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Federal Court Reports

Dutch Industries Ltd. v. Canada (Commissioner of Patents) (T.D.) [2002] 1 F.C. 325

Date: 20010813

Dockets: T-967-00

T-968-00

Neutral citation: 2001 FCT 879

Ottawa, Ontario, Monday the 13th day of August 2001

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

DUTCH INDUSTRIES LTD.

Applicant

- and -

THE COMMISSIONER OF PATENTS,

BARTON NO-TILL DISK INC., and FLEXI-COIL LTD.

Respondents

REASONS FOR ORDER AND ORDER

DAWSON J.

[1] At issue in these applications for judicial review is whether the Commissioner of Patents ("Commissioner") may accept payments on account of underpaid maintenance fees after the prescribed time for payment. The issue arises in circumstances where at all relevant times maintenance fees were paid on the basis that the patentee, and patent applicant, was entitled to claim small entity status when, effective November 25, 1994, it was not.

THE FACTS

[2] The facts are not in dispute.

[3] On November 24, 1994, the respondent Barton No-Till Disk Inc. ("Barton") entered into an exclusive license agreement with the respondent Flexi-Coil Ltd. ("Flexi-Coil") whereby rights to practise the invention described in Canadian Patent No. 2,121,388 (" '388 patent ") were granted to

Flexi-Coil. The '388 patent was issued on July 23, 1996 based on an application filed on April 15, 1994.

[4] By what is described as an extension of the license agreement, Barton also granted certain rights to Flexi-Coil in the invention described in Canadian Patent Application No. 2,146,904 (" '904 application "). The '904 application was filed on April 12, 1995 and no patent has yet issued in respect of that application.

[5] Until March 29, 2000, all fees, including filing and maintenance fees, that were due to be paid to the Canadian Intellectual Property Office ("CIPO") in respect of the '388 patent and the '904 application were paid in the amounts due from a small entity.

[6] Dutch Industries Ltd. ("Dutch") is alleged, in other proceedings pending in this Court, to have infringed the '388 patent by selling and supplying the apparatus described in that patent. In that other proceeding Dutch asserts as a defence that the '388 patent has lapsed for non-payment of the required maintenance fees within the prescribed time. The allegation of non-payment is based on the fact that maintenance fees were paid as a small entity when the patentee was not entitled to small entity status. Dutch asserts that the '388 patent lapsed on April 15, 1997.

[7] On March 7, 2000, Dutch's solicitors wrote to the Commissioner setting out its position and submitting that the Commissioner was not in a position to accept any corrective payment to correct the entity status and underpayment of past maintenance fees. The Commissioner responded by letter dated March 9, 2000 which advised that the Commissioner accepts the status claimed by a patent or an applicant for a patent, and has no authority to investigate status claims.

[8] On March 29, 2000 the solicitors for Barton, the patentee and patent applicant, wrote to the Commissioner in respect of both the '388 patent and the '904 application advising that the patentee and patent applicant was not entitled to claim small entity status effective November 25, 1994 and paying in each case "the balance of the official fees that have been paid since that date". The amounts required to be paid were not large: \$375 in respect of the '388 patent and \$300 in respect of the '904 application. No evidence was tendered as to how the error arose.

[9] CIPO accepted those monies on or about March 29, 2000. In affidavits sworn by the Deputy Director of the Patent Branch it is stated that "it is and has been the normal practice of the Patent Office to accept such a payment in these circumstances, and the payment of these additional monies were accepted in this particular instance as well". The TechSource records were also amended to show that payments for a large entity were made at the times they were due.

[10] Shortly thereafter, on April 5, 2000, the patent agents for the patentee and patent applicant wrote to the Commissioner enclosing the maintenance fees due in respect of the '388 patent and the '904 application, respectively, by April 15, 2000 and April 12, 2000. Through unexplained error the amounts paid were those due in respect of a small entity. On April 20, 2000, CIPO responded advising of the error and stating that the balance of the fee or a small entity declaration should be received on or before May 12, 2000 to prevent the lapse of the '388 patent and the abandonment of the '904 application. In each case the balance of the prescribed fee was paid on April 28, 2000.

[11] Dutch says that the March 29, 2000 decisions of the Commissioner to accept the retroactive payments and to amend the maintenance fee records were communicated to it on May 23, 2000.

