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**Datasheet for the decision
of 14 November 2017**

Case Number: T 1719/13 - 3.3.05

Application Number: 05798742.2

Publication Number: 1807165

IPC: B01D29/01, B01D46/24, B01D46/52

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR WINDING A FILTER MEDIA PACK

Patent Proprietor:
Baldwin Filters, Inc.

Opponent:
DONALDSON COMPANY, INC.

Headword:
Method for winding a filter media pack/BALDWIN

Relevant legal provisions:
EPC R. 80, 99(2)
RPBA Art. 12(2), 12(4)
EPC Art. 54(1), 54(2), 56, 83, 84, 100(c), 123(2), 123(3)

Keyword:

Admissibility of appeal - (yes)
Grounds for opposition - added subject-matter (yes)
Late-filed request - addition of dependent claim to request held allowable by the opposition division - request could have been filed in first instance proceedings (yes) - request amounts to an attempt to tidy up a request held allowable by the opposition division (yes) - admitted (no)
Request held allowable by the opposition division and corresponding to requesting the dismissal of the opposing party's appeal - no reason to hold inadmissible
Amendments - allowable (yes)
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

T 0993/07

Catchword:

Admissibility of request including the addition of a dependent claim to request held allowable by the opposition division (see reasons 3).



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Case Number: T 1719/13 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 14 November 2017

Appellant 1: Baldwin Filters, Inc.
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Appellant 2: DONALDSON COMPANY, INC.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
31 May 2013 concerning maintenance of European
patent No. 1807165 in amended form**

Composition of the Board:

Chairman E. Bendl
Members: A. Haderlein
O. Loizou

Summary of Facts and Submissions

- I. The present appeals of the proprietor (appellant 1) and of the opponent (appellant 2) lie from the opposition division's interlocutory decision finding that European patent No. 1 807 165 in amended form and the invention to which it relates meet the requirements of the EPC.
- II. The opposition division held that the ground for opposition pursuant to Article 100(c) EPC prejudiced the maintenance of the patent as granted. The patent in amended form according to auxiliary request I underlying the impugned decision was found to comply with the requirements of the EPC. In particular, the requirements of Articles 123(2) and (3), 83, 54 and 56 EPC were held to be met. The claims of this request correspond to the claims as granted, with claims 7, 8 and 13 to 15 deleted.
- III. The documents cited in the proceedings before the opposition division include the following:
- A3: US 2004/0118771 A1
A7: US 6 416 605 B1
A8: US 6 179 890 B1
A9: US 5 374 006 A
- IV. With its notice of appeal, appellant 1 filed eight auxiliary requests.
- V. Claim 1 of the main request (patent as granted) and of auxiliary requests I and II reads as follows:
- "1. A method for forming a filter element having a coiled web (106) of fluted filter media (108), the method comprising, feeding the web (106) of fluted

filter media (108) at a controlled linear speed, characterized in that the web of fluted filter media (108) is fed at said controlled speed onto a mandrel (112) rotated by a winding motor (118) providing a controlled driving torque to the mandrel (112), and that thereby a controlled tension on the web (106) of fluted filter media (108) is maintained as the web (106) is wound onto the mandrel (112)."

VI. The claims dependent on claim 1 of auxiliary request I at issue correspond to the claims dependent on claim 1 of auxiliary request I found allowable by the opposition division (cf. II above), except for the addition of claim 5 (corresponding to claim 6 as originally filed).

VII. Independent apparatus claim 7 of auxiliary request II corresponds to its granted counterpart and reads as follows:

"7. An apparatus for forming a filter element having a coiled web (106) of fluted filter media (108), the apparatus comprising:
a web feeder (116) for feeding the web (106) of fluted filter media (108) at a controlled linear speed, characterized in that
a mandrel (112) mounted for rotation about an axis of the mandrel (112) is provided,
that the web feeder (116) is feeding the web (106) of fluted filter media (108) at said controlled linear speed onto the mandrel (112); and that
a winding motor (118) operatively connected to the web feeder (116) is providing a controlled driving torque to the mandrel (112), to thereby maintain a controlled tension on the web (106) of fluted filter media (108) as the web (106) is wound onto the mandrel (112) is

provided."

