

Federal Court



Cour fédérale

Date: 20130617

Docket: T-583-09

Citation: 2013 FC 427

Ottawa, Ontario, June 17, 2013

PRESENT: The Honourable Chief Justice

BETWEEN:

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

Plaintiffs

and

**9054-8181 QUÉBEC INC,
PHILIPPE CHAPUIS and
BENOIT BAZOGE**

Defendants

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This proceeding has its roots in an apparent misunderstanding that has had a sad outcome for the three individuals identified above, who were once very dear friends. The manner in which they have chosen to resolve that misunderstanding has also been very costly. It is likely that the legal costs alone that each of them has incurred in connection with this proceeding far exceeds the value of the interests they assert.

[2] At its heart, this case is about whether the Defendants have a right to use a business simulation software product, and adaptations of that product, in respect of which the Plaintiffs have registered and claim to own copyright.

[3] Among other things, the Plaintiffs seek:

- i) a declaration that copyright subsists in those software products, that the Plaintiff PLANIFICATION-ORGANISATION-PUBLICATIONS SYSTÈMES (POPS) LTÉE [POPS] is the owner of copyright in those products, and that such copyright has been infringed by the Defendants;
- ii) a permanent injunction to restrain the Defendants from infringing POPS' copyright in those products; and
- iii) all of the Defendants' profits arising from their alleged infringing activities, an accounting of revenues obtained therefrom, certain damages and pre-and post-judgment interest.

[4] By way of counterclaim, the Defendants seek:

- i) an expungement of POPS' Certificates of Registration from the Register of Copyright, together with a declaration that Ms. Posada is not the author of one of the adaptations of the software (known as "Epsilon");
- ii) punitive and exemplary damages in the amount of \$10,000;
- iii) \$100,000 in solicitor-client costs; and

iv) confirmation that they hold a perpetual licence to use the software and certain of its adaptations for all purposes related to IDP Inc's professional activities.

[5] For the reasons set forth below, I have determined that:

- 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 Defendant 9054-8181 QUÉBEC INC, which also does business as IDP Inc [collectively, IDP] has at least an implied licence to use those products;
- iv) the Plaintiffs were not entitled to revoke that licence;
- v) the Defendants did not infringe the Plaintiffs' copyright and therefore are not liable to pay any damages, or to account for any profits, to the Plaintiffs;
- vi) the Defendants have not demonstrated that the Plaintiffs' 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 Plaintiffs are not entitled to any of the other relief that they sought in this proceeding;
- viii) the Defendants 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.

[6] This was a bilingual (English and French) proceeding. In the reasons below, all translations of testimony given in the other official language and of passages in documents written in that language are my own.

I. The Parties

[7] The Plaintiff, POPS, is a federally incorporated company engaged in the business of software development and commercialization, consulting and professional training since 1985.

[8] The Plaintiff, Elizabeth Posada, is the sole shareholder, director and officer of POPS. She is also employed at the Université du Québec à Montréal [UQAM] as a Professor in the Department of Strategy. She holds a PhD in business administration and has been intimately involved in the development of the above-mentioned software products since 1984. In addition, from approximately February 1, 2007 until at least October 1, 2008, she was a shareholder, director, officer and employee of IDP.

[9] The Defendant, IDP, was formed under the laws of the Province of Quebec in 1997. It is primarily engaged in the business of conducting learning seminars in Canada and abroad for university students and corporations, sometimes with the aid of the simulation software products that are the subject of this proceeding.

[10] The Defendant, Philippe Chapuis, is a shareholder, director, officer and employee of IDP. He holds a PhD in business administration and has been a lecturer in the Department of Strategy and Social Responsibility at UQAM for over 10 years.

[11] The Defendant, Benoît Bazoge, is a shareholder, director, officer and employee of IDP. He holds a PhD in business administration, is a Professor in the Department of Strategy and Social

Responsibility at UQAM, and is currently academic Vice-Dean of the Management School of Business.

II. Background

[12] In the 1970s and perhaps earlier, Andrew Szendrovits, a Professor at McMaster University [McMaster], developed a software product alternately known as “Business Game” and “Business Simulation”, which was programmed in Fortran and operated on mainframe computers.

[13] By all accounts, the software was built around a core of sophisticated mathematical formulas and “calculation routines” that permitted users to simulate business outcomes based on inputs that were reduced to what were then known as punch-cards, which were “read” by mainframe computers.

[14] In the early 1980s, when Ms. Posada was a student at the University of Sherbrooke, she assisted a Professor there who used another simulation software product known as Compete. It appears that Compete was very cumbersome and difficult to use in the classroom environment. Accordingly, when she first came into contact with Business Game in approximately 1984, she became interested in the possibility of switching to that product.

[15] At that time, it appears that Business Game was circulating widely in academic circles in Ontario and Quebec as virtually an open source product. Contemporaneously, the first microcomputers had started to become available and Ms. Posada began to investigate the possibility

of adapting Business Game to the microcomputing environment. After discovering that Fortran for microcomputers was available, she began to develop a microcomputer interface for Business Game.

[16] According to her uncontested testimony, after several months of extensive work, Ms. Posada was successful in developing the microcomputer interface for the simulation software, which she began to call “Ceres”. Among other things, an important and novel feature of Ceres was that it permitted users to learn business concepts in an interactive manner.

[17] For example, among other things, the software allowed users, typically university students or business executives, to vary certain inputs to produce marketing, sales, financial, production, inventory and other reports, or “outputs”.

[18] Notwithstanding Ms. Posada’s substantial work on the software, which resulted in her having contributed slightly more lines of the software’s code than Mr. Szendrovits, its “core”, namely its mathematical formulas and “calculation routines”, remained virtually unchanged from what was developed by Mr. Szendrovits (Transcript, January 8, 2013, at p 94).

[19] Soon after developing Ceres, Ms. Posada contacted Mr. Szendrovits to inform him of what she had done with the software. It appears that he took a great interest in her work and that they soon became good friends.

[20] In 1985, Mr. Szendrovits, Ms. Posada, Jérôme Doutriaux and Jean-Paul Sallenave entered into an agreement [the 1985 Agreement] to cede certain rights in Ceres to POPS.

[21] According to Ms. Posada, Mr. Doutriaux was a party to that agreement because he had translated certain lines of code to permit certain outputs to be displayed in French (e.g., he adapted the software to enable the words “balance sheet” to be displayed as “bilan”). Ms. Posada also testified that Mr. Sallenave was a party to the agreement because he wrote the instruction, pedagogical and other manuals that were distributed with Ceres during the years that it was sold, in the 1980s and 1990s.

[22] Given that neither Mr. Doutriaux nor Mr. Sallenave participated in this proceeding, this decision will not address the full extent of their contribution to Ceres or its manuals, or the nature of the rights, if any, that they may have in Ceres or its adaptations. Accordingly, any conclusion reached regarding the ownership of the copyright in Ceres, its adaptations or any manuals that may continue to include material authored by Mr. Sallenave will be couched in terms of such ownership being at least “partial” in nature.

[23] In approximately 1986, Mr. Bazoge met Mr. Chapuis while they were both doctoral students. They met Ms. Posada the following year, while she too was a doctoral student. Over time, they developed a close friendship.

[24] In 1989, Mr. Bazoge purchased Ceres from POPS on behalf of UQAM for \$2,000. The following year, Mr. Chapuis purchased Ceres for the same amount on behalf of the École Supérieure de Commerce in Tours, France.

[25] In the last several years, various updated versions of Ceres, known as Epsilon 1, Epsilon 2 [collectively, Epsilon], Comex and Omega [collectively, the Software], were developed by one or more parties to this proceeding.

[26] The parties' longstanding informal working relationship was formalized on or about February 1, 2007, when Ms. Posada became a shareholder, director, officer and employee of IDP.

[27] In October 2008, a dispute arose between the parties. Initially, it appears to have primarily concerned the compensation that Ms. Posada was receiving from IDP, relative to that which Messrs. Chapuis and Bazoge were receiving. However, that dispute quickly expanded to include the terms of Ms. Posada's exit from IDP. That dispute is the subject of another proceeding that is currently before the Superior Court of Québec.

[28] By approximately October 20, 2008, after Ms. Posada came to believe that the Defendants had begun to assert ownership rights in the copyright to the software, the dispute further expanded to include the Defendants' right to use the Software, and, at least in Ms. Posada's mind, POPS' copyright in the Software. The following year, after attempting to resolve their dispute over the course of several months, the Plaintiffs instituted this proceeding.

III. The Issues

[29] The issues to be determined in this proceeding can be conveniently summarized as follows:

- i) Does POPS and/or Ms. Posada own the copyright in Ceres or any of its adaptations, including Comex, Epsilon 1, Epsilon 2 and Omega?
- ii) Was Ms. Posada hired by IDP to develop any of Comex, Epsilon or Omega?
- iii) If so, what rights, if any, do the Plaintiffs and IDP have in respect of those versions of the Software, and in Ceres?
- iv) Were the Plaintiffs entitled to revoke any rights that they may have granted to IDP to use the Software?
- v) Did the Defendants infringe any copyright that POPS may have held in any versions of the Software?
- vi) If so, what profits were made by, or should be imputed to, the Defendants in respect of their allegedly infringing activities and awarded to the Plaintiffs?
- vii) What remedies and legal costs, if any, should be awarded to the Plaintiffs or the Defendants?

[30] Although the foregoing statement of issues differs somewhat from the issues identified by Prothonotary Morneau in his Order dated April 25, 2012, and by the parties themselves in the Joint List of Issues To Be Determined At Trial, I am satisfied based on the parties' pleadings and the issues jointly addressed during the proceeding that the foregoing list accurately reflects and summarizes the issues in this proceeding.

