

FEDERAL COURT OF APPEAL

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Appellant
(Plaintiff)

- and -

NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all other persons or entities unknown to the Plaintiff who are reproducing, publishing, promoting and/or authorizing the reproduction and promotion of the Infringing Materials

Respondents
(Defendants)

APPELLANT'S MEMORANDUM OF FACT AND LAW
(Appeal of the Order of Justice Tremblay-Lamer dated April 24, 2013)

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PART I – FACTS

A. Overview

1. This appeal arises in the context of a reference proceeding commenced by the Appellant (Plaintiff), His Highness Prince Karim Aga Khan, for an accounting of profits for copyright infringement resulting from the Respondents (Defendants), Messrs. Tajdin and Jiwa's, unauthorized publication of a book that wrongfully reproduced copyright protected material belonging to the Appellant.
2. By Order dated October 29, 2012, the Referee ordered Messrs. Tajdin and Jiwa to answer 11 outstanding discovery questions and produce certain unredacted documents, including the names of 10 third parties who printed, purchased and distributed the infringing book, as well as information concerning some of Mr. Tajdin's personal bank accounts ("**Referee Production Order**").
3. The Referee Production Order was necessary owing to Messrs. Tajdin and Jiwa's failure to retain or produce original documentation in this Reference Proceeding. As a result, the Referee agreed that the names of third parties were necessary to verify the revenues and expenses that have been declared by the Respondents in this proceeding.
4. The Referee Production Order was also necessary owing to the extraordinary difficulties experienced by the Appellant throughout this proceeding in extricating any verifiable or reliable information from the Respondents.
5. In the brief history of this Reference Proceeding, Messrs Tajdin and Jiwa have already unsuccessfully: (i) sought to stay the Reference Proceeding; (ii) appealed a Direction of the Referee to produce relevant unredacted documents to Justice Russell and then again to the Court of Appeal; and (iii) brought motions to stay and/or dismiss the Reference Proceeding.
6. In addition, the Respondents refused so many questions on discovery that it has been virtually impossible for the Appellant to follow any chain of money, accounting or sales to determine what happened to any profits, other than through the unverified assertions of the defendants.

7. Consistent with their unwillingness to produce relevant documents in this Reference Proceeding, Messrs Tajdin and Jiwa appealed the Referee Production Order.
8. By Order dated April 24, 2013, Madam Justice Tremblay-Lamer allowed the majority of Messrs Tajdin and Jiwa's appeal and overturned all 11 questions ordered to be answered by the Referee, with the exception of one, which was nevertheless substantially modified so as to render the information ordered to be virtually useless to the Appellant in pursuing any relevant train of inquiry.
9. The Appellant now appeals from the Order of Madam Justice Tremblay-Lamer on the basis that she erred in reversing the Referee Production Order, and in exercising the Referee's discretion *de novo*, absent any finding that the Referee Production Order raised questions vital to the final issue of the case, or that the decision was clearly wrong.
10. For the reasons set out below, the Appellant submits that this appeal be should be allowed as the motions judge had no grounds to interfere with the discretionary order of the case management Referee, whose intimate familiarity with the issues raised by this Reference Proceeding should not have been disregarded.

B. Procedural Background

(a) Underlying Action for Copyright Infringement

11. The Appellant, the Aga Khan is the 49th hereditary Imam of the Shia Imami Ismaili Muslims. Ismailis live in over 25 countries around the world. It is the mandate of the Imam to interpret to his community the faith of Islam. The Aga Khan's communications to his community are conveyed in this privileged context thereby creating his significant concern that their integrity be safeguarded.

Statement of Claim; Appeal Book, Vol. 1, Tab 5, p. 31-32.

12. The Respondents are responsible for the publication and distribution of a book and mp3 audio bookmark entitled *Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman* (“**Golden Edition**”). The Golden Edition reproduced in substantial part a series of original religious addresses and messages (*viz.* Farmans and Talikas), of which His

Highness is the sole and original author. After lengthy efforts to seek an internal resolution failed, the Appellant commenced an action for copyright infringement on April 6, 2010 with respect to the Golden Edition.

Statement of Claim; Appeal Book, Vol. 1, Tab 5, pp. 2-30.

13. By judgment dated March 4, 2011, Mr. Justice Harrington found Messrs. Tajdin and Jiwa liable for copyright infringement and granted summary judgment in favour of the Appellant (“**Harrington Judgment**”). The Harrington Judgment was upheld by this Court. Leave to appeal to the Supreme Court of Canada was denied.

His Highness Prince Karim Aga Khan v. Nagib Tajdin et al., 2011 FC 14, 329 D.L.R. (4th) 521 [“**Harrington Judgment**”], aff’d 2012 FCA 12, leave to appeal to the Supreme Court of Canada denied, [2012] S.C.C.A. No. 119.

(b) The Reference Proceeding

14. The Harrington Judgment provided for a reference for the determination of damages or profits. By the Order of Chief Justice Lufty dated March 16, 2011, Madam Prothonotary Milczynski was subsequently designated as the Referee.

Harrington Judgment, *supra*.

15. On March 29, 2011, the Appellant submitted a Requisition and Statement of Issues for a Reference Proceeding to quantify the profits realized by Messrs. Tajdin and Jiwa as a result of their infringement.

Plaintiff’s Statement of Issues; Appeal Book, Vol. 1, Tab 10, p. 102-111.

16. The Statement of Issues set out the following detailed issues for determination on the Reference Proceeding:

- i. What is the total number of books and MP3 audios that were printed and produced?
- ii. What sales did the Defendants make of the Farmans and Talikas and the MP3 audio bookmark by the reproduction and distribution of the Golden Edition and the Farmans and Talikas contained therein (the “**Impugned Sales**”)?

- iii. What revenues were made by the Defendants from the Impugned Sales?
- iv. What costs are properly deductible by the Defendants from the revenues made in respect of the Impugned Sales?
- v. What award of pre-judgment and judgment interest under sections 36 and 37 of the *Federal Courts Act* are applicable?

Plaintiff's Statement of Issues; Appeal Book, Vol. 1, Tab 10, p. 108.

17. The Respondents sought to stay the Harrington Judgment, and in particular the Reference Proceeding, pending their appeal on the merits. The Federal Court of Appeal, by Order of Mr. Justice Mainville dated May 19, 2011, refused to stay the Reference Proceeding.

Tajdin v. Aga Khan, 2011 FCA 172, 93 C.P.R. (4th) 411.

18. On July 18, 2011, Messrs. Tajdin and Jiwa each served and filed a "Reply to the Plaintiff's Statement of Issues". Mr. Tajdin attached two self-prepared spreadsheets to his Reply purporting to represent his travel expenses and all revenue and expenses incurred with respect to the Golden Edition.