Dependent claims 2 to 6 and 8 to 10 of auxiliary request II are directed to particular embodiments of the subject-matter of the independent claims upon which they depend.

VIII. The arguments of appellant 1 which are relevant to the present decision may be summarised as follows:

Appellant 1's appeal was admissible.

Article 100(c) EPC did not prejudice the maintenance of the patent as granted, in particular because the language in claim 7 was clear, such that it was irrelevant whether the cutter was fixed at a fixed location along the feed path or not.

In auxiliary request I, new claim 5 was added, which was literally based on claim 2 but referred to claim 3 in order to establish identical dependency as in the underlying PCT application.

Auxiliary request II corresponded to the request held allowable by the opposition division. Auxiliary request II complied with the requirements of Articles 123, 83, 54 and 56 EPC. In particular, none of documents A3, A7 and A8 anticipated the claimed subject-matter or rendered it obvious.

IX. The arguments of appellant 2 which are relevant to the present decision may be summarised as follows:

Appellant 1's appeal was inadmissible because appellant 1 in its statement of grounds of appeal provided arguments only with respect to the requirement

of Article 123(2) EPC.

All requests infringed the requirements of Articles 123(2) and 83 EPC. In particular, the dependencies in claims 7 and 8 as granted led to added subject-matter, as did the replacement of "thereby" with "and that thereby". In the independent claims, the expressions "a controlled linear speed", "a controlled driving torque" and "a controlled tension" were unclear and led to insufficiency of disclosure. Auxiliary requests I and II should not be admitted. The set of claims found allowable by the opposition division and corresponding to present auxiliary request II infringed Article 123(3) EPC and was directed to subject-matter which was not patentable, because the subject-matter of claims 1 and 7 lacked novelty over A3, A7 or A8 or at least was obvious in view thereof. The subject-matter of independent claims 1 and 7 of auxiliary request II was obvious in particular in view of the combination of A3 and A9.

X. Requests

Appellant 1 requests that the decision under appeal be set aside and the patent maintained as granted (main request), or in the alternative, on the basis of auxiliary request I as filed with the notice of appeal, or that the appeal of appellant 2 be dismissed and the patent be maintained on the basis of auxiliary request II as found allowable by the opposition division, or on the basis of one of auxiliary requests III to VIII as filed with the notice of appeal.

Appellant 2 requests that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

1. Admissibility of appellant 1's appeal
 - 1.1 According to appellant 2, appellant 1's appeal should be rejected as inadmissible because appellant 1 in its statement of grounds of appeal provided arguments only with respect to the requirement of Article 123(2) EPC but did not submit any arguments with respect to the grounds for opposition under Articles 100(a) and 100(b) EPC.
 - 1.2 The board observes that in the present case the claims of the patent as granted (main request before the opposition division and also present main request) were held to contain added subject-matter, i.e. that the ground for opposition according to Article 100(c) EPC prejudiced the maintenance of the patent as granted (see section 2.1.6 of the reasons of the impugned decision). The impugned decision does not state that any further ground for opposition prejudiced the maintenance of the patent as granted. Auxiliary request I underlying the impugned decision was then held to comply with the requirements of the EPC (see section 6.5).
 - 1.3 Hence to comply with the requirement of Rule 99(2) EPC it is sufficient for appellant 1 to set out in its grounds for appeal why the ground for opposition pursuant to Article 100(c) EPC did not prejudice the maintenance of the patent as granted, i.e. why in its view the patent as granted did not contain added subject-matter.

As appellant 1's grounds of appeal include an explicit statement of why it did not agree with the findings of the opposition division with respect to the claims as granted (cf. page 2, third paragraph: "This is not justified for the following reasons") and provide supporting arguments, appellant 1's appeal is sufficiently substantiated to meet the requirement of Rule 99(2) EPC.

- 1.4 Appellant 1's appeal is therefore admissible.
- 2. Main request (patent as granted) - Article 100(c) EPC
 - 2.1 Appellant 2 objects *inter alia* to claims 7 and 8 because their dependencies would create added subject-matter.
 - 2.2 It is common ground that claims 7 and 8 correspond to originally filed claims 10 and 12 which refer to claim 9 as originally filed, the latter being deleted from the claims as granted, i.e. form the claim of the main request.

