IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Steel JJ.A.

B E T W E E N :

KELLOGG BROWN & ROOT INC.	)	***R. J. Handlon,***
	)	***R. P. Sokalski*** *and*
(Plaintiff) Respondent	)	***K. A. Johnston***
	)	*for the Appellants*
	)	
- and -	)	***D. W. Leslie*** *and*
	)	***D. J. Kroft***
	)	*for the Respondent*
AEROTECH HERMAN NELSON INC.	)	
and ***PAUL R. SIGURDSON***	)	*Appeal heard:*
	)	***November 18 and 27, 2003***
(Defendants) Appellants	)	
	)	*Judgment delivered:*
	)	***May 4, 2004***

SCOTT C.J.M. and STEEL J.A.

1 The plaintiff, Kellogg Brown & Root Inc. (Brown), claimed that in purchasing from the defendant, Aerotech Herman Nelson Inc. (Aerotech), 282 portable heaters (on behalf of its client, the United States government, for immediate use in Hungary), it was the victim of a fraud and entitled to rescission of the contract. The trial judge so found. Both conclusions are challenged on this appeal.

2 Brown is one of the world's largest engineering and construction firms with its head office in Houston, Texas. It has provided long-term service to the U.S. government, including the military, since at least 1992.

In early December, 1995, Brown was retained to provide logistical support in the establishment of a life-support staging area for the U.S. military near Kaposvar. The staging area was to include living quarters and services for up to 20,000 soldiers, many of whom would be accommodated in large "festival" tents. Given the time of year and the anticipated weather conditions in Hungary, the trial judge found there was an urgent need for heat, not only to provide essential warmth but also to reduce the snow load on the roofs of the tents.

3 As a result of the intervention of an entrepreneur from Florida, Steven Riggins, Brown was put in contact with Aerotech, initially with Aerotech's sales manager, Peter Marykuca, and thereafter with the defendant, Paul R. Sigurdson, the president and operating mind of Aerotech.

4 Matters quickly came to a head on Saturday, December 16th. Discussions between Riggins and Sigurdson recommending the supply of Herman Nelson H82 heaters were followed by direct discussions between Sigurdson and Tom Barrow, Brown's purchasing department's supervisor in Houston, together with Ken Dreiling, a field buyer for Brown charged with the task of scouring the heaters. Several written proposals, accompanied by trade material and brochures, were sent by Sigurdson firstly to Riggins and then directly to Brown. Aerotech's material asserted that the Aerotech heaters were "new product." Late that afternoon in a conversation involving Barrow, Dreiling and Sigurdson, it was agreed that Aerotech, in order to expedite the installation and operation of the heaters in Hungary (Sigurdson having earlier indicated that it would take six to eight weeks to complete the

testing and installation of the heaters), would send five of its technicians to Hungary to arrive concurrently with the heaters. On this understanding, Brown prepared and forwarded a facsimile notice of award to Aerotech for 240 H82 heaters later that afternoon. On December 18th, this was increased to 282 heaters. As agreed upon, the purchase price in the final purchase order was $1,392,071.50, made up as follows:

> 56 spare parts kits: $39,312 (U.S.) ($702 each);
>
> 282 bare base recirculating heaters: $1,319,760 (U.S.) ($4,680 each);
>
> 15 manuals: $499.50 ($33.30 each);
>
> cable (not to exceed $7,500); and
>
> five technical representatives (not to exceed $25,000 at a rate of $500 per day per person).

Payment in full was required before delivery.

5 Following the wiring of the full purchase price by bank draft on December 19th, the first shipment of 141 heaters was air freighted at Brown's expense from Winnipeg to Kaposvar arriving on December 21st, and the second load the next day. The cost to Brown was $321,905.55 U.S.

6 Immediately after the arrival of the heaters, it became apparent to Brown's representatives at Kaposvar that the heaters were not new, but were used and had numerous missing or broken parts.

7 On December 22nd, Joe Williams, Brown's overall procurement manager, and Dreiling spoke with Sigurdson. The conversation was not

pleasant. Sigurdson denied that the heaters were used or "couldn't be made operable," and insisted that they were new. When Williams suggested that the hour meters had been changed on the heaters, Sigurdson told Williams that he was a "f…ing liar." Williams insisted that the technicians be sent over immediately as promised (they did not arrive until January 4th). He told Sigurdson that Brown was rejecting the heaters and was not prepared to accept them until they were "up and operational."

8 Thereafter all efforts in Hungary, given the conditions there, were directed toward making the heaters work.

9 The technicians commenced work on January 5th but returned home a week later due to lack of progress and the continuing unavailability of spare parts and other accessories.

10 In February 1996, all H82 heaters were ordered in by Brown and were not used thereafter, with the exception of six heaters which inadvertently remained in the field – three operational – for another year or so.

11 On March 6, 1996, Brown's legal department provided written notice to Aerotech that the contract was being rescinded. Aerotech was asked to remove the heaters and reimburse Brown for all amounts paid, including the purchase price, transportation costs and any other costs incurred.

THE JUDGMENT AT TRIAL

12 The trial judge, in a thorough judgment, concluded that Brown "at all

times expected that the H82 heaters would be a new product" in keeping with the terms of the contract and that there "was an obvious intention to mislead the buyer [by Sigurdson], albeit the used state of the heaters was evident" (at para. 64). The terms of the contract she concluded were those set out in the formal purchase order from Brown to Sigurdson. Not only did Aerotech take no steps to advise Brown of the true state of the heaters, but (at para. 84):

> Instead, Aerotech took steps to disguise the fact that the goods were used by virtue of altering hour meters, painting, cleaning, reserializing and changing manufacture plates.

13 The trial judge had no difficulty in finding that all of the elements of fraud had been made out against Aerotech and Sigurdson, emphasizing (at para. 96):

> In this case, a reasonable buyer would have anticipated that new product was an intended and, indeed, an expressed term. There were clear misrepresentations by Aerotech and Sigurdson in this case.

And (at para. 117):

> The misrepresentations are replete throughout this case but the question of "new" versus "old," the technicians and the spare parts kits best exemplify these issues. The spare parts kits simply did not exist, albeit B & R were invoiced and paid approximately $40,000.00 (U.S.) for them.

Finally (at para. 107):

> I am mindful, as well, that B & R paid a significant sum for something that was valued in Aerotech's own financial statement at "nothing." I

> am persuaded to find it in these circumstances, based upon a heightened onus of proof, that fraud has been proven.

14 The more difficult issue for her (as for us) was whether Brown had accepted the goods by attempting, after December 22, 1995, to "make the heaters work" or by such conduct had otherwise disentitled itself to reject the heaters as it purported to do by letter dated March 6, 1996.

15 She held that Brown was entitled to rescission, on the basis that (at para. 93):

> In a number of cases it has been held that keeping and using goods for some time, in the hope that they might be made to work or be repaired, does not constitute acceptance. Again, as was stated in Fridman [*Sale of Goods in Canada*, 4th ed. (Toronto: Carswell, 1995) at 256]:
>
> > ... A buyer who points out the defects in the goods he has bought, and attempts to have the seller rectify those defects over a period of time, does not accept the goods for the purposes of the exercise of his right to reject them for failure to be of the right quality. .... the buyer is entitled to a reasonable time within which the seller has an opportunity to make the goods function in accordance with the quality they ought to have under the contract. Until such reasonable time has elapsed, and while the efforts by the seller are taking place, the buyer's conduct in retaining the goods does not amount to acceptance.

16 She found that Brown had repudiated the contract within a reasonable period of time. It was her conclusion that the fact that Brown had attempted to repair the heaters to make them useable did not constitute acceptance or bar rescission.

17 In the result, judgment was given in favour of Brown with conversion

to be made in Canadian dollars as at the date of the judgment.

18 Punitive damages were awarded in the amount of $50,000, but Brown's claims for solicitor/client costs were rejected.

CAN THE FINDING OF FRAUD BE MAINTAINED?

19 The trial judge found that "the state of the heaters was clearly at odds with what was anticipated by and contracted for by B & R" (at para. 73), and that Brown was the victim of a massive fraud. Aerotech and Sigurdson argue that in so finding the trial judge committed palpable and overriding error.

20 There can be no doubt that the most significant factual issue to be decided by the trial judge was: what did Brown contract for, new or used heaters? We have no hesitation in concluding that the trial judge got it right when she found that Brown had paid for and was entitled to new, unused H82 heaters. Close scrutiny of the evidence at trial, both documentary and *viva voce*, makes it clear that the overwhelming weight of evidence supports this finding.

21 We begin our review by noting Aerotech and Sigurdson did not plead that Brown agreed to buy used military surplus heaters; indeed, as found by the trial judge, Sigurdson's posture throughout the events that gave rise to this action was that Brown had received new heaters. Only Marykuca, whose testimony was resoundingly rejected by the trial judge (as she put it, there were a "great many inconsistencies and blatant inaccuracies uncovered

throughout the course of his [Marykuca] evidence" (at para. 66, and see para. 68)), testified that he had advised Brown on December 28, 1995, while in Houston that whether the heaters were supposed to be new or used was "a grey area." See paras. 56, 60 and 66-68 of the reasons.

22 The trial judge had the following additional comment about Marykuca's testimony (at para. 44):

> … [He] provided the court with a flavour of the company's business practices. At best those "practices" could be described as sharp. His evidence was at times evasive, confrontational and lacked the definitiveness necessary to render it totally reliable. Consequently, where the evidence diverges as to the substantive aspects of the "agreement," I accept that of the witnesses called on behalf of B & R.

23 Sigurdson did not testify at trial. The trial judge declined to draw an adverse inference from his failure to do so (though she might well have), deciding instead that: "The failure of Sigurdson to testify did not raise an adverse inference, it simply created a significant gap in the defendant's evidence" (at para. 45).