Nagib Tajdin Reply to the Plaintiff's Statement of Issues, including schedules; Appeal Book, Vol. 1, Tab 11, p. 112-130.

19. Mr. Tajdin took the position at that time that he had no further documents to produce in the Reference Proceeding.

Nagib Tajdin Reply to the Plaintiff's Statement of Issues, para. 24; Appeal Book, Vol. 1, Tab 11, p. 7.

(c) The Referee's Direction for Discovery

20. On August 26, 2011, the parties attended a case management conference, in person, at the Federal Court with the Referee. The Referee directed the Respondents to attend for examination for discovery and deliver:

"complete and unredacted copies of all relevant documents, and including an explanation for any documents missing or lost; and including enquiries that have been made of others to locate relevant documents".

Referee Direction dated September 6, 2011, para. 2 (“**Referee Direction**”); Appeal Book, Vol. 3, Tab 15C, p. 579.

21. Mr. Tajdin appealed the Referee Direction. Further, he unilaterally determined that he would not comply with the Referee Direction to produce unredacted copies of relevant documents pending his appeal.

Referee Direction dated September 6, 2011 and Russell Order; Appeal Book, Vol. 3, Tab 15C and D, p. 579, 582.

22. Mr. Justice Russell dismissed Mr. Tajdin’s appeal of the Referee Direction, with costs on a full indemnity basis, payable forthwith and irrespective of the cause (“**Russell Order**”).

His Highness Prince Karim Aga Khan v. Nagib Tajdin et al.
(unreported in T-514-10) dated October 26, 2011 [“**Russell Order**”];
Appeal Book, Vol. 3, Tab 15D, p. 596.

23. Russell J. held that Mr. Tajdin’s production in the Reference Proceeding was deficient, noting that:

- a) “The problem in this case is that Mr. Tajdin claims not to have kept records that will allow the assessment of profit. He expects the Plaintiff and the Court to simply accept his version of what occurred. Mr. Tajdin is the one who created the problem.”
- b) “His approach to record keeping means that the Plaintiff must, of necessity, seek relevant information from people Mr. Tajdin dealt with at the material times.”
- c) “Raising vague and unsubstantiated allegations of possible harassment and privacy infringement, he now wants to prevent the Plaintiff from finding out who the relevant third parties are.”
- d) “Transcripts of the cross-examination on the affidavits for this motion reveal that Mr. Tajdin intends to be uncooperative when it comes to answering questions and also that some of his answers are not necessarily supported by other evidence and require a much fuller explanation and confirmation from other sources.”
- e) Mr. Tajdin cannot simply control the relevant information to his own advantage. The Plaintiff is entitled to full discovery in the usual way as ordered by the Referee.

Russell Order, *supra*, paras. 41-43; Appeal Book, Vol. 3, Tab 15D, p. 593-594.

24. Despite the Referee Direction, and the Russell Order, Mr. Tajdin continued to refuse to produce relevant unredacted documents pending his appeal to this Court, which was subsequently dismissed on September 17, 2012.

Aga Khan v. Tajdin, 2012 FCA 238.

(d) Examination for Discovery of Messrs. Tajdin and Jiwa

25. Messrs. Tajdin and Jiwa presented themselves for examination for discovery on November 8, 2011 pursuant to the Referee Direction. This examination was made difficult by Mr. Tajdin's continued non-compliance with the portion of the Referee Direction and Russell Order requiring him to produce relevant unredacted documents.

Tajdin Discovery Transcript; Appeal Book, Vol. 2, Tab 14F, pp. 219-291;

Jiwa Discovery Transcript; Appeal Book, Vol. 2, Tab 14G, pp. 293-325.

26. On discovery, Mr. Tajdin refused to produce original documents, including: any information or documents identifying the printer of the book; or any information or documents that would enable the Appellant to verify the quantity of books printed, the sale price of the book, or the expenses Mr Tajdin claimed to have incurred.

Tajdin Discovery Transcript; Appeal Book, Vol. 2, Tab 14F, pp. 219-291;

27. Rather, Mr. Tajdin continued to insist that his self-authored spreadsheets of financial data, unsupported by any original documents, and admittedly prepared after the commencement of the Reference Proceeding, were sufficient to satisfy his discovery obligations.

Tajdin Discovery Transcript, Exhibits 1 and 2; Appeal Book, Vol. 3, Tab 15H and I, pp. 647, 659, 677-78, 701-706.

Tajdin Discovery Transcript, p. 46, Q. 167-168, p. 48, Q. 172; Appeal Book, Vol. 2, Tab 14F, p. 232, 233.

28. Mr. Tajdin refused to disclose what he did with the revenues he received from sales of the Golden Edition. He refused to even accept that the Appellant needed information about revenue at all, once the number of books was ascertained.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172; pp. 90-92, Q. 362-368; Appeal Book, Vol. 2, Tab 14F, p. 231, 232, 233, 243-244.

29. He also refused to give the Appellant verifiable information on his claimed expenses.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172; pp. 90-92, Q. 362-368; Appeal Book, Vol. 2, Tab 14F, p. 231, 232, 233, 243-244.

30. Mr. Tajdin admitted that he is the author of the Golden Kiz e-mail address (goldenkiz@live.com). Despite repeatedly asserting on cross-examination that there has only been one book printing, an advertisement posted by the Golden Kiz clearly states that there was a second printing of the book.

Tajdin Cross-Examination Transcript, p. 46, Q. 202-203, lines 10-20, p. 49; Q. 217-218, lines 11-17, pp. 50-51; Q.221-224, lines 7-25; Appeal Book, Vol. 3, Tab 15E, p. 612, 613.

Tajdin Cross-Examination Transcript, Exhibit 10 Print-out of Golden Edition advertisement from www.ismaili.net; Appeal Book, Vol. 3, Tab 15G, p. 640-641.

31. Although he is an experienced businessman who operates several businesses and is familiar with ledgers and books of account, and Mr. Tajdin himself estimated book revenues at between \$127,850 and \$182,850, Mr. Tajdin claimed that he nevertheless did not maintain any ledgers or books of account in respect of the sale of the infringing Golden Edition. Mr. Tajdin will not say where he put the money he received or identify the bank or bank account.

Tajdin Cross-Examination Transcript, p. 19, Q. 78-81, lines 4-19; pp. 27-28, Q. 123-124, lines 21-3; pp. 30-31, Q. 139 and 142, lines 23-1, 10-14; Appeal Book, Vol. 3, Tab 15E, p. 605, 607, 608.