The question that needs to be answered is whether omitting the features contained in originally filed claim 9 ("with a cutter [being] disposed at a fixed location along the feed path, with respect to the mandrel") while maintaining claims 7 and 8 corresponding to originally filed claims 10 and 12 leads to subject-matter going beyond the content of the application as filed.

Claims 10 and 12 as originally filed refer at several points to features such as "over-feed distance from the cutter" and "past the cutter at a distance equal to the over-feed distance". According to the wording of claims

10 and 12, the features of these claims are therefore considered to be inextricably linked with the cutter being disposed at a fixed location along the feed path, with respect to the mandrel. The statement on page 11, last three lines, of the application documents as originally filed, as referred to by appellant 1, relating to variations and combinations of the described subject-matter, is of such a general nature that the skilled person would not construe the wording of claims 10 and 12 as meaning that the contentious feature of claim 9 as originally filed was optional.

Claims 7 and 8 of the main request therefore contain subject-matter going beyond the content of the application as filed.

- 2.3 Thus, the main request is not allowable because the ground for opposition pursuant to Article 100(c) EPC prejudices the maintenance of the patent as granted.
- 3. Auxiliary request I - admissibility
 - 3.1 This request corresponds to auxiliary request I found allowable by the opposition division, except for the addition of dependent claim 5 (corresponding to claim 6 as originally filed).
 - 3.2 It is undisputed that a request including present dependent claim 5 could have been filed in the proceedings before the opposition division. The admittance of this request into the proceedings was thus at the board's discretion (Article 12(4) RPBA).
 - 3.3 In its grounds of appeal, appellant 1 argued only that this amendment had been carried out in order to "establish the identical dependency of the claims as

existing in the PCT application". And at the oral proceedings it refrained from commenting on the admissibility of this request under Article 12(4) RPBA.

3.4 The board finds that there is no convincing reason to admit this request into the proceedings. The independent claims of this request are identical to those of the request held allowable by the opposition division, and therefore the inclusion of an additional dependent claim cannot be considered either a legitimate reaction to the impugned decision or a legitimate attempt to defend the patent in view of objections newly raised by the opponent (appellant 2) in its grounds of appeal. Rather, this request amounts to an attempt to tidy up the claim set found allowable by the opposition division.

3.5 It is consistent case law that the opposition proceedings may not be used to tidy up the patent by adding one or more dependent claims; such an addition is normally inadmissible under Rule 80 EPC (see for instance T 993/07, reasons 1.4 et seq.).

By the same token, the board considers the addition of one or more dependent claims in appeal proceedings to a claim request held allowable by the opposition division to be an attempt to tidy up the allowable claim request and thus not admissible under Article 12(4) RPBA.

3.6 For the sake of completeness, the board observes that this finding is independent of the admissibility of the amendments in question under Rule 80 EPC. In fact, as in the present case, it could be argued that the addition of dependent claim 5 along with making claim 3 dependent on claim 1 only and making claim 4 dependent on claim 3 only (instead of being dependent on "any

preceding claim" as in their granted version) was occasioned by the ground for opposition set out in Article 100(c) EPC, because the dependency of claim 3 on claim 2 as granted and of claim 4 on claim 3 as granted was objected to by the opponent in its opposition brief (see item IX.1 thereof), and the features of the now added dependent claim 5 are those of granted claim 2. Put differently, with respect to the granted set of claims the inclusion of claim 5 could be considered not merely an addition of a dependent claim but the result of the redrafting of claims 3 and 4 occasioned by the ground for opposition set forth in Article 100(c) EPC. But, as stated above, for admissibility under Article 12(4) RPBA, compliance with Rule 80 EPC is not decisive.

3.7 For the above reasons, the board did not admit auxiliary request I into the proceedings.

4. Auxiliary request II - admissibility

4.1 It is uncontested that this request corresponds to the request held allowable by the opposition division. It therefore amounts to requesting the dismissal of appellant 2's appeal.

4.2 Appellant 2 objects to its admission because appellant 1 had not stated in its written submissions that this request corresponded to the one held allowable by the opposition division, nor was this readily apparent from appellant 1's written submissions. Therefore, Article 12(2) RPBA was not complied with. Moreover, this request did not overcome the objections raised by appellant 2.