IV. Relevant Legislation

[31] It is not disputed between the parties that software falls within the following definition of “every original literary, dramatic, musical and artistic work” that is set forth in section 2 of the *Copyright Act*, RSC, 1985 c C-42 [the Act]:

“every original literary, dramatic, musical and artistic work”

« toute oeuvre littéraire, dramatique, musicale ou artistique originale »

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

« toute oeuvre littéraire, dramatique, musicale ou artistique originale »

“every original literary, dramatic, musical and artistic work”

« toute oeuvre littéraire, dramatique, musicale ou artistique originale » S’entend de toute production originale du domaine littéraire, scientifique ou artistique quels qu’en soient le mode ou la forme d’expression, tels les compilations, livres, brochures et autres écrits, les conférences, les oeuvres dramatiques ou dramatico-musicales, les oeuvres musicales, les traductions, les illustrations, les croquis et les ouvrages plastiques relatifs à la géographie, à la topographie, à l’architecture ou aux sciences.

[32] Section 2 of the Act also defines “infringing” to mean, “in relation to any work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act.”

[33] Pursuant to section 3 of the Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof. Pursuant to paragraph 3(1)(a), this includes the sole right to produce, reproduce, perform or publish any translation of the work.

[34] Pursuant to subsection 5(1), copyright subsists in every original literary, dramatic, musical and artistic work if certain conditions are met. It is not contested by the parties that the requisite conditions in respect of the Software are met in this proceeding. Accordingly, as requested by the Plaintiffs, a declaration to this effect will be made in the attached judgment and it is not necessary to address that issue in these reasons.

[35] Subsection 13(1) of the Act states that the author of a work shall be the first owner of the copyright therein. However, subsection 13(3) states:

Work made in the course of
employment

(3) Where the author of a
work was in the employment
of some other person under a
contract of service or
apprenticeship and the work

Oeuvre exécutée dans
l'exercice d'un emploi

(3) Lorsque l'auteur est
employé par une autre
personne en vertu d'un contrat
de louage de service ou
d'apprentissage, et que

was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

l'oeuvre est exécutée dans l'exercice de cet emploi, l'employeur est, à moins de stipulation contraire, le premier titulaire du droit d'auteur; mais lorsque l'oeuvre est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, en l'absence de convention contraire, est réputé posséder le droit d'interdire la publication de cette oeuvre ailleurs que dans un journal, une revue ou un périodique semblable.

[36] Subsection 13(4) of the Act deals with assignments and licences. That provision states:

Assignments and licences

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Cession et licences

(4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

[37] Pursuant to subsection 27(1), it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that only the owner of the copyright has the right to do under the Act. Subsection 27(2) specifically states that it is an infringement of copyright for any person to:

<p>Secondary infringement</p> <p>(2) It is an infringement of copyright for any person to</p> <p>(a) sell or rent out,</p> <p>(b) distribute to such an extent as to affect prejudicially the owner of the copyright,</p> <p>(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,</p> <p>(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or</p> <p>(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),</p> <p>a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe</p>	<p>Violation à une étape ultérieure</p> <p>(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une œuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication alors que la personne qui accomplit l'acte sait ou devrait savoir que la production de l'exemplaire constitue une violation de ce droit, ou en constituerait une si l'exemplaire avait été produit au Canada par la personne qui l'a produit:</p> <p>a) la vente ou la location;</p> <p>b) la mise en circulation de façon à porter préjudice au titulaire du droit d'auteur;</p> <p>c) la mise en circulation, la mise ou l'offre en vente ou en location, ou l'exposition en public,</p>
--	--

copyright if it had been made in Canada by the person who made it.

dans un but commercial ;

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas a) à c) ;

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas a) à c).

[38] Pursuant to section 34(1) of the Act, where copyright has been infringed, the owner of the copyright is, subject to other provisions in the Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

[39] It is also pertinent to note that, pursuant to paragraph 34(1)(b), in any civil proceedings taken under the Act, the author is presumed to be the owner of copyright. In addition, pursuant to subsection 53(2), a certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

V. Analysis

A. Does POPS and/or Ms. Posada own the copyright in Ceres?

[40] The Plaintiffs submit POPS owns the copyright in Ceres by virtue of either:

- i) the 1985 Agreement;
- ii) a letter dated March 25, 1998 [the 1998 Szendrovits Letter], in which Andrew Szendrovits purported to grant certain rights to POPS;
- iii) an assignment to POPS dated October 28, 2008, from Mr. Les Szendrovits [the Les Szendrovits Assignment], acting on behalf of his mother and the estate of Andrew Szendrovits;
- iv) an assignment to POPS, dated October 29, 2009, by Elsie Quait-Randall, on behalf of McMaster [the McMaster Assignment].

[41] In addition, the Plaintiffs assert that POPS' registration of its ownership interest in Ceres on September 25, 1991 gave rise to a presumption that it is the rightful owner of that software.

[42] The recitals to the Les Szendrovits Assignment and the McMaster Assignment make it clear that they were executed for the purpose of resolving any doubt that may have existed regarding the ownership of copyright in Ceres. In the case, of the McMaster Assignment, the document also confirmed McMaster's right to continue to use Ceres and the updated versions thereof.

[43] The Defendants submit that from the outset of their relationship with Ms. Posada until the time their dispute with her arose in October 2008, they accepted on good faith Ms. Posada's representations concerning POPS' ownership of the copyright in Ceres.

[44] For various reasons, they maintain that none of the documents listed above effectively transferred ownership of the copyright in Ceres to POPS.

[45] For the reasons set forth below, I disagree.

i. The 1985 Agreement

[46] It is common ground between the parties that Andrew Szendrovitz was the author of the core source code of Ceres. However, the Defendants submit that he developed Ceres in his capacity as an employee of McMaster, and that pursuant to subsection 13(3) of the Act, McMaster was the original owner of the copyright in Ceres and has never properly ceded that copyright to POPS or Ms. Posada.

[47] Accordingly, the Defendants maintain that the copyright in Ceres could not have been assigned by the 1985 Agreement, because McMaster was not a party to that agreement. That particular submission will be dealt with in part V.A(iv) of these reasons below.

[48] In any event, the Defendants assert that the 1985 Agreement did not assign ownership of the copyright in Ceres to POPS. I agree.

[49] The 1985 Agreement is entitled “Contrat de Promotion,” which may be translated as “Promotion Contract”. Nowhere in that document is there an assignment of the copyright in Ceres to POPS.

[50] Instead, the first paragraph of the agreement states: “The undersigned, co-authors of the business simulation CERES, cede by the present document to the company POPS Ltée, of Sherbrooke, Québec, the rights to promote CERES in all languages and in all countries.” Consistent with POPS’ status under the agreement as a promoter, it is referred to throughout the agreement as “the promoter.” In addition, in addressing the scope of the rights granted under the agreement, Article II(1) states that “the authors expressly and exclusively cede to the promoter the rights to translate in all languages and all countries, to market, to adapt and to reproduce [Ceres] by all existing and future visual, audio [and] electronic means, without exception or reserve.” There is no language in that article which assigns the copyright in Ceres to POPS.

[51] Also, in Article II(3), an obligation is imposed upon POPS to communicate to the authors the results of any negotiations with third parties. In my view, in the context of the 1985 Agreement, that provision is more consistent with a promotion or distribution agreement than it is with an outright assignment of copyright. The intention of the authors to retain their ownership of the copyright in Ceres is further reflected in, Article I(1), which deals with the duration of the agreement and states that it is intended “to have effect for the entire period during which the literary interest of the authors, or their [ayants droit] or representatives, shall last.”

[52] The Plaintiffs rely upon the use of the word “cession” in the second paragraph of the agreement, in the titles of Articles I and II, and in the opening words of both of those articles, to support their argument that the document was intended to function as an assignment of the copyright in Ceres to POPS. However, the second paragraph simply served to make clear that the rights being granted under the agreement were subject to the conditions set forth in Articles I, II and

III. In addition, the headings of Articles I and II have no legal effect, and the opening words of those articles were simply introductory in nature and served no other purpose.

[53] The Plaintiffs and the Defendants each asserted that their view of the 1985 Agreement was supported by the provisions of Article III, which requires POPS to forward to the authors, (i) in equal parts, the totality of net proceeds received from sales of the Ceres user's manual; and (ii) 10% of the net revenues received from the sale of computer disks and the instructor's manual. In my view, Article III is not particularly helpful in determining whether the 1985 Agreement either effectively conveyed, or was intended to convey, the copyright in Ceres to POPS. However, it does convey the parties' view that they intended their agreement to include the right for POPS to distribute Ceres. That view is reinforced by Article 1(3) of the Agreement, which prevents the authors from distributing the Software or its adaptations without the prior written agreement of POPS.

[54] Given all of the foregoing, I agree with the Defendants that even if Mr. Szendrovits owned the copyright in Ceres in 1985, the 1985 Agreement did not transfer that ownership interest to POPS. However, it was effective in conferring upon POPS a very broad and exclusive licence to, among other things, distribute, adapt and sell Ceres.

[55] Given Ms. Posada's confirmation on cross-examination (Transcript, January 8, 2013, at pages 191-195) that POPS' registration of its purported ownership interest in Ceres on September 25, 1991 was based solely on her belief that POPS obtained such "ownership interest" pursuant to the 1985 Agreement, I am satisfied that any presumption that such registration may have created in

favour of POPS' ownership of Ceres has been rebutted (*Samsonite Canada Inc v Costco Wholesale Corporation*, [1993] FCJ No 302) [*Samsonite*]; *Oakley Inc v Shoppers Drug Mart Inc*, [2001] FCJ No 415, at para 33 [*Oakley*]).

[56] One implication of the above finding is that Ms. Posada remained an owner of Ceres, in her capacity as one of its authors.

ii. The 1998 Szendrovits Letter

[57] The Plaintiffs asserted in their pleadings that the 1985 Agreement “was, to the degree necessary, confirmed or perfected through the [1998 Szendrovits Letter].” I disagree.

[58] That short letter, which was sent by Andrew Szendrovits to POPS, simply stated the following:

The undersigned hereby authorize and give [*sic*] exclusive right to POPPS LTEE [*sic*] for using [*sic*] the original sources of the above named simulation, in any language, as well as exclusive rights to negotiate all relevant issues and matters in the names of Elizabeth Posada and Andrew Z. Szendrovits.

