that he had rights to the simulation". Evidence of such statements in the normal course of events was not submitted.

[60] Second, contrary to what the appellants are suggesting, in my view, the judge did not disregard the fact that Philippe Chapuis stated, among other things, that it is consistent with the Act to maintain that the tools developed by employees of IDP and consultants paid by IDP belong to the company (reasons at paragraph 137). It is also relevant to note that Philippe Chapuis confirmed that he is not disputing the ownership rights in Ceres, contrary to what Elizabeth Posada implied in her e-mail, but that he would like counsel for Elizabeth Posada to provide him with documentation attesting to her rights, particularly with respect to the participation of Andrew Szendrovits.

[61] Before receiving the letter dated October 20, 2008, the evidence shows that the respondents had always assumed in good faith that Elizabeth Posada or POPS was the owner of all rights in Ceres. However, as stated by the judge, that was not accurate. Elizabeth Posada was only one of the authors of Ceres and POPS had only the rights granted to it by the authors under the Promotion Contract (see paragraph 10, above).

[62] The comment made regarding the ownership of the programs developed by IDP employees was completely appropriate, especially considering the context in which the e-mail was sent. The judge provided a good explanation of this context in paragraphs 132 to 139 of his reasons. It should be pointed out that, in the negotiations that followed, counsel for the appellants

limited their request to recognition of POPS' rights in respect of the source code developed before February 2007 (see letter by counsel dated October 24, 2008 (A.B., Vol. I, Tab 8, pages 159-160)).

[63] There is nothing here to warrant the intervention of this Court.

VI. INFRINGEMENT OF COPYRIGHT

[64] In light of the foregoing, it was clearly open to the judge to conclude that there was no infringement of POPS or Elizabeth Posada's copyright because IDP did not use the various programs that are the subject of the appeal without the appellants' consent (subsection 27(1) of the Act).

VII. EXPUNGEMENT OF CERTIFICATE OF REGISTRATION OF COPYRIGHT NUMBER 1079833

[65] As previously stated, the judge struck the Certificate of Registration of Copyright that identifies Elizabeth Posada as the sole author and POPS as the sole owner of the rights in respect of the literary work described as follows: Epsilon a.k.a Comex—approximately 20 lines of source code or data, used in conjunction with business simulation software.

[66] First, the appellants submit that the judge failed to provide adequate reasons for his decision to expunge the certificate. They argue that since the judge recognized that POPS was the owner of the copyright in Omega, Epsilon and Comex, he could not come to this conclusion given the evidence in the record.

[67]   In addition, the appellants argue that the work covered by the certificate is a compilation in which only POPS may claim to be the owner of copyright (appellants' memorandum at paragraphs 106 to 111).

[68]   Such a certificate of registration is evidence that the copyright subsists and that the person registered is the owner of the copyright. The presumption created by the certificate can be rebutted by credible evidence to the contrary (*Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2014) at page 20-6; *Hughes on Copyright & Industrial Design*, 2nd ed. (Markham: LexisNexis Canada, 2005) at pages 422 and 423).

[69]   It is important to note that the formal judgment contains only one paragraph with respect to POPS' rights—that it is the owner of the copyright in Ceres subject to the rights that Jérôme Doutriaux and Jean-Paul Sallenave may have. As previously stated, the judge in his reasons simply concluded that POPS is one of the owners of the other products (see paragraph 18, above).

[70]   Furthermore, with respect to Epsilon and Comex, the judge was satisfied that the respondents rebutted the presumption created by the registration of the certificate (reasons at paragraph 122) and that, for the reasons stated in section C. (reasons at paragraphs 104 to 122 and, given the reference in paragraph 107, reasons at paragraphs 85 to 103), the respondents' request that the certificate be struck should be granted (reasons at paragraph 144). Like any other decision, these reasons must be read in their context and in view of all of the evidence in the record.

[71]   In my opinion, although it would have been preferable for the judge to group the main elements that supported his conclusion under the same heading, this is not a satisfactory reason to invalidate his decision to expunge because I am satisfied that this conclusion is cogent considering the evidence in the record and the judge's findings of fact.

[72]   Indeed, even though the respondents never asked the judge, in their re-re-amended statement of defence and counterclaim, to issue a declaration that they are the owners of the copyright in Epsilon or Comex, the fact remains that the judge had the duty to consider all of the evidence before him in order to determine whether their request that the certificate be struck should be granted.

[73]   It is far from clear that the certificate relates to a compilation rather than the 20 lines of source code to which it specifically refers. The description that follows the reference to these lines of code appears instead to explain or illustrate the context in which they are used.

[74]   From this perspective and in view of the judge's factual finding that Elizabeth Posada was working for IDP when these lines of code were written and that her job included developing Epsilon and Comex, the rule set out at subsection 13(3) of the Act applied and unless otherwise stipulated, IDP (the employer) was the first owner of the copyright.

[75]   The judge therefore could not ignore that under this provision neither Elizabeth Posada (the author) nor POPS (her dormant company) could claim to be the sole owners of the copyright in the absence of a specific agreement to that effect with IDP.

[76]   It is clear to me that the judge was not satisfied that such an agreement existed with respect to Epsilon and Comex (reasons at paragraph 132). On this point, the appellants had the burden of proof, as IDP benefited from the rule provided at subsection 13(3) of the Act. I am satisfied that the evidence in the record was therefore sufficient for the judge to strike the certificate that contained an erroneous description of the copyright owner.

[77]   Similarly, if, as the appellants assert, the certificate refers to a compilation (the software as a whole), I am satisfied that the evidence in the record was sufficient for the judge to strike the certificate.