Tajdin Cross-Examination Transcript, Exhibit 5; Appeal Book, Vol. 3, Tab 15F, p. 638.

Defendant's response number 38, Refusals Chart attached to Refusals Order; Appeal Book, Vol. 3, Tab 15A, p. 548.

32. With respect to Mr. Jiwa, although he admitted that many people asked him about the book and contacted him to buy the book, prior to the Referee Production Order, Mr. Jiwa

had located very few e-mails relating to the purchase of the infringing Golden Edition. Apparently, he deleted any such e-mails as he received them.

Jiwa Cross-Examination Transcript, p. 13, Q. 60-63, lines 1-19; Appeal Book, Vol. 3, Tab 15J, p. 718.

33. Mr. Jiwa knows the identity of some of the book distributors, including the distributor from whom he purchased his 24 boxes of books, but he will not disclose these names, or any others.

Jiwa Cross-Examination Transcript, pp. 24-25, Q. 122-125, lines 17-4; pp. 28-29, Q. 150-153, lines 15-5; Appeal Book, Vol. 3, Tab 15J, p. 721, 722.

34. Mr. Jiwa states that he bought the books and paid half the amount owing (\$2400 CAD) in cash. He sold all the books for cash. He did not pay or collect any GST or PST. He did not keep any records and he has no e-mails relating to book sales.

Jiwa Cross-Examination Transcript, pp. 26-27, Q. 138-145, lines 19-25; Appeal Book, Vol. 3, Tab 15J, p. 721.

35. Mr. Jiwa searched his hotmail account, but cannot remember whether he found e-mails that related to the price at which he was selling the book. Later, Mr. Jiwa stated that when he searched his e-mail account, he could not find a single e-mail that referenced the price of the Golden Edition, or the amount of books that he was selling, or anything relating to the number, distribution or sale price of the Golden Edition.

Jiwa Cross-Examination Transcript, p. 34, Q. 184, lines 22-25; pp. 36-37, Q. 192-193, lines 24-8; Appeal Book, Vol. 3, Tab 15J, p. 723, 724.

36. Messrs. Tajdin and Jiwa's production throughout this Reference Proceeding has been incomplete and uncooperative. They have both admitted to having destroyed or failed to keep relevant documents. The little information they have provided must, therefore, be tested against third party sources for accuracy and completeness.

(e) **Motion to Compel Outstanding Answers to Questions on Discovery**

37. During the examination for discovery of Messrs. Tajdin and Jiwa, numerous questions asked of the Respondents were refused, or taken under advisement, as set out in the Refusals Chart prepared by the Appellant.
38. By Notice of Motion dated April 19, 2012, the Appellant sought to compel answers from Messrs. Tajdin and Jiwa to outstanding questions on discovery (the “**Refusals Motion**”). The Refusals Motion was returnable at a special sitting scheduled by the Appellant, for April 24, 2012.

Notice of Motion dated April 19, 2012; Appeal Book, Vol. 2, Tab 14H,
p. 326-358.

39. The Referee adjourned the Refusals Motion to a special sitting on May 14, 2012 to allow the Respondents additional time to respond.

T-514-10 Court Docket; Appeal Book, Vol. 3, Tab 15K, pp. 738-39

(f) **The Referee Production Order**

40. On May 14, 2012, the parties argued the Refusals Motion over the course of a half day hearing. At the request of the Referee, the Appellant had grouped the outstanding questions into categories set out in a chart. Messrs. Tajdin and Jiwa then submitted their responding position on the chart. The Referee heard submissions on each group of questions before deciding, in her discretion, which questions should be answered, had already been answered or should be dismissed or deferred.

Plaintiff's Revised Charts of Undertakings and Refusals with respect to
the discovery of Messrs. Tajdin and Jiwa; Appeal Book Vol. 3, Tab
15A, pp. 534.

41. The Referee ruled on the questions from the bench and later issued an order dated October 29, 2012, (“**Referee Production Order**”). Messrs. Tajdin and Jiwa were ordered to answer the following 11 questions:

- i. Tajdin Chart Item 1 undertaking: To produce an unredacted copy of the screen capture e-mail dated November 21, 2009 (Exhibit 2, Tab 1 of the Discovery Transcript of Mr. Tajdin taken November 8, 2011 [**“Tajdin Transcript”**]);

E-mail dated Nov. 21, 2009; Appeal Book Vol. 3, Tab 15I, p. 687.

- ii. Tajdin Chart Item 2 undertaking: To produce an unredacted copy of the e-mail dated November 24, 2009 (Exhibit 2, Tab 2 Tajdin Transcript);

E-mail dated Nov. 24, 2009; Appeal Book Vol. 3, Tab 15I, p. 689.

- iii. Tajdin Chart Item 5 undertaking: To obtain from the printer the original documents identifying the printing cost of the book;

- iv. Tajdin Chart Item 6 undertaking: To produce the original unredacted invoices from the shipping company for the amounts referenced in the spreadsheet of revenue and expenses where the invoice contains a reference to the unit number of books (Exhibit 2, Tab 9);

Shipping Invoices; Appeal Book Vol. 3, Tab 15I, p. 704.

- v. Tajdin Chart Item 8 undertaking: To produce the unredacted PayPal documents (Exhibit 1, Tab B-7 and Exhibit 2, Tab 11) showing customer names, without prejudice to Mr. Tajdin’s right to seek a Rule 151 order at trial;

PayPal Documents; Appeal Book Vol. 3, Tab 15H, pp. 670-71 and Tab 15I, pp. 708-09.

- vi. Tajdin Chart Items 14-22 refusals: To produce the names of ten people who ordered books, as indicated on the “Golden Edition Shipping Spreadsheet” (Exhibit 2, Tab 8 Tajdin Transcript). The Plaintiff is entitled to select the ten names it wishes to have produced by Mr. Tajdin from this spreadsheet. If Mr. Tajdin does not have names in connection with the shipping orders identified by the Plaintiff, then Mr. Tajdin is to produce any customer names he has in connection with this spreadsheet;

Golden Edition Spreadsheet; Appeal Book Vol. 3, Tab 15I, p. 701.