[59] In cross-examination, Andrew Szendrovits' nephew, Les Szendrovits, testified in a forthright and credible manner that his uncle was someone who would certainly have understood the meaning of the words he used in his correspondence. In particular, according to his nephew, he would have understood the difference between giving something and giving permission to use something (Transcript, January 8, 2013, at p 141).

[60] The language quoted above does not in any way convey any ownership interest in the core source code of Ceres, or anything else, to POPS. Instead, for the present purposes, the key language used was “for using,” and “exclusive rights to negotiate all relevant issues and matters in the names of Elizabeth Posada and Andrew Z. Szendrovits.”

[61] With this in mind, and given the above-mentioned testimony of Mr. Les Szendrovits, I am satisfied that the 1998 Szendrovits Letter did not convey to POPS Mr. Andrew Szendrovits’ ownership interest in the core source code of POPS.

iii. The *Les Szendrovits Assignment*

[62] The Plaintiffs submit that the Les Szendrovits Assignment effectively assigned any residual rights that Andrew Szendrovits may have held in Ceres at the time of his death. I agree.

[63] Mr. Les Szendrovits’ forthright and uncontested testimony was that he was very close to Andrew Szendrovits and his spouse, Margaret Szendrovits. Based on his understanding of “the family’s knowledge,” and specific conversations that he had with other members of the family prior to testifying in this proceeding, he believed that Andrew Szendrovits “had handed over basically the running of [Ceres] to Dr. Posada” and that the effect of the 1985 Agreement was to convey all rights in Ceres to Ms. Posada (Transcript, January 8, 2013, at pp 130-131, and 137). Given that understanding, he had “no qualms signing” the Les Szendrovits Assignment, to assist Ms. Posada to

establish the ownership interest in Ceres that he believed his uncle had previously transferred to her (Transcript, January 8, 2013, at pp 147-148).

[64] There was no mention of the Business Game, Ceres or other software in Andrew Szendrovits' Will. Nevertheless, pursuant to paragraph 3(e1) of the Will, the residue of Andrew Szendrovits' estate was transferred to Margaret Szendrovits for her own use absolutely.

[65] Margaret Szendrovits signed a Continuing Power of Attorney for Property dated November 2, 1994, which was tendered into evidence by the Plaintiffs. Pursuant to paragraph 1 of that document, she appointed her husband, Andrew Szendrovits to be her attorney for property. In the event that he became unable to act by reason of death, incapacitation or resignation, she substituted and appointed her son, William Szendrovits to be her attorney for property in her husband's place. In turn, in the event that William became unable to act for those same reasons, she substituted and appointed her sister Hayna Szendrovits. In turn, in the event that she became unable to act for those reasons, Hayna's son, Les Szendrovits was substituted and appointed to be Margaret's attorney for property.

[66] Les Szendrovits testified that since his aunt Margaret became incapacitated, he has had the power of attorney [POA] to act on her behalf, because William has "lost the power to look after himself" (as reflected by the fact that his daughter looks after his affairs), and Hayna is 89 years old and "signed over her powers" to him (Les). Les Szendrovits also testified that William has been a schizophrenic since the 1970s.

[67] In final argument, the Defendants invited the Court to question the validity of the above-mentioned Will and POA, given that William's parents gave him important responsibilities under those documents, which were executed in 1995 and 1994, respectively, notwithstanding that he had been a schizophrenic since the 1970s. However, based on Les Szendrovits' testimony that William's condition has "gotten progressively worse," I am not persuaded that it would be appropriate to question the validity of those documents, solely on the basis suggested by the Defendants.

[68] Among other things, the recitals in Les Szendrovits Assignment state that, "in a simple document" Andrew Szendrovits "intended to assign all of his rights" in the software known as Ceres to POPS and that "there may be some doubt as to the completeness or efficacy of" the simple document. It is not entirely clear whether the document in question is the 1985 Agreement or the 1998 Szendrovits Letter. However, given that the 1985 Agreement is mentioned at paragraph 3 of the Les Szendrovits Assignment, I am inclined to infer that it is the "simple document" in question.

[69] Given the aforementioned doubt, the recitals proceed to state that "for greater certainty, the Assignor wishes to assign and transfer unto POPS Ltée (the "Assignee") the Assignor's entire right, title and interest to copyright in the Work, and wishes to further waive in favour of the Assignee all of the Assignor's moral rights related to the Work." The "Assignor" was defined to be "Margaret Szendrovits and the Estate of Andrew Szendrovits." The "Work" was defined to be Ceres.

[70] Paragraph 2 of the document then states:

In return for the Royalty, defined hereunder, and for other good and valuable consideration, the receipt and sufficiency of which is hereby

acknowledged, the Assignor hereby assigns and transfers in perpetuity to the Assignee the Assignor's entire right, title and interest, worldwide, in and to all ownership, intellectual property and all other property rights including, without limitation, the copyright, in the Work authored in whole or in part by [Andrew Szendrovits], including all rights of action, powers and benefits relating thereto.

[71] In my view, the language of paragraph 2 clearly and unequivocally transferred any and all residual interest that Andrew Szendrovits continued to have in Ceres, including his copyright, after he executed the 1985 Agreement and the 1998 Szendrovits Letter. In passing, I would simply add that, pursuant to paragraph 4, the document also expressly assigned all of the assignor's moral rights in Ceres to POPS.

iv. The *McMaster Assignment*

[72] The Defendants submit that the Les Szendrovits Assignment could not have legally assigned to POPS the copyright in the core source code of Ceres that was written by Andrew Szendrovits, because Andrew Szendrovits was employed by McMaster when he wrote that source code. In support of that position, the Defendants rely on subsection 13(3) of the Act, which deems an employer to be the first author of a work created by an employee in the course of his or her employment. I disagree with the Defendants' position on this point.

[73] In the months following the dispute that led to this proceeding, Ms. Posada contacted one or more representatives of McMaster to confirm that it did not assert any rights to the copyright in Ceres. After an internal investigation, Ms. Elsie Quaiter-Randall, Executive Director of McMaster's Industrial Liaison Office [ILO], executed an assignment to POPS, dated October 29, 2008, of

McMaster's "entire right, title and interest, worldwide, in and to all ownership, intellectual property and other proprietary rights including, without limitation, the copyright in the Work authored in whole or in part by Dr. Szendrovits, including all rights of action, powers and benefits relating thereto."

[74] Among other things, the recitals to the McMaster Assignment state that Andrew Szendrovits was employed by McMaster during the period in which he authored his contribution to Ceres, that he used that software as one of his teaching aids, that POPS wished to confirm that there do not exist competing claims to the ownership of Ceres, that POPS was prepared to grant to McMaster a licence to continue to use Ceres and updated versions of Ceres, and that the university "has, and makes, no claim whatsoever to the title to, nor any rights in, [Ceres]". The recitals conclude by stating that the university (defined as the "Assignor") wished to "assign and transfer into POPS Ltd (the "Assignee") all of the Assignor's entire right, title and interest in and to the copyright and other rights in [Ceres]."

[75] In the absence of Ms. Quaiter-Randall, who was on sabbatical in the Philippines at the time of the trial, her colleague Ms. Gay Yuyitung testified on behalf of McMaster. Ms. Yuyitung is a Business Development Manager in the ILO at the university. She reports to Ms. Quaiter-Randall.

[76] Ms. Yuyitung testified in a straightforward and credible manner. Among other things, she stated that the ILO handles the patenting, licensing and commercialization of all intellectual property that is developed at McMaster. In addition, she stated that she was the one who investigated and determined that Andrew Szendrovits had developed the Software "as part of his

teaching materials at the university.” She noted that Ms. Quaite-Randall typically does not conduct an extensive review of the documents that she signs, but rather relies on her staff – in this case, Ms. Yuyitung and one other person – to conduct the required review. She also testified that she helped to review the McMaster Assignment prior to its execution, that she recognized the signature on the McMaster Assignment as being Ms. Quaite-Randall’s signature, and that she was told by Ms. Quaite-Randall in an e-mail that she had signed that assignment.

[77] Ms. Yuyitung further testified that her understanding “has always been that instructional materials – teaching materials are owned by the professor.” In this regard, she identified the applicable policy as being a document entitled *Distribution of Income from the Sale of Instructional Materials* [the DISIM Policy] applied to the software. She stated that she satisfied herself that the DISIM Policy applies to the software developed by Andrew Szendrovits. She also noted this policy came into effect on March 16, 1981, and that “[t]he intent of the policy is that the copyright is owned by the professor.” She added that prior to the issuance of the DISIM Policy, the University’s position was that the copyright in any instructional materials developed by a professor was held by the professor. In support of the latter view, section D.1.1 of the DISIM Policy states: “The University affirms the traditional practice that copyright in instructional materials produced by faculty members belongs to those faculty members, except in the special cases listed below.” None of those special cases applies to the facts at issue in this case. Significantly, Section B.3 of that policy also states that the DISIM Policy “is intended to serve as the ‘agreement to the contrary’ on behalf of McMaster University and its academic and non-academic staff,” within the meaning of what is now subsection 13(3) of the Act.

[78] On cross-examination, Ms. Yuyitung was presented with another policy, entitled *Intellectual Property Policy*, dated May 27, 1998, together with a policy entitled *Joint Intellectual Property Policy* [JIPP], which “Supersedes/Amends” the 1998 policy and governs all matters related to intellectual property at the institutions covered by that policy, after its coming into force on January 1, 2005.

[79] Ms. Yuyitung acknowledged that she was aware that, pursuant to Article 9.1 of the JIIP, “the University shall be the nominal owner of all newly created or discovered Intellectual Property arising at any of the institutions.” She also acknowledged that Article 2.7 of the JIIP specifically includes “computer software recorded in any format” within the definition of Intellectual Property, and that there is no reference to “computer software” in the DISIM Policy.