24 The scale of Aerotech and Sigurdson's deceit, as detailed in the reasons, is, if nothing else, impressive in its scale. See paras. 67-69. Aerotech, contrary to its written and verbal representations, never manufactured the type of heaters in question; they had been manufactured by others in the 1980s, previously used by the U.S. military, and purchased by Aerotech at a cost of about $45 a unit several years prior to the events that give rise to this litigation. Yet, Aerotech presented the heaters as "new product" and disingenuously attempted to persuade the trial judge that this

description simply meant that it was “new” to Aerotech, as opposed to new equipment.

25 Brown received anything but new heaters. Deficiencies were replete; virtually all of the 282 heaters (19 of which were H81 and not H82) were in various states of disrepair; 20 were not even transported from Winnipeg to Hungary given their condition.

26 Aerotech and Sigurdson argue that even if not new, the heaters were good, reliable military heaters and therefore fit, or capable of being made fit for the purpose. The trial judge demonstrably erred, they say, when she found that Aerotech technicians encountered “continued breakdowns” and “that a number … that had been made operational functioned only on a temporary basis” (at paras. 28 and 60). In support of their position Aerotech and Sigurdson presented an analysis of Brown’s service and use of the heaters as evidence that they were repairable and serviceable had Brown not prematurely sent Aerotech’s technicians home on January 12, 1996. According to this analysis, approximately 121 heaters were made operational for some period of time, either by Brown’s own staff or Aerotech’s technicians, with the hour meters showing an accumulated usage of approximately 14,000 hours. Furthermore, six heaters were subsequently found in the field about a year later, three of which were operational.

27 While there can be no doubt that massive efforts were made by Brown and Aerotech’s technicians to put the heaters into service, Aerotech’s analysis assumes that the meter readings were accurate, a dubious proposition at best given evidence of tampering. It also assumes that those

units initially repaired remained operational, which is not supported by the evidence of Murray Boles, one of Aerotech's technicians sent to Hungary, who stated a majority of the heaters they worked on that went out into the field were returned for additional work. Boles also testified that it would have taken two months for all the units to be made operational, assuming the availability of the appropriate equipment and replacement parts which as we have seen was not the case.

28 Critical to the effective and immediate operation of the heaters in Hungary was the role of Aerotech technicians, five in number, who were supposed to arrive concurrently with the heaters on December 22nd. This did not happen, nor did all the technicians possess the necessary expertise. They did not arrive until January 4th, two weeks after the delivery of the second load of heaters to Kaposvar. The trial judge summarized the evidence of Boles and Frank Nadoryk, another one of Aerotech's technicians who was in Kaposvar after January 5, 1996, as presenting a "bleak picture" (at para. 59). Nadoryk did not know how many heaters were operational on a continuous basis.

29 In Boles' opinion, communicated to Brown's representatives, the technicians were fighting a "losing battle." By January 11, 1996, the technicians had run out of cabling and parts, most critically the K8 safety relay without which the units should not be operated and "which could not be replaced unless it was taken from another H82 heater" (at para. 61). Brown had been told that Aerotech had spare parts kits to maintain the H82s in the field, but none was supplied. Significant cabling was also needed and

while testimony was presented by Aerotech staff to the effect that cabling had left Winnipeg before January 12th, it did not arrive prior to the departure of the technicians. In fact, the technicians never went to the field in Hungary to install the heaters. On January 11th, after a brief discussion with a Brown employee in Kaposvar, the decision was made that the Aerotech technicians should return home. Ironically, on the very same date, January 11th, Sigurdson advised Brown that the technicians were making "good progress" and that all 282 of the heaters should be operational before the end of the month.

30 In our opinion, there was ample evidence to support the trial judge's conclusion that there was little effective use of the heaters before the decision was made by Brown to discontinue the attempt to service or use the heaters, and that given the "totality of the state of the used heaters … and not each on an individual basis" (at para. 63), the heaters supplied were not fit for the purpose. In the result (at para. 94):

> B & R personnel, because of the urgency of the heat situation, endeavoured to utilize and render functional the used heaters that were supplied. B & R did not signify acceptance by an attempt to repair nor did it retain the goods without reasonable notice of rejection.

31 One small item, but one which the trial judge accurately characterized as demonstrating "the flavour of Sigurdson's business dealings" (at para. 71), relates to Aerotech's invoicing to Brown. In total, Aerotech's counterclaim was in excess of $400,000 for goods and services such as manuals and spare parts kits, overtime wages for staff, and repeat invoices

for accounts already paid. Only at trial was it acknowledged that none of these funds was in fact owing.

32 As to the applicable law, the trial judge correctly identified the four elements that are essential to sustain a finding of fraud and found all four to be present in the case before her (at para. 98). Aerotech and Sigurdson argue that she erred in finding that the defendants materially induced Brown to act to its detriment and that Brown had failed to prove damage. Both assertions are entirely without merit and deserve no further comment.

33 One other observation needs to be made. Aerotech and Sigurdson, though they did not put the matter quite so bluntly, seemed to be arguing that the action of Brown, the defrauded purchaser, cannot succeed because it did not exercise due diligence on its own behalf. This position is unsustainable as a matter of law. See *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, at para. 67. Indeed, due diligence is not a pre-condition to rectification either. As Binnie J., writing for the court, noted (at paras. 68-69):

> "[F]raud 'unravels everything'": *Farah v. Barki*, [1955] S.C.R. 107, at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch.D. 616, at p. 623).
>
> The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of

> caution because I relied implicitly upon your fairness and honesty'": *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at pp. 120-21.

RESCISSION

34 Was Brown entitled to reject the heaters and rescind the contract or, to put it another way, even if the right of rescission existed was the remedy lost or limited by the actions of Brown on and after December 22, 1995, in continuing to use, modify, or work on the heaters?

35 The trial judge found that Williams, on behalf of Brown, verbally rejected the heaters during his conversation with Sigurdson on December 22, 1995 (at para. 26), and that Brown's subsequent written rejection on March 6, 1996, was made "within a reasonable time" (at para. 94). As she summarized the matter in the conclusion to her judgment (at para. 115):

> The conduct of Aerotech and specifically Sigurdson in these dealings was, for the lack of a better word, "appalling." There was a fundamental and total breach of contract. The used heaters, absence of spare parts kits, invoicing practices and lack of qualified technicians on a timely basis were all materially different from what was represented or contracted for. This entitles the plaintiffs [*sic*] to repudiation. Further, there was no undue delay in B & R's rejection of the goods to negate that remedy.

36 The essence of Aerotech and Sigurdson's argument is that it was obvious to Brown by December 22nd that the heaters were not new and that with full knowledge of this fact Brown, by focussing its efforts on getting the heaters operational and putting some into use at field locations,

precluded itself from rejecting them. Brown's response is that given the urgent circumstances, there was no other practical course of action that could be taken. It was only after the technicians arrived and started to work on January 5th that it was realized (within a week) that the situation was hopeless and the technicians were sent home.

37 As we have already seen, there was ample evidence to support the trial judge's conclusion that Williams, in his conversation with Sigurdson on December 22nd, purported to reject the heaters, indicating that they would not be accepted "until they're up and operational." Of particular significance is that Sigurdson, while denying Williams' allegations (that the heaters were used, not new, had numerous missing and/or broken parts, there were no spare parts, cable or manuals, and that the hour meters had been tampered with), undertook to rectify all issues. He insisted throughout that the heaters were as bargained for and that with the assistance of Aerotech's expert technicians they would be operational in short order. Also of significance is the fact that Sigurdson never conceded at any time that the heaters were used military surplus, a contention he was only able to maintain because Brown, relying upon the representation and understanding that the heaters were new and a stock item, had not inspected them prior to payment and shipment.

38 From a business standpoint, given the reality of the situation "on the ground" in Kaposvar, Brown can hardly be faulted for "conditionally" rejecting the heaters only if they were not promptly "up and operational." But the question remains, to be addressed shortly, whether, by proceeding in

this way, Brown precluded itself, as a matter of law, from rejecting the heaters on March 6, 1996.

39 Before this court, counsel for Aerotech and Sigurdson argued that the conditions in Hungary were not nearly as drastic as Brown asserted and that there was in reality no real emergency facing Brown on and after December 15, 1995. This position is belied not only by the evidence of Brown's witnesses, which the trial judge accepted, but by the admission in the defendants' factum that Brown "had a one day window of opportunity to purchase heaters, as the festival tents were being constructed outside Kaposvar, Hungary, and there was a danger of these tents collapsing from snow." While Aerotech and Sigurdson in their factum went on to make the point that the "state of emergency" was not their responsibility, their concession nonetheless belies the later contention that Brown was exaggerating the sense of urgency.

40 Their second argument (the first being that Brown by its conduct in attempting to make the heaters work accepted the goods) that a significant number of the heaters were serviced and used in Kaposvar and put out into the field, has already been considered and rejected.

41 One final issue needs to be dealt with under this heading. Aerotech and Sigurdson argue that Brown is not entitled to rescission because it is not in a position to return the goods to the defendant Aerotech. This is because Brown's client, the U.S. government, became the owner of the heaters once they were delivered to Hungary and efforts were made to utilize the heaters in the field. Furthermore, the transfer of title (even if possession remains in

Brown) to the U.S. Army negates Brown's ability to repudiate the contract since *restitutio in integram* cannot be made. See *Hardy & Co. v. Hillerns and Fowler*, [1923] 2 K.B. 490 (C.A.) (referred to in *Alkins Brothers v. G. A. Grier & Sons Ltd.* (1924), 55 O.L.R. 667 at 676-77 (S.C.,App.Div.)).

42 With respect to this argument, the trial judge concluded (at para. 120):

> It is true that a government property number was placed upon these machines, however, that does not result in a finding that the government owns it. Further, there was no privity of contract between the United States government and the defendants, nor any direct dealings. Consequently, I find that the action was properly constituted.

43 The evidence on this point is not as clear as it might be, doubtless because Aerotech and Sigurdson did not raise the issue concerning either the transfer of the heaters by Brown to the U.S. military or the status of Brown to maintain the action in the pleadings. No evidence was presented as to the ownership of the heaters by Aerotech and Sigurdson. Evidence was given by various Brown witnesses that the consignee of the heaters in Kaposvar was the U.S. military and that the heaters were to become the property of the U.S. government at the time of purchase. But the full contractual and legal relationship between Brown and the U.S. government was never fully explored; for example, no testimony was directed to the issue of title in the heaters upon rejection by Brown.