- vii. Tajdin Chart Items 24-25 refusals: To (i) identify the bank account where he placed monies received from the sale of the book; and (ii) identify the bank account where he deposited his book funds from paypal; and (iii) with respect to his personal bank account and personal line of credit, and to produce bank records from these two accounts only limited to the period of November 2009 to March 2011, without prejudice to the Plaintiff’s right to later pursue information from other accounts;

Referee Production Order; Vol. 3, Tab 15A.

viii. Tajdin Chart Item 28 refusals: To produce the invoices referenced in the Printer's Statement of Account no. 03417 (Exhibit 1, Tab B-8 Tajdin Transcript);

Printer's Statement of Account; Appeal Book Vol. 3, Tab 15H, p. 674.

ix. Jiwa Chart Items 1-6 undertakings: Mr. Jiwa is to produce unredacted copies of all redacted documents produced;

x. Jiwa Chart Items 4-9 refusals: Mr. Jiwa is to answer questions 4-9 of the Revised Chart on the identity of book distributors and information on free books, including:

- a. To provide the names and addresses of the book distributors known to Mr. Jiwa;
- b. To identify the person from whom Mr. Jiwa received 24 boxes of books that he distributed;
- c. To prepare a list of names and addresses of all those who received a free copy of the book from Mr. Jiwa;
- d. To provide a list of every person to whom Mr. Jiwa can recall distributing a book;

Referee Production Order; Vol. 3, Tab 15A, p. 529-530, 555-557.

42. Rather than comply with the Referee Production Order, Messrs. Tajdin and Jiwa again sought to appeal a discretionary order, and again unilaterally decided to ignore an extant order of the Court pending appeal.

Notice of Motion dated November 8, 2012; Appeal Book, Vol. 2, Tab 13, p. 135.

43. Finally, on February 18, 2013, Mr. Tajdin produced the printer invoices ordered at paragraph 8 of the Referee Production Order. These invoices raise new questions as they show delivery of the Golden Edition to a "Clinique Medicale Diamant", a previously unknown party in this proceeding. Indeed, that further discovery is required is demonstrated by the fact that Mr. Tajdin felt necessary *proprio motu* to explain by affidavit the sudden appearance of this third party and produce supporting extracts from the Quebec corporate registry.

Printer Invoices; Appeal Book, Vol. 2, Tab 14N-O, pp. 490-502.

44. Even with this new production, Mr. Tajdin has failed to answer all of the questions ordered to be answered. At best he can be considered to have answered question (viii) and perhaps, partially (iii) as listed in paragraph 41 above and in the case of (i) above (as will be explained below) his answer was that the unredacted document was not retained. Moreover, Mr. Jiwa has answered none of the questions ordered to be answered.

Referee Production Order, paras 1-10; Appeal Book, Vol 3, Tab 15A,
p. 527-530.

45. With respect to Mr. Tajdin's undertaking to produce an unredacted e-mail (paragraph 1 of the Referee Production Order), Mr. Tajdin has since advised through his counsel that he has not retained [or had destroyed] the unredacted e-mail and so cannot produce it. At no point, beginning with the original Referee Direction to produce unredacted documents, and the appeals to Russell J. and to the Federal Court of Appeal, had Mr. Tajdin ever stated that he did not keep unredacted copies of his document productions. Only now, after being ordered to produce these documents, has he made this disclosure.

Letter from Mr. Gervais dated February 18, 2013; Appeal Book,
Volume 2, Tab 14N, p. 481.

E-mail dated November 21, 2009; Appeal Book Vol. 3, Tab 15I, p. 687

**(g) Order under Appeal – Order of Justice Tremblay-Lamer
dated April 24, 2012**

46. On November 8, 2012, Messrs. Tajdin and Jiwa filed a Notice of Motion appealing the Referee Production Order returnable on December 3, 2012.

Notice of Motion dated November 8, 2012; Appeal Book, Vol. 2, Tab
13, p. 135.

47. By Order dated April 24, 2013, Madam Justice Tremblay-Lamer overturned the entirety of the Referee's Production Order, save for a partial answer to a much-modified single question. Tremblay-Lamer J. based her Order on the following two considerations expressed in her brief reasons:

- a) "...this Court has expressed to the parties that it believes that this matter should be brought to a conclusion forthwith, in light of the

limited financial scope of the debate in issue and the extent of resources allocated to this file as of this date”; and

- b) “...this Court is of the opinion that the outstanding questions which the Prothonotary ordered the Defendants to answer, have been satisfactorily answered by material and information communicated by the Defendants to the Plaintiff subsequent to the Prothonotary Order”;

Order of Justice Tremblay-Lamer dated April 24, 2013, p. 2; Appeal Book, Vol. 1, Tab 2, p. 13.

48. The only question ordered to be answered, was as follows:

“The Order of the Prothonotary dated October 29, 2012 is set aside, with the sole exception that the Court orders the Defendants to provide the Plaintiff and his legal counsel with the names of ten (10) purchasers of the material in dispute, being a book entitled [Golden Edition], for the sole purpose of ascertaining the purchase price paid by them.”

Order of Justice Tremblay-Lamer dated April 24, 2013, para. 2; Appeal Book, Vol. 1, Tab 2, p. 13.

49. Absent any motion for confidentiality, or evidence under Rule 151 of the *Federal Courts Rules*, Tremblay-Lamer J. restricted disclosure, and limited the use, of the single partial answer ordered to be provided:

“The Court further orders, as a condition of making this Order, that information will be given to the Plaintiff His Highness Prince Karim Aga Khan and Plaintiff’s legal counsel and the Plaintiff shall share this information only with the following names representatives of the Plaintiff, each of whom is the Chairman of the Ismaili Tariqah and Religious Education Board (ITREB) in his or her respective country ...”

Order of Justice Tremblay-Lamer dated April 24, 2013, para. 3; Appeal Book, Vol. 1, Tab 2, p. 13.

50. The Appellant brought a motion for reconsideration of paragraph two of the Tremblay-Lamer Order to seek clarity as to whether or not she had intended to vary the Referee’s Production Order (at paragraph six) with respect to the “sole” question she purported to have upheld

Order of Justice Tremblay-Lamer dated June 7, 2013, p. 3-4; Appeal Book, Vol. 1, Tab 4, p. 25-26.

51. By Order dated June 7, 2013, Tremblay-Lamer J. dismissed the Appellant's motion for reconsideration stating that it had not been her intention to uphold paragraph six of the Referee's Production Order, but rather to order a reformulated version of paragraph six. The reformed version allows Tajdin to give the names of any 10 purchasers and not the names of the large volume purchasers that would be selected by the Plaintiff.

Order of Justice Tremblay-Lamer dated June 7, 2013, p. 3-4; Appeal Book, Vol. 1, Tab 4, p. 25-26.

PART II – POINTS IN ISSUE

52. Did the motions judge have grounds to interfere with the discretionary Referee Production Order?
53. If so, was the decision of the motion judge arrived at on a wrong basis and/or plainly wrong?
54. The Appellant submits that this appeal may be resolved on the first issue alone as the motions judge had no grounds for interfering with the discretionary Referee Production Order. Alternatively, this appeal should be allowed because the decision of the motions judge was arrived at on a wrong basis and/or was plainly wrong.