[12] In T-967-00 Dutch seeks an order quashing the Commissioner's decision with respect to the '904 application and a declaration that the patent application has not been in effect since April 12, 1997 due to the failure to pay the prescribed maintenance fees and the failure to apply for reinstatement.

[13] In T-968-00 Dutch seeks an order quashing the Commissioner's decision with respect to the '388 patent and either a declaration that the patent application '388 was not in effect as of April 15, 1996 so that no valid patent could issue therefrom, or an order that the '388 patent lapsed on April 15, 1997, all due to the failure to pay the prescribed fees and the failure to apply for reinstatement.

[14] In these proceedings no issue was taken with the status of Dutch to bring these applications as a party "directly affected" by the impugned decisions within the meaning of section 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7. The Commissioner did not appear at the hearing of the applications.

ISSUES

[15] Dutch frames the issues as:

1. Did the Commissioner have jurisdiction under the *Patent Act*, R.S.C. 1985, c. P-4 ("Act") and the *Patent Rules*, SOR/96-423 ("Rules") to accept maintenance fee payments after the prescribed time for payment?
2. Did the Commissioner have jurisdiction under the Act and Rules to accept maintenance fee payments more than one year after the due date thereof?
3. Did the actions of the Commissioner affect in any way the validity of the patent and the patent application?

[16] Barton and Flexi-Coil formulate the issues as:

1. Does the payment of a small entity fee when a large entity fee is due constitute non-payment of the fee such that the patent application is irrevocably abandoned?
2. Did the Commissioner properly exercise her discretion in accepting the corrective payments to "top-up" the fees?

STANDARD OF REVIEW

[17] Barton and Flexi-Coil pointed to the expertise of the Commissioner and argued that decisions made by the Commissioner, particularly as they relate to administrative matters, are entitled to deference. They submitted that the applicable standard of review was reasonableness *simpliciter*, perhaps tending to the more deferential standard of patent unreasonableness. Dutch made no submission on the standard of review.

[18] In order to determine the standard of review applicable to the Commissioner's decisions it is necessary to conduct the pragmatic and functional analysis as explained by the Supreme Court of Canada in cases such as *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1

S.C.R. 982.

[19] The pragmatic and functional approach requires consideration of the existence of a privative clause, the relative expertise of the decision-maker, the purpose of the legislation and the particular provisions at issue, and the nature of the question before the decision-maker.

[20] Applying those factors in turn, sections 18 and 18.1 of the *Federal Court Act* provide that decisions of the Commissioner are amenable to judicial review. This is an intermediate provision between a full privative clause and an unrestricted right of appeal, and suggests some deference.

[21] Expertise is the most important of the four factors to be considered. While the Commissioner has expertise with respect to a number of matters, I am not persuaded that such expertise extends to interpreting the relevant provisions of the Act and the Rules for the purpose of determining the effect of an underpayment of fees. As the majority of the Federal Court of Appeal observed in *President and Fellows of Harvard College v. Canada (Commissioner of Patents)*, [2000] 4 F.C. 528 (C.A.) at paragraph 183, the broader the proposition and the further the implications of a decision stray from the Commissioner's expertise, the less deference is warranted. This suggests a less deferential standard of review, closer to the correctness and of the spectrum.

[22] While the object of the Act is to promote the development of inventions so as to benefit both inventors and the public, I conclude that the purpose of the specific provisions at issue with respect to the payment of fees is not polycentric in nature, not involving a multi-faceted balancing test. The Act establishes and regulates the respective rights of patent holders. Where the purpose of the legislation is to establish rights between parties, closer scrutiny by the Court is warranted.

[23] The nature of the question at issue is a question of law: the interpretation will have determinative impact on future decisions. This again warrants less deference, and a standard closer to correctness.

[24] Applying those factors, I conclude that the decisions of the Commissioner in the cases before me are reviewable on the standard of correctness.

ANALYSIS

(i) T-967-00 (the '904 application)

[25] I think it helpful to begin with the review of the applicable legislative framework. Counsel were agreed that with respect to this judicial review application the governing provisions are found in the Act as fully amended and in Part IV of the Rules.