[80] In the absence of any further testimony on behalf of McMaster or otherwise regarding the interplay of the DISIM Policy and the JIIP, I accept Ms. Yuyitung’s view that the DISIM Policy applies to the software that was created by Andrew Szendrovits and that now forms part of the Software. Her position on this point would appear to be supported by the fact that while the DISIM Policy explicitly affirms that copyright in instructional materials produced by faculty members belongs to those faculty members, except in cases that are not applicable in the case at bar, the JIIP does not mention copyright and establishes ownership rights only in “newly created or discovered intellectual property” (Articles 1.3(d), 9.1 and 9.2). In addition, both the JIPP and the 1998 *Intellectual Property Policy* exclude from their application any matters dealt with in the DISIM Policy (Article 4.3(c)), as well as “computer software that is either ancillary to or the functional equivalent of any of the items described in paragraph [4.3](a) hereof where such material has been

created by someone who is a member of the Teaching Staff.” Among other things, paragraph 4.3(a) excludes from that policy copyright in and title to lecture notes, laboratory manuals, articles, books, artifacts, works of visual art, maps, charts, and other materials “no matter in which format they may have been recorded or embodied, including, without limitation, in a computer readable format, where any of the foregoing material has been created by someone who is a member of the Teaching Staff.” I accept Ms. Yuyitung’s view that the Software authored by Mr. Szendrovits falls within this exception.

[81] Based on the foregoing, I am satisfied that Andrew Szendrovits was the original author and owner of the copyright in the Software that he contributed to Ceres and that I have found was effectively conveyed to POPS pursuant to the Les Szendrovits Assignment.

[82] In any event, I am satisfied that the terms of the McMaster Agreement are sufficiently clear and unambiguous to have effected an assignment of any copyright that McMaster may have still owned as at the date that agreement was executed, on October 29, 2008.

v. *Summary*

[83] Andrew Szendrovits was the first author of, and the owner of copyright in, the software that he contributed to Ceres. The 1985 Agreement did not transfer his ownership interest or copyright in that software to POPS. However, it was effective in conferring upon POPS a very broad, and exclusive, licence to, among other things, distribute, market, sell and adapt Ceres. The 1998 Szendrovits Letter did not change this state of affairs.

[84] Nevertheless, the Les Szendrovits Assignment did effectively convey to POPS the copyright in that software, as required by subsection 34(1) of the Act. Accordingly, POPS has been the owner of that copyright, subject to any rights that Messrs. Sallenave and Doutriaux may have, since the date of that assignment, namely, October 28, 2008. In any event, even if McMaster was the first owner of that copyright, pursuant to section 13(3) of the Act and the applicable policy of McMaster, that copyright was effectively assigned to POPS pursuant to the McMaster Agreement, dated October 29, 2008. Given my conclusion on this point, it is not necessary to address the oral submissions made by the Plaintiffs, in the alternative, regarding POPS' copyright in a "compilation" that consisted of the software developed by both Mr. Szendrovits and Ms. Posada.

B. Was Ms. Posada hired by IDP to develop any of Omega, Comex or Epsilon?

[85] The Defendants assert that Ms. Posada was hired by IDP to develop Comex and Epsilon, and to complete the development of Omega, which IDP had been collaborating with her to develop for many years prior to her becoming an employee of IDP. However, the Plaintiffs maintain that the parties at no time discussed software development as being among Ms. Posada's responsibilities as an employee of IDP. They also maintain that the parties never discussed Ms. Posada having responsibility for the translation, adaptation or programming required to develop the Software.

[86] In my view, the evidence establishes the Defendants' 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.

[87] According to Mr. Bazoge, IDP was registered as a business name in 1992 and incorporated in 1997. During that period, he and Mr. Chapuis collaborated closely with Ms. Posada on numerous seminars. In general terms, they contributed most of the pedagogical content and Ms. Posada contributed, among other things, Ceres. By 1998, the three of them agreed that it was becoming necessary to develop a Windows version of Ceres, due to the increasing popularity of successive versions of Microsoft's Windows software (Transcript, January 9, 2013, at p 77-78).

[88] Accordingly, they entered into an agreement with a young student named Vlady Ravelomanana [Vlady], who Messrs. Bazoge and Chapuis had met in France. The opening terms of that one-page agreement, which was produced at Tab 14 of the Joint Book of Documents [JBD], state that its purpose is to form "a contractual relationship concerning the development of a new business simulation software." The parties then agreed that (i) the source code of the software would remain with POPS, represented by Ms. Posada, (ii) neither Vlady nor IDP could use the source code to develop an adaptation of the new software without the explicit agreement of POPS, (iii) IDP was invited to participate in the development of the new software, and was authorized to use that software without having to provide further consideration ("à titre gracieux"); and (iv) no copies of that software would be used unless they had been purchased and the acquiring company's logo was reflected in the boot-up screens produced by the software. Unfortunately for the parties,

Vlady ultimately did not deliver on his commitment. Nevertheless, I accept Mr. Bazoge's testimony that this agreement, which was signed by Ms. Posada (on behalf of POPS), Mr. Bazoge (on behalf of IDP) and Vlady, marked the beginning of a more formal alliance between the parties to develop a Windows version of Ceres (Transcript, January 9, 2013, at p 79).

[89] By the year 2000, Messrs. Bazoge and Chapuis agreed among themselves to provide Ms. Posada with an incentive to accelerate her efforts to develop a Windows version of Ceres. To this end, they entered into an arrangement with POPS pursuant to which, among other things, POPS would be paid \$1,000 for each seminar in which IDP used Ceres (Transcript, January 9, 2013, at p 83; January 10, 2013, at p 104). In return, POPS would pay IDP \$1,000 each time Ms. Posada used IDP's pedagogical material in one of her seminars. An unsigned version of that agreement [the 2000 Agreement], dated March 16, 2000, was produced at Tab 15 of the JDB. Under the heading "Contribution," it was stated that "IDP (Philippe et Benoît) continue to participate in the development of the product (strategy, marketing, finance) and Elizabeth is responsible for the development of new versions of the software" (my translation). Under the heading "Planning," it was stated:

Having regard to the pending disappearance of DOS, it is imperative that the software Ceres (or another name) be rewritten for the Windows environment. Elizabeth undertakes to finalise a new Windows version (with user-friendly inputs) by December 2000. A meeting is scheduled in the coming weeks (before the end of May) to work on modifications and/or enhancements to the simulation.

[90] Mr. Chapuis forthrightly acknowledged that he could not definitively recall if the 2000 Agreement had ever been signed. However, he stated that he thought it had been signed (Transcript, January 10, 2013, at p 105). In any event, Mr. Bazoge testified that IDP acted in accordance with

the agreement for approximately 5 or 6 years, during which they paid Ms. Posada \$1,000 per year, to reflect the single contract that they had during that period (which was renewed each year). This was not disputed by Ms. Posada, who acknowledged being a party to a verbal agreement receiving the annual \$1,000 payments. However, she maintained that the 2000 Agreement was never signed and that therefore no legal contract had been entered into (Transcript, January 10, 2013, at p 164-6). Given that the parties acted in accordance with the agreement and each of them recognized that the agreement was at least verbal in nature, I am satisfied that even if that agreement was not ultimately signed, it was a binding verbal agreement between the parties.

[91] By early December 2000, Ms. Posada had not yet developed a Windows version of Ceres, as she had at least verbally agreed to do. In my view, this explains why she entered into an agreement, dated December 10, 2000, with Mr. Fernando Romero, a computer programmer. Pursuant to that agreement [the Romero Agreement], which was on POPS letterhead and signed by Mr. Romero and Ms. Posada, Mr. Romero agreed to program and conduct tests for a Windows interface for Ceres that would be marketed under the name Omega or under another name. Among other things, that agreement also provided that the new interface would remain the exclusive property of POPS. Ms. Posada testified that she entered into the Romero Agreement because she was unfamiliar with a program named Crystal Reports, which was required “to program the input/output part of the simulation that was going to be called Omega” (Transcript, January 8, 2013, at pp. 112-113). Mr. Bazoge speculated that Mr. Romero may have been hired to fix a number of “bugs” that existed in the Windows version of Ceres that the parties had agreed to develop.

[92] Mr. Bazoge testified that between December 2000 and the fall of 2006, he and Mr. Chapuis were invited to attend a number of meetings to provide their views on certain characteristics of the evolving software (Transcript, January 9, 2013, at p 87). This was not disputed by Ms. Posada.

[93] According to Mr. Bazoge, by the fall of 2006, the Windows version of Ceres still had not been fully developed and the parties began to discuss a more formal partnership (Transcript, January 9, 2013, at p 88). Contemporaneously, and as reflected in various exchanges of e-mails dated between November 2006 and the beginning of February 2007, and which are included at Tab 30 of the JDB, the parties continued to work together.

[94] For example, in an e-mail dated November 16, 2006, which appears at page 203 of the JBD, Mr. Chapuis reminded Mr. Bazoge, Ms. Posada and others of the workplan that had been established on November 13, 2006. Among other things, he noted that “everyone” was responsible for proposing modules to be added to Ceres, and that Mr. Bazoge was responsible for testing Ceres in a limited “consumer market,” with a view to proposing a strategy to expand the software if the tests were positive. In another exchange dated January 6, 2007, Mr. Bazoge sent to Ms. Posada and Mr. Chapuis a patch that had been developed for the new adaptation of the software by Mr. Trepanier, a programmer who had been paid by IDP. In another e-mail, dated January 9, 2007, which appears at page 212 of the JBD, Ms. Posada sent a list of her clients to Mr. Bazoge. In a further e-mail dated January 16, 2007, included at page 214 of the JBD, Mr. Bazoge reported to Mr. Chapuis and Ms. Posada that he had met someone who might be able to assist them with a particular problem that they had encountered with the software.

[95] On November 23, 2006, Mr. Chapuis sent an e-mail to Ms. Posada, with a copy to Mr. Bazoge, entitled “Project ID-POP Revisited.” Under the heading “Project ID-POP,” it was stated:

Creation of a JV for the development of Omega and the exploitation of Ceres, with:
Option I – 2 shareholders IDP and POP [*sic*] or
Option II – 3 people.

