

FEDERAL COURT OF APPEAL

B E T W E E N:

ROVI GUIDES, INC. AND TIVO SOLUTIONS INC.

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F	Nov 07, 2022
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D	Rebecca Duong
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TORONTO, ON	1
Appellants	

(Plaintiffs/Defendants by Counterclaim)

- and -

**BCE INC., BELL CANADA, BELL ALIANT REGIONAL
COMMUNICATIONS INC., BELL MTS INC. AND NORTHERNTEL, L.P.**

Respondents

(Defendants/Plaintiffs by Counterclaim)

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellants request that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellants' solicitor, or where the appellants are self-represented, on the appellants, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 7, 2022

Issued by: _____

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Bell Canada et al.

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment of Justice Lafrenière (the “Trial Judge”) dated October 7, 2022, in Federal Court File No. T-113-18 (the “Judgment”).

THE APPELLANTS ASK THAT this Court:

1. Allow this appeal and reverse and/or set aside paragraphs 1 to 6 of the Judgment;
2. Grant the Appellants’ action in T-113-18 and declare that the asserted claims (defined below) are valid and infringed;
3. Grant Judgment (a) awarding the Appellants’ entitlement to equitable relief; and (b) awarding the Appellants an injunction until expiry of the 585 Patent (defined below);
4. Order the action to proceed to the determination of the Quantification Issues, as defined in the Bifurcation Order in this action dated September 5, 2019, and amended by Orders dated February 4, 2020, and July 6, 2020;
5. In the alternative to items 2-4 above, order a new trial of the Liability and Entitlement Issues, as defined in the Bifurcation Order in this action dated September 5, 2019, and amended by Orders dated February 4, 2020, and July 6, 2020, in front of a different judge of the Federal Court;
6. Grant the Appellants their costs both in this Court and in the Court below;
7. To the extent the Appellants have paid any Respondent any funds in respect of costs in the Court below, order said Respondent to pay back to the Appellants any such funds, with interest; and
8. Grant such further and other relief as this Honourable Court may find just.

THE GROUNDS FOR THIS APPEAL are as follows:

A. Background Regarding the Below Action

1. The Appellants, Rovi Guides, Inc. and TiVo Solutions Inc. (together “Rovi”), supply digital entertainment technology, including interactive program guide (“IPG”) technology, to consumers to help them find programming of interest.
2. “Rovi has a long history of innovation and numerous patented features have been incorporated in its products” (para. 24).
3. The Trial Judge states that the evidence of “Rovi’s corporate history and licensing business” are to be read in from the previous decision released in T-921-17 at 2022 FC 874 [*Rovi #1*], which is the subject of a separate appeal. The following findings were made in *Rovi #1*, in addition to others that may be relied on by the Appellants.
4. “Rovi’s predecessors were pioneers and at the forefront of program guide technology. Rovi’s corporate lineage starts with the paper TV Guide Magazine launched in the United States of America in 1953 and continues to today’s modern IPG technology” (para. 18 in *Rovi #1*).
5. “Rovi’s predecessors have been recognized by the industry for their long history of innovation and received awards and accolades for their contributions to the IPG technology” (para. 23 in *Rovi #1*).
6. “Significant investments were made by Rovi in research and development over the years – in the order of magnitude of USD\$1 billion – to develop new products and services for its core business: licensing patented innovations to third-party companies who create or use their own digital entertainment solutions using Rovi’s patented technology” (para. 21 in *Rovi #1*).

7. “Rovi’s largest market for licensing has been subscription-based television broadcasting [Pay-TV]. Rovi has licensed its technologies and related patents to many of the leading Pay-TV providers around the world, including most of the largest Pay-TV providers in Canada” (para 22 in *Rovi #1*).

8. Bell Canada (“Bell”), is a telecommunications company and subscription-based television broadcasting provider. In 2010, Bell launched an IPTV service, “Bell Fibe TV” (“Fibe TV”), to subscribers in Ontario, Quebec, Manitoba, and the Atlantic provinces.

9. Bell was previously a licensee of the patents in suit. “... Bell and TELUS were licensed when they launched their IPTV systems” (para. 27).

10. “For years Rovi was in discussions with Bell, TELUS, and Ericsson regarding the need for a licence to Rovi’s patent portfolio” (para. 29). Specifically, Rovi engaged in extensive negotiations with Bell in an effort to enter into an agreement to cover Fibe TV.

11. Given Bell’s refusal to take a license from Rovi for Fibe TV, Rovi commenced the underlying action, asserting that certain claims of the following four patents (the “asserted claims” and the “patents”) were infringed by Bell and its Fibe TV service:

- a. Canadian Letters Patent No. 2,336,870 (the “870 Patent”), which generally relates to IPG systems and methods in which programs and associated program data may be stored on remote or local servers and played back by one or more users (with claims 346, 456, 721 and 724 being asserted);
- b. Canadian Letters Patent No. 2,339,629 (the “629 Patent”), which generally relates to IPG systems and methods with integrated digital storage that users employ to record programs, maintain program guide

data, and display guide data (with claims 7, 80, 90 and 91 being asserted);

- c. Canadian Letters Patent No. 2,514,585 (the “585 Patent”), which generally relates to systems and methods for operator-initiated recording of programs on a remote server, based on retention-criteria, for later viewing by users and then subsequent deletion of those programs (with claims 34, 36, 87 and 127 being asserted); and
- d. Canadian Letters Patent No. 2,425,482 (the “482 Patent”), which generally relates to systems and methods for caching of on-demand media data in a video-on-demand (“VOD”) system to reduce latency (with claims 1, 5, 13, 14, 41, 45, 53 and 54 being asserted).

12. The action went to trial in July 2020.

13. By order dated August 10, 2020, the style of cause was amended and BCE Inc., Bell Aliant Regional Communications Inc., Bell Mts Inc. and Northerntel, L.P. were removed as defendants from the action.