[26] Subsection 27.1(1) of the Act provides:

<p>(1) An applicant for a patent <u>shall, to maintain the application in effect, pay to the Commissioner such fees, in respect of such periods, as may be prescribed.</u>[underlining added]</p>	<p>(1) Le demandeur est tenu de payer au commissaire, <u>afin de maintenir sa demande en état, les taxes réglementaires pour chaque période réglementaire.</u> [Le souligné est de moi.]</p>
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[27] Subsection 154(1) of the Rules in Part IV deals with the timing of the payment of maintenance fees, and is to the following effect:

(1) For the purposes of subsection 27.1(1) and paragraph 73(1)(c) of the Act, the applicable fee to maintain an application in effect, set out in item 30 of Schedule II, shall be paid in respect of the periods set out in that item before the expiry of the times provided in that item. [underlining added]

(1) Pour l'application du paragraphe 27.1(1) et de l'alinéa 73(1)c) de la Loi, la taxe applicable prévue à l'article 30 de l'annexe II pour le maintien de la demande en état est payée à l'égard des périodes indiquées à cet article, avant l'expiration des délais qui y sont fixés. [Le souligné est de moi.]

[28] The consequence of non-payment of the fee is specified in paragraph 73(1)(c) of the Act:

(1) An application for a patent in Canada shall be deemed to be abandoned if the applicant does not

(1) La demande de brevet est considérée comme abandonnée si le demandeur omet, selon le cas :

[...]

[...]

(c) pay the fees payable under section 27.1, within the time provided by the regulations; [underlining added]

(c) de payer, dans le délai réglementaire, les taxes visées à l'article 27.1; [Le souligné est de moi.]

[29] While the Act, in subsection 73(3), contains a procedure for reinstating abandoned patent applications, there is no indication in the present case that reinstatement was either sought or granted and no evidence that the requisite fee for reinstatement was paid. Moreover, the Rules provide that a request for reinstatement must be made within 12 months after the application was deemed to be abandoned. In the present case more than 12 months had elapsed by the time Barton moved to "top-up" the underpaid fees.

[30] The Commissioner is given some authority to extend time frames fixed under the Rules. That discretion is found in subsection 26(1) of the Rules which states:

(1) Subject to subsection (2) and any other provision of these Rules, except in respect of Part V, the Commissioner is authorized to extend the time fixed by these Rules or by the Commissioner under the Act for doing anything, subject to both the extension being applied for and the fee set out in item 22 of Schedule II being paid before the expiry of that time, where the Commissioner is satisfied that the circumstances justify the extension.

(1) Sous réserve du paragraphe (2) et des autres dispositions des présentes règles, sauf pour l'application de la partie V, le commissaire est autorisé à proroger tout délai prévu aux présentes règles ou fixé par lui en vertu de la Loi pour l'accomplissement d'un acte, s'il est convaincu que les circonstances le justifient et si, avant l'expiration de délai, la prorogation a été demandée et la taxe prévue à l'article 22 de l'annexe II a été versée.

[31] However, the Commissioner's jurisdiction is expressly circumscribed with respect to extending the time for the payment of fees required to maintain a patent application. Section 157 of the Rules provides:

Section 26 does not apply in respect of the times set out in sections 154, 155 and 156. L'article 26 ne s'applique pas aux délais prévus aux articles 154, 155 et 156.

[32] From this recitation of the applicable legislation it can be seen that the legislative scheme is clear that milestones are set for the payment of fees and payment must be made by those dates. This was conceded by the corporate respondents who argued that the Act and Rules are express with respect to non-payment of fees, but are silent as to the consequence of the payment of an incorrect fee. In that case, it was submitted, the Commissioner has discretion, and a convention was said to exist whereby the Commissioner allows corrective "top-up" payments. Put another way, an incorrect payment was submitted to be other than a non-payment and was said to be a correctable error.

[33] In support of that submission the corporate respondents relied upon the maxim *expressio unius est exclusio alterius*. Parliament did not deal with the issue of wrong payments in the context of abandonment, therefore it was submitted that abandonment must not have been intended to be a consequence of an incorrect payment. Absent unfair or capricious conduct, or legislation restricting the Commissioner's discretion, it was submitted that the Commissioner might use her discretion to accept a corrective payment of an official fee.

[34] The answer to this submission is, I believe, found in the express wording of the Act and the Rules.