PART III – SUBMISSIONS

A. Standard of Review on Appeal

55. The Federal Court of Appeal may interfere with the decision of a motions judge where the judge had no grounds to interfere with the Prothonotary's decision or, in the event such grounds existed, if the judge's decision was arrived at on a wrong basis or was plainly wrong.

Merck & Co. v. Apotex Inc. (2009), 74 C.P.R. (4th) 9 at para. 11 (F.C.A.) citing *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at para. 18 [*“Merck & Co.”*].

56. For the reasons set out below, the Appellant respectfully submits that the motions judge had no grounds for interfering with the Referee Production Order, let alone to consider

the matter *de novo*. The present appeal should be allowed, and the Referee Production Order reinstated, on this basis alone.

B. No Grounds for Intervening with a Discretionary Order

57. A motions judge ought not to disturb a discretionary order of a Prothonotary (or Referee) unless:

- a) The questions raised in the motion are vital to the final issue of the case; or
- b) The orders are clearly wrong in the sense that the exercise of discretion was based on a wrong principle or a misapprehension of the facts.

Merck & Co., supra at pars. 8.

Eli Lilly Canada Inc. v. Hospira Healthcare Corp., 2010 FCA 282 at para. 5.

58. The questions raised on the motion before Tremblay-Lamer J. pertained to the Appellant's motion to compel answers to outstanding questions on discovery, including the production of unredacted documents.

59. It is well-established by the jurisprudence that matters on discovery are not vital to the final issue of the case. The motions judge had no basis for considering this matter *de novo*.

Microsoft Corp. v. 9038-3746 Quebec Inc. (2005), 42 C.P.R. (4th) 417 at para. 12 (F.C.T.D.).

Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd., 2010 FC 327 at para. 13 [*"Galerie au Chocolat"*].

Merck & Co., supra at para. 9.

Apotex Inc. v. Warner-Lambert Company LLC and Parke, Davis & Company LLC, 2011 FC 1136 at para. 4.

60. Moreover, this Court is particularly loath to interfere with discretionary case-management decisions on non-vital issues since the case management judge "is intimately familiar with the history and details of a complex matter".

Galerie au Chocolat, supra at para. 10, citing *Montana Indian Band v. Canada*, 2002 FCA 331.

Mushkegowuk Council v. Canada (Attorney General), 2011 FCA 133 at para. 5.

61. Mr. Justice Rothstein, as he then was, has stated the position of this Court that the discretionary decision of a case management judge should only be interfered with “in the clearest case of misuse of judicial discretion”:

“We would take this opportunity to state the position of the Court on appeals from orders of case management judges. **Case management judges must be given latitude to manage cases. This Court will interfere only in the clearest case of a misuse of judicial discretion.** This approach was well stated by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins, and Sells*...and is applicable in these appeals. We adopt these words as our own:

This is a very complicated lawsuit. It is the subject of case management and has been since 1993. The orders made here are discretionary. We have said before, and we repeat, that case management judges in those complex matters must be given some “elbow room” to resolve endless interlocutory matters and move these cases on to trial. In some cases, the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. **Only in the clearest case of misuse of judicial discretion will we interfere.** In this case, the carefully crafted orders made by the case management judge display sound knowledge of the rules and the related case law. In particular, the order contains a provision that the parties are free to return to the case management judge for relief from the imposition of any intolerable burden imposed by the order. No clear error has been shown and we decline to interfere. While there may be some inconvenience to some of the parties, this does not translate into reversible error. We are not here to fine tune orders made in interlocutory proceedings, particular in a case such as this one. **[citation omitted, emphasis added]**

L'Hirondelle et al v. Her Majesty the Queen, [2001] F.C.A. 338 at para. 11.

Microfibres Inc. v. Annabel Canada Inc., (2001) 16 C.P.R. (4th) 12 at paras. 6-12 (F.C.T.D.).

62. The Referee Production Order was made upon reviewing written submissions, and hearing lengthy oral arguments from all parties on the outstanding questions over the course of a half day hearing. During this time, many of the outstanding questions were resolved and / or withdrawn, as reflected in the Referee Production Order.

63. In view of the Referee's history of experience with this case, including the combative nature of the Respondents involved, and her thorough consideration of the Refusals Motion, it is impossible to consider that the Referee Production Order presented "the clearest case of misuse of judicial discretion" such that any kind of interference from a motions judge could be warranted on a non-vital issue. In any event, Justice Tremblay-Lamer's Order does not point to any misuse of discretion justifying her intervention.
64. The Appellant respectfully submits that the Federal Court of Appeal should not condone unwarranted interference with discretionary orders, particularly where, as in this case, the motions judge has failed to provide any reasoned justification as to why the matter was considered *de novo*, or in what manner the Referee could have possibly made a reviewable error of law or fact.
65. Absent a "clear case of misuse of judicial discretion" the Referee Production Order should not have been disturbed. Ordering Messrs. Tajdin and Jiwa to answer relevant questions, including the provision of third party names for verification purposes, was a proper exercise of discretion and was not based on any misapprehension of the facts.

C. The Decision of the Motions Judge was Wrong

(a) The outstanding questions in the Referee Production Order are relevant and have not been satisfactorily answered

66. In the event this Court finds that the motions judge had some basis for interfering with the Referee Production Order, the Appellant submits that the decision of the motions judge was arrived at on a wrong basis and/or was plainly wrong.
67. The motions judge was plainly wrong in finding that the outstanding questions "have been satisfactorily answered by material and information communicated by the Defendants to the Plaintiff subsequent to the Prothonotary's Order". In fact, this is not the case.

68. Mr. Tajdin answered paragraph 1 of the Referee Production Order in the sense that he has now advised for the first time in this proceeding that he did not retain an unredacted copy of the e-mail he was ordered to produce. Mr. Tajdin answered paragraph 8 of the Referee Production Order by producing the original printer invoices.

Letter from Mr. Gervais dated February 18, 2013; Appeal Book, Volume 2, Tab 14N, p. 481.

E-mail dated November 21, 2009; Appeal Book Vol. 3, Tab 151, p. 687.

Printer Invoices; Appeal Book, Vol. 2, Tab 14O, pp. 490-502.