14. Through Confidential Judgment and Reasons dated October 7, 2022, the Trial Judge dismissed Rovi’s action.

15. Despite the order dated August 10, 2020, the Confidential Judgment and Reasons dated October 7, 2022, included BCE Inc., Bell Aliant Regional Communications Inc., Bell Mts Inc. and Northerntel, L.P. as parties. As of the date of preparation of this Notice of Appeal, the Confidential Judgment and Reasons dated October 7, 2022 and the public version thereof dated October 24, 2022, remain uncorrected. To the extent the style of cause is not amended, the Appellants reserve their rights to amend this Notice as necessary.

16. The action was heard jointly with another action bearing Court File No. T-206-18. That action is the subject of a separate Notice of Appeal being issued on the same date.

B. Summary of the Trial Judge’s Relevant Conclusions

i. The 870 Patent – Simultaneous and Peer-to-Peer Transmission (paras. 171-307)

17. Two groups of claims were addressed at trial: the 870A Claim (claim 346) describes an IPG recording two programs simultaneously, and the 870C Claims (claims 456, 721, 724) describe the ability to request playback by a second user’s equipment of a program recorded on a first user’s equipment. The Trial Judge’s conclusions for each group included the following, which will be summarised in turn.

18. **870A Construction:** The Trial Judge interpreted the terms “tune” and “tuner” to mean an “analog or digital device that can select a specific frequency band, and therefore, a specific television channel” (paras. 176-195).

19. **870A Validity:** The Trial Judge determined that the 870A Claim was not anticipated by Browne (paras. 196-233).

20. The Trial Judge also determined that the 870A Claim was rendered obvious by the skilled person’s common general knowledge alone, or by Browne plus the skilled person’s common general knowledge, or by DAVIC 1.3.1 plus the skilled person’s common general knowledge (paras. 234-256).

21. **870A Infringement:** The Trial Judge stated that, as conceded by Bell, if the 870A Claim was valid, then it was infringed (para. 257). There are no reasons provided for this conclusion.

22. **870C Construction:** The Trial Judge interpreted the phrase “generating a request to playback a program with a first user equipment, wherein the program was

recorded on a second user equipment in response to a record request generated at the second user equipment” in the following way: “The skilled person understands that the first user equipment generates a request to playback a program. This can be done in response to a user control signal, or some other control signal generated by the system. The program that is the subject of the request was recorded on the second user equipment in response to a record request generated at that second user equipment, again in response to a control signal arising from a user input, or some other signal generated by the system (paras. 258-259).

23. **870C Validity:** The Trial Judge determined that the asserted claims of the 870 Patent were rendered obvious by DAVIC 1.3.1 plus the skilled person’s common general knowledge, and by Hair plus the skilled person’s common general knowledge (paras. 262-295).

24. The Trial Judge rejected the allegation that the asserted claims of the 870 Patent are broader than the invention made by the inventors (paras. 296-307).

25. **870C Infringement:** The Trial Judge determined that, as conceded by Bell, if the 870C Claims were valid, then they were infringed (paras. 412-414).

ii. The 629 Patent – Recording Directory (paras. 308-376)

26. The parties did not raise any claims construction issues in relation to the 629 Patent. However, relevant to the determination of validity, the Trial Judge accepted that “maintaining a directory” means “creating a directory of the stored associated program data and keeping it up to date, including by adding, deleting or editing entries” (para. 324).

27. **Validity:** The Trial Judge determined that the asserted claims of the 629 Patent were anticipated by Florin (paras. 319-352).

28. The Trial Judge determined that the asserted claims of the 629 Patent were rendered obvious by the skilled person’s common general knowledge alone or, Florin

plus the skilled person's common general knowledge (paras. 353-369) or Browne plus the skilled person's common general knowledge (para. 370-375).

29. **Infringement:** The Trial Judge determined that, as conceded by Bell, if the asserted claims of the 629 Patent were valid, then they were infringed (para. 317).

iii. The 585 Patent – Restart (paras. 377-466)

30. **Construction:** The Trial Judge determined that the skilled person would understand that there is no difference between an “access-period” and a “retention-period” (para. 388).

31. The Trial Judge interpreted the term “accessing” in the phrase “in response to determining, accessing the portion” to mean “establishing a connection in preparation for transmission” (paras. 389-398).

32. **Validity:** The Trial Judge determined that the asserted claims of the 585 Patent were anticipated by iMagic (paras. 400-438).

33. The Trial Judge determined that the asserted claims of the 585 Patent were rendered obvious by iMagic (paras. 439-459); the Oracle White Paper and the Oracle Patent (paras. 453-459); and the Microsoft Patent (paras. 460-463).

34. **Infringement:** The Trial Judge determined that, as conceded by Bell, if the asserted claims of the 585 Patent were valid, then they were infringed by Bell's STB implementations (paras.465-466). Rovi did not allege that Bell's web or mobile implementations infringed the 585 Claims.

iv. The 482 Patent – Caching Data (paras. 467-575)

35. **Construction:** The Trial Judge determined that that the skilled person would understand the asserted claims of the 482 Patent to require a specific sequence of steps (paras. 483-492).

36. The Trial Judge determined that that the skilled person would understand the phrase “a second set of on-demand media data” to mean “a set of data that is not already displayed but is related to or ancillary to the first (displayed) set” (paras. 493-497).

37. The Trial Judge determined that that the skilled person would understand the phrase “automatically retrieving” to mean “without user indication to access it” (paras. 498-500).

38. **Validity:** The Trial Judge determined that the asserted claims of the 482 Patent were anticipated by Rosin (paras. 507-535).

39. The Trial Judge determined that the asserted claims of the 482 Patent were rendered obvious by Rosin (paras. 554-555), Aristides and LaJoie (paras. 536-549), and O’Robarts together with Rosin, Aristides, LaJoie, and the skilled person’s common general knowledge (paras. 550-555)

40. The Trial Judge determined that the asserted claims of the 482 Patent were not broader than the invention disclosed, but stated that to the extent manual retrieval was found to be within the scope of the asserted claims of the 482 Patent, the claims would be broader than any invention disclosed (paras. 556-563).

41. **Infringement:** The Trial Judge determined that Bell did not infringe the asserted claims of the 482 Patent on the basis that Bell does “not have the sequence required” (para. 564-565).

42. The Trial Judge also determined that Bell’s web implementation did not infringe the asserted claims of the 482 Patent on the basis there was no evidence that the on-demand media data and the non-on-demand media data come from separate sources (para. 567).