Among other things, it was then suggested in the e-mail that it would have to be confirmed with an accountant which option might be more advantageous. Under the subsequent heading “Objective,” it was noted: “Develop and licence a business simulation that would vary according to the clientele (segmentation).” Under the next heading “Organization (general)”, it was noted, among other things, that “POP [*sic*] brings Ceres and Omega and their future adaptations.” In her testimony, Ms. Posada pointed to the latter statement as supporting her position that Omega was largely completed before she became an employee of IDP. Although she later acknowledged that work continued on Omega after that time, she maintained that such work, as well as her work on Comex and Epsilon, was on behalf of POPS, rather than IDP (Transcript, January 8, 2013, at pp 195 and 205-6).

[96] Shortly after the latter e-mail was sent, Mr. Chapuis prepared another document for a meeting on January 3, 2007, just weeks before Ms. Posada became an employee of IDP, on February 1, 2007 (Agreed Statement of Facts and Admissions [ASFA], paragraph 3). Among other things, that document, entitled “IDP + POP = IDP” indicated that Ms. Posada would obtain a 25% equity interest in IDP in exchange for POPS, including the commercial rights to Ceres. In addition, IDP would acquire the right to use POPS’ trade name. It was also stipulated that Mr. Bazoge would

be responsible for the general management and billing of the joint venture, Mr. Chapuis for “developing and operationalizing R&D”, and Ms. Posada for “technical R&D”.

[97] I accept Mr. Bazoge’s testimony that this meant that he would be responsible for managing the joint venture and for the academic content of the business simulations, Mr. Chapuis would be responsible for commercializing adaptations of the software and ensuring that those adaptations met the pedagogical needs of IDP, and Ms. Posada’s principal contribution would be to be responsible for the technical aspects of adapting the simulation software to meet IDP’s needs (Transcript, January 9, 2013, at pp 90-1). In Ms. Posada’s own words, she “was responsible for the simulation to work properly” (Transcript, January 8, 2013, at p 150). This is consistent with the express terms of the 2000 Agreement, discussed at paragraphs 89 and 90 above.

[98] I also accept Mr. Bazoge’s testimony that this is what actually happened after Ms. Posada joined IDP, and that she was paid primarily to bring her experience with conceptualizing (as opposed to actually programming) business simulation software (Transcript, January 9, 2013, at pp 186-7). That said, I recognize that Ms. Posada also had other responsibilities in IDP, including ensuring that the software worked properly during seminars, participating in the development and teaching of the seminars that the three protagonists gave through IDP, participating in the preparation of transparencies and other teaching aids, and overseeing the work of programmers who were hired to work on the Software.

[99] During the hearing, a significant amount of time was devoted to a disagreement between the parties as to whether they had agreed, at the time that Ms. Posada became an employee, shareholder

and director of IDP, that POPS would “close,” which I understood to mean “wind up.” This is important because, if it was generally understood among the parties that POPS would wind-up its operations when Ms. Posada joined IDP, the ownership of any adaptations of the Software that were developed after Ms. Posada became employed by IDP would be less clear than what it would have been under the two options that were reflected in the aforementioned e-mail dated November 23, 2006, neither of which appeared to contemplate the closure of POPS.

[100] I accept the defendants’ position that, at the time Ms. Posada became an employee of IDP, it was generally understood among the parties that POPS would wind-up or at least become dormant and cease activities in respect of Ceres and its adaptations. In my view, Mr. Bazoge’s testimony in this regard was forthright, honest and persuasive (see for example, Transcript, January 9, 2013, at pp 92-93 and 122-126). It is also consistent with the fact that POPS’ trade name was transferred to IDP, and with how things evolved with respect to the issue of POPS’ closure.

[101] Specifically, in February 2007, soon after she became an employee of IDP, Ms. Posada met with her accountant, Mr. Hotte, to discuss, among other things, the closure of POPS. Mr. Hotte testified that after he identified the tax advantages that would be associated with taking her capital out of POPS over a period of a few years, rather than all at once, Ms. Posada and he decided to maintain POPS in a dormant state for a few years, for that purpose. He also testified that POPS did not recommence any activities until the end of 2008, after the parties decided to go their separate ways.

[102] Over one year later, in an e-mail to Messrs. Chapuis and Bazoge dated April 14, 2008, found at Tab C10 of the parties' Responses to Undertakings, Ms. Posada identified two topics "for discussion". The first concerned her desire to have POPS' trade name returned to POPS. She explained that she wanted to be able to use POPS with her spouse, for the purposes of her research activities and for certain dealings with the government, for which she needed to transact through a company. She noted that Mr. Hotte, whom she went to see "to close POPS' accounts and to do her personal accounting," had advised her that it made more sense to do those activities through POPS, than to establish another company. That said, she stated that IDP could continue to use POPS' trade name for billing purposes. She ended that part of her e-mail by asking Messrs. Chapuis and Bazoge what they thought. In my view, this clearly reflected a prior understanding to close POPS. This understanding is also reflected in Mr. Chapuis' response to that e-mail, in which he stated that he did not have a problem with what she was proposing to do, so long as POPS didn't later sue IDP (presumably, for using POPS' name), and so long as POPS did not engage in the same activities as IDP.

[103] Given all of the foregoing, I have no difficulty in finding that Ms. Posada was hired by IDP in early 2007 to develop the adaptations of Ceres sought by IDP. This included completing the work on Omega that the parties had jointly pursued since at least 1998, and developing the adaptations that would become known as Comex and Epsilon.

C. What rights, if any, do the Plaintiffs and IDP have in respect of Ceres, Comex, Epsilon and Omega?

[104] The Plaintiffs assert that they own the copyright in Ceres, Comex, Epsilon and Omega.

[105] In their Amended Statement of Claim, the Plaintiffs also maintain that Messrs. Chapuis and Bazoge proposed to Ms. Posada in late 2006 that she become a shareholder in IDP, so that they and IDP could gain access to the Software. However, during the hearing, and as discussed below, Ms. Posada conceded that she had previously granted Messrs. Chapuis and Bazoge a licence to use the Software in their business seminars. She maintained that such licence was granted without consideration (“à titre gracieux”).

[106] The Defendants maintain that Comex and Epsilon were entirely developed while Ms. Posada was an employee of IDP, and that they collaborated in the development of Omega, before and after Ms. Posada became an employee of IDP. While they do not assert any copyright in Ceres, Comex, Epsilon or Omega (Transcript, January 8, 2013, at pp 45-46), they claim that they have a licence to use each of those versions of the Software, pursuant to the terms of either a verbal agreement with, or an implied licence received from, Ms. Posada or POPS. In the case of Omega, they assert that their licence was obtained well before Ms. Posada became an employee of IDP.

[107] Given the evidence discussed below and in the immediately preceding section above, I agree with the Defendants’ position on these points. Among other things, the evidence discussed below demonstrates that:

- i) it has always been understood between the Parties that the Defendants had and would continue to have the right to use the Software; and
- ii) the Defendants have given a significant amount of consideration, over many years, in exchange for that right to use the Software.

[108] Mr. Bazoge testified that he began to use Ceres in his capacity as a Professor at UQAM in 1990, soon after purchasing that software from POPS, on behalf of UQAM, in September 1989. Mr. Chapuis began to use Ceres the following year, after purchasing a licence to use Ceres on behalf of the École Supérieure de Commerce in Tours [ESCT]. In the years that followed, they also began to use Ceres outside of UQAM and ESCT, as part of a friendly arrangement with Ms. Posada, pursuant to which Messrs. Bazoge and Chapuis were allowed to use Ceres in exchange for granting Ms. Posada access to their seminars and the supporting materials used in those seminars (*Interrogatoire après défense de M. Phillippe Chapuis*, October 20, 2010, at p 51). As confirmed by Ms. Posada, by approximately 1996, IDP was provided with a version of Ceres that displayed the IDP logo on certain outputs (Transcript, January 10, 2013, at p 163). An example of this is a marketing report, dated 2001, which appears at Tab 16 of the JBD.

[109] During the discovery phase of this proceeding, Ms. Posada also conceded that she had verbally granted to IDP the right to use Ceres (see for example, *Interrogatoire avant défense [IAD] de Mme Elizabeth Posada par Me Simon Grégoire*, July 16, 2009, at p 49-52). At one point, she characterized this right as having been given as “a sort of commission or whatever, on the sale of a large number of simulations in France” (IAD, at p 65). This verbal grant of a right to use Ceres and its adaptations, given during the parties’ collaboration in the 1990s, was also confirmed by Ms. Posada during the hearing of this proceeding (see for example, Transcript, January 10, 2013, at pp 165, 167-9).

[110] As discussed at paragraph 88 above, in 1998, the agreement that IDP and POPS entered into with Vlady specifically provided that “the company IDP Inc. is invited to participate in the development of the simulation and, in this capacity, has the right to use [the simulation software] without further consideration – à titre gracieux”. Although Vlady subsequently failed to contribute much to the development of the Software, the fact remains that Ms. Posada, on behalf of POPS, confirmed in this document her prior verbal grant to IDP of the right to use the Software. In my view, it was implicit in this contract that this grant included the right to use any future enhancements of the Software that resulted from the IDP’s collaboration with Ms. Posada.

[111] This understanding between the parties is also reflected in the 2000 Agreement, which may not have been signed, but was acted upon by the parties. As discussed at paragraphs 89 and 90 above, that agreement provided that “IDP (Philippe et Benoît) continue to participate in the development of the product (strategy, marketing, finance).” It also provided that each of POPS and IDP would have the right to use “[e]ach new version of the simulation (whether named CERES or otherwise) and each new version of the course materials.”