44 What we are left with, such as it is, is that Brown was the contracting purchaser and the victim of the fraud. It was Brown which rescinded the contract, commenced and maintains these proceedings. The units are in

Brown's possession and are stored in Kaposvar, Hungary, available to Aerotech upon repayment of the amount of this judgment, including costs. Given the state of the evidence, there is simply no issue here.

THE LAW

45 It is trite to say that a contract, even one entered into as a result of a fraudulent misrepresentation, is voidable, not void, at the election of the person defrauded after notice of the fraud. Until the contract is repudiated it remains in force. See *United Shoe Machinery Company of Canada v. Brunet and Others*, [1909] A.C. 330 (H.L.).

46 Aerotech and Sigurdson's principal argument is that Brown cannot approbate and reprobate at the same time. Once Brown had knowledge by December 22, 1995, that the heaters were not new but were used, it had to make a decision then and there – to rescind or not. See *Racicot et al. v. Bertrand et al.*, [1979] 1 S.C.R. 441, where the Supreme Court explained (at p. 458):

> One cannot at the same time claim to have a voidable and a good and valid title to a property. A person who, being aware of the defect of his title to a property, nevertheless acts in all respects and for several months as an absolute owner and exercises all the rights of such an owner, demonstrates an unambiguous intent not to avail himself of the defect of his title.

47 Strong reliance is placed on the dicta of O'Halloran J.A. in *Purdy & Purdy v. Carter & Carter* (May 5, 1960), 239/59 (B.C.C.A.) (at p. 4):

> … because a claim for rescission requires the party claiming it to

> repudiate the contract at once on learning of the misrepresentation, and to treat it as no longer in effect. He cannot blow hot and cold by claiming that the contract is at an end, and at the same time treat it as subsisting and retain advantages under it. He must elect without delay once and for all. If he retains advantages, he has elected to affirm the contract, and cannot then set up that it is vitiated by misrepresentation.

48 The defendants say Brown tried to "conditionally" reject the heaters by attempting to use them and did so for at least some period of time (six heaters remaining in the field until 1997), leaving the option open at a later date to change its mind. But if the trial judge's finding that Aerotech was required to supply new heaters is correct and the goods sold to Brown were "obviously" used, Brown was fully capable of making its decision then and there, since it was impossible to make the used heaters into new ones.

49 Furthermore Aerotech and Sigurdson argue, even if it was reasonable and necessary from Brown's business perspective, to attempt to utilize the non-complying heaters, this does not create a legal exception to the rule (as interpreted by the defendants) that the decision whether to repudiate or not must be made as soon as it is clear an essential term of the contract has not been met. See the trial decision in *Showtime Marketing Services Ltd. v. Lower Fraser Valley Exhibition Assn.*, [1991] B.C.J. No. 3779 (QL) (S.C.).

50 Both *The International Sale of Goods Act*, C.C.S.M., c. S11, and *The Sale of Goods Act*, C.C.S.M., c. S10, provide that when a purchaser receives delivery of goods, having had a reasonable opportunity to inspect them, any act done inconsistent with ownership by the seller will constitute acceptance. In considering this provision, "the courts have adopted a strict interpretation

favourable to the seller." See *Staiman Steel Ltd. v. Franki Canada Ltd.* (1985), 23 D.L.R. (4th) 180 at 193 (Ont.C.A.).

51 Finally, Aerotech and Sigurdson say that there is one last bar to Brown's contention that it is entitled to rescind, namely, its inability to offer *restitutio in integram*. Without the ability to restore the parties' positions to what they were before the contract, rescission is simply not available no matter how "reprehensible may be the briber's conduct." See *Steedman v. Frigidaire Corp.*, [1933] 1 D.L.R. 161 at 165 (P.C.). While there was much dispute at trial as to the nature and extent of the use of the heaters by Brown, clearly some were made operational for some period of time, and hence cannot be returned as they were beforehand.

52 Brown responds by challenging Aerotech and Sigurdson's assertion that a decision to repudiate must be made immediately, once and for all, as soon as it is ascertained that there is non-compliance with the contract, or that, in the case of fraud, absolute *restitutio* is required in every case.

53 As to the argument that Brown waited too long to rescind, affirmation or acceptance could only take place, Brown's counsel say, when it became fully aware of the facts. While Brown's officials on the ground in Hungary could see the condition of the heaters, Sigurdson was insisting to Brown's senior management that the heaters were fit for the purpose, that the technicians would be able to have them up and running in short order, and that adequate parts would be available. This gross misrepresentation continued until the very end. This is the context in which Williams, the procurement manager, rejected the heaters on December 22nd unless

Aerotech could make them operational so as to meet the ongoing emergency situation in Hungary. This did not happen.

54 In our opinion, it is not, and never has been, the law that victims of fraud must, as soon as there is an inkling of a misrepresentation, make up their mind then and there whether to rescind or not. Indeed, as we have seen, lack of diligence by the victim of a fraud, while potentially relevant on the issue of mitigation, is not a defence available to the fraudster. See *Performance Industries.* Professor G. H. L. Fridman, Q.C., *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999), provides the following useful analysis (at p. 864):

> Delay is not the only basis for a claim of affirmation, etc. The plaintiff's positive conduct may reveal that he has chosen to affirm, or may indicate that it would be inequitable to grant the remedy of rescission. This again is a question of fact. Dealing with property, after discovery of the fraud, may not amount to affirmation or election. Even using a chattel for a period of time with knowledge of the conduct which could entitle a party to rescind may not amount to affirmation or election. But attempting to get a mare in foal after discovery of an innocent misrepresentation, on the basis of which the plaintiff had bought the mare, was a ground for refusing rescission in *Monticello State Bank v. Guest* [[1920] 3 W.W.R. 14 (Alta.Q.B.)]. In deciding whether the conduct of the plaintiff bars him from obtaining rescission, the court must look at the realities of the situation as opposed to the mere technicalities relating to the application of the principles of equity. Moreover conduct that might otherwise amount to affirmation will not have such effect if the plaintiff's behaviour was the result of the defendant's behaviour, such as his failure to disclose material facts (when the defendant will be estopped from relying on affirmation as an answer to rescission).
>
> [emphasis added]

55 Particularly pertinent for our purposes is the following comment by an

American author, J. H. Tigges, "Circumstances Justifying Delay in Rescinding Land Contract After Learning of Ground of Rescission" (1965), 1 ALR 3d 542, in which the following observation is made (at p. 545):

> Where the conduct of the adverse party has been such as to induce the aggrieved party to delay taking action to rescind, such delay will not serve to bar the right to rescission.
>
> Thus, where the adverse party induces the aggrieved party to delay rescinding by a reiteration of the original promise or representation, or by inducing the belief that the situation will be remedied or the defect corrected, or by inducing belief in the possibility of settlement or adjustment, or by other conduct inducing delay, it has been held that the right of rescission is not barred by the delay so induced.

56 This view is echoed by the following statement of principle in Peter D. Maddaugh & Prof. John D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990) (at p. 457):

> … continuing performance or use of the subject-matter of the contract will not constitute affirmation where it occurs in the context of objections being made to the representor or of assurances from the representor that amends will be made or after an attempt to repudiate. Further, affirmation will not be inferred from conduct in circumstances where the representee is not fully aware of all the facts. As was said in *Bevan v. Anderson* [(1957), 12 D.L.R. (2d) 69 at 77 (Alta.S.C.)]: "Innocent people are not deprived of their right of rescission before they had an opportunity of knowing the true facts and of knowing they have a right to rescind."

57 In this case the fraud perpetrated by Sigurdson continued until the very end – until the very day in which the technicians returned from Kaposvar. Indeed, as late as January 11, 1996, in a facsimile to Williams in

Houston, Sigurdson asserted, “Of the 282 each units shipped, our techs now have some 183 plus units in full operational condition, and in use on the site.” This was patently false since on the very same day the decision was made to send Aerotech’s technical representatives home because the situation was “hopeless.” In such circumstances, it hardly lies in the mouth of Aerotech and Sigurdson to argue that Brown should have rescinded at an earlier date. This conclusion is a vivid example of the well-known understanding that “fraud vitiates everything.”

58 Dealing with the second issue, the inability to make full restitution, G. H. L. Fridman, Q.C., *Restitution*, 2nd ed. (Toronto: Carswell, 1992), summarizes the matter this way (at p. 203):

> In cases of fraud, it has been suggested that the inability of the party defrauded to restore the subject-matter of the contract in its pristine condition will not bar such party from rescission and recovery of money paid. Even if the parties cannot be restored to their original position, rescission and recovery will be allowed.

59 When fraud is involved (*Restitution*, *ibid*. at 204):

> … subject to the possibility of some mutual adjustment to take into account the benefits actually obtained by the victim of the representation as a result of the contract, such as the use and enjoyment of goods or property prior to the rescission, the mere fact that the subject-matter of the contract cannot be fully restored to the representor will not stand in the way of rescission and the recovery of money paid under the contract. Only if restoration of the subject-matter of the contract is completely impossible in any realistic sense will it be too late for the innocent victim of the misrepresentation to seek the remedy of rescission (leaving him with a claim for damages for fraud to compensate him for any actual loss consequent upon the fraud).

60 The leading authority is the well-known decision of *Spence v. Crawford*, [1939] 3 All E.R. 271 (H.L.). Lord Wright, in an oft-quoted passage, enunciated the principle that once fraud is established (at p. 288):

> The remedy is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case.
>
> . . . . .
>
> The court must fix its eyes on the goal of doing "what is practically just." How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation. …. in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff.

As Lord Wright pointed out, in certain cases this may involve adjustments for both parties.