43. The Trial Judge also determined that Bell did not infringe the asserted claims of the 482 Patent on the basis that the component of the Bell system responsible for

identifying on-demand media data is “not the user television equipment as required by the 482 Asserted Claims” (para. 568-570); that “all the on-demand media data was not downloaded in two sets (paras. 571-572); and that all the on-demand media data is downloaded in a “manual only” manner not by “automatic retrieval” (paras 573-574).

v. Entitlement to Equitable Relief (paras. 576-655)

44. **Accounting of profits:** Even if one or more of the asserted patents was valid and infringed, the Trial Judge determined that Rovi was not entitled to elect the remedy of an accounting of Bell’s profits (paras. 582-608).

45. **Injunction:** At the time of decision, only the 585 Patent was unexpired (the 482 Patent having expired after trial while the decision was pending). The Trial Judge determined that, even if the 585 Patent was valid and infringed, he “would not be prepared to exercise his discretion in favour of Rovi and grant injunctive relief” (paras. 645-655).

C. The Appeal

i. Over-Arching Reviewable Errors Regarding Liability

46. A granted patent entitles the patentee to the exclusive right to make, use and sell its invention, as well as to license its invention. A patentee may enforce its rights against those it believes to be infringing on its exclusive monopoly. A granted patent is presumed to be valid. These statements are basic tenets of the Canadian patent system. Patented inventions benefit the public by giving the public access to advances in science and technology, and solutions to practical problems. In the judgment below, the Trial Judge erred in ignoring these fundamental aspects of the Canadian patent system. Instead, the Trial Judge engaged in an analysis tainted by tunnel vision and hindsight. The Court’s analysis was also suffused with negative characterization, and condemnation, of the Appellants’ lawful right to apply for, obtain, and assert patents. The Trial Judge further committed numerous overarching errors regarding liability, including the following.

47. **Oversimplification of patent law frameworks:** The Trial Judge made several errors of law in setting out and characterising the law on anticipation, obviousness, and sufficient disclosure. The Trial Judge described these areas of the law as well-settled when many of them are in flux and are currently the subject of inconsistent decisions in the Federal Court and the Federal Court of Appeal. This oversimplification carried through his approaches to anticipation, obviousness, and sufficiency, as set out below.

48. **Vague and elevated common general knowledge:** The Trial Judge erred in failing to clearly define the applicable common general knowledge. Further, he improperly imported unspecified evidence from *Rovi #1* into this case. He also misstated, misapplied or misunderstood the parties' agreed statement in respect of the common general knowledge. What the Trial Judge believed to be part of the common general knowledge is unclear and unknowable from the decision. As the common general knowledge plays a pivotal role in most of the Trial Judge's invalidity findings, this error prevents meaningful appellate review of those findings because it is impossible to discern the considerations that underpin the Trial Judge's findings.

49. In addition, in assessing what constituted the common general knowledge of the skilled person, the Trial Judge erred in his legal and factual definitions of the common general knowledge. Legally, he framed the common general knowledge as "the technical background of the Skilled Person" (para. 154). Critically, however, he equated information that was "known" with the common general knowledge, i.e., information that was generally known and accepted without question by the bulk of those who were engaged in the particular art. Factually, he concluded that concepts were widely known and accepted when they were not. These errors tainted the Trial Judge's entire assessment of the common general knowledge, claims construction and validity.

50. **Incorrect approach to claims construction:** The Trial Judge made errors of law in his approach to claims construction of the asserted claims. He adopted an approach to construction that was not purposive. The Trial Judge – repeatedly, improperly and inconsistently in his decision – relied on dictionary definitions or “plain meaning” rather than focussing on what the skilled person would have understood a term or phrase to mean. The Trial Judge also repeatedly and improperly conducted his claims construction analysis with an eye to Bell’s non-infringement evidence or arguments.

51. The Trial Judge also made an error of law or a palpable and overriding error by accepting the claims construction opinions of Bell’s expert, Mr. Kerr, who improperly construed the claims in light of his invalidity opinions. Mr. Kerr admitted to having reviewed the prior art before coming to his construction of the asserted claims of the 629 and 870 Patents.

52. **Failure to give effect to the presumption of validity:** An issued patent is presumed to be valid pursuant to subsection 43(2) of the *Patent Act*. The Trial Judge was predisposed to finding the patents invalid rather than starting from the presumption of validity, and that predisposition is made clear at various points in the Trial Judge’s reasons. Having failed to start with this presumption is an error of law that undermines the entirety of the Trial Judge’s decision.

53. Early in his decision the Trial Judge makes a number of sweeping statements about all of the patents at issue, including: (1) “no evidence was presented of any technical step or approach that needed to be taken to implement any advance claimed in the Patents that would have been outside the CGK of the Skilled Person” (para. 52); and (2) “none of the Patents identify any technical problem for which the claimed subject matter provides a solution. The reason for this is simple. It was understood that the Skilled Person knew how to do it;” (para. 53; emphasis in original). These statements are incorrect, difficult to understand and, ultimately, irrelevant to any issue of validity. The Court’s fascination with looking for “technical problems”, “technical

steps” and “technical approaches” is not explained including what the Court meant by the term “technical” or why such “technical” matters were required for patentability. This approach, combined with the elevated common general knowledge described above, meant that Rovi was put to the task of proving validity from a presumption of invalidity.

54. The Trial Judge’s confounding of the disclosure standards for sufficiency and enablement, as described below, also demonstrate this improper approach.

55. Despite stating that he would consider the matters anew in this case and not rely on conclusions in the decision in *Rovi #1*, the Trial Judge allowed his findings in *Rovi #1* to taint his views. This lack of objectivity was a legal error that undermined the entirety of the Trial Judge’s decision.

56. **Improper approach to anticipation:** The assessment of anticipation, pursuant to section 28.3 of the *Patent Act*, requires that, for purposes of disclosure, the matter relied upon as prior art must disclose subject matter which, if performed, would necessarily result in an infringement of the patent, with no room for trial and error or experimentation by the skilled person. The Trial Judge fell into error by not asking, let alone answering, whether performing the allegedly anticipatory reference would *inevitably* result in infringement. Rather, the Trial Judge filled in apparent gaps in the prior art disclosures to arrive at a finding that the asserted claims were anticipated.