69. However, none of the remaining questions Mr. Tajdin was ordered to answer have been answered “satisfactorily” or at all, specifically:

- (a) Mr. Tajdin has never produced an unredacted copy of the e-mail dated November 24, 2009 (Referee Production Order, paragraph 2);
- (b) Mr. Tajdin has now produced invoices from the printer identifying the printing cost of the book (Referee Production Order, paragraph 3). Perhaps this represents all of the documents that are still in existence, but we have not been so advised. One would have thought that there would be e-mails, shipping information, quotations etc., which could provide information to verify that the invoices produced represent all the books printed and that no other printer or printing was used;
- (c) Mr. Tajdin has never produced the original unredacted invoices from the shipping company where the invoice contains a reference to a unit number of books (Referee Production Order, paragraph 4);
- (d) Mr. Tajdin has never produced the unredacted PayPal documents showing the customer names (Referee Production Order, paragraph 5);
- (e) Mr. Tajdin has never produced the names of 10 people, selected by the Plaintiff, who ordered books as indicated on the “Golden Edition Shipping Spreadsheet”

(Referee Production Order, paragraph 6). Some people on this list have ordered and had shipped to them 100, 300 and even 400 books each;

Golden Edition Spreadsheet; Appeal Book Vol. 3, Tab 15I, p. 701.

- (f) Mr. Tajdin has never produced any information with respect to the bank accounts he used to deposit the money received for the books, nor has he ever produced bank records, for the period during which he manufactured and sold the infringing Golden Edition (Referee Production Order, paragraph 7); and

Referee Production Order; Vol. 3, Tab 15A, p. 529-530, 555-557.

70. Mr. Tajdin's answers to these questions, including information on customer names, units of books sold, price of books sold and revenues collected are all relevant to this Reference Proceeding as they will enable the Appellant to verify the assertions made by Mr. Tajdin and the documents proffered to date. This in turn will allow the Appellant to advance its case or damage the case of Messrs. Tajdin and Jiwa by testing their assertions, as is its right on discovery.

Novopharm Limited v. Eli Lilly Canada Inc. et al., 2008 FCA 287, (2008), 69 C.P.R. (4th) 381 at p. 400.

71. In a copyright infringement case, the production of information pertaining to the identity of clients and rental invoices may be relevant to establishing that the defendants infringed the copyright. The production of information by the defendants concerning gross fees may be relevant to an accounting of the profits earned by the copyright infringement.

International Tele-Film Enterprises Ltd. v. De Boche Library Inc. et al. (1994), 55 C.P.R. 198 at p. 199 (F.C.T.D.).

72. In answering the questions relating to the profit earned by the defendant in a reference:

"...the court must be conscious that it is the defendant's wrongdoing which has made the present litigation necessary and that **neither the court nor the plaintiff are obliged to accept, at face value, the defendant's assertions as to its revenues and costs.**" [Emphasis added.]

Beloit Canada Ltee/Ltd. et al. v. Valmet Oy (1992), 45 C.P.R. (3d) 116 at 118 (F.C.A.).

73. On the facts of this case specifically, the identification of customers and other third parties has previously been determined to be an important issue, where as noted by Russell J., virtually no original documents or records have been disclosed, Mr. Tajdin has been “uncooperative”, and his evidence requires “a much fuller explanation and confirmation from other sources”:

[41] The problem in this case is that Mr. Tajdin claims not to have kept records that will allow the assessment of profit. **He expects the Plaintiff and the Court to simply accept his version of what occurred. Mr. Tajdin is the one who created the problem. His approach to record keeping means that the Plaintiff must, of necessity, seek relevant information from people Mr. Tajdin dealt with at the material times.** Raising vague and unsubstantiated allegations of possible harassment and privacy infringement, he now wants to prevent the Plaintiff from finding out who the relevant third parties are. He has created the problem, but he suggests no way that the Plaintiff can ascertain the information he needs to assess profit objectively.

[42] Transcripts of the cross-examination on the affidavits for this motion reveal that **Mr. Tajdin intends to be uncooperative** when it comes to answering questions and also that some of his answers are not necessarily supported by other evidence and require a much fuller explanation and confirmation from other sources.

[43] **Mr. Tajdin cannot simply control the relevant information to his own advantage.** The Plaintiff is entitled to full discovery in the usual way as ordered by the Referee. Mr. Tajdin’s attempts to mount a full-blown relevance discussion as part of this motion and before discovery has taken place reveal that he intends to resist discovery and does not wish to submit to normal procedures. In addition, his unsubstantiated allegations that Mr. Gray has misused information reveal that what he says needs to be objectively tested for accuracy. **[emphasis added].**

74. Information on customer names, units of books sold, price of books sold and revenues collected are directly relevant to the Statement of Issues identified by the Appellant in this Reference Proceeding, including:
- i. What sales did the Defendants make of the Farmans and Talikas and the MP3 audio bookmark by the reproduction and distribution of the Golden Edition and the Farmans and Talikas contained therein (the “Impugned Sales”)?; and
 - ii. What revenues were made by the Defendants from the Impugned Sales?

Plaintiff’s Statement of Issues; Appeal Book, Vol. 1, Tab 10, p. 108.

75. The information ordered to be provided under the Referee Production Order is relevant as follows:

- (a) First, it will assist in determining how many infringing items were sold and the revenue received from those sales. By identifying the distributors, the Appellant will be able to at least attempt to corroborate the unsubstantiated statement of the Respondents as to how many books were sold and to determine if the books came from the single printer as alleged. It appears that many of those books were shipped directly from the printer to distributors.

Exhibit 2 to Tajdin Discovery, Exhibit I, Tab 8; Appeal Book, Vol. 3,
Tab 15I, p. 701-702.

- (b) The second basic issue is expenses. Simply because Mr. Tajdin now states that he does not wish to claim expenses (other than the cost of the printing and certain free books), does not mean that no documentation on expenses is relevant. Some of the expenses information will provide secondary evidence as to how many books were sold and at what price. Documents such as shipping information, advertising expenses (if any) or other commercial documents could help to establish the number of books sold and the price.

Letter from M. Gervais dated February 14, 2013; Appeal Book Vol. 2,
Tab 14M, p. 472.

- (c) Thirdly, the sale price of the Golden Edition must be determined. The Respondents assert that they do not have invoices or books of account or banking records showing the price at which the Golden Edition books were sold and the revenues received. By going to third party customers and distributors to whom the books were sold, the Plaintiff can obtain some certainty as to the price that was received for the books. Notably:

- i. The Respondents have collectively produced only one cheque showing payment received from a customer, and this shows a payment of \$70, which the Respondents say includes the cost of shipping. Some of the

books may have been sold at \$50, but there has so far been no documentation to independently verify this price.