61 In *McCarthy v. Kenny*, [1939] 3 D.L.R. 556 (Ont.S.C.), Hogg J., after noting that the inability to effect *restitutio* will ordinarily negate rescission, went on to comment (at p. 563):

> But if fraud is present, the Court will grant relief where it would withhold such relief were fraud not established. Rescission was granted although *restitutio in integrum* was impossible in *Adams v. New Bigging* (1888), 13 App. Cas. 308.

62 An oft-cited decision is *Kupchak et al. v. Dayson Holdings Co. Ltd. et al.* (1965), 53 D.L.R. (2d) 482 (B.C.C.A.). In that case, purchasers were

induced by fraudulent representations as to past earnings to purchase a hotel from the defendants. The purchasers sought rescission which was resisted by the defendants on the ground that an interest in the property had been conveyed to a third party, buildings torn down and a new structure erected. Five years had elapsed since the purchase. Davey J.A., for the majority, granted rescission, relying on the dicta of Lord Wright in *Spence v. Crawford*. The court attempted to unravel the complexities of the case, and in the face of fraud and the realities of the hotel business concluded that the purchasers had little choice but to continue to run the hotel while the litigation proceeded. To similar effect see *Wandinger v. Lake et al.* (1977), 16 O.R. (2d) 362 (H.C.), *Lasby v. Royal City Chrysler Plymouth* (1987), 59 O.R. (2d) 323 (Div.Ct.), and *Atherton v. N.B. Plumbing & Heating Ltd.*, [1985] B.C.J. No. 930 (QL) (S.C.). In the latter case, the purchaser continued to use and occupy the building for three years, until trial. The court noted (at para. 43):

> That situation is the direct result of the refusal by N.B. Plumbing to accept the plaintiff's offer of rescission. The fact that the problem was created by the wrongful act of the party guilty of the fraud makes it all the more important that a solution be found.

63 Another example of a decision where a plaintiff, who continued to use and modify the subject-matter of the contract, was not precluded from successfully invoking the remedy of rescission is *Halleran v. O'Neill Brothers Auto Limited* (1971), 1 Nfld. & P.E.I.R. 455 (Nfld. C.A.). In that case, the vendors of a car purposely rolled back the odometer from 45,000 to 24,000 miles. The plaintiff, having discovered the fraud, first attempted to

sell the vehicle and when unsuccessful some work was done to put the vehicle in reasonable running order. The court concluded that the plaintiff's conduct was simply an attempt to minimize damages, and did not amount to an affirmation of the contract.

64 Authorities from Australia are to the same effect (see *Alati v. Kruger*, [1955] 94 C.L.R. 216 (H.C.), and *Vadasz v. Pioneer Concrete (Sa) Pty Limited* (1995), 184 C.L.R. 102 (H.C.)).

65 Is an adjustment required in favour of Aerotech as a result of Brown's use of the heaters, as short as that may be, and the work done and changes made to the heaters in an effort to make them functional? The trial judge found (at para. 79) that some of the heaters were damaged by employees of Brown through attempts to move them or in an attempt to "procure parts to make others operational" (*ibid.*). In addition to the cases already referred to, *Redican v. Nesbitt*, [1924] S.C.R. 135, is further authority for the principle that the court, when it cannot restore the parties precisely to the state they were in before the contract, has full power to make allowances. For example, in *Carter et al. v. Golland*, [1937] O.R. 881 (C.A.), fraudulent representation had been made to purchasers with respect to the earning capacity of the business. Rescission was granted despite the fact that the business had been transferred and the business had been carried on by the purchasers in the interim; however, an adjustment was made based on the asset value of the business at the time of rescission as compared to its acquisition together with expenses incurred by the purchasers and any depreciation.

66 But the circumstances here are very different from those encountered by the court in *Carter* where it was obvious that the asset in question remained of considerable value. In considering an allowance in circumstances where fraud has been found, what the court is attempting to do is that which is "practically just" (at p. 886). While Aerotech and Sigurdson strenuously argued that Brown had received a substantial benefit from the use of the heaters and that much damage had ensued as a result of the "cannibalizing" process that occurred in an effort to make some of the heaters operational, the fact is that the heaters were virtually worthless from the beginning. Indeed, an argument can be made that the value of the heaters collectively may even have increased as a result of the time and effort that was spent in an effort to make at least some of them operative. There is no evidence before the court that supports an adjustment in favour of Aerotech in the circumstances.

67 In our opinion, Brown was entitled to rescind as and when it did, and Aerotech and Sigurdson's position is without merit. Given the circumstances "on the ground" in Kaposvar, Hungary, obtaining heat promptly and effectively was of the essence. Notwithstanding the fact that the used condition and the overall serviceability of the heaters were obvious to Brown's representatives in Kaposvar, Brown can be forgiven for being uncertain, if not confused, given Sigurdson's continuing and aggressive fraudulent misrepresentations concerning the suitability of the heaters, the availability of parts and technical assistance. It was only after January, 1996, that it was clear that the representations made by Sigurdson to Williams in the conversation of December 22nd could never be fulfilled.

FUNDAMENTAL BREACH

68 The trial judge also found that a fundamental breach of contract had taken place. While it is not strictly necessary to deal with this issue given the affirmation of the finding of fraud and the entitlement of Brown to rescission, a few comments are in order. In the recent Manitoba decision of *Print Three Franchising Corp. v. McLennan Printing Inc. et al.* (2001), 153 Man.R. (2d) 32, 2001 MBCA 1, Philp J.A., for the court, noted (at para. 20) that in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499-500, "Wilson, J., clarified the uncertainty that hitherto prevailed in Canadian and English authorities as to the meaning of 'fundamental breach'" by adopting the definition of fundamental breach given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), namely (at p. 849):

> A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract."

Wilson J. went on to say (at p. 500):

> It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

69 The decision in *Hunter* has been re-affirmed by the Supreme Court in

Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, and applied in any number of appellate decisions, for example, *Holt, Renfrew & Co. v. Burlington Northern Air Freight (Canada) Ltd.*, [1990] O.J. No. 1579 (QL) (C.A.), *Lau v. 1755 Holdings Ltd.* (1996), 6 R.P.R. (3d) 152 (B.C.C.A.), *Majdpour v. M & B Acquisition Corp.* (2001), 151 O.A.C. 351, *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. et al.* (1997), 101 O.A.C. 56, and *Genesis Tower Ltd. v. Cheung* (2002), 174 B.C.A.C. 107, 2002 BCCA 582. Aerotech and Sigurdson not surprisingly argue, once again, that Brown was not deprived of substantially the whole benefit that it was entitled to receive and that the doctrine does not apply. Conversely, Brown points out that it contracted for new heaters and got old/used ones that were unreliable and did not work and, in such circumstances, this constitutes a fundamental breach. There would appear to be a number of trial decisions that support Brown's contention. See *Davis v. First Choice Industries Ltd.*, [1992] O.J. No. 1256 (QL) (Gen.Div.), *Infotec Leasing Ltd. v. Lumac Holdings Ltd.* (1994), 145 N.B.R. (2d) 1 (Q.B.), and *LeBlanc and LeBlanc v. Brett (Lorne) Chev Olds Ltd.* (1986), 69 N.B.R. (2d) 193 (Q.B.).

70 As with the trial judge, we have no difficulty in concluding that a fundamental breach occurred.

71 This ground of appeal is rejected.

OTHER ISSUES

Foreign Currency Conversion

72 The trial judge awarded Brown the following sums (at para. 121):

> Cost of the heaters and other related equipment in the amount of $1,359,571.50 (U.S.);
>
> Cost of shipment of goods to Kaposvar in the amount of $321,905.55 (U.S.);
>
> Punitive damages in the sum of $50,000.00;
>
> Costs of the action.
>
> Pre-judgment interest in accordance with the **Court of Queen's Bench Act** [C.C.S.M., c. C280].

73 Although the trial judge expressed the first two items of damage in American currency, there is no dispute between the parties that the amount of the judgment must be expressed in Canadian currency. The *Currency Act*, R.S.C., 1985, c. C-52, s. 12, requires that any money referenced in a legal proceeding must be stated in Canadian currency. This section has traditionally been understood as prohibiting the entry of a judgment expressed in a foreign currency. See *Baumgartner v. Carsley Silk Co. Ltd.* (1971), 23 D.L.R. (3d) 255 (Que. C.A.), and Law Reform Commission of British Columbia, *Report on Foreign Money Liabilities* (Victoria: Queen's Printer for British Columbia, 1983) at 11.

74 However, Aerotech and Sigurdson argued at the appeal hearing that this provision also prohibited Brown from suing in its statement of claim for an amount expressed in a foreign currency. The amount, it is submitted, should have been pled in Canadian dollars.

75 Section 12 of the *Currency Act* states:

> All public accounts established or maintained in Canada shall be in

> the currency of Canada, and any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada.

76 The question then becomes: what is the interpretation to be given to the phrase "other legal proceedings"? It is true that looking at the words in isolation, it might be argued that pleadings are included within its strict literal meaning. See, for example, Brian Riordan, "The Currency of Suit in Actions for Foreign Debts" (1978) 24 McGill L.J. 422 at 438[1] and *Report on Foreign Money Liabilities*, at p. 46.

77 However, applying a contextual approach to the interpretation of the section, reading the *Currency Act* as a whole and taking into account its purpose and the context of its enactment, I find that the phrase "other legal proceedings" was not intended to include statements of claim. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 20-23.

78 Given the context of its enactment, it would appear that Parliament did not intend to limit or affect the rights of foreign litigants whose claims are properly stated in foreign currency, but rather to encourage the use of one domestic currency within Canada. This is explained in *Report on Foreign Money Liabilities* (at p. 47):

> The currency legislation enacted at various times in Upper Canada and the Province of Canada is revealing. Before Confederation, 12

[1] The author also questions the constitutionality of s. 12 of the *Currency Act*. He argues that it is *ultra vires* the Parliament of Canada because its "pith and substance" relates to "Procedure in Civil Matters" and not "Currency and Coinage." See pp. 438-39. See also, *Report on Foreign Money Liabilities*, at p. 44. In his dissent on this point, Justice Twaddle agrees in *obiter* with the author. However, I prefer not to deal with the issue of the constitutional validity or applicability of s. 12 of the *Currency Act* since it was not raised by the parties and notice was not given to either Attorney General as required by s. 7(2) of *The Constitutional Questions Act*, C.C.S.M., c. C180. I believe it more appropriate to leave this issue for another day after opportunity has been provided for full argument.