57. The Trial Judge compounded his erroneous anticipation analysis by failing to properly apply the test for enablement which is not concerned with how “technical” or “detailed” a patent description is (para 433) but rather on whether there is adequate information disclosed for the skilled person to perform the claimed invention without inventive ingenuity; such performance must *inevitably* result in infringement.

58. **Confounding standards for sufficiency and enablement:** At various points in his reasons, the Trial Judge raises the issue of sufficiency of the disclosure of the patent when no argument relating to sufficiency was raised nor needed to be determined. He does so explicitly for the 629 Patent (para. 351), and implicitly when he labels the 482 and 585 Patents inappropriately as “paper” or “ideas” patents. Further, the Trial Judge improperly equates the standard for a patent disclosure to be sufficient, and the standard for a prior disclosure to be enabling. This was a legal error.

59. **The hindsight approach to obviousness:** The assessment of obviousness, pursuant to section 28.3 of the *Patent Act*, must be conducted without hindsight. The asserted patents have priority dates between 1998 and 2003. Television technology has advanced immeasurably over the last twenty years and the inventions disclosed in the asserted patents have become ubiquitous. The Trial Judge was warned of the grave danger in applying hindsight to the asserted patents in the assessment of obviousness which he failed to recognize and consider.

60. The Trial Judge fell into legal error by articulating and applying a hindsight test for obviousness. The Trial Judge assumed the perspective of a “motivated skilled person” (para. 154) when reviewing the prior art, rather than looking to whether there was any evidence of motivation. The Trial Judge is required by law to evaluate “whether, viewed without any knowledge of the alleged invention as claimed, do the differences between the state of the art and the inventive concept of the claim constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?” (emphasis added). Here, instead, the Trial Judge improperly asked the question backwards, providing the skilled person with the patented solution and then asking if the solution was obvious in view of the prior art, with complete hindsight.

61. With respect to the Trial Judge’s findings that the combination of two pieces of prior art rendered any of the asserted claims invalid, the Trial Judge fell into legal

error in failing to identify any evidence of why the skilled person would be motivated to combine the prior art. Again, he applied a hindsight bias by starting from a combination instead of asking whether the combination would be made by the skilled person.

62. The Trial Judge's hindsight bias was a legal error that tainted the entirety of his assessment of obviousness.

63. **Inconsistent obviousness framework applied:** Over the course of his obviousness analyses, the Trial Judge was inconsistent in his use of key concepts such as problem-solution, subject-matter, inventive concept and essential elements. He adopted whatever framework suited his results-driven analysis.

64. In so doing, the Trial Judge made legal and/or palpable and overriding errors in arriving at his conclusions that the asserted claims were obvious.

65. **Errors and procedural unfairness in treatment of Rovi's expert Wahlers:** Bell argued that the evidence of Rovi's sole expert on validity issues, Mr. Wahlers, should be given no weight, and the Judgment states (paragraph 110): "The Defendants [Bell] further submit that an expert report that contains extensive and unattributed copying of another's work is disqualifying relying on *Anderson v. Pieters*, 2016 BCSC 889 (*Anderson*) for this proposition." The Trial Judge then considered jurisprudence and factors on whether to disqualify.

66. Bell's ambush attack on Mr. Wahlers, by which the Trial Judge considered disqualification, was procedurally unfair. Bell raised no pretrial objections to Mr. Wahlers as an expert, including no objection under Rule 52.5 of the *Rules*, and no objection to Mr. Wahlers' expert reports. As a result, Rovi had no opportunity to elucidate the circumstances for the Court, or to counter the prejudice engendered.

67. Although the Trial Judge decided not to disqualify Mr. Wahlers, instead approaching his evidence with "great skepticism", he accorded little to no weight to the evidence of Mr. Wahlers on key issues. The specter of disqualification coloured

the Trial Judge's approach to Mr. Wahlers and his testimony. These ambush tactics go beyond hardball cross-examination and constitute procedural unfairness that should not have been condoned by the Trial Judge.

68. **Unfair approach to credibility across experts:** The Trial Judge made palpable and overriding errors in his vastly different approaches to assessing the credibility of Bell's experts and Rovi's experts.

69. For example, when Rovi's expert, Mr. Wahlers, refused to concede a point in cross-examination, the Trial Judge characterised his positions as "obfuscating" or "indefensible" (paras. 414). In contrast, the Trial Judge held that Bell's expert, Dr. Robinson, "was often hard to pin down and Rovi's counsel was not able to move him from his strongly held positions." Yet, that behaviour was defended by the Trial Judge as "understandable" (para. 135).

70. Similarly, when Mr. Wahlers did concede points on cross-examination, the Trial Judge highlighted those concessions as evidence of weakness and a lack of credibility. When Dr. Robinson or Mr. Kerr conceded a point, the Trial Judge characterised those concessions as neutral or positive. The Trial Judge also had contrasting approaches to errors made by the experts: Mr. Wahlers was criticized, and Dr. Robinson was not.

71. The Trial Judge conflated the notions of credibility and reliability in respect of Bell's experts. For example, at paragraph 423, Dr. Robinson was found to be credible by the Trial Judge, but was also found to be reliable despite the fact that he conceded he had mixed up two applications, and admitted they could not work in the way he opined. The Trial Judge simply accepted all of Dr. Robinson's testimony despite his acknowledgment that he was wrong.

72. The Trial Judge's palpable and overriding errors in his approach to assessing credibility were exacerbated by a number of factors unique to this case, including that

there was an inordinate delay (more than two years) from the evidence portion of the trial to the release of the Judgment.

73. **The mistaken criticisms of Rovi's expert:** In contrast to the forgiving approach the Trial Judge applied to Bell's experts, the Trial Judge erred in refusing to fairly consider Mr. Wahlers' evidence. The Trial Judge's reasons on this point are internally inconsistent. Despite having accepted Mr. Wahlers' sworn testimony that his report expressed his expert opinion, and that he was not involved in any copying, the Trial Judge concluded that the existence of identical phrases in an expert report tendered by Rovi in *Rovi #1* and the validity expert report of Mr. Wahlers undermined Mr. Wahlers' credibility. There was no evidence that Mr. Wahlers crossed the line of propriety, impartiality or independence.