[112] IDP’s right to at least use Ceres and its adaptations is also reflected in the document entitled IDP + POP = IDP, discussed at paragraph 96 above, which stated that Ms. Posada would receive an equity interest of 25% in IDP, “in exchange for POPS and the commercial rights to Ceres.” The same is true of the e-mail dated November 23, 2006, discussed at paragraph 95 above, which stipulated that “IDP contributes its network and existing clients that use the simulation,” while “POP [*sic*] contributes Ceres and Omega at their future adaptations.” Although the parties ultimately did not pursue the form of collaboration that would have involved IDP merging with or

acquiring POPS, I am satisfied that it was generally understood between them in February 2007 that IDP would have the right to continue to use Ceres, and to use Omega and other future adaptations of the Software, including Epsilon and Comex, in exchange for ongoing access to IDP's pedagogical materials and various contributions to the development of the Software.

[113] As discussed above, Omega is the Windows version of Ceres that the parties have been collaborating to develop since at least 1998. Omega permits users to conduct simulations in four markets (eg, industrial west, industrial east, consumer west and consumer east). 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, which became an increasing focus of IDP's seminars (Transcript, January 9, 2013, at pp 117-118). According to Mr. Bazoge, whose testimony I accept, each of these versions of the Software were developed to work with IDP's pedagogical approach (*Interrogatoire après défense*, December 1, 2010 [BB IAD], at p 31).

[114] It is common ground between the parties that all of the development work that has been performed in respect of Ceres, Omega, Epsilon and Comex over the years has been confined to input and output files, and has not changed the "core" source code, or "motor" (including the calculation libraries) developed by Mr. Szendrovits.

[115] Ms. Posada maintains that Omega had been entirely developed before she became an employee of IDP. This is disputed by the Defendants, who maintain that it continued to have many

bugs and, to this day, still has not been completed. They concede that it is possible to use Omega in simulation seminars, but only if one of Mr. Bazoge, Mr. Chapuis or Ms. Posada is involved in actually operating the software (Transcript, January 9, 2013, at p 130).

[116] I accept Ms. Posada's testimony that she spent hundreds of hours designing and developing Omega (Transcript, January 8, 2013, at pp 85-86), and that she paid third parties to assist her in that regard. However, in my view, the evidence also persuasively establishes that (i) IDP has been intimately involved in the development of Omega, dating back to at least 1998; (ii) after Ms. Posada became an employee of IDP, significant development work continued to be required to enable the parties to productively work with Omega (see, for example, Transcript, January 9, 2013, at pp 99-102, 111-112, 129 and 205; and January 10, 2013, at pp 111 and 116); and (iii) Ms. Posada was paid by IDP to, among other things, oversee the completion of Omega, which had been the subject of the parties' joint collaboration since at least 1998.

[117] Turning to Epsilon and Comex, it is common ground between the parties that those versions of the Software were developed to their existing state during the period that Ms. Posada was employed by IDP. It appears that Comex has never been operational while Epsilon continues to have many "bugs," but can be used, at least by Messrs. Bazoge and Chapuis, and Ms. Posada (*Interrogatoire avant la défense de Philippe Chapuis*, at pp 39-41; BB IAD, at pp 29-30).

[118] I am satisfied that the document entitled "BB-E1 Contributions of IDP to the simulation [software] since 1998", and addressed in Mr. Bazoge's testimony (Transcript, January 9, 2013, at pp 96-100) substantially reflects the considerable consideration that has been provided by IDP in return

for at least a non-exclusive licence to use Ceres, Omega, Epsilon and Comex. That consideration can be summarized as follows:

- i) ongoing conceptual contribution to the development of the Software, dating back to the early 1990s, including during hundreds of meetings that were attended by one or both of Messrs. Chapuis and Bazoge (see also Transcript, January 9, 2013, at pp 113-116);
- ii) extensive involvement in testing and providing feedback on the various versions of Ceres, and its adaptations, including Omega, Epsilon and Comex, that have been developed for use in IDP's business simulation seminars;
- iii) contributing approximately half of the compensation that was paid to Vlady (Transcript, January 10, 2013, at p 161);
- iv) attending various meetings to assist with the work that was conducted by Mr. Romero;
- v) developing various Excel inputs for the Software (Transcript, January 9, 2013, at pp 97 and 102);
- vi) development of macros related to certain output files of Ceres;
- vii) paying approximately \$59,000 to Ms. Posada to, among other things, oversee the development of the Software,* while she was employed with IDP; and

viii) paying Anersys Inc (Mr. Davy Fraser) approximately \$6,500 to assist with the development of Epsilon.

* While BB-E1 indicates that this salary was paid in respect of Epsilon, I am satisfied that it was also paid in respect of the other functions that Ms. Posada performed for IDP, including overseeing the completion of Omega (“making it happen”), and the functions summarized at paragraph 116 above.

[119] In addition to the foregoing, other contributions by IDP to the ongoing development of the Software included developing a printer patch, known as PTR Laser, to permit Ceres outputs to be printed on a laser printer; and arranging for various programmers including Messrs. Kogovsek, Mayer, Amado and Trepanier to test and provide input to Ms. Posada on the Software (Transcript, January 9, 2013, at pp 97-99 and January 10, 2012, at p 14).

[120] Given all of the foregoing, I am satisfied that Ms. Posada, on behalf of POPS, granted at least an implied, 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 (*Tremblay v Orio Canada Inc*, 2013 FC 109, at para 53); *Robertson v Thompson Corp* (2001), 15 CPR (4th) 147, at para 161; *Cselko Associates Inc v Zellers Inc* (1992), 44 CPR (3d) 56, at 59). Indeed, it is arguable that the 1998 written agreement that the parties entered into with Vlady, as well as the 2000 Agreement that was at least verbally agreed upon and then implemented, conferred an explicit licence to IDP to use the Ceres adaptations that became Omega, Epsilon and Comex. In light of my finding with respect to the implied licence that was granted to IDP, it is not necessary to make a definitive finding regarding the existence of an explicit licence in this regard.

[121] Given my finding that POPS did not own the copyright in the core source code of Ceres that was developed by Andrew Szendrovits until it received an assignment of that copyright from Les Szendrovits in October 2008, POPS granted the aforementioned implied licence to IDP in its capacity of exclusive distributor of the software, pursuant to the 1985 Agreement.

[122] In view of the fact that the Defendants did not assert full or joint ownership rights in any of the adaptations of Ceres that were developed by or on behalf of IDP, or by Ms. Posada or POPS in collaboration with IDP, it is not necessary for me to determine whether IDP or the individual defendants own any copyright in those adaptations. Indeed, given that those issues were not litigated in this proceeding, it would not be appropriate for me to do so. However, I am satisfied that the Defendants have rebutted any presumption of POPS' ownership of Epsilon and Comex that may arise by virtue of the fact that POPS registered ownership in "Epsilon a.k.a. Comex" on August 24, 2010 (*Samsonite*, above; *Oakley*, above). Accordingly, as requested by the Defendants, I will Order that the Plaintiffs' Certificate of Registration in respect of "Epsilon a.k.a. Comex" be struck from the Register of Copyrights.

D. Were the Plaintiffs entitled to revoke any rights that they may have granted to IDP to use the Software?

[123] On October 20, 2008, counsel for the Plaintiffs demanded, among other things, that IDP "immediately cease any and all use, modifications, or any other dealings or activities with the Software ..."

[124] The Plaintiffs assert that POPS was entitled to revoke the licence that it had previously granted to IDP to use the Software, because that licence had been granted for no consideration (“à titre gracieux”), based on the relationship of good faith and trust that existed between Ms. Posada, Mr. Chapuis and Mr. Bazoge.

[125] The Plaintiffs further assert that such licence was predicated upon the recognition by IDP of POPS’ exclusive ownership of the Software, and upon Ms. Posada’s continued participation in IDP. They maintain that when Mr. Bazoge wrote to Ms. Posada to state that he and Mr. Chapuis had taken note of her desire to leave IDP and proposed that she terminate her involvement in IDP on September 30, 2008, that trust was breached and an important basis upon which IDP’s licence to use the Software was predicated no longer existed. They add that this trust was further breached, and that the remaining basis upon which the licence was predicated ceased to exist, when Mr. Chapuis claimed, in an e-mail dated October 23, 2008 [the Contested E-mail], that the intellectual property rights in Omega, Comex, Epsilon and variations thereof belonged to IDP.

[126] As a result of the foregoing, the Plaintiffs maintain that POPS was entitled to revoke IDP’s licence, because a licence granted without consideration may be revoked at will. They add that to the extent that the Defendants may be said to have provided consideration in exchange for their licence to use the Software, Mr. Chapuis’ declarations (to Mr. Decoste on October 9, 2008 and to Ms. Posada in the Contested E-mail) of ownership of the Software and his decision (with Mr. Bazoge) to purchase Ms. Posada’s shares in IDP, constituted a fundamental breach of the parties’ agreement and entitled her to revoke the licence and to generally refuse to perform under that agreement.

[127] For the most part, I disagree with the Plaintiffs' positions on these points.

[128] As discussed in the immediately preceding section above, IDP provided substantial consideration in exchange for an explicit or implied licence to use and to continue to develop the Software. That consideration was provided pursuant to an explicit or verbal agreement, and was further evidenced by a course of conduct pursued by the parties over the course of many years. Accordingly, POPS was not entitled to unilaterally revoke that licence (*Katz (Michael Katz Associates) v Cytrynbaum* (1983), 76 CPR (2s) 276, at para 19 (BCCA), citing H G Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed (Toronto: Carswell, 1967), at pp 339-340); see also (J S McKeown, *Fox, Canadian Law of Copyright and Industrial Designs*, 4th ed, (Toronto: Carswell, 2009) at 19:4(e); and *Winter Garden Theatre v Millenium Products*, [1948] A.C. 173, at 193 and 198).

[129] As an aside, it may be noted that such consideration exceeded, by a very substantial margin, the \$2,000 that Ms. Posada charged for licences to use the Software until approximately 1996 (it appears that Ms. Posada has not sold any licences since approximately that time – Transcript, January 10, 2013, at 156), particularly when one considers the hundreds of meetings attended by Messrs. Chapuis and Bazoge to contribute to the development of the Software, and their other very considerable personal efforts to advance the development of the Software over many years.