> different acts had been passed dealing with this subject. The first of these was enacted in 1796 and the last in 1853. The earlier statutes suggest that there was no Canadian currency as such but that a wide variety of foreign currencies circulated freely within the colonies.
>
> The thrust of much of the currency legislation was to identify those currencies acceptable as legal tender and to specify their value in terms of English currency and coinage, notionally the principal medium of exchange. The Act of 1841 for example provided rates for the conversion of currency or coinage of the United States, France, Spain, Mexico, La Plata, Columbia, Peru, Chile, Portugal and Brazil, all of which were specified to be legal tender.
>
> The number of currencies in circulation was further increased by provisions that permitted coinage to be struck in the colony, first in "English" denominations and later in decimal coinage. It also appears that Nova Scotia had its own currency before joining Canada.
>
> The pre-Confederation situation, with its multiplicity of currencies, would strike the modern Canadian observer as chaotic. It is against that background that the Act of 1871, containing the precursor of section 11, must be read. Its long title, *"An Act to Establish One Uniform Currency for the Dominion of Canada,"* suggests its purpose. The aim was to replace all of the pre-Confederation currencies in use with a single Canadian monetary unit. In enacting that sums in "any indictment or legal proceeding" be stated in the money of Canada, the aim of the statute was to discourage proceedings framed in terms of any of the pre-Confederation currencies. Its target was domestic proceedings.

That its target was domestic proceedings is further confirmed by s. 13(1) of the *Currency Act*, which allows money contracts and every matter involving the liability to pay money to be expressed in the currency of other countries.

79 Moreover, although the *Currency Act* has been in force since 1871[2], counsel has been unable to refer us to any case supportive of their position. In fact, several cases have held that the phrase "legal proceeding" does not

[2] *An Act to Establish One Uniform Currency for the Dominion of Canada*, 34 Vict., c. 4 (1871)

refer to each and every document arising from such a proceeding so that, specifically, s. 12 of the *Currency Act* does not apply to offers to settle. See *Champion International Corp. v. "Sabina" (The)* (2003), 24 C.P.R. (4th) 363, 2003 FCT 39, at paras. 16-20, *per* Blais J., followed in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, [2003] Y.J. No. 60 (QL), 2003 YKSC 26. Indeed, the many cases dealt with in the remainder of these reasons must have proceeded on the basis that s. 12 of the *Currency Act* simply required that the final judgment be given in Canadian funds (despite the money values being expressed in other currencies during court proceedings). Otherwise, there would have been no need for a judicial decision on date of conversion.

80 It should be noted that Aerotech and Sigurdson came to this argument themselves rather late in the day. Their own pleadings, specifically the counterclaim filed in 1996, expresses its amounts in American currency. This issue was not addressed by the trial judge and is not mentioned in the notice of appeal or the factum. Although dictionary definitions may support their argument, I do not believe it accords with a purposive construction of the statute as a whole.

81 Of course, this does not end the matter. Even if the sums sued for in the pleadings and the contract are expressed in foreign currency, the *Currency Act* requires that the judgment entered must be expressed in Canadian dollars.[3] Professor S. M. Waddams, in his looseleaf edition of *The*

[3] For a critique of this rule and a recommendation that Canada follow other jurisdictions and allow judgments to be given in foreign currency, see Riordan, at p. 437 and following, and see *Report on Foreign Money Liabilities*.

Law of Damages (Toronto: Canada Law Book Inc., 2003) acknowledges that the weight of Canadian authority is to the effect that the *Currency Act* requires judgments to be given in Canadian dollars. However, he suggests that this section does not prevent a court from giving judgment in the following manner (at para. 7.150): "The defendants shall pay such a sum in Canadian dollars as shall at the date of payment be equal to [a named sum in a foreign currency]." He states that this is the approach of s. 121 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, and that "it would be possible for other Canadian jurisdictions to make similar orders even in the absence of statutory assistance" (at para. 7.150). We find his common sense approach to be the most equitable one for both plaintiffs and defendants. It compensates plaintiffs for their loss while not allowing undue enrichment.

82 It is the path chosen by many jurisdictions which have introduced statutory amendments (see para. 95, *infra*). The Law Reform Commission of British Columbia, after a careful analysis of the history and purpose of s. 12 of the *Currency Act*, concluded that a conversion rate expressed as a sum in Canadian dollars equivalent to the award in foreign currency as of the date of payment could be justified. The authors argued (at p. 48):

> … [S]ection 11 was first enacted to meet a particular problem that existed at the time of Confederation and that, given the degree of ambiguity in its language, the courts would be justified in construing it narrowly and in a way that would not prohibit, in an appropriate case, a judgment such as that given in *Miliangos* [[1976] A.C. 443 (H.L.)].
>
> Notwithstanding that argument, the most widely held view is that section 11 does preclude such a judgment. ….

83 Should the Manitoba legislature see fit to consider this matter, presently so confused by way of case law, it is the choice we commend to them. However, the question for us is whether it is a choice a court should adopt in this particular case by way of judicial development rather than legislation.

84 Unfortunately, although Professor Waddams' suggestion has much to commend it, with reluctance we have not taken it in this case. Aerotech and Sigurdson cited the jurisdictions that have adopted this approach by way of legislation, but no Canadian court has, as of yet, judicially legislated this option. The proposal can be problematic. First, it is still not clear that a judgment worded in that manner would comply with the wording of s. 12 of the *Currency Act*, which requires that reference to monetary awards in a legal proceeding shall be stated in the currency of Canada. Second, such an order would raise certain procedural problems, especially in terms of execution. The Law Reform Commission of British Columbia, when recommending such a legislative regime, acknowledged the need for consequential amendments. Procedural rules would have to be developed in relation to problems with enforcement, set-off and payment into court. Specifically, it pointed out (at p. 52):

> The Working Paper concluded by pointing out that further work would be necessary to develop an appropriate body of procedural rules to govern the assertion and enforcement of foreign currency claims.

85 It may be that procedural difficulties could be overcome by a properly worded order (see Waddams, at para. 7.150), but we decline to do so in this

case where we have not had the benefit of argument with respect to the procedural implications of such an order. We are especially concerned about enforcement problems given Aerotech and Sigurdson's conduct throughout and the findings of fraud made against them. That is not to say that in another case, with due consideration of the procedural implications, this court may come to a different conclusion.

86 Consequently, we are left with the same issue faced by the trial judge. What is the appropriate date for conversion of the foreign currency into Canadian dollars?

87 Aerotech and Sigurdson argued that the court was bound by authority to choose the date of the breach (December 22, 1995). They submitted that that was the traditional approach and that courts are still bound by precedent to follow that inflexible rule. Alternatively, if the court was not bound, then the appropriate conversion date should be the date of payment or the date of these reasons. On the other hand, Brown argued that the operative date to set the applicable conversion rate was the date of the trial judgment (September 20, 2002).

88 After a consideration of the authorities, the trial judge held that the "breach date rule" was a reflection of the historical stability of currency exchange rates. A change in judicial thinking occurred when currency exchange rates began to fluctuate significantly. If one were to focus on the objective that a successful plaintiff should not experience any non-compensated loss by virtue of currency fluctuations between the date of breach and the date of judgment, then a flexible approach is warranted. In

the context of this case, the trial judge held that the interests of justice required the conversion date to be the date judgment was pronounced in the main action. We agree with that decision for the reasons that follow.

89 At present, the Canadian "breach date rule" is based on a series of Canadian cases which adopted a now obsolete British rule.

90 In 1945, the Supreme Court of Canada, in *Gatineau Power Co. v. Crown Life Insurance Co.*, [1945] S.C.R. 655, applied a date of conversion at breach date in an action to recover a debt. They did so in brief reasons, referring to the cases of *The Custodian v. Blucher*, [1927] S.C.R. 420 (a case dealing with unpaid dividends), and *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544 (H.L.).

91 Those two cases, in turn, relied upon principles enunciated by previous English House of Lords cases. That principle was that in all cases involving sums payable in a foreign currency, the applicable rate of exchange was the rate in existence on the date of breach. See, for example, *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1960] 2 All E.R. 332 (H.L.).

92 In the past, currency conversion was not a significant issue since severe currency fluctuations were rare and international trade was not so prevalent a part of everyday business. That is no longer the case, especially because of the general move by industrialized countries away from fixed exchange rates toward a system of "floating" exchange rates dictated by supply and demand. See Riordan, at p. 425.

93 The English House of Lords acknowledged that change when it reversed itself in the case of *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443. In that case, the plaintiff sued in England for the price of goods sold and delivered. The goods were manufactured in Switzerland and delivered to the English defendant. The sales contract called for payment in Swiss funds. The House of Lords held that the breach date rule was not to be inflexibly applied and the court was free to choose any conversion date which served the interests of justice. Lord Wilberforce, in that case, explained the problem in these terms (at p. 463):

> The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re- or devaluations, many of them are now "floating," i.e., they have no fixed exchange value even from day to day. This is true of sterling. This means that, instead of a situation in which changes of relative value occurred between the "breach date" and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice.

94 The choice of the conversion date can have substantial impact on the monetary award. For example, in this case, the difference between the date of breach and the date of judgment can be illustrated as follows:

(1) Date of breach – exchange rate 1.3671

$1,681,477.05 U.S. x 1.3671 =	$2,298,747.28 Cdn.
Plus Pre-judgment interest	854,189.30
	$3,152,936.58 Cdn.

(2) Date of judgment – exchange rate 1.5730

$1,681,477.05 U.S. x 1.5730 =	$2,644,963.40 Cdn.
Plus Pre-judgment interest	982,839.41
	$3,627,802.81 Cdn.