74. Indeed, the Trial Judge articulated only three possibilities for the alleged copying, when further options – consistent with the witness's accepted testimony – were available. The Trial Judge inexplicably concluded that while Mr. Wahlers had not seen the other impugned expert report, he was nevertheless guilty of "plagiarism" (para. 107). This extremely serious accusation is unfair, incorrect and cannot be left to stand. The Trial Judge made further incorrect assumptions about the role of the witness and counsel that were unfair to both. The Trial Judge's conclusion on credibility was therefore an error of law or a palpable and overriding error, which permeated his analyses on construction, common general knowledge, and validity.

75. In addition to the legal errors identified above that broadly apply to all patents, the following legal errors and palpable and overriding errors are identified per patent.

ii. Reviewable Errors Regarding the 870 Patent (Simultaneous and Peer-to-Peer Transmission)

76. **Construction:** The Trial Judge committed reviewable errors of law and/or palpable and overriding errors in arriving at his construction of the terms "tuner" and "tuning" in the 870A Claim.

77. The Trial Judge failed to provide a construction of the terms “tuner” and “tuning”, instead purporting to adopt four entire paragraphs from the responding infringement report of Bell’s expert, Mr. Kerr, as the construction of those claim terms (para. 195). Those paragraphs that the Trial Judge purported to adopt contain Mr. Kerr’s infringement opinion. Accordingly, even if it were proper for the Trial Judge to incorporate by reference paragraphs of an expert’s opinion as the Court’s construction, this adoption would be an error of law because it improperly construed the 870A Claim with an eye to infringement.

78. The Trial Judge also adopted Mr. Kerr’s construction that the 870 Patent, which includes IPTV systems within its scope, included a claim element that no IPTV system would have, i.e., a “tuner” as a piece of hardware (para. 190). In doing so, the Trial Judge failed to approach the 870 Patent from the perspective of a skilled person with a “mind willing to understand” and “a judicial anxiety to support a really useful invention”. In approaching the matter as he did, the Trial Judge erred.

79. The Trial Judge adopted inconsistent and irreconcilable approaches to the functional definition of terms in the 870 Patent and prior art. For example, at one point he chastised Mr. Wahlers for employing a functional approach (paras. 192, 193), and then later employed that approach himself, relying on Mr. Kerr (paras. 210, 212, 228, 241). In simultaneously rejecting and relying on the functional definition of the same terms in the same patent, the Trial Judge revealed his ends-directed approach to what is supposed to be an objective analysis. In approaching these matters as he did, the Trial Judge erred.

80. The Trial Judge committed other errors in construing the claims of the 870A Claim including holding Rovi to a higher evidentiary standard than required by law, giving insufficient weight to the references to “tuning” in Bell’s own documents, and ignoring the clear admission of Bell’s expert, Dr. Robinson, that “in the context of IPTV, ‘tuning’ includes selecting a program via an EPG with a user device (e.g., set-top box)” (para. 185).

81. In addition, as set out above, the Trial Judge improperly emphasized the plain language of the claim rather than purposively construing these terms in the context of the patent as a whole.

82. **Validity:** Regarding obviousness of both the 870A and 870C Claims, the Trial Judge made palpable and overriding errors in finding that Mr. Wahlers admitted or conceded numerous points that he did not concede. The Trial Judge also erred in law or made palpable and overriding errors in conflating a previously expressed goal in the art with a claimed method that achieves that goal. Similarly, the Trial Judge erred in conflating the stated objectives of prior art patents and references with what they actually taught the skilled person. Both of these errors led the Trial Judge to ignore gaps between the art and the asserted claims, which could not be bridged by the common general knowledge. Finally, the Trial Judge erred in law by approaching the obviousness analysis with hindsight, and with an elevated common general knowledge, as described above.

83. The Trial Judge also erroneously followed Mr. Kerr's reliance on the DAVIC reference, which disclosed only hopes for future development or "high-level concepts" (para. 360) and not the methods by which to achieve them. In concluding that such aspirational statements obviate all future implementations, the Trial Judge erred.

84. The Trial Judge also erroneously asserted that Rovi had abandoned positions that it did not.

85. **Infringement:** The Trial Judge erred in law or made a palpable and overriding error by failing to provide any reasons to support his judgment that the 870A Claim was not infringed. Indeed, his reasons say the opposite. Further, as described above, the Trial Judge made a clear legal error in his construction analysis, and his judgment that Bell did not infringe the 870A claim flowed from that legal error. Bell does not dispute that the 870C Claims would be infringed in the event they were found to be valid.

iii. Reviewable Errors Regarding the 629 Patent (Recording Directory)

86. **Claims construction:** The Trial Judge stated at paragraph 317 that there were no issues of claim construction raised by the parties. That is incorrect. For example, there was a dispute around the phrase “maintaining a directory” which the Trial Judge not only discussed later in his Reasons but upon which he based, at least in part, his findings on anticipation. The Trial Judge erred in failing to give the term a construction, in construing the term with an eye to validity and/or ignoring Mr. Wahlers’ evidence relating to construction.

87. **Validity:** Regarding anticipation by Florin, as described above, the Trial Judge applied an incorrect approach to the disclosure analysis, which was a clear legal error. He accepted the evidence of Mr. Kerr that an element of the asserted claims of the 629 Patents was not disclosed but would have been known to the skilled person as sufficient for a finding of anticipation. It is not, and the Trial Judge’s finding of anticipation is a legal error as a result.