[35] Subsection 27.1(1) of the Act does not simply require payment of some or any fee, it requires payment of "such fees ... as may be prescribed". Subsection 154(1) of the Rules requires "the applicable fee ... shall be paid ... before the expiry" of the prescribed period. If the "fees payable under section 27.1" are not paid within the time provided the patent application is deemed to be abandoned. By specifically barring in section 157 of the Rules application of the saving provision found in section 26 of the Rules to the situation where prescribed maintenance fees are not paid as required, I conclude that Parliament expressly considered the possibility of error in the payment of maintenance fees. Having considered this, Parliament directed that the failure to pay the prescribed fee could only be corrected within the one-year grace period provided by section 152 of the Rules.

[36] Such express requirements in my view preclude an exercise of discretion by the Commissioner which has the effect of allowing less than the proper amount to be paid and then affording the opportunity to perfect the required payment beyond the permitted grace period. Such express requirements also oust any application of the *expressio unius* principle of statutory interpretation: a contrary intent cannot be implied in view of the plain meaning of the express provisions found in the Act and the Rules.

[37] I have considered the submission of the corporate respondents that because of what was said to be the reliance of the public upon the existing practice of the Commissioner it would be manifestly unfair for the Court to stop the practice. The corporate respondents also submitted that it would create uncertainty if members of the public could go beyond statements in the patent office records as to the status of the patent holder and the fees paid.

[38] As the Court of Appeal found in *Pfizer Inc. v. Canada (Commissioner of Patents)* (2000), 9 C.P.R. (4th) 13 (F.C.A.) the validity of a patent depends upon the construction of the relevant provisions of the Act and the Rules. I am bound to give effect to what I have concluded is the plain meaning of the

Act and the Rules.

[39] Further, the Manual of Patent Office Practice warns in section 20.02.13 that "[t]ime limits for payment of maintenance fees are not extendable". This warning undercuts the argument that it would be unfair to stop the practice of allowing a shortage in the payment of the maintenance fees to be made up at any time.

[40] While the result may appear harsh, it is no harsher than the consequence which would have flowed from the failure of the patentee/patent applicant to have topped up the fee to the required level by May 12, 2000 as required by the Commissioner. It does not appear reasonable to conclude that the failure of the patentee/patent applicant to correctly advise the Commissioner as to the right to claim small entity status should result in more advantageous treatment being afforded to the patentee/patent applicant (the more advantageous treatment being to allow a top-up payment to be made after the expiration of the grace period).

(ii) T-968-00 (the '388 patent)

[41] At the time the application for the '388 patent was filed and continuing until October 1, 1996, the previous versions of the Act and Rules were in effect.

[42] Section 27.1 of the Act as it existed before the amendment of S.C. 1993, c.15, s. 32 read as follows:

(1) An applicant for a patent shall, to maintain the application in effect, pay to the Commissioner such fees, in respect of such periods, as may be prescribed.

(1) Le demandeur est tenu de payer au commissaire, afin de maintenir sa demande en état, les taxes réglementaires pour chaque période réglementaire.

(2) An application for a patent shall be deemed to have been abandoned if the fees payable by the applicant in respect of a period prescribed for the purposes of subsection (1) are not paid before the expiration of that period.

(2) La demande est réputée abandonnée si les taxes réglementaires ne sont pas acquittées avant l'expiration du délai réglementaire pour la période en cause.

(3) An application deemed to have been abandoned under this section may be reinstated on petition by the applicant presented to the Commissioner within such period as may be prescribed and on payment of a prescribed fee and an application so reinstated shall retain its original filing date and its priority date, if any.

(3) La présomption d'abandon est annulée sur dépôt au commissaire par le demandeur d'une requête à cet effet dans le délai réglementaire et paiement des taxes réglementaires. [Le souligné est de moi.]