95 In *Miliangos*, the House of Lords chose the date of payment, expressed in foreign currency, as the conversion date. This ensured that the plaintiff would not sustain any non-compensated loss as a result of currency devaluations between the date of breach and the date of payment of the damage award by the defendant. The changing economic climate has also been reflected by statutory amendments in three Canadian provinces and in several of the United States of America. In those jurisdictions, the applicable conversion date is the date of payment, subject, in some cases, to judicial discretion to prevent an inequity. So, for example, pursuant to s. 121 of Ontario's *Courts of Justice Act*, foreign currency obligations shall be converted using the most recent closing exchange rate with respect to each payment, unless the court is satisfied that that would be inequitable to any party. The order requires payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario at the Canadian dollar rate for purchase of the foreign currency the day before payment of the obligation is received by the creditor. See also, the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155, the *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, and the Uniform Law Conference of Canada *Foreign Money Claims Act*, April 1990, s. 1.[4]

[4] In the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has promulgated the *Uniform Foreign-Money Claims Act*. The NCCUSL *Uniform Foreign-Money Claims Act* provides that foreign currency obligations shall be converted into the domestic currency as of the payment date. The *Uniform Foreign-Money Claims Act* has been endorsed by the American Bar Association and adopted by 23 states as of July 11, 2003.

96 Professor Waddams, in *The Law of Damages*, recommends that while Canadian courts should be cautious before departing from the breach date rule of conversion, any rigid formula should be avoided and courts should have the necessary flexibility to decide on a case-by-case basis, taking into account new arguments and changing circumstances. See para. 7.300.

97 Given the above overview, we have no doubt that unless bound by precedent, courts in provinces without statutory provisions on this point should have flexibility to achieve justice in a particular case and render judgment in accord with the commercial realities of the day. As explained by Justice McKenzie in the case of *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* (1979), 108 D.L.R. (3d) 585 (B.C.S.C.), rev'd (1981), 123 D.L.R. (3d) 612 (B.C.C.A.), Court of Appeal decision aff'd [1983] 1 S.C.R. 661 (at p. 586)[5]:

> The breach-day rule prevailed in England for over 300 years but in the present decade the rule has been cast out on the basis that the economic and legal conditions underlying the application of the rule no longer existed and, therefore, the law was changed to conform to existing commercial realities and the date of judgment or payment was substituted.

98 Are Canadian courts bound to apply the breach date rule by virtue of the Supreme Court decisions in *The Custodian* and *Gatineau Power*? Some Canadian courts have held that the principles applied by the Supreme Court in those cases are applicable in all situations. The Federal Court, both trial and appeal, have felt themselves so bound, albeit reluctantly. In *N.V.*

[5] This point was not addressed in the reasons of the Supreme Court of Canada.

Bocimar S.A. v. Century Insurance Co. of Canada (1984), 7 C.C.L.I. 165 (F.C.A.), rev'd on other grounds [1987] 1 S.C.R. 1247, the court felt bound to adopt the breach date rule although "[i]n the present climate of large and rapid currency fluctuations, a rule as rigid as the old one appears to me to be inappropriate" (*per* Hugessen J., at p. 179). See also, *Agrex S.A. v. Canadian Dairy Commission et al.* (1984), 24 B.L.R. 206 (F.C.T.D.), *per* Dube J., and *Am-Pac Forest Products Inc. v. Phoenix Doors Ltd. et al.* (1979), 12 C.P.C. 97 (B.C.S.C.).

99 Other Canadian courts have confined the Supreme Court of Canada decisions to their facts and have felt free to make the conversion date more flexible. For example, in *Williams & Glyn's Bank*, the plaintiff sued to enforce certain promissory notes payable in English currency. The plaintiff recovered judgment and the trial court chose the date of judgment as the conversion date, holding that *Miliangos* rendered both *The Custodian* and *Gatineau Power* obsolete and no longer binding. Other British Columbia cases have held that the operative principle is to provide the successful litigant with sufficient Canadian funds to purchase the amount awarded in foreign currency at the time of judgment. See, for example, *Prasad v. Frandsen* (1985), 60 B.C.L.R. 343 (S.C.), followed in *Banque Indosuez v. Canadian Overseas Airlines Ltd.* (1990), 40 C.P.C. (2d) 33 (B.C.S.C.), aff'd [1992] B.C.J. No. 578 (QL) (C.A.).

100 Several Manitoba judges have also adopted flexibility in conversion rate as the principle best serving the interests of justice. Justice Beard followed *Banque Indosuez* in *Dino Music AG v. Quality Dino Entertainment*

Ltd. (1994), 96 Man.R. (2d) 46 (Q.B.), finding that given the currency fluctuations in that case, the only way to do justice to the plaintiff was to have the conversion take place at the date of judgment. Justice Schulman came to the same conclusion in *C-L & Associates Inc. v. Airside Equipment Sales Inc. et al.* (2000), 151 Man.R. (2d) 220, 2000 MBQB 203, and departed from the breach date rule on the basis that a different date was necessary to make the plaintiff reasonably whole.

101 The Supreme Court of Canada decision in *Gatineau Power* dealt with the issue of conversion date very briefly, reciting the rule laid down in previous cases, but in the end concluding that it would not make a difference since in that case, even if the date of judgment was taken, the amount would be the same. Justice Rand stated (at pp. 658-59):

> In such a case, the rule laid down in *The Custodian v. Blucher* and in *S.S. Celia v. S.S. Volturno*, is that conversion into the currency of the forum is to be made as of the date of the breach and that rule was followed in the Court of King's Bench. But even if we were to take the date of judgment as controlling, the amount recoverable would be the same.

102 So, in that case, the Supreme Court did not have to decide which date was preferable since both dates yielded the same amount. Looking at the case of *The Custodian*, it is to be noted that although the date of breach is adopted, the particular facts of the case and the equities in that case are relied on by the court. In that case, a company during World War I declared a dividend payable to its shareholders. Legislation enacted during the war prevented a shareholder who was a British subject from receiving his

dividend. In 1921, the legislation was repealed, and the shareholder sued for payment of those withheld dividends. The action was tried in 1924, and the shareholder recovered judgment. As the dividends were payable in U.S. currency, the court was required to convert the claim to Canadian funds. During the period from 1917 (when the dividend was declared and withheld) to 1924 (the date of the trial), the exchange rate between Canadian and American dollars had fluctuated dramatically. In 1921, when the writ was issued, U.S. currency was at a premium of 12 percent. However, by 1924, that premium had dropped to 3.2 percent. The plaintiff argued that the conversion date should be 1917, the date of withholding and breach, on which date the premium on U.S. funds was higher than it was in 1921 and 1924. The court agreed with the plaintiff. In so doing, it considered the equities of the situation. It considered (at pp. 426-27, *per* Newcombe J.):

> I see no reason, however, why the exchange should be computed as of a date depending upon the termination of the War and the diligence of the claimant in rectifying his title, nor why the claimant should derive any benefit from the fact that the Railway Company had failed to deposit these dividends with the Custodian as required by the trading with the enemy regulations. If the War had not occurred, the dividends would have been paid to the Nationalbank fur Deutchsland from time to time as they were declared and became payable.

103 We conclude from a review of these cases that the breach date rule is not binding in all situations. We do not disagree with Justice Twaddle's statement in his dissent on this point that an intermediate appellate court cannot depart from a binding precedent of the Supreme Court of Canada. However, for the reasons stated in the previous paragraphs, we are of the

opinion that the breach date rule is not binding and unequivocal in all situations. Certainly, it is not binding in tort. See *Stevenson Estate v. Siewert* (2001), 202 D.L.R. (4th) 295, 2001 ABCA 180. We also conclude that in matters of breach of contract, Canadian courts have flexibility in their choice of conversion date, the underlying objective being to achieve equity in the particular circumstances of the case. Professor Waddams also concluded that the Supreme Court of Canada has left this matter open. See para. 7.140 and footnote 34.

104 Consequently, the next issue becomes the choice of conversion date in the particular circumstances of this case. There are several possible dates that courts have considered in the cases:

(1) when the cause of action arose;
(2) when the writ was issued;
(3) the date of trial; or
(4) as is argued by Aerotech and Sigurdson in this case and adopted by several jurisdictions, the date of payment.

See Harvin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*, looseleaf, 2d ed. (Toronto: Carswell, 1989) at 13-1 and 13-2.

105 The argument in favour of the breach date rule is that the damage complained of is done to the plaintiff on the date of default; the cause of action arises at that date and the remedy is the amount that would then have been received had instant justice been done. The delay between default and judgment can be fully compensated by an adequate award of interest. The creditor ought not to throw upon the debtor the risk of currency fluctuations when the creditor could have mitigated the loss in the case of the depreciating domestic currency by hedging against the change in exchange rates. It is also argued that flexibility introduces uncertainty, which, in turn,

can impact negatively upon settlement:

> Under the new rule, the extent of liability will depend, in part, on post-breach currency fluctuation and this may, depending on the nature of the fluctuations, provide a new incentive to the plaintiff or an additional incentive to the defendant to delay settlement.
>
> [*Report on Foreign Money Liabilities*, at p. 34. See also, a review by Roger A. Bowles & Christopher J. Whelan, "Foreign Money Liabilities, Working Paper No. 33" (1982) 60 Can. Bar Rev. 805.]

106 There are several arguments against the breach date rule. The objective of the contractual remedy of rescission is that the plaintiff, as far as possible, be put back in the same position it would have been in had the breach not occurred. Where, as in this case, the currency of the forum has undergone a relative decline, a breach date rule will not achieve that result. The plaintiff is entitled to be made whole according to the facts as they appear at the time of judgment. The burden of taking steps to guard against adverse fluctuation in the domestic currency should not be on the innocent plaintiff. Instead, the risk and burden should be on the party in breach. Mitigation of loss by currency speculation is often impracticable or impossible for the plaintiff. See Waddams, at para. 7.100. As well, pre-judgment interest will not always be able to compensate for currency fluctuations where it is set by regulation, as in Manitoba. See *The Court of Queen's Bench Act*, s. 79(1).