4.3 The board notes that this request was filed with the notice of appeal. Therefore, the only legal basis for rejecting it as inadmissible would be Article 12(4) RPBA; but it was held by the opposition division to comply with the requirements of the EPC. It was the subject of the impugned interlocutory decision and evidently was not rejected as inadmissible by the opposition division. The proprietor did not fail to present it in the first-instance proceedings, having in fact filed it in the proceedings before the opposition division (cf. Article 12(4), first half-sentence, RPBA). The request also relates to the case under appeal and meets the requirements of Article 12(2) RPBA (cf. Article 12(4), second half-sentence, RPBA).

4.4 The requirements of Article 12(2) RPBA do not include the necessity to indicate in the grounds of appeal or in the reply thereto whether claim requests submitted in appeal proceedings have already been submitted in the first-instance proceedings. The board therefore fails to see why auxiliary request II could be held inadmissible solely on the basis of this provision.

Moreover, the board also holds that Article 12(2) RPBA is complied with because, by re-filing the request held allowable by the opposition division, appellant clearly and concisely requests (as an auxiliary request) in its notice of appeal that the impugned decision be upheld, i.e. that the appeal of appellant 2 be dismissed. That the opposing party, i.e. appellant 2, is allegedly unable to determine whether present auxiliary request II corresponds to the request held allowable by the opposition division is of no relevance because, on an objective basis, a comparison of the two claim requests reveals that they are identical. This is also confirmed by the fact that the board had no difficulty

in identifying auxiliary request II as corresponding to the request held allowable by the opposition division (cf. the board's communication pursuant to Article 15(1) RPBA, point 6.1).

4.5 The question of whether this request fails to comply with the substantive requirements of the EPC, as submitted by appellant 2, is immaterial for the issue of its admittance.

4.6 For the above reasons, the board saw no reason not to admit auxiliary request II.

5. Auxiliary request II - amendments - Article 123(2) EPC

5.1 According to appellant 2, the amendment of the expression "to thereby maintain" in claim 1 to "and that thereby ... is maintained" infringed the requirement of Article 123(2) EPC because claim 1 now lacked a link between the mandrel and the functional description originally disclosed in claim 1 as filed.

The board fails to see the alleged lack of link between mandrel and functional description. The expression "and that thereby ... is maintained" clearly entails adapting the (structural) features preceding the expression to result in the functional features following the expression. The board therefore fails to see why the aforementioned two expressions should not be considered equivalent or synonymous.

5.2 Further according to appellant 2, the deletion of paragraphs [0011] and [0012] in the patent specification (see amended page 2 of the patent specification annexed to the impugned decision) was not compliant with Article 123(2) EPC.

The board fails to see why the deletion of these passages should not be in compliance with this provision. Firstly, paragraph [0011] as granted merely states in general terms that "further advantageous embodiments of the method ... and ... of the apparatus are subject matter of [the dependent claims]". Secondly, while it is questionable whether the deletion of advantages of an invention in the description can possibly lead to an infringement of Article 123(2) EPC, the advantages referred to in the deleted paragraph [0012] of the granted specification are still referred to in other parts of the description which have not been deleted (see for instance column 9, lines 45 et seq.).

- 5.3 For the above reasons, the requirement of Article 123(2) EPC is met.

- 6. Auxiliary request II - amendments - Article 123(3) EPC
 - 6.1 Appellant 2 also submits that for the reasons set out in point 5.2 above, the requirement of Article 123(3) EPC was infringed because the claims now also extended to embodiments in which "inadequate" control is achieved.

 - 6.2 Again, the board fails to see why the deletion in question should lead to an extension of protection. Neither present independent claims 1 and 7 nor granted independent claims 1 and 9 require "adequate control of the tension in the media during winding". So, even in the hypothetical case that present claims 1 and 9 were construed, as submitted by appellant 2, as also covering embodiments where only "inadequate" control of the tension in the media during winding is achieved,

such embodiments are also covered by the claims as granted.