[78]   The appellants devoted only one paragraph in their memorandum to this point (appellants memorandum at paragraph 111). Further, the evidence they offered regarding this compilation is thin. It amounts to little more than a few pages of Elizabeth Posada's testimony (A.B., Vol. VI, Tab 45, pages 1039 to 1040 and 1109 to 1112). No expert was called to testify. According to Elizabeth Posada, Epsilon is a complete software package that includes the Windows interface and the same calculation libraries as Omega, with the exception of the 20 lines of code described in the certificate.

[79]   I note that the originality of a work is not measured by the number of lines. Indeed, Elizabeth Posada confirmed that the new links between the equations that these 20 lines of code represent took a lot of time and were difficult to create. As for the additional comments of the witness on the three main components of simulation software, they seem to apply as much to Omega as to Epsilon, which is in large part a product that was derived from Omega. I therefore

examined the evidence on the record as to who the authors of the compilation are and who are the owners of the copyright based on its simplest description, namely, that it is Omega plus the 20 lines of code. This holds true, even though the certificate itself does not refer directly to Omega but instead includes a generic reference to simulation software.

[80]   As I have stated, Elizabeth Posada obtained a Certificate of Registration of Copyright for Omega on July 29, 2010 (A.B., Supplementary Book 1, Tab 50, page 14).

[81]   This certificate describes Omega's authors as being:

Elizabeth Posada
Andrew Szendrovits (author's death: November 22, 1999)
Fernando Romero

[82]   Omega is described as "a Windows software adaptation of the Ceres business simulation software". It is therefore, according to Elizabeth Posada, also a compilation, but without the adjustments and the 20 lines of code developed for Epsilon when she was employed by IDP.

[83]   It is therefore obvious that the Epsilon certificate, if it does in fact refer to the three main components Omega and the 20 lines of code, should include other authors such as Fernando Romero who, according to the contract in the record (A.B., Supplementary Book 1, Tab 49, page 8) effectively programmed the Windows interface of Ceres. Regardless of whether or not this author transferred ownership of his copyright to POPS, it in no way alters the fact that he remains an author. He should therefore have been included as an author, along with Andrew Szendrovits, on certificate number 1079833 referring to Epsilon a.k.a. Comex.

[84]   Furthermore, it matters little whether Elizabeth Posada is the sole author or one of several authors of Epsilon a.k.a. Comex. Indeed, according to Elizabeth Posada's testimony, the 20 lines of code that were written when she was employed by IDP are what distinguish Epsilon from Omega. Therefore, even if she were the sole author of Epsilon, it appears to me that this compilation could only have been created in the context of that employment and at a time when POPS was dormant. Under subsection 13(3) of the Act, IDP is, in the absence of an agreement to the contrary, the first owner of the copyright (see paragraphs 74 to 76 above).

[85]   Due to the erroneous or incomplete information contained in the Epsilon certificate, it was open to the judge to strike it even if Epsilon is considered to be a compilation.

VIII.   COSTS OF $20,000

[86]   The appellants submit that the judge erred in law by awarding $20,000 in costs solely to the respondents when the appellants had nonetheless obtained confirmation that they held the copyright for Ceres. In cases in which neither party can claim an outright victory, the rule is that each party is expected to bear its own costs.

[87]   The allocation of costs is a discretionary decision of the judge. In the judge's view, the respondents were the party that was primarily successful. Furthermore, he added that Philippe Chapuis had confirmed in October 2010 that the respondents were not claiming copyright over Ceres and this is the only finding in the appellants' favour (reasons at paragraphs 167 and 169). The judge further noted at paragraph 152 of his reasons that the appellants' conduct throughout

the proceeding unquestionably caused the costs incurred by the respondents in their defence to increase significantly. Such considerations are relevant under subsection 400(3) of the Rules. The appellants have not established the existence of any error that would warrant the intervention of this Court, especially if one considers the fact that the $20,000 lump sum awarded to the respondents represents only a small fraction of the actual costs incurred.

[88]   In addition, there is no need to change the allocation of the trial costs even if, for reasons set out above, some parts of the formal judgment mostly those amended as a result of the appellants' motion should be reformulated. However, with respect to the appeal costs, given that each party had at least some degree of success, I propose that each party bear its own costs.

IX.   CONCLUSION

[89]   In conclusion, I propose that the appeal be dismissed, except for that part of the judgment relating to the scope of the licence, which should be reformulated as follows:

> ii)   [The respondent] 9054-8181 QUÉBEC INC. (IDP) has a non-revokable licence to use Ceres, the adaptations of Ceres known as Omega, Epsilon 1, Epsilon 2 and Comex, for all purposes related to IDP's pedagogical activities, namely, pedagogical seminars. For greater certainty, pedagogical activities for this purpose do not include the assignment, licensing or other transfer of, or access to, such software to anyone other than IDP and those of its principals, managers, employees or independent contractors who need to have access to the aforementioned software products to give effect to this Order.

> viii)   The [appellants] shall provide to IDP within 30 days of the date of this Judgment copies of the most recent versions of Ceres, Omega, Comex and Epsilon, that were developed before the effective date on which Ms. Posada ceased to be an employee of IDP, and any prior versions of such software that the

[respondents] may identify and request in writing from the [appellants] within 30 days of the date of this Order, and that are reasonably available to the [appellants].

<div align="right">

"Johanne Gauthier"
_____
J.A.

</div>

"I agree
   Pierre Blais C.J."

"I agree
   Robert M. Mainville J.A."

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DATED:	JULY 25, 2014

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