[underlining added]

[43] Section 76.1 of the then applicable Rules read as follows:

(1) The fee to maintain an application for a patent in effect shall be paid for each one-year period between the first and nineteenth anniversaries of the (1) Les taxes requises pour maintenir en état la demande de brevet doivent être payées pour chaque période d'un an comprise entre le premier et le dix-

- date of the filing of the application in Canada. neuvième anniversaire du dépôt de la demande au Canada.
- (2) The fee referred to in subsection (1) shall be paid before the expiration of each period referred to in that subsection but may not be paid before the commencement of that period. (2) Les taxes visées au paragraphe (1) doivent être payées avant l'expiration de chaque période mais ne peuvent être payées avant le début de la période.
- (3) For the purposes of this section, a divisional application shall be deemed to have been filed in Canada on the filing date of the original application, pursuant to the provisions of subsection 36(4) of the Act, and any fee that would have been payable from that date to maintain the application in effect shall be paid when the divisional application is filed. (3) Pour l'application du présent article, la demande complémentaire est censée avoir été déposée au Canada à la date de dépôt de la demande originale, en conformité avec le paragraphe 36(4) de la Loi, et les taxes qui auraient dû être payées depuis cette date pour maintenir la demande complémentaire en état doivent être payées au moment de son dépôt.
- (4) A petition to reinstate an application for a patent pursuant to subsection 27.1(3) of the Act shall be presented within six months after the date on which the application for the patent was deemed to have been abandoned. (4) la requête en rétablissement visée au paragraphe 27.1(3) de la Loi doit être déposée dans les six mois qui suivent la date à laquelle la demande de brevet est réputée abandonnée.
- (5) Where a petition is presented to reinstate an application deemed to have been abandoned, or an application is made to restore an application that has been forfeited, the fees to maintain the application that would have been payable had the application not been deemed abandoned or forfeited shall be paid when the petition is presented or the application is made. (5) Dans le cas de la requête en rétablissement d'une demande réputée abandonnée ou frappée de déchéance, les taxes qui auraient dû être payées pour maintenir la demande en état doivent être payées au moment du dépôt de la requête.
- (6) Section 139 does not apply in respect of the periods prescribed in subsections (1) and (4). (6) L'article 139 ne s'applique pas aux délais prévus aux paragraphes (1) et (4).
- (7) Subsections (1) to (5) do not apply in respect of:
- (a) an application for a patent filed in Canada prior to October 1, 1989;
- (b) a divisional application that, pursuant to subsection 36(4) of the Act, bears a filing date that is prior to October 1, 1989; or
- (c) an application for the reissue of a patent. [underlining added]
- (7) Les paragraphes (1) à (5) ne s'applique pas :
- a) à la demande déposée au Canada avant le 1er octobre 1989;
- b) à la demande complémentaire qui, conformément au paragraphe 36(4) de la Loi, porte une date de dépôt antérieure au 1er octobre 1989;
- c) à la demande de redéliivrance d'un brevet. (Le souligné est de moi.)

[44] Section 139 of the then applicable Rules read:

Subject to these Rules, where the Commissioner is Sous réserve des présentes règles, le commissaire, s'il

satisfied by an affidavit setting forth the relevant facts that, having regard to all the circumstances, any time prescribed by these Rules or fixed by the Commissioner for doing any act should be extended, the Commissioner may, either before or after the expiration thereof, extend such time.

est convaincu, à la suite d'un affidavit établissant les faits pertinents, qu'eu égard à toutes les circonstances, un délai quelconque prescrit par les présentes règles ou institué par le commissaire pour l'exécution d'un acte quelconque devrait être prolongé, pourra prolonger ce délai, soit avant, soit après son expiration.

[45] Again, the words used in the Act and Rules evidenced, in my view, a mandatory requirement to pay the prescribed fees and a mandatory consequence of deemed abandonment if the specified fees were not paid before the expiration of the period prescribed for payment. Any request for reinstatement must have been made within the prescribed period.

[46] While section 139 of the then applicable Rules gave a broad discretion and authority to the Commissioner to extend the time for doing anything, subsection 76.1(6) of the then existing Rules removed this discretion and authority to extend the time both for paying maintenance fees, and for reinstating an application deemed abandoned for failure to pay maintenance fees.

[47] For the reasons articulated above with respect to the '904 application, I similarly conclude that there was no jurisdiction in the Commissioner to allow the missing portion of the maintenance fees to be paid after the expiration of the time for applying for reinstatement of the deemed abandoned application.

[48] It follows that the '388 patent application was by operation of the legislation deemed abandoned on April 15, 1996 as a result of the failure to pay the prescribed maintenance fees. No application was made to reinstate the application within the six-month period then allowed for the bringing of reinstatement proceedings. Thus, on July 23, 1996 when the '388 patent issued there was in fact no valid application then extant to support the granting of the patent.