88. Regarding obviousness, similarly to the 870 Patent, the Trial Judge made palpable and overriding errors in finding that Mr. Wahlers conceded points that he did not concede. The Trial Judge also erred in law by approaching the obviousness analysis with hindsight and with an elevated common general knowledge (including “high level concepts”), as described above.

iv. Reviewable Errors Regarding the 585 Patent (Restart)

89. Where there were disputes, the Trial Judge accepted Mr. Wahlers’ claim construction.

90. **Validity:** Regarding anticipation by iMagic, the Trial Judge made palpable and overriding errors in his assessment of the evidence. This includes, for example, finding that Mr. Wahlers conceded numerous points that he did not concede, and characterizing Mr. Wahlers’ positions as “utterly indefensible” despite those same positions having been conceded by Dr. Robinson either in his initial report or in

cross-examination. He also made a palpable and overriding error in finding that Mr. Wahlers' evidence as it relates to the 585 Patent should be given little to no weight, despite having preferred and adopted Mr. Wahlers' construction of the claims in issue. Similarly, the Trial Judge made a palpable and overriding error in his finding that Mr. Robinson was consistent or "steadfast in his opinion" regarding the validity of the 585 Patent despite Mr. Robinson having changed his opinion several times, and being unable to defend or explain those inconsistencies in cross-examination.

91. By way of further example, the Trial Judge baldly rejected Mr. Wahlers' evidence regarding the lack of disclosure of operator-initiated recordings in the iMagic patent without citing any specific evidence to the contrary; such an unsupported rejection of Wahlers' evidence was also wholly inconsistent with the Court's own comments at paragraph 408 describing the iMagic patent as being recordings from the network video server and *made available* to users.

92. Another example of a palpable and overriding error made by the Trial Judge is in his finding that both of the distinct applications described in iMagic rely on and are based on the same "NDVR", despite also finding that Dr. Robinson conceded that his report was incorrect on this point, "was defensive when confronted with the inconsistency", "reluctant to agree that he was wrong", and instead suggested that the inventors who wrote iMagic "must have made a mistake". To completely reject the evidence of Mr. Wahlers and fully accept the evidence of Dr. Robinson in these circumstances is a palpable and overriding error.

93. Regarding obviousness, the Trial Judge erred in law by approaching the obviousness analysis with hindsight and with an elevated common general knowledge, as described above.

94. **Infringement:** At paragraph 465, the Trial Judge acknowledged Bell's concession of infringement of claim 34 if it was found valid. As such, if the invalidity finding is reversed, claim 34 must be deemed to be infringed.

v. **Reviewable Errors Regarding the 482 Patent (Caching)**

95. **Construction:** The Trial Judge committed reviewable errors of law and/or palpable and overriding errors in his construction and reading of the 482 Patent including as it relates to the need for a particular sequence of steps. These errors include failing to consider the language of the specification and the examples contained in the disclosure of the 482 Patent.

96. Another example of an error in construction and reading of the 482 Patent relates to “automatically retrieving.” The Trial Judge erred in finding that “automatic retrieval” of a *second* set of data in response to a user indication to retrieve a *first* set of data constituted “manual retrieval.” The Trial Judge also made a palpable and overriding error in his finding that Mr. Wahlers made a concession in this regard.

97. Another example of an error in construction and reading of the 482 Patent is finding that the patent uses the terms “video-on-demand” and “on-demand media data” interchangeably. The Trial Judge also made a palpable and overriding error in his finding that Mr. Wahlers made a concession regarding the problem that the 482 Patent was seeking to solve and was inconsistent in his evidence on this point.

98. **Validity:** Regarding anticipation, the Trial Judge made several palpable and overriding errors including in finding that Rosin discloses “on demand media data” as that term is used in the 482 Patent. The Trial Judge also made palpable and overriding errors in finding that Rosin discloses the automatic retrieval of a second set of on-demand media data that corresponds to a first set of on-demand media data, and that Rosin discloses the automatic storage of the second set of on-demand media data. These three errors include an error in failing to consider the type of data being described in Rosin, and the timing of the retrieval of that data, and an error in failing to consider whether the data in question is a “second-set” of data as that term is used in the 482 Patent. The Trial Judge also made a palpable and overriding error in finding that the essential elements of the asserted claims of the 482 Patent were enabled by Rosin.

99. Regarding obviousness, the Trial Judge erred in law by approaching the obviousness analysis with hindsight and with an elevated common general knowledge, as described above. He further erred in referring to the common general knowledge as filling any gaps in the prior art in a manner that is inconsistent with his actual findings regarding the state of common general knowledge. The specific findings of the Trial Judge regarding the common general knowledge do not assist in filling the gaps in the prior art, in particular as it relates to the timing and sequence of steps described in the 482 Patent.

100. Regarding overbreadth, as described above, the Trial Judge made clear legal errors in his construction analysis. These errors led the Trial Judge to find that the asserted claims of the 482 Patent would be overbroad if the claims covered “manual only” retrieval, as he defined it.

101. **Infringement:** The Trial Judge made palpable and overriding errors in his infringement analysis including in finding that it was somehow inappropriate or incorrect for a different expert to provide evidence about the technical functionality of the systems without given an opinion on claim construction or infringement. Mr. Barth was qualified as an expert within his area of expertise and gave valid evidence within the scope of that area of expertise. No evidence was called by Bell to counter or contradict Mr. Barth’s evidence. The Trial Judge further erred in his finding that Mr. Barth conceded a point regarding the identification of data that he did not concede, and in his finding that the second set of media data was not identified at the user equipment.

102. The Trial Judge incorrectly concluded that no burden of any kind rested on Bell with respect to their infringing activities. Rovi met its evidential burden to lead positive evidence on infringement. A burden then shifted to Bell to explain their activities to the Court. They did not do so. The Trial Judge nevertheless held Rovi to the strict proof of their infringement allegation, discounted the evidence led on that subject, and then accepted Bell’s evidence, which was comprised of assumptions

provided to the experts by counsel. Bell had some obligation (an evidential burden, a persuasive burden or both) to counter Rovi's positive evidence with positive evidence of its own. It did not. The Court failed to draw the appropriate inferences from this failure. This was a reviewable error.

103. The Trial Judge made palpable and overriding errors at paragraphs 571 to 575 relating to his conclusions that the Bell system did not have two "sets" of on demand media data.

104. The Trial Judge made a palpable and overriding error in finding that Mr. Wahlers conceded that all on-demand media data is downloaded only in response to a user indication. This is a misstatement and mischaracterization of Mr. Wahlers' evidence in relation to this issue.