107 Alternatively, Aerotech and Sigurdson argue that the conversion date in this case should be the conversion of foreign currency obligations as of date of payment. We have not adopted that solution for the reasons given

previously.

108 Alternatively, as well, they have argued that the conversion date should be the date of these reasons rather than the reasons of the trial judge. Since the date of those reasons (September 20, 2002), the Canadian dollar has increased in value, such that as of the date of hearing of the appeal, the rate of U.S. currency was almost the same as it was on the date of breach. In support is cited the case of *Stevenson Estate*. That was a tort case and raises different issues of compensation than a breach of contract case where the plaintiff has paid for defective goods and remains out of pocket. Nonetheless, the case confirms the value of flexibility and the focus on the particular facts of each case.

109 The real issue in these cases is deciding where the risk of currency fluctuations should be placed. Commentators talk about which date best ensures full compensation of the plaintiff in an appreciating climate and which date to adopt in a depreciating climate. See Riordan, at p. 440. In our case, the Canadian dollar depreciated as against American currency between the date of breach and the date of judgment. It then appreciated between the date of judgment and the hearing of the appeal. Its path at present is a matter of speculation into which we have no intention of entering. Our primary concern is that the innocent plaintiff should not bear the risk of the fluctuating exchange rate.

110 If we have to choose between equities in this case, we choose the side of the innocent plaintiff and the date of judgment by the trial judge. There will still be a number of cases where justice requires adherence to the breach

date rule. See Waddams, at para. 7.300. Here, a date of breach would not have fully compensated Brown at the point in time at which the trial judge was making her decision. Brown would not have been fully compensated. To substitute the date of release of these reasons, or the simple date of payment (without conversion into American funds), would encourage debtors to speculate on the future trend of the exchange rate by withholding payment of the monies due and/or the filing of an appeal. As of September 20, 2002, Aerotech and Sigurdson knew for certain that a judgment had been made against them. They could have, had they wished, bought Canadian currency as of that date of judgment in order to insulate themselves from fluctuation pending appeal and possible payment. It is appropriate that such risk and burden of hedging against the possibility of adverse currency fluctuations fall on the party in breach and not the plaintiff, especially where the defendant is a sophisticated commercial entity and especially after a trial judgment.

111 Brown also argues that given the finding of fraud in this case, it should not be placed at the mercy of the fraudulent individual to await payment at a date most advantageous to Aerotech and Sigurdson. We agree that this is one of the factors that we have taken into account in this case, although not the only one and not the determinative one. Brown is entitled to full compensation, but not unjust enrichment.

Solicitor and Client Costs

112 Brown cross-appealed on the issue of costs, arguing that the trial judge erred in failing to order solicitor and client costs in its favour.

Although the court certainly has the jurisdiction to make such an award, an award of costs on a solicitor and client scale should be ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The conduct of the offending party must be truly reprehensible, scandalous or outrageous. See Queen's Bench Rule 57.01(6)(c) and Mark M. Orkin, Q.C., *The Law of Costs*, looseleaf, 2d ed. (Toronto: Canada Law Book Inc., 2003) at para. 219.

113 It is true that the trial judge concluded that Aerotech and Sigurdson had acted fraudulently throughout this transaction. She made that clear when she awarded Brown punitive damages. However, her reasons also indicate that she took no significant issue with the manner in which Aerotech and Sigurdson conducted the litigation at trial. Considering the overall criteria of reasonableness, the sparing use made of solicitor-client costs generally and the particular award of punitive damages in this case, she declined to make an award of solicitor-client costs. We do not see any palpable error in this exercise of her discretion. Without a finding of palpable or overriding error, a discretionary order as to costs should not be interfered with on appeal. See *Lyne v. McClarty et al.* (2003), 170 Man.R. (2d) 161, 2003 MBCA 18, at para. 73.

114 In the result, the appeal and cross-appeal are dismissed with one set of costs to Brown.

_____ C.J.M.

_____ J.A.

TWADDLE J.A. (dissenting in part)

115 I agree with my lord the Chief Justice and my sister Steel on all of the issues in this appeal other than those involving the *Currency Act*, R.S.C., 1985, c. C-52, and the conversion of the plaintiff's monetary entitlement from United States to Canadian currency.

116 Prior to 1976, an English judgment to enforce payment of a sum of money due under a contract had to be expressed in sterling. Where the obligation to pay had been incurred in a foreign currency, a conversion into sterling was required. The rate of conversion was that prevailing at the date the debt became due. A similar rule prevailed for the payment of damages where the loss had been incurred in a foreign currency.

117 The evolution of those rules began perhaps as many as 350 years ago. It is sufficient for my purpose, however, to begin with the decision of the English Court of Appeal in *Di Ferdinano v. Simon, Smits & Co.*, [1920] 3 K.B. 409. In that case, the defendants contracted to carry goods to Italy. In breach of their contract, they failed to deliver them. The applicable rule for the assessment of damages was stated by Bankes L.J. in these terms (at p. 412):

> The plaintiff is entitled to have his damages assessed as at the date of breach, and the Court has only jurisdiction to award damages in

> English money. The judge must therefore express those damages in English money, and in order to do so he must take the rate of exchange prevailing at the date of breach.

118 The House of Lords considered the rule in *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544 (H.L.(E.)). That was a case involving a collision between an English ship and an Italian ship, both ships having been held to blame. The damages to which the owners of the Italian ship were entitled, in Italian lire, were agreed upon subject to the conversion of those damages into sterling. A majority of the House held that the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date the ship was detained for repairs, that being the date when the loss was incurred.

119 The Supreme Court of Canada adopted the English conversion rule in *The Custodian v. Blucher*, [1927] S.C.R. 420. Newcombe J. said for the Court (at p. 427):

> … the authorities are conclusive that, if payment were claimed in Canadian money, the conversion should be made at the time when the obligation to pay in foreign currency was incurred … .

120 Newcombe J. referred to a number of English cases including the two to which I have just referred.

121 The rule was again considered by the Supreme Court of Canada in *Gatineau Power Co. v. Crown Life Insurance Co.*, [1945] S.C.R. 655. Rand J., for the Court, confirmed that "… the rule laid down in *The Custodian v. Blucher* [citation omitted] and in *S.S. Celia v. S.S. Volturno* [citation

omitted] is that conversion into the currency of the forum is to be made as of the date of the breach" (at p. 658).

122 Rand J. did acknowledge that, in that case, the amount recoverable would have been the same regardless of whether the date of breach on the date of judgment had been used for the conversion. Nonetheless, I do not think the Court's decisions in *The Custodian* and *Gatineau Power* can be regarded as anything short of full endorsement of the breach-date rule, as it is sometimes called.

123 The breach-date rule prevailed both in England and in Canada for at least another 30 years. In particular, the House of Lords approved and applied it to a claim for the payment of a foreign debt in *In re United Railways of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007 (H.L.(E.)). In doing so, however, several of the law lords, Lord Reid in particular, found continued acceptance of the breach-date rule not to be without its difficulties (see Lord Reid's speech at pp. 1051-52). Lord Reid's concern was the practicality of choosing a different conversion date. He said (at p. 1052):

> The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment of dollars … . So at best he could only have the dollars converted to sterling at the date of judgment. Owing to appeals or difficulties of enforcement a long time may elapse between judgment and getting his money, and the rate of exchange may have altered substantially during that time.

124 Having dealt with the practical difficulties of taking the date of judgment as the conversion date, he went on to say (at pp. 1052-53):

> Really the only practicable choice would seem to be between converting at the date of breach and converting at the date of raising the action in England. The latter alternative might perhaps be preferable … . But the rate at the date of raising the action might be very different from the rate at the date of payment. … So even if this were still an open question, I would have to come to the conclusion that in every case where a plaintiff sues for a debt due in a foreign currency, that debt should be converted into sterling at the rate of exchange current when the debt fell due. That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result: indeed, no other rule is really practicable.

125 The breach-date rule was abandoned by the House of Lords in 1976. In *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 (H.L.(E.)), a majority of the House, dealing with an action for the payment of money due in Swiss francs, expressly departed from the breach-date rule and ruled instead that

(i) in certain circumstances an English court could give judgment for a sum of money expressed in a foreign currency; and

(ii) if conversion was required for enforcement purposes, conversion could be effected at the rate prevailing on the date when the court authorized enforcement of the judgment in terms of sterling.

126 The key to the abandonment of the breach-date rule, as I see it, was the House's view that judgment could be given for a sum of money expressed in a foreign currency. This enabled the currency conversion to be made at the rate prevailing on the eve of enforcement, a rate which most probably would be close to that available to the plaintiff if it should choose

to reconvert the amount recovered into the currency of its loss. The plaintiff would thus receive a sum as near to full reparation as the court can provide.

127 The *Miliangos* approach to the conversion of foreign-currency debts was extended in *The Despina R*, [1979] A.C. 685 (H.L.(E.)), to cover damages for both breach of contract and tort.

128 The Supreme Court of Canada has not considered the issue of foreign currency conversion since *Miliangos* and *The Despina R* were decided. The issue was raised in *Williams and Glyn's Bank Ltd. v. Belkin Packaging Ltd.*, [1983] 1 S.C.R. 661 and in *N.V. Bocimar S.A. v. Century Insurance Co.*, [1987] 1 S.C.R. 1247, but the Court found it unnecessary to deal with the issue in either case as both could be decided on other grounds. Referring to those two cases, Professor S. M. Waddams asserts in his looseleaf edition of *The Law of Damages* (Toronto: Canada Law Book Inc., 2003) at para. 7.140, that the Supreme Court of Canada has left the matter open. I agree, but only open for further consideration by the Supreme Court of Canada itself and not by lower courts.

129 The decisions of the Supreme Court of Canada in *The Custodian* and *Gatineau Power* are somewhat aged and the reasons for adopting the English breach-date rule succinct. But the rule was adopted quite expressly and applied. The subsequent decisions of the House of Lords in *Miliangos* and *The Despina R* overruled the House's previous decisions, but not those of the Supreme Court of Canada. In my view, the old rule prevails in Canada and will do so until it is expressly overruled by the Supreme Court itself or by legislation.