[130] With respect to the allegation that IDP's licence to use the Software was predicated on Ms. Posada's continued involvement in IDP, this was not supported by any evidence, apart from Ms.

Posada's bald assertions. Based on my review of the other evidence adduced in this proceeding, there was no such understanding between the parties. Indeed, from the perspective of IDP, this would not have made sense, as its considerable investment over many years in the Software would have been vulnerable to the precise type of unilateral decision to withdraw from IDP that Ms. Posada made when she informed Mr. Bazoge that she wanted things to return to "the way they were", before she joined IDP (Transcript, January 9, 2013, at p 135-7; see also page 2 of the Contested E-mail).

[131] I will now turn to the egregious breach of contract which the Plaintiffs have alleged on the part of the Defendants. The evidence reviewed in the two immediately preceding sections above demonstrates that the fundamental terms of the explicit and implicit agreements between the parties were that IDP would receive a licence to use and to continue to develop the Software in exchange for:

- i) contributing in various important ways to the development of the Software; and
- ii) providing Ms. Posada access to IDP's pedagogical materials. In my view, the evidence demonstrates that IDP upheld its side of this bargain.

[132] That said, it appears to have been always understood between the parties that POPS or Ms. Posada would retain the copyright in Ceres and Omega. Among other things, this is reflected in the agreement that was entered into with Vlady in 1998 and in the e-mail dated November 23, 2006 that Mr. Chapuis sent to Ms. Posada, which are discussed at paragraphs 88-95 above. However, there was no mention in the latter e-mail or elsewhere of who would own the copyright in other adaptations of the Software, including Epsilon and Comex. Accordingly, the situation regarding the

ownership of the copyright in those adaptations is less clear, particularly given the parties' understanding that POPS would close, as part of the somewhat different type of collaboration that they ultimately pursued. This latter fact also raises a question about whether the parties intended that POPS or Ms. Posada would retain the copyright in Omega, in the context of the form of collaboration that the parties eventually settled upon.

[133] Ms. Posada and Mr. Decoste both testified that they interpreted Mr. Chapuis' e-mail, dated October 9, 2008 (which is included at p. 164 of the JBD) as having conveyed the position that he or IDP owned the copyright in the Software (Transcript, January 8, 2013, at p 167; January 9, 2013, at p 17). However, I do not find that evidence to be persuasive. Both of them were aware that Mr. Decoste had been dealing with Mr. Chapuis because Ms. Posada had been on sabbatical (Transcript, January 9, 2013, at 12). In this context, I find it difficult to accept their interpretation of Mr. Chapuis' suggestion to Mr. Decoste that they meet to try to resolve his problem with the Software before he left on a six-day trip at the end of that week, because if they did not meet before that time, Mr. Decoste would have nowhere else to turn, presumably because no one else would be available to help him.

[134] In my view, Mr. Chapuis' e-mail to Mr. Decoste cannot reasonably be construed as having articulated any claims to the copyright in the Software, and could not provide a legitimate basis for the purported revocation that was set forth in her counsel's letter to the Defendants dated October 20, 2008 (included at Tab 32 of the JBD) and again in a second letter sent by her counsel to the Defendants, dated October 21, 2008 (included at Tab 33 of the JBD). To the extent that Mr. Decoste may have been relying on something other than the aforementioned e-mail to support his belief that

Mr. Chapuis had claimed to own the copyright in Ceres or any of its adaptations, I am not satisfied that any such claim was ever made to Mr. Decoste by Mr. Chapuis.

[135] It was not until Mr. Chapuis sent the Contested E-mail on October 23, 2008 that anyone on behalf of the Defendants raised a question about the ownership of the Software. That e-mail responded to an e-mail earlier in the day from Ms. Posada, and to the aforementioned letters from her counsel dated October 20, 2008 and October 21, 2008. In her e-mail, Ms. Posada essentially repeated the positions taken in her counsel's letters, to the effect that POPS owned the rights in the Software and that her collaboration with Messrs. Chapuis and Bazoge had always been predicated on their recognition of POPS' rights in the simulation software.

[136] In his response, Mr. Chapuis explicitly confirmed that he had never made any claim to the copyright in Ceres. However, no doubt as a result of the purported revocation of IDP's right to use Ceres, he requested that she provide a copy of the copyright assignment from Andrew Szendrovits or McMaster University. He observed that it would be difficult to negotiate with her in good faith without such proof, and he wondered why, if she had that proof, she would refrain from sharing it with him and Mr. Bazoge.

[137] Mr. Chapuis also observed in that e-mail that Omega, Comex and Epsilon had been developed over the course of the preceding 18 months by employees of IDP, and that it was consistent with the law to state that the intellectual property in that software belonged to IDP. That said, he stated that if she could establish the contrary, they would have the basis for a useful discussion that could enrich the meeting that he and Mr. Bazoge hoped to have with her.

[138] In my view, it is clear from the language in the Contested E-mail that Mr. Chapuis was simply raising questions that he and Mr. Bazoge understandably wished to discuss with Ms. Posada, particularly given the position that she had taken regarding their rights to continue to use the Software. Based on the evidence adduced in this proceeding, it was entirely legitimate for Mr. Chapuis to raise those questions.

[139] Contrary to the assertions of the Plaintiffs, the position taken by Mr. Chapuis in his e-mail dated October 23, 2008, which formed the basis for the evolving position that the Defendants took in the ensuing months in the context of settlement discussions, did not constitute a fundamental or other breach of contract that may have entitled the Plaintiffs to revoke the licence to use the Software that they had at least implicitly granted to the Defendants. In my view, the terms of that licence did not permit the Plaintiffs to revoke the licence for the reasons that have been advanced by the Plaintiffs. Among other things, such action on the part of the Plaintiffs was completely inconsistent with the basis upon which the parties collaborated and with their general course of conduct over many years. Indeed, the same is true with respect to the Plaintiffs' withholding from the Defendants of copies of the adaptations of the Software that Ms. Posada was responsible for developing, on behalf of IDP.

E. Did the Defendants infringe any copyright that POPS or Ms. Posada may have owned in any versions of the Software?

[140] Given my conclusions above, I find that the Defendants did not infringe any copyright that POPS or Ms. Posada may have owned in any versions of the Software (*Ritchie v Sawmill Creek Golf & Country Club Ltd* (2004), 35 CPR (4th) 163, at para 22).

F. Remedies

[141] Given my conclusions above, the Plaintiffs are not entitled to any damages from the Defendants, to an accounting for profits, or to any of the other remedies that they have sought in this proceeding, other than a declaration that they own the copyright in Ceres.

[142] In their Re-Re-Amended Counterclaim dated January 11, 2013, the Defendants seek:

- i) The expungement of the Certificates of Registration of Copyright in the name of POPS (as owner) and Ms. Posada (as author), in respect of Ceres and “Epsilon a.k.a. Comex”, respectively;
- ii) Confirmation that IDP, Mr. Bazoge and Mr. Chapuis have a licence in perpetuity to use Ceres, Omega, Epsilon and Comex for all purposes related to IDP’s pedagogical activities;
- iii) \$10,000 in punitive and exemplary damages; and
- iv) Solicitor-client costs in the amount of \$100,000.

[143] For the reasons discussed in section V.A. of these reasons for judgment, the Defendants' request that POPS' Certificate of Registration of Copyright in respect of Ceres be struck from the Register of Copyrights will be denied.

[144] For the reasons discussed in Section V.C. of these reasons, the Defendants' request that POPS' Certificate of Registration of Copyright in respect of "Epsilon a.k.a. Omega" be struck from the Register of Copyrights will be granted.

[145] For the reasons discussed in Section V.D. of these reasons, the Defendants' request for confirmation that IDP has a licence to use Ceres, Omega, Epsilon and Comex for all purposes related to IDP's pedagogical activities will be granted.

[146] I will now turn to the Defendants' counterclaim for \$10,000 in punitive and exemplary damages.

[147] The Defendants base their claim for punitive and exemplary damages on, among other things, (i) the manner in which they were treated by the Plaintiffs from the time of their dispute until the hearing in this matter, despite the Defendants' good faith efforts to settle the dispute; and (ii) the refusal of the Plaintiffs to provide some proof of their ownership of copyright in Ceres before the hearing in this matter.

[148] Punitive damages may be awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency." This "test thus limits the award to

misconduct that represents a marked departure from ordinary standards of decent behaviour”
(*Whiten v Pilot Insurance Co*, 2002 SCC 18, at para 36).

[149] I am very sympathetic with the Defendants’ claim for punitive and exemplary damages, particularly given that they did not claim other damages. It is readily apparent from the evidentiary record that they have suffered significantly from the course of conduct adopted by Ms. Posada. However, I am not satisfied that they have established that such conduct meets high test for awarding such damages.

[150] The most questionable conduct in this regard included:

- i) the disingenuously justified purported revocation of the Defendants’ implicit licence to use the Software, which the Defendants had spent many years helping to develop, at great expense, in both monetary and non-monetary terms (Plaintiffs’ letters to the Defendants, beginning on October 20, 2008);
- ii) the repeated threats of legal action against IDP, as well as against Messrs. Bazoge and Chapuis in their personal capacity, should they continue to use the Software in their seminars, including in a seminar that had been scheduled for the first week of November 2008, without first unequivocally acknowledging that “IDP has absolutely no ownership rights, including copyright, to the source code of the Software as it existed prior to February 2007, or any of its versions” (Letter dated October 24, 2008, from Plaintiffs’ counsel to the Defendants);
- iii) the refusal to meet to discuss the issues in dispute with respect to the Software, unless the Defendants first expressly recognized within 72 hours the exclusive

ownership of the Software by POPS (Letters dated October 20, 2008 and October 21, 2008, from Plaintiffs' counsel to the Defendants);

- iv) the refusal to provide any proof of their ownership of the copyright in Ceres, except before a Court (Letter dated October 31, 2008, from Plaintiffs' counsel to the Defendants' counsel);
- v) the sending of notices to persons with whom IDP was collaborating, informing them, among other things, that (i) "[c]opyright in the Software is entirely and exclusively owned by POPS Ltd", (ii) neither IDP nor Messrs. Bazoge and Chapuis "have any rights or authority to instruct you as to using or dealing with the Software in any manner whatsoever", and (iii) they should immediately cease any and all use or other dealings or activities with the Software, other than strictly pursuant to the personal instructions from Elizabeth Posada" (Letters from the Plaintiffs' counsel to Ms. Marie-Agnes Chayane and Variem Inc, dated November 2, 2008);

[151] I recognize that much of the aforementioned conduct persisted over a significant period of time and caused great emotional distress and economic harm to the Defendants, as they substantially scaled down their simulation seminar activities in the face of the Plaintiffs heavy handed threats. However, in my view, that conduct did not rise to the exceptional level required to establish punitive and exemplary damages.