[49] In the alternative, any valid patent lapsed on April 15, 1997 as the result of the failure to pay the maintenance fee due on the third anniversary of the filing date of the application.

[50] In concluding that any valid patent so lapsed, I have had regard to the then applicable legislative scheme. Section 46 of the Act as in force at the material time contained the applicable requirement for payment and specified the consequence of non-payment:

46. (1) A patentee of a patent issued by the Patent Office under this Act after the coming into force of this section shall, to maintain the rights accorded by the patent, pay to the Commissioner such fees, in respect of such periods, as may be prescribed.

46.(1) Le titulaire d'un brevet délivré par le Bureau des brevets conformément à la présente loi après l'entrée en vigueur du présent article est tenu de payer au commissaire, afin de maintenir les droits conférés par le brevet en état, les taxes réglementaires pour chaque période réglementaire.

(2) Where the fees payable under subsection (1) are not paid within the time provided by the regulations, the term limited for the duration of the patent shall be deemed to have expired at the

(2) En cas de non-paiement dans le délai réglementaire des taxes réglementaires, le brevet est périmé à l'expiration du délai supplémentaire réglementaire. [Le souligné est de moi.]

end of that time. [underlining added]

[51] The amount of the fee and when it was due was prescribed by section 155 of the Rules in Part IV which provided:

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|--|--|
| <p>(1) Subject to subsections (2) and (3), for the purposes of section 46 of the Act, <u>the applicable fee to maintain the rights accorded by a patent, set out in item 31 of Schedule II, shall be paid in respect of the periods set out in that item before the expiry of the times, including periods of grace, provided in that item.</u></p> <p>(2) In subsection (1), "patent" does not include a reissued patent.</p> <p>(3) No fee to maintain the rights accorded by a patent shall be payable in respect of any period for which a fee to maintain the application for that patent was paid. [underlining added]</p> | <p>(1) Sous réserve des paragraphes (2) et (3), pour l'application de l'article 46 de la Loi, <u>la taxe applicable prévue à l'article 31 de l'annexe II pour le maintien en état des droits conférés par un brevet est payée à l'égard des périodes indiqués à cet article, avant l'expiration des délais, y compris les délais de grâce, qui y sont fixés.</u></p> <p>(2) Au paragraphe (1), « brevet » ne vise pas le brevet redélivré.</p> <p>(3) Aucune taxe pour le maintien en état des droits conférés par le brevet n'est exigible pour la période à l'égard de laquelle a été payée une taxe pour le maintien en état de la demande du brevet. [Le souligné est de moi.]</p> |
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[52] The Commissioner did have authority to extend time as provided by section 26 of the Rules, however that authority was expressly stated in section 157 of the Rules to not apply in respect of the time limits set by section 155 of the Rules.

CONCLUSION

[53] I have concluded that the Commissioner had no jurisdiction to accept corrective payments on account of the failure to pay the prescribed maintenance fees within the required time. It follows that the Commissioner erred in accepting the corrective payments and the decisions to accept those payments should be set aside.

[54] In addition to orders setting aside the decisions of the Commissioner, the applicant sought declaratory relief as to the status of the patent and the patent application and orders requiring the Commissioner to declare the '388 patent lapsed and the '904 application not to be in effect. Given that the decisions of the Commissioner are to be set aside I consider it more appropriate to simply remit the matters to the Commissioner for redetermination in accordance with these reasons.

[55] The applicant also sought costs under Column V of Tariff B of the *Federal Court Rules, 1998*, SOR/98-106. The corporate respondents argued that costs should be assessed in the middle of Column III. In my view neither the volume of evidence nor the complexity of the legal issues merit an assessment of costs other than in the ordinary course.

ORDER

[56] **IT IS HEREBY ORDERED THAT:**

1. The decisions of the Commissioner of Patents made on March 29, 2000 are set aside and the matters are remitted to the Commissioner for redetermination in accordance with these reasons.

2. The respondents shall pay to the applicant one set of costs, to be assessed in accordance with Column III of the table to Tariff B of the *Federal Court Rules, 1998*.

"Eleanor R. Dawson"

Judge