130 There can be no doubt that in England an intermediate appellate court is bound to follow a decision of the final appellate court even if that decision appears outdated and in need of change. This is apparent from the speeches of Lords Wilberforce and Cross of Chelsea, in *Miliangos* at pp. 458 and 496, respectively. They were there commenting upon the decision of the Court of Appeal in *Schorsch Meier G.m.b.H. v. Hennin*, [1975] Q.B. 416, in which Lord Denning M.R., for the majority, had declined to follow the decision of the House of Lords (in which he had participated and concurred in the result) in the *Havana Railway* case on the ground that "the reasons for the rule no longer exist." The words of Lord Cross should be quoted (*Miliangos*, at p. 496):

> It is not for any inferior court – be it a county court or a division of the Court of Appeal presided over by Lord Denning – to review decisions of this House.

131 That statement is, as far as I am aware, as true in Canada as it is in England. An intermediate appellate court has no authority to depart from a rule adopted by the Supreme Court of Canada because it is somewhat old, was not fully reasoned or no longer provides a just result. The proper course is to apply the rule and leave it to the Supreme Court of Canada to reconsider the rule when opportunity presents.

132 This is indeed the course which several Canadian courts have adopted. Thus, in *N.V. Bocimar S.A. v. Century Insurance Co. of Canada* (1984), 53 N.R. 383 (Fed.C.A.), Hugessen J., for the court, having referred to the defendant's invitation to the court to follow the English decisions in

Miliangos and *The Despina R*, said (at para. 48):

> Not without regret, I do not think it is open to this court to change the rule adopted by the Supreme Court.

133 Other cases in which the breach-date rule has been applied since *Miliangos* and *The Despina R* were decided include:

(i) *Am-Pac Forest Products Inc. v. Phoenix Doors Ltd*. (1979), 14 B.C.L.R. 63 (S.C.);

(ii) *Agrex S.A. v. Canadian Dairy Commission et al.* (1984), 24 B.L.R. 206 (Fed.Ct.,T.D.); and

(iii) *First National Bank of Oregon v. Watson (A.H.) Ranching Ltd.* (1984), 57 A.R. 169 (Q.B.).

134 In *Batavia Times Publishing Co. v. Davis* (1978), 88 D.L.R. (3d) 144 (Ont.H.C.), Carruthers J. found it necessary to distinguish a claim on a foreign judgment from those for money due under a contract and those for damages. He fixed the conversion date as the date of the foreign judgment, the "immediate source" he said (quoting from Sellers J. in *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, [1952] 2 Q.B. 439 at 444) "from which the defendants' liability flows."

135 Whether Carruthers J. was right or wrong in making that distinction (it matters not for the purposes of this case), he clearly recognized the supremacy of the Supreme Court of Canada decisions over *Miliango*s and *The Despina R.* He said (at p. 152):

> [T]hey [the earlier decisions of the Supreme Court of Canada] therefore remain today as authorities binding upon the lower Courts of Canada …

136 Not all of the lower courts in Canada have adhered to the breach-date rule, preferring instead to follow the *Miliangos* approach, which, they thought, better promoted justice. Cases taking this approach include:

(i) *Prasad v. Frandsen* (1985), 60 B.C.L.R. 343 (S.C.);

(ii) *Salzburger Sparkasse v. Total Plastics Service Inc.* (1988), 28 C.P.C. (2d) 120 (B.C.S.C.);

(iii) *Banque Indosuez v. Canadian Overseas Airlines Ltd.* (1990), 40 C.P.C. (2d) 33 (B.C.S.C.), aff'd without the conversion issue being considered [1992] B.C.J. No. 578 (QL) (C.A.);

(iv) *Dino Music AG v. Quality Dino Entertainment Ltd*., [1994] 9 W.W.R. 137 (Man.Q.B.);

(v) *Alpine Canada Alpin v. Oppenheim et al.* (1999), 245 A.R. 252 (Q.B.); and

(vi) *Stevenson Estate v. Siewert* (2001), 202 D.L.R. (4th) 295, 2001 ABCA 180, reconsidering its decision reported at 191 D.L.R. (4th) 151, 2000 ABCA 222.

137 The evil of a lower court revisiting a rule previously adopted by the Supreme Court of Canada lies not only in the lower court's non-adherence to binding precedent, but also in a resulting multiplicity of substituted rules. That is what has happened here. A number of alternative rules to determine the conversion date have been propounded and applied. The alternative rules are:

(1) A *prima facie* rule that the breach-date governs, with discretion to a judge to depart from it where the creditor could not reasonably have secured protection against currency fluctuations: see Waddams, *supra*, at para. 7.300; *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd.*, [1994] 4 W.W.R. 374 (Man. Q.B.), rev'd on other grounds [1995] 4 W.W.R. 484 (Man. C.A.); and *C-*

L & Associates Inc. v. Airside Equipment Sales Inc., [2001] 4 W.W.R. 42, 2000 MBQB 203.

(2) A rule that the conversion occur when judgment is entered: see *Prasad*, *Banque Indosuez*, and *Dino Music AG*, *supra*.

(3) A rule that the conversion occur on the date judgment is pronounced: see *Salzburger Sparkasse*, *supra*, and the trial judgment in the present case.

(4) A rule that the conversion occur when the Court of Appeal delivers its judgment: see *N.V. Bocimar S.A.* [(1984), 53 N.R. 383 (Fed.C.A.)], and *Stevenson Estate*, *supra.*

(5) A rule conferring on the trial judge a discretion as to when the currency conversion should be made: see *Alpine Canada*, *supra.*

138 Curiously enough, the one date that none of the Canadian authorities suggest is that espoused by the House of Lords in both *Miliangos* and *The Despina R*, namely, the date when the court grants an enforcement order. Yet the reasoning of the House of Lords for choosing that date is powerful.

139 If the Supreme Court decisions in *The Custodian* and *Gatineau Power* are not binding authorities, as many courts suggest, then Canadian law with respect to the proper date for converting foreign monies into Canadian dollars when foreign monies are claimed is in a state of disarray. A court would be free to choose whichever rule it preferred. There would be no certainty. Litigants, not knowing which rule to follow, would have difficulty agreeing upon the conversion date themselves. This, as I see it, would be a highly undesirable state of affairs, the avoidance of which leans me in favour of accepting the Supreme Court decisions as binding authorities.

140 The defendants also argued that the plaintiff's claim was not properly advanced as it claimed payment of a debt in United States dollars contrary to s. 12 of the *Currency Act*. In light of the disposition I propose, it is unnecessary for me to address this argument. I must say, however, that I would be very surprised if a statute originally enacted in 1871 (34 Victoria, c. 4, 1871) to establish a Canadian currency had the effect of regulating how a claim for payment of monies due in a foreign currency was to be advanced.

141 I cannot leave the *Currency Act* without noting that it may be the source of the perceived prohibition against a Canadian court giving judgment for payment of a sum due in a foreign currency: see, e.g. *Baumgartner v. Carsley Silk Co. Ltd.* (1971), 23 D.L.R. (3d) 255 (Que.C.A.). Such a prohibition would impair the adoption of an enforcement-date conversion as favoured in *Miliangos*. Although the issue is not strictly before me, I think the dearth of comment rejecting a construction of the *Currency Act* as imposing such a prohibition justifies an *obiter* comment.

142 The *Currency Act*, when first enacted in 1871, bore the long title: *An Act to Establish One Uniform Currency for the Dominion of Canada*. At the time of such enactment, the need for it was real. The following observations were made in Law Reform Commission of British Columbia, *Report on Foreign Money Liabilities* (Victoria: Queen's Printer for British Columbia, 1983) at 47:

> The pre-Confederation situation, with its multiplicity of currencies, would strike the modern Canadian observer as chaotic. It is against that background that the Act of 1871 … must be read. … The aim was to

> replace all of the pre-Confederation currencies in use with a single Canadian monetary unit. In enacting that sums in "any indictment or legal proceeding" be stated in the money of Canada, the aim of the statute was to discourage proceedings framed in terms of any of the pre-Confederation currencies. Its target was domestic proceedings.

143 The present language of the material provision of the current statute (R.S.C., 1985, c. C-52) is as follows:

> **12.** … any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada.

144 This provision, in my opinion, does no more than confirm the Canadian dollar as the currency of the courts, to be used ordinarily by litigants and the courts themselves. A loss or sum due in Canadian dollars must be sued for in that currency. But there is nothing in the federal legislation which prohibits reference to a foreign currency in an action properly brought for the recovery of foreign funds. A construction of the federal statute which produces a different result ignores the constitutional distribution of powers. The provinces alone can provide for the procedure to be followed in civil cases.

145 It follows, in my view, that the supposed requirement that a Canadian judgment must always speak in terms of the Canadian dollar is as much a myth as the supposed English requirement that a judgment speak in terms of sterling. For a rejection of that as an English requirement, see the speech of Lord Cross of Chelsea in *Miliangos* beginning with the last paragraph on p. 493.

146 If I am right in my view that there is nothing to stop a Canadian court from giving judgment in a proper case in a foreign currency, there is no reason (apart from precedent) why the *Miliangos* approach to conversion should not be adopted here. This court is bound by precedent, however, and that is why I propose following the breach-date rule as the only rule endorsed by the Supreme Court of Canada.

147 The trial judge in this case directed that judgment be entered in Canadian dollars converted from the amount due in United States dollars on the date she delivered her reasons for judgment. For the reasons given herein, I am of the view that in choosing the date of her reasons for conversion, she erred.

148 In the result, I would allow the appeal to the extent that I would set aside the award of $3,627,751.40 inclusive of interest and substitute the amount derived by converting the sum of $1,681,477.05 U.S. into Canadian currency at the rate prevailing on December 22, 1995, being the date of breach. To the resulting sum I would add pre-judgment interest at the prevailing rate from December 22, 1995, until the date judgment was entered.

_____ J.A.