[152] That said, the conduct unquestionably and significantly increased the costs incurred by the Defendants to defend this action. This is a factor that I will take into account in deciding how to

allocate the fixed lump sum amount that the parties agreed upon as representing the legal costs in this proceeding.

VI. Costs

[153] At the end of the hearing in this matter, I invited the parties to try to reach an agreement on a lump sum amount of costs to be awarded in this matter, by January 18, 2013. On January 17, 2013, counsel to the Plaintiffs wrote to the Court to advise, among other things, that the parties had agreed that the costs of these proceedings can be fixed at the global sum of \$20,000.

[154] As reflected in paragraph 2 of that letter, this agreement was without prejudice to the Defendants' request for solicitor-client costs in the amount of \$100,000.

[155] For the reasons set forth below, I am not satisfied that it would be appropriate to award solicitor-client costs in this case.

[156] Solicitor-client costs "are very rarely granted" and are generally only awarded if a party displays "reprehensible, scandalous, or outrageous conduct" or if such costs are justified by "reasons of public interest" (*Quebec (Attorney General) v Lacombe*, 2010 SCC 38, at para 67; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 77; *Young v Young*, [1993] SCJ No 112, at para 251).

[157] In addition to being exceptional, solicitor-client costs are generally awarded only in relation to reprehensible, scandalous, or outrageous conduct connected with the proceeding in which such costs are sought (*Apotex Inc v Canada (Minister of National Health and Welfare)*, [2000] FCJ No 1919, at paras 7-8).

[158] In *Microsoft Corp v 9038-3746 Quebec Inc*, 2007 FC 659 at para 16, Justice Harrington defined “reprehensible,” “scandalous” and “outrageous” as follows:

"Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things, "outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive (see: *Oxford Canadian Dictionary*).

[159] The Defendants claimed solicitor-client costs in this matter based on the following conduct, which they allege was reprehensible:

- i) deliberately appropriating the copyright in Ceres when they knew that the copyright in the core source code was held by Mr. Andrew Szendrovits or by McMaster;
- ii) cavalierly persisting in reprehensible conduct from the time the parties dispute erupted, until trial, including by:
 - a) sending a series of heavy handed letters demanding shortly after the dispute between the parties erupted, in October 2008, demanding, among other things, that the Defendants cease using the Software;

- b) refusing to produce various documents, such as documents evidencing their ownership of copyright in Ceres;
 - c) permitting the Defendants to invest significant time and money in developing the Software, without alerting them of the Plaintiffs' intention to maintain sole ownership of the copyright in the Software; and
 - d) refusing to identify the person who signed the McMaster Assignment on behalf of McMaster.
- iii) knowingly initiating the action in this matter without any grounds for doing so;
and
- iv) conducting themselves in a manner that significantly increased the legal costs incurred by the Defendants in defending this action.

[160] In addition, the Defendants claim that it was outrageous for the Plaintiffs to repeatedly refuse to provide certain documents in response to undertakings, and to delete certain paragraphs from their Statement of Claim (namely, paragraphs 2 and 56 – 70), after being ordered to do so by Prothonotary Morneau.

[161] It is immediately apparent that some of the grounds upon which the Defendants have claimed solicitor-client costs are the same as the grounds upon which they claimed punitive and exemplary damages, which are discussed at the end of the immediately preceding section above.

[162] In my view, the grounds identified by the Defendants do not meet the test of “reprehensible” “scandalous” or “outrageous” conduct, individually or in aggregate.

[163] Specifically, with respect to the alleged appropriation of the copyright in Ceres, I am not satisfied that Ms. Posada knew that copyright in the core source code of Ceres was still held by Mr. Andrew Szendrovits at the time she requested a Certificate of Registration, in 1991.

[164] With respect to the investments in the Software that were made by the Defendants, the preponderance of the evidence suggests that it was always understood between the parties that Ms. Posada or POPS would continue to own the copyright in Ceres, notwithstanding the contributions to the development of Ceres that were made by the Defendants. (See, for example, the agreement entered into with Vlady, at Tab 14 of the JBD, and the e-mail dated November 23, 2006, from Mr. Chapuis to Ms. Posada, at Tab 6 of the JBD). The situation with respect to Omega, Epsilon and Comex is less clear, and in any event, it is certainly not sufficiently clear to support the Defendants’ claims to solicitor-client costs.

[165] With respect to the alleged refusal to produce certain documents, whether in response to undertakings or otherwise, and the refusal to identify the person who signed the McMaster Assignment, I am very sympathetic to the Defendants’ claims. I also have no doubt that this conduct contributed to the Defendants’ costs being significantly higher than they otherwise would have been, had the Plaintiffs conducted themselves in less cavalier and more appropriate manner. The same is true with respect to the conduct that the Defendants also relied upon to support their claim for punitive and exemplary damages. Had the parties not reached an agreement on a lump sum

award of costs in this manner, I certainly would have seriously considered awarding the Defendants a further amount to reflect these additional costs that they were forced to incur. That said, I am not satisfied that this conduct rises to the level of being “reprehensible” or “outrageous”. Indeed, in fairness to the Plaintiffs, there is evidence that they made some efforts to obtain some of the documents in question, and to identify the person who signed the McMaster Assignment.

[166] With respect to the Plaintiffs failure to redact certain paragraphs from their Amended Statement of Claim, it is not clear to me that this was an intentional refusal to abide by Prothonotary Morneau’s order.

[167] Finally, I am not satisfied that the Plaintiffs knowingly initiated this action without any grounds for doing so. That said, I find it troubling that they continued the action even after the Mr. Chapuis confirmed, on October 20, 2010, that IDP was not claiming ownership of any copyright in Ceres (Chapuis IAD, at 48). In this regard I note that Ms. Posada testified that upon hearing this confirmation, she and her counsel turned to each other and stated: “Well, why are we here?” This is another factor that I have taken into account in determining how to allocate the fixed lump sum amount that the parties agreed upon as being the legal costs of this proceeding.

[168] Given the foregoing, the Defendants’ claim for solicitor-client costs in the amount of \$100,000 will be denied.

[169] However, given that the Defendants largely prevailed in this action and that the Plaintiffs were only successful in obtaining confirmation that they own the copyright in Ceres – something

that the Defendants confirmed in October 2010 they were not asserting on their own behalf, I will award the Defendants' the full amount of the fixed lump sum amount of \$20,000 that the parties agreed upon. In my view, this award is particularly appropriate in light of certain conduct engaged in by the Plaintiffs, discussed above. I am satisfied that such conduct resulted in significantly increasing the overall costs incurred by the Defendants in defending this proceeding, relative to the costs they would have incurred had the Plaintiffs conducted themselves in a more appropriate manner.

JUDGMENT

THIS COURT DECLARES, ADJUDGES AND ORDERS that:

- i) The Plaintiff PLANIFICATION-ORGANISATION-PUBLICATIONS SYSTÈMES (POPS) LTÉE [POPS] is the owner of the copyright in the software known as Ceres, subject to any rights that may be asserted and established by Mr. Jérôme Doutriaux and Mr. Jean-Paul Sallenave.

- ii) The Defendant 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, 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.

- iii) The Defendants did not infringe the POPS' copyright in Ceres or any copyright that POPS or Ms. Elizabeth Posada may have in any of Ceres' adaptations, as alleged in the Plaintiffs' Amended Statement of Claim, dated June 29, 2009 [ASC].
- iv) The Certificate of Registration of Copyright, dated August 24, 2010, and identified by the registration number 1079833, in respect of "Epsilon a.k.a. Comex," which identifies POPS as the owner and Elizabeth Posada as the author, shall be struck from the Register of Copyrights.
- v) The Plaintiffs are not entitled to damages, an accounting for profits or any of the other relief that they claimed in paragraphs 1(a)(iii), 1(b) - (l) of their ASC.
- vi) The Plaintiffs shall forthwith pay costs in the amount of \$20,000 to IDP.
- vii) The Defendants are not entitled to punitive and exemplary damages or to solicitor-client costs, as alleged in their Re-Re-Amended Statement of Defence and Counterclaim, dated January 11, 2013.
- viii) The Plaintiffs 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, including the source code, that were developed between 1998 and the effective date on which Ms. Posada ceased to be an employee of IDP, and any prior versions of such software that the

defendants may identify and request in writing from the Plaintiffs within 30 days of the date of this Order, and that are reasonably available to the Plaintiffs.

"Paul S. Crampton"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-583-09

STYLE OF CAUSE: PLANIFICATION-ORGANISATION-PUBLICATIONS
SYSTÈMES (POPS) LTÉE and ELIZABETH POSADA v
9054-8181 QUÉBEC INC, PHILIPPE CHAPUIS and
BENOIT BAZOGE

PLACE OF HEARING: Montreal, Quebec

DATES OF HEARING: January 8 - 11, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** CRAMPTON C. J.

DATED: April 25, 2013
Amended June 17, 2013

APPEARANCES:

Daniel F. O'Connor

FOR THE PLAINTIFFS

Simon Grégoire
Yaël Lachkar

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Daniel F. O'Connor
Barristers and Solicitors

FOR THE PLAINTIFFS

Simon Grégoire
Yaël Lachkar
Borden Ladner Gervais s.r.l. s.e.n.c.r.l

FOR THE DEFENDANTS