105. Further, as described above, the Trial Judge made clear legal errors in his construction analysis, and his judgment that Bell did not infringe the asserted claims of the 482 Patent flowed from those legal error.

vi. Reviewable Errors Regarding Entitlement to Equitable Relief

106. The Trial Judge concluded that, even if Rovi had established that any of the claims of the asserted patents were valid and infringed, Rovi was not entitled to either an accounting of profits or, in respect of the 585 Patent, an injunction. The Trial Judge's conclusions contain serious legal errors and palpable and overriding errors of mixed fact and law and errors of fact.

107. The Trial Judge erred in his analysis on entitlement to equitable relief by setting out that he was doing the analysis in the event he was incorrect in his validity findings but proceeded to conduct the analysis on the basis that the patents were invalid. In the event that any of the patents are found to be valid, the Trial Judge's criticisms and conclusions would no longer be defensible.

108. **Accounting of Profits:** The Trial Judge's decision to pre-emptively deny Rovi its election of an accounting of Bell's profits is nearly unprecedented and rests on clear legal errors and/or palpable and overriding errors.

109. The Trial Judge adopted an incorrect and incomplete approach at law to the principles to be considered in the decision to award an accounting of profits, including the following errors.

110. The Trial Judge defined the goal of an accounting of profits as "compensatory", and ignored the clear restitutionary purpose of the award, which erroneously influenced his selection and consideration of factors. The Trial Judge ignored factors that should have been considered, and erred in placing emphasis on factors that were incorrect and/or did not merit the importance at law attributed by him.

111. The Trial Judge erred at law in identifying and elevating the notion of "reliability" of the conduct and result of the accounting as a key factor, which is not supported by the jurisprudence cited on this point. In doing so, the Trial Judge erred by creating a new and elevated legal test and ignored the accepted legal principles of "rough justice" and the "broad axe".

112. The Trial Judge erred in law in his approach to the role of apportionment in an accounting of profits as a factor in whether to grant the election. The Trial Judge ignored the teachings of the Federal Court of Appeal on the apportionment exercise and the "numerous examples" in the jurisprudence of complex apportionments cited, for example, in *Nova Chemicals* 2020 FCA 141, instead holding that the complexity of apportionment was a factor against the award.

113. **Complexity:** The Trial Judge held that the complexity of quantifying an accounting of profits militates against Rovi being able to elect. This conclusion is untenable. It contains legal errors and palpable and overriding errors of mixed fact and law and errors of fact.

114. The Federal Court and this Court have been called upon numerous times to engage in complex, contested assessments of remedies. There was nothing peculiar about Rovi's claim or the expert evidence that ought to have disentitled Rovi from the right to elect an accounting of profits.

115. Rovi led evidence from two experts—Dr. Coleman Bazelon and Andrew Harington—to describe the methodology that they would employ to quantify an accounting of profits. They testified that the quantification of accounting of profits could be accomplished in this case using standard economic and accounting tools, and they described the methods that they would use.

116. The Trial Judge accepted that Dr. Bazelon and Mr. Harington's evidence was sound. Despite accepting their evidence that an accounting of profits could be quantified using standard economic and accounting tools, the Trial Judge proceeded to conclude that an accounting of profits would be complex to the point of disentitlement.

117. The Trial Judge erred in law by setting the bar for complexity too low. The Trial Judge held that any degree of complexity or contentiousness in determining an accounting of profits is a factor that weighs against such a remedy being granted. This is a clear error of law.

118. The Trial Judge erred in law in holding that Rovi should not be permitted to elect an accounting of profits because "isolating the impact of the individual features at issue in this case, while not impossible, would prove extremely challenging". With only limited exceptions (such as certain pharmaceutical patents), patents almost invariably only cover one feature of a product, rather than the entirety of a product. The Trial Judge's conclusions effectively create a blanket rule that an accounting of profits is unavailable where a patented feature is only one component of an overall product. This conclusion, if affirmed, would deny to most patentees a right that Parliament decided to afford to them. The Trial Judge's conclusion is a clear error of law.

119. Moreover, Dr. Bazelon and Mr. Harington—whose evidence the Trial Judge held to be rigorous, well reasoned and balanced—provided a methodology specifically directed at isolating the profits associated with one patented feature in a complex product. The Trial Judge never provided any reason to reject their evidence on this point. He erred in rejecting their evidence.

120. The Trial Judge also held that “There is a real risk that the analysis could ultimately be based on flawed assumptions about customer or market behaviour, non-infringing alternatives or competitors, or based on non-transparent analytical decisions in market modeling. The concern here is not that the complicated, time consuming and expensive analysis will fail, but rather that it will produce an unreliable number that would mislead the Court.” This conclusion reflects an error of law in the Trial Judge’s analytical approach. In *any* quantification, there is a risk that input assumptions will be wrong and that the results will be unreliable. That is precisely why each party has the opportunity to present its own expert evidence and cross-examine the opposing party’s expert. There is nothing unique about the quantification of an accounting of profits here.

121. The Trial Judge’s conclusion on this point was erroneous for a further reason: he reached the conclusion that the quantification exercise could generate unreliable results, without any evidence as to whether it actually would generate unreliable results, in addition to the errors of law around role, if any, of reliability in the legal test. If, at the quantification phase, the Trial Judge was to conclude that Rovi had not met its burden to reliably quantify an accounting of profits, it would be open to the Trial Judge at that point to decline to award an accounting of profits. Yet to do so at this stage—when experts who provided accepted, rigorous and well-reasoned opinions testified that the quantification could be done reliably—is a clear error of law. It sets the burden on a party seeking an accounting of profits impossibly high.

122. ***Rovi's alleged conduct:*** The Trial Judge erred in law by finding that prosecution conduct in line with the *Patent Act* and *Patent Rules* was sufficient to disentitle a patentee from an accounting of profits.

123. Rovi disputes the entirety of the Trial Judge's characterizations of its prosecution practices. The Trial Judge drew unsupported and insupportable inferences and immediately drew adverse factual and credibility conclusions on the basis of those inferences. The Trial Judge's findings that Rovi intentionally delayed the prosecution of the patents at issue are contrary to the uncontested evidentiary record.