- ii. The Appellant did state in its Statement of Claim that the Defendants promoted the sale of the Golden Edition book for \$50 on their website. However this is not an admission that books were sold at \$50. This could have been an introductory or sale price. At no time has the Appellant admitted the price of the book, nor would the Appellant have the necessary information to do this. In any event this allegation in the Statement of Claim was denied by both Respondents in their respective Statements of Defence.

Statement of Claim, para. 25; Appeal Book, Vol. 1, Tab 5, p. 33.

Federal Courts Rules, SOR/98-106 ("**Federal Courts Rules**"), Rule 183(1)(a).

76. With respect, Justice Tremblay-Lamer's view that the Respondents' minimal productions should be accepted without a real opportunity for testing their truthfulness is inconsistent with Justice Russell's extensive reasons. While Justice Tremblay-Lamer was legitimately concerned with bringing this matter to an expeditious conclusion, that can only be appropriately achieved by: (1) respecting the Appellant's discovery rights; and (2) permitting the Appellant to place all relevant information before the Referee in order that she may make a determination on the merits as to the Respondents' profits. The expeditious resolution of this case has been delayed by the Respondents' actions not by those of the Appellant.
77. Mr. Tajdin's insistence that he has not maintained any ledgers or books of account in respect of the sale of the Infringing Materials is simply not credible in respect of an enterprise which saw the printing and distribution of at least 5,500 books, and perhaps more. With receipts of revenue which could be as high as \$275,000 (if the books admittedly printed were all sold at \$50) or which could be much higher if more books were printed (as asserted), or were sold at a higher price. Mr. Tajdin himself estimated revenue at between \$127,850 and \$182,850.

Tajdin Cross-Examination Transcript, Exhibits 5 and 10; Appeal Book, Vol. 3, Tab 15F, p. 638; Appeal Book, Vol. 3, Tab 15G, p. 640-641.

Exhibit 2 to Tajdin Discovery, Exhibit I, Tab 9; Appeal Book, Vol. 3, Tab 15I, p. 704.

78. In summary, the Appellant submits that, contrary to the findings of the motions judge, the outstanding questions ordered answered by the Referee Production Order have not been “satisfactorily answered”.
79. The Appellant should not be required to assess an accounting of profits based without testing the information submitted by the Infringer.
80. All of the information sought by the Appellant is relevant to the accounting issues in this Reference Proceeding and imposes no onerous or unreasonable burden upon the Respondents. Any information provided by the Respondents will be protected from extraneous use by the implied undertaking rule.
81. As a result, the decision of the motions judge to overturn the Referee Production Order on relevant outstanding questions was arrived at on a wrong basis and/or was plainly wrong.

(b) The single question upheld from the Referee Production Order was improperly modified, including by applying improper restrictions on confidentiality

82. Of the eleven questions ordered to be answered by the Referee, the motions judge only partially upheld a modified single question, set out at paragraph two of the Tremblay-Lamer Order as follows:

“The Order of the Prothonotary dated October 29, 2012 is set aside, with the sole exception that the Court orders the Defendants to provide the Plaintiff and his legal counsel with the names of ten (10) purchasers of the material in dispute, being a book entitled “*Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman*”, for the sole purpose of ascertaining the purchase price paid by them.”

Order of Justice Tremblay-Lamer dated April 24, 2013, para. 2; Appeal Book, Vol. 1, Tab 2, pp. 13-14.

83. According to the above order, the motions judge permitted Mr. Tajdin to provide the Appellant (Plaintiff) with the names of: (i) any ten purchasers of the infringing book; (ii) regardless of whether such names are from purchasers listed on the specific document production referred to in the Referee Production Order; (iii) regardless of the amount of books purchased by the name provided; and (iv) further restricted that the applicability of any information provided be restricted to being for “the sole purpose of ascertaining the purchase price paid by them”.

Order of Justice Tremblay-Lamer dated April 24, 2013, para. 2; Appeal Book, Vol. 1, Tab 2, p. 13-14.

84. In contrast, paragraph six of the Referee Production Order specified that the Appellant be allowed to select the ten names it wished to have produced from the “Golden Edition Shipping Spreadsheet” (Exhibit 2, Tab 8 of the Discovery Transcript of Mr. Tajdin taken November 8, 2011):

“The Defendant Mr. Tajdin shall answer the questions represented by Item Nos. 14 to 22 on the Revised Summary chart of refusals by producing the names of ten people who ordered books, as indicated on the “Golden Edition Shipping Spreadsheet” (Exhibit 2, Tab 8 of the Discovery Transcript of Mr. Tajdin taken November 8, 2011). The Plaintiff is entitled to select the ten names it wishes to have produced by Mr. Tajdin from this spreadsheet. If Mr. Tajdin does not have names in connection with the shipping orders identified by the Plaintiff, then Mr. Tajdin is to produce any customer names he has in connection with this spreadsheet.”

Reference Production Order, para 6; Appeal Book, Vol 3, Tab 15A, p. 529.

85. The information, as ordered by the Referee, was relevant because it enabled the Appellant to select the purchaser names of those who purchased 100, 300 and even 400 books, as opposed to only a handful of books.

86. Acquiring the names of the high-volume purchasers would enable the Appellant to verify the number of books acquired, sold, and the purchase price of the book. All of which are relevant inquiries in this Reference Proceeding. As stated in the section above, information from third parties for verification purposes is particularly important in the circumstances of this case where Messrs. Tajdin and Jiwa have failed to produce adequate original and unredacted documentation.

87. Further by imposing a condition that the information obtained can only be used to determine the price at which the books were sold, and not the number of books acquired or to follow a train of inquiry to determine the truth of all of the information provided by the defendants, the Tremblay-Lamer Order has unreasonably restricted the rights of the Appellant to establish the extent of the infringement of the Plaintiff's rights.
88. Finally, in the absence of any Rule 151 motion for confidentiality before the Court, or the requisite supporting evidence, the Tremblay-Lamer Order further ordered at paragraph three that the information provided to the Appellant and the Appellant's legal counsel be restricted to a list of designated individuals:

“The Court further orders, as a condition of making this Order, that information will be given to the Plaintiff His Highness Prince Karim Aga Khan and Plaintiff's legal counsel and the Plaintiff shall share this information only with the following named representatives of the Plaintiff, each of whom is the Chairman of the Ismaili Tariqah and Religious Education Board (ITREB) in his or her respective country: [list of 10 names omitted] to be used solely for the aforementioned purpose.”

Order of Justice Tremblay-Lamer dated April 24, 2013, para. 3; Appeal Book, Vol. 1, Tab 2, pp. 13-14.