6.3 For the above reasons, Article 123(3) EPC is complied with.

7. Auxiliary request II - sufficiency of disclosure

7.1 Appellant 2 is of the opinion that the requirement of Article 83 EPC is not met because of the features "a controlled linear speed", "a controlled driving torque" and "a controlled tension". In particular, the patent disclosed neither the specific speed, torque and tension nor how control thereof could be achieved. Also, the patent did not disclose how those parameters could be held constant as required in paragraph [0051] of the patent in suit.

7.1.1 The board is not persuaded by this argument. Firstly, even in the event that the opposed patent did not explicitly disclose how the parameters were to be adjusted and controlled, for the requirement of Article 83 EPC to be infringed appellant 2 would have to show that the skilled person drawing on common general knowledge would not be in a position to adjust and control them. Appellant 2, who bears the burden of proof, has not provided any evidence that would give rise to doubt in this respect.

7.1.2 Secondly, the claims do not require the linear speed to be held constant. It is true that in paragraph [0051] of the patent reference is made to conditions where "a substantially constant linear speed" is maintained while controlling the motor to provide "a substantially constant torque". While appellant 2 may be right that at varying weight and varying diameter of the web wound

onto the mandrel it is physically impossible to maintain the torque at an exactly constant value while also maintaining the linear speed at an exactly constant value, this is not at odds with the notion of "substantially" (sic) holding these values constant. Put differently, at sufficiently low speeds and sufficiently high torques (or weight of the wound filter), the torque will not need to change in order to achieve a "substantially" constant linear speed.

In any event, the appellant has not shown that the passage in paragraph [0051] of the patent in suit would prevent the skilled person from carrying out the invention with the features set out in the claims. Even if the embodiment referred to in paragraph [0051] were indeed at odds with the claims, this would amount to an objection of lack of support in the description pursuant to Article 84 EPC rather than lack of sufficiency of disclosure.

7.2 For the above reasons, the board concludes that the requirement of sufficiency of disclosure set forth in Article 83 EPC is met.

7.3 Novelty

7.3.1 Appellant 2 submits that the subject-matter of the independent claims is not new in view of either A3, A7 or A8.

7.3.2 While appellant 2 concedes that none of A3, A7 and A8 discloses a direct connection between motor and mandrel, it argues that the independent claims did not require such a direct connection. This was particularly apparent from claim 7, where the motor was said to be connected to the web feeder but no mention

was made of the connection between motor and mandrel. In paragraph [0030] of the patent in suit the motor was said to be operatively connected to the mandrel, which means that the feature of the motor being operatively connected to the mandrel was optional. Given the absence of this feature from the claims, the latter claim had to be construed so as to extend to embodiments where the mandrel was not directly connected to the motor.

7.3.3 The board observes that claim 1 requires that the "winding motor provides a controlled driving torque to the mandrel". Similarly, claim 7 requires the motor to provide a controlled driving torque to the mandrel. This means that the mandrel must be mechanically connected to the mandrel by means which differ from the web feeder to the mandrel. Put differently, the motor providing a torque to the mandrel only by means of the web feeder is not capable of providing a "controlled torque" to the mandrel because of the compressive nature of the coiled web. Since in A3 (see in particular Figure 10, numeral 192) and A7 (see in particular Figure 2E, numeral 130) the mandrel, if any, is connected to the winding motor only via the web itself and not by other means, the contentious feature is not disclosed in either of them. In A8 (column 11, lines 18 et seq.) the possibility of winding the web around a mandrel is mentioned, but similarly this does not necessarily imply that the mandrel is mechanically connected to the winding motor by means other than the web itself.

7.3.4 The board also notes that A3 does not directly and unambiguously disclose a mandrel. The reference numeral 192 (see in particular Figure 10) rather appears to be a theoretical axis because the wound web is said to be

"coreless" (cf. paragraph [0045]; compare also Figures 9 and 10: no "winding axis" is present in Figure 9). In this respect, appellant 2 submits that the claims of the patent in suit also cover a theoretical axis to be considered a mandrel because Figure 14 showed such a theoretical axis. This argument is not persuasive because, while Figure 14 does indeed show a theoretical axis, it also shows the mandrel to be a physical and structural entity (cf. paragraph [0046]).