124. However, even if the Trial Judge's factual findings were accepted as true, there is no basis in law to deny a patentee the right to elect an accounting of profits when it has prosecuted its patents in a lawful manner. There is no suggestion in the *Patent Act* that an extended period of time to prosecute patents is somehow untoward, nor is there any indication in the *Patent Act* that a party who takes an extended period of time to prosecute its patents should be denied an accounting of profits. This is particularly true where, as here, the patentee prosecuted its patents within the legally permissible timeframes, in the context of an internationally managed patent portfolio of hundreds of patents and international treaties that guarantee certain rights and procedures to patent applicants in Canada. The Trial Judge's normative conclusions and their effect on his accounting of profits analysis are errors of law. The Trial Judge also erred in effectively applying the US doctrine of *prosecution laches* to his analysis. He applied a doctrine that does not exist in Canada based on evidence not before him to deny Rovi equitable relief. This was a reversible error. The Trial Judge's failure to consider the text, context and purpose of the *Patent Act* or the treaty obligations that underpin it are also errors of law.

125. Under the *Patent Act*, a patentee can only claim an accounting of profits from the date on which the patent issues. Consequently, if a patentee prosecutes its patents in a way that delays their issuance, the effect of that delay is only to *decrease* the

quantum of their entitlement to an accounting of profits. It was an error of law for the Trial Judge to conclude that conduct that would in fact *decrease* the quantum of Rovi's claim for accounting of profits should somehow disentitle it from electing an accounting of profits.

126. The Trial Judge held that "The case before me exemplifies the 'patent holdup' problem". This conclusion reflects errors in law and palpable and overriding errors of fact. As a matter of law, there is no legal authority for the proposition that a systemic concern like "patent holdup" can bar a specific plaintiff from an equitable remedy. Further, the patent holdup problem is simply not a problem in a system where patent filings are public, and particularly so where the defendant is a sophisticated party, whose involvement in active licensing negotiations with a patentee would motivate it to evaluate pending applications. A defendant can at any time before issuance search for any pending patent applications, and upon issuance can bring an impeachment action to try to have the patents declared invalid. Where a defendant takes no steps to determine whether there are pending patent applications that might cover technology a defendant is planning to implement, it does not lie in a defendant's mouth to claim that it was somehow duped and is a victim of the patent holdup problem.

127. As a matter of fact, there was no evidence that the patent holdup problem is an accepted legal concept or principle in Canadian law, exists in Canada at all, or that it was in fact a problem for Bell in this case. There is no authority for the proposition that this novel concept can or ought to disentitle a party from equitable relief. There was no evidence that, irrespective of how Rovi prosecuted its patents, Bell would have made a different decision as to the technology it implemented. There was no evidence that, as a result of Rovi's alleged delay in prosecuting the patents, it acquired any additional market power. There was also no evidence that Rovi expanded the scope of its patents beyond the scope covered by the claims in its initial filing during prosecution. There was no evidence and no findings regarding any violation of section 38.2 of the *Patent Act*. And there was no evidence that Bell was

locked-in and somehow unable to change its practices after the patents were issued and the litigation was commenced.

128. To the contrary, Bell was a former licensee of Rovi. The Court failed to recognize the implications of this fact and surrounding circumstances as factors to be considered in the availability of equitable remedies and to conduct the proper analysis.

129. The absence of an easily available non-infringing alternatives and the presence of switching costs are necessary conditions for any possible patent holdup problem. Yet in this case, Bell asserted at trial that it had non-infringing alternatives it could have easily implemented in respect of every feature covered by the asserted patents. It is a palpable and overriding error to find any possibility of a patent holdup problem when Bell's evidence is that it could, during the period of infringement, have easily implemented a non-infringing alternative.

130. **Injunction:** The Trial Judge's decision to pre-emptively deny Rovi an injunction in respect of the asserted claims of the 585 patent is an error of law and/or a palpable and overriding error of mixed fact and law or error in fact. It is predicated on the stunning and unprecedented adoption into Canadian law of a 2006 U.S.S.C. decision which is itself the subject of considerable controversy, commentary and legislative effort in the United States.

131. In declining to grant Rovi an injunction in respect of the 585 Patent, the Trial Judge relied on many of his erroneous conclusions and findings previously described in his analysis of Rovi's ability to elect an accounting of profits. Rovi relies on and reiterates the errors described above.

132. Further, the Trial Judge erred in law in applying the standard from *eBay Inc v Merc-Exchange, LLC*, 547 US 388 (2006). *eBay* is an American decision that has never before been accepted or applied by Canadian courts. To the contrary, the consistent and virtually invariable practice is that an injunction is the normal remedy

where a valid patent is infringed, other than in exceptional circumstances. Such exceptional circumstances do not exist in this case, and the Trial Judge erred in law in concluding otherwise.

133. The Trial Judge erred in holding that “it is not in the public interest to deny millions of their customers access to features they previously enjoyed”. The Trial Judge erred in relying on this as a factor to deny an injunction. *Every* injunction will have the effect of taking products or product features away from customers who previously enjoyed them. The fact that they do so is not an unintended consequence of an injunction: it is the very point of an injunction. Injunctions exist to protect parties’ property rights over their patents and their investments in intellectual property. Without injunctions, the patent system becomes, at best, merely a compulsory licensing system that encourages and rewards efficient patent infringement. Parliament could have created such a system had it wished; it did not. The Trial Judge’s conclusions undermine the very structure that Parliament created.

134. Rovi relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

135. Rovi proposes that the Appeal be heard in Toronto, Ontario.

DATED: November 7, 2022



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Court File No. A-_____-_____
(T-113-18)

FEDERAL COURT OF APPEAL

B E T W E E N:

**ROVI GUIDES, INC. and TIVO
SOLUTIONS INC.**

Appellants
(Plaintiffs/Defendants by Counterclaim)

-and-

**BCE INC., BELL CANADA, BELL
ALIAN T REGIONAL
COMMUNICATIONS INC., BELL MTS
INC. AND NORTHERN TEL, L.P.**

Respondents
(Defendants/Plaintiffs by Counterclaim)

NOTICE OF APPEAL

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