89. Rule 151 of the *Federal Courts Rules* provides that a Court may order that material be treated confidentially upon: (i) a motion for confidentiality being before the Court; and (ii) there being a demonstrated need for confidentiality:

Rule 151(1) Motion for Order of Confidentiality – On motion, the Court may order that material to be filed shall be treated as confidential.

Rule 151(2) Marking of Confidential Material – Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Rule 151, *Federal Courts Rules*, *supra*.

90. A confidentiality order should only be granted when it is necessary to: (i) prevent a serious risk to an important interest, including a commercial interest; and (ii) where the

salutary benefits of the order, including the right of the litigants to a fair trial, outweighs its effects on the public interest in open courts.

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 18 C.P.R. (4th) 1 at para 53 (S.C.C.).

91. Confidentiality will not be lightly ordered. The moving party bears a heavy onus and must present evidence demonstrating the need for such an order. More than bald assertions of the need for such protection are required.

Canada (A.G.) v. Almalki, 2010 FC 733 at para 17.

92. The terms of the Tremblay-Lamer Order have prevented the Appellant from pursuing a full line of inquiry and have rendered the sole question ordered answered to be essentially useless for the purpose of this Reference Proceeding. As such, the decision of the motions judge was arrived at on a wrong basis and/or was plainly wrong.

(c) The motions judge erred by relying on an improper consideration of the limited financial scope of the Reference Proceeding

93. Finally, the decision of the motions judge was arrived at on a wrong basis and/or was plainly wrong by improperly finding that “this matter should be brought to a conclusion forthwith, in light of the limited financial scope of the debate in issue and the extent of resources allocated to this file as of this date”. Not only is this conclusion misinformed, it bears no relation to the relevance of the questions ordered answered by the Referee or to the propriety of the Referee’s discretion.

94. A referee may order that a party be examined for discovery and order the production of documents that are relevant to a matter in issue.

Rule 157, *Federal Courts Rules*, *supra*.

95. The Appellant is entitled to have the amount of the Respondents’ profits determined by the Referee on the merits in accordance with the Order of the Chief Justice.

96. Based on the evidence submitted to date, there is a significant amount of money at stake in this Reference Proceeding. For example, the Respondents admit to printing at least 5,500 books, and perhaps more. With receipts of revenue which could be as high as \$275,000 (if the books admittedly printed were all sold at \$50) and even higher if more books were printed (as asserted), or were sold at a higher price. Mr. Tajdin himself has estimated revenue at between \$127,850 and \$182,850.

Tajdin Cross-Examination Transcript, Exhibits 5 and 10; Appeal Book, Vol. 3, Tab 15F, p. 638; Appeal Book, Vol. 3, Tab 15G, p. 640-641.

Exhibit 2 to Tajdin Discovery, Exhibit I, Tab 9; Appeal Book, Vol. 3, Tab 15I, p. 704.

97. Regardless of the funds at stake, a plaintiff is entitled to have his claim for profits determined on the merits, on a proper evidentiary record pursuant to a proper discovery.
98. In terms of the motion judge's concern for the resources that have been allocated to this file to date, the Appellant submits that his otherwise relevant line of inquiry on discovery should not be prejudiced by the behaviour of the Respondents, who have systematically sought to stay and/or appeal every single order and direction in this proceeding.
99. The Appellant respectfully submits that the motions judge overturned the Referee Production Order on a wrong basis and/or was plainly wrong. This conclusion bears no relation to the relevance of the questions ordered answered by the Referee. The Appellant should not be prejudiced in engaging in a proper line of discovery by the obstructive behaviour of the Respondents.
100. If the Respondents truly wish to bring this matter to an end, they have but to respect the Appellant's procedural rights and provide satisfactory and appropriate disclosures so as to permit this Reference to proceed to the merits. Their conduct, by appealing every order or direction, and failing to provide required unredacted documents has been quite inconsistent with the same asserted desire to have these proceedings brought to a conclusion.

PART IV – ORDER SOUGHT

101. For the foregoing reasons, the Appellant respectfully requests this Court to:

- a) Allow the appeal;
- b) Set aside the Order of Madam Justice Tremblay-Lamer;
- c) Affirm the Referee Production Order;
- d) Award the Appellant its costs of this appeal; and
- e) Grant such further or other relief as counsel may request and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2013.

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PART V – LIST OF AUTHORITIES

Jurisprudence	
1.	<i>Apotex Inc. v. Warner-Lambert Company LLC and Parke, Davis & Company LLC</i> , 2011 FC 1136
2.	<i>Beloit Canada Ltee/Ltd. et al. v. Valmet Oy.</i> (1992), 45 C.P.R. (3d) 116 (F.C.A.)
3.	<i>Eli Lilly Canada Inc. v. Hospira Healthcare Corp.</i> , 2010 FCA 282
4.	<i>Canada (A.G.) v. Almalki</i> , 2010 FC 733
5.	<i>Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd.</i> , 2010 FC 327
6.	<i>His Highness Prince Karim Aga Khan v. Nagib Tajdin et al.</i> , 2011 FC 14, per Harrington J.
7.	<i>International Tele-Film enterprises Ltd. v. De Boche Library Inc. et al.</i> (1994), 55 C.P.R. 198 (F.C.T.D.)
8.	<i>L'Hirondelle et al v. Her Majesty the Queen</i> , [2001] F.C.A. 338.
9.	<i>Merck & Co. v. Apotex Inc.</i> (2009), 74 C.P.R. (4th) 9 (F.C.A.)
10.	<i>Microfibres Inc. v. Annabel Canada Inc.</i> , (2001) 16 C.P.R. (4th) 12 (F.C.T.D.)
11.	<i>Microsoft Corp. v. 9038-3746 Quebec Inc.</i> (2005), 42 C.P.R. (4th) 417 (F.C.T.D.)
12.	<i>Mushkegowuk Council v. Canada (Attorney General)</i> , 2011 FCA 133
13.	<i>Nagib Tajdin v. His Highness Prince Karim Aga Khan / Alnaz Jiwa v. His Highness Prince Karim Aga Khan</i> , 2012 FCA 12
14.	<i>Novopharm Limited v. Eli Lilly Canada Inc. et al.</i> 2008 FCA 287, (2008), 69 C.P.R. (4th) 381 (F.C.A.)
15.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> (2002), 18 C.P.R. (4th) 1 (S.C.C.)
16.	<i>Tajdin v. Aga Khan</i> , 2011 FCA 172, 93 C.P.R. (4th) 411
Regulations	
17.	<i>Federal Courts Rules</i> , SOR/98-106, Rules 151, 156, 157, 183(1)(a), 385, 240, 241