7.3.5 For the above reasons, the subject-matter of independent claims 1 and 7, and consequently also that of the claims dependent thereon, is new (Article 54(1), (2) EPC).

7.4 Inventive step

7.4.1 The patent concerns a method and apparatus for winding a filter media pack.

7.4.2 In its written submissions, appellant 2 mainly argued that A3 represented the closest prior art, while A7 or A8 could also be considered such. At the oral proceedings, it relied on A3 alone as the closest prior art. The board considers A3 to be the closest prior art because it discloses a winding process and apparatus in some detail and is concerned with a similar purpose to the patent in suit, i.e. control of the web tension and avoidance of crushing of the inner layers of the media (cf. last sentence of paragraph [0051] of the patent in suit and paragraph [0054] of A3). In contrast, A7 aims at avoiding the use of a mandrel (cf. column 1, lines 43 et seq.), and A8 lacks details of the manufacturing process and only mentions the possibility of winding the media around a mandrel without indicating how such a process step should be implemented (column 11, lines

18 et seq.).

- 7.4.3 According to the patent in suit, the problem consisted in providing adequate control of the tension in the media during winding (paragraph [0012]) and in precluding crushing of the inner layers of the media by excessive tension in the outer layers (paragraph [0051], last sentence).
- 7.4.4 The patent proposes to solve this problem by a method for forming a filter element having a coiled web of fluted filter media characterised in that the web of fluted filter media is fed onto a mandrel rotated by a winding motor providing a controlled driving torque to the mandrel, and that thereby a controlled tension on the web is maintained as the web is wound onto the mandrel.
- 7.4.5 It is uncontested that the proposed solution solves the problem set out at 7.4.3 above.
- 7.4.6 According to appellant 2, the solution was obvious in view of document A9.

A9 discloses a mandrel rotated by a winding motor providing a controlled driving torque to the mandrel, thereby controlling the tension on the substrate as the substrate is wound onto the mandrel (column 8, lines 3 et seq.). While A9 refers in general to "winding substrates that are capable of being wound" (column 1, lines 6 et seq.), it is concerned more specifically with the dyeing of textiles (column 1, lines 10 et seq.) and in particular does not refer to coiled webs of fluted filter media. Therefore, A9 offers no hints to the skilled person faced with the problem set out above.

According to appellant 2, the same problem as in the patent was addressed in A9. This was apparent from the passage in column 1, line 68, to column 2, line 10, of A9.

This argument however is not persuasive. The passage referred to above deals with the problem of a sleeve being stretched to different extents, leading to an uneven penetration of the dye into the sleeve. It is silent about crushing of inner layers, let alone of inner layers of a coiled web of fluted filter media.

Appellant 2 also submitted that A9 dealt with substrates in general and that its teaching was not to be limited to the dyeing of fabrics.

While it is true that A9 does indeed deal with substrates in general and does address the problem of uniform tension in the wound substrate (column 2, lines 24 et seq.), it does not address the problem of crushing of inner layers of fluted filter media. Moreover, the problem of uniform tension is mentioned in A9 in the context of the capacity of the inner layers to be penetrated by the dye and not in relation to the possible damage of the inner layers or crushing thereof by excessive tension.

The board also agrees with appellant 1 that the skilled person would not have used a mandrel in A3 because this document is generally concerned with "coreless, spiral-wound" filter media (cf. paragraph [0045]). It is true, as submitted by appellant 2, that claim 28 of A3 teaches that the apparatus claimed does not use a mandrel. This, however, does not constitute a teaching to actually use such a mandrel. Rather, the overall

disclosure of A3 is aimed at producing a coreless spiral-wound filter in the absence of a mandrel (cf. paragraphs [0045], [0049]).

For the above reasons, the method according to claim 1 was not obvious in view of the cited prior art. The same reasoning applies *mutatis mutandis* to the apparatus according to claim 7 and the dependent claims.

7.4.7 It follows from the above that auxiliary request II complies with the requirement of Article 56 EPC.

8. Conclusion

Since the main request is not allowable and auxiliary request I is not admitted, and since auxiliary request II, which corresponds to the request held allowable in the impugned decision, is allowable, both appeals are to be dismissed.

Order

For these reasons it is decided that:

Both appeals are dismissed.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated