

Court File No. T-514-10

FEDERAL COURT

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

- and -

FILED	FEDERAL COURT COUR FÉDÉRALE	DEPOSED
	AVR 19 2012 APR 19 2012 Plaintiff	
	CHARLES SKELTON	
	TORONTO, ONT 159	

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

Defendants

PLAINTIFF'S (MOVING PARTY'S) WRITTEN SUBMISSIONS
 (The Plaintiff's Motion to compel answers arising out of an examination of discovery of the Defendants)

PART I – FACTS

A. Overview

1. This motion arises in the context of a reference proceeding commenced by the Moving Party (Plaintiff) for an accounting of profits for copyright infringement (the “**Reference Proceeding**”).
2. In a decision on the merits that was upheld by the Court of Appeal, the Defendant, Mr. Tajdin and his co-defendant Mr. Jiwa, were held to have infringed the Plaintiff’s copyright by their unauthorized reproduction 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 the Plaintiff is the sole and original author.
3. On September 6, 2011, the Referee, Madam Prothonotary Milczynski, made an Order respecting the production of relevant documents and a schedule for an examination for discovery in this Reference Proceeding (the “**Referee Order**”). Pursuant to the Order, an examination for discovery of the defendants Nagib Tajdin and Alnaz Jiwa was conducted on November 8, 2011. At that time numerous questions were refused or taken under advisement, as set out in the charts attached at Schedules “A” and “B” to the Notice of Motion dated April 19, 2012. This motion is to compel answers to those questions.
4. While the Defendants attended on discovery pursuant to the Referee Order of September 6, 2011, Mr. Tajdin did not produce relevant documents as requested but instead appealed that part of the Order respecting the production of relevant documents. The Defendant Mr. Jiwa did not appeal the Order.

5. On October 26, 2011, Mr. Justice Russell (the “**Russell Order**”) upheld the Referee Milczynski’s Order dated September 6, 2011 respecting the production of relevant documents and a schedule for an examination for discovery.
6. Mr. Tajdin has now appealed the Russell Order to the Federal Court of Appeal but no date has yet been set for the hearing of that appeal.
7. The Defendants’ massive failure to retain or to produce documents and records necessitates the discovery requests for the names of third parties who can verify the revenues and expenses or the names of institutions where financial transactions might be recorded.

B. Procedural History

8. The Plaintiff commenced this action on April 6, 2010 for a declaration, *inter alia*, that the Defendants infringed the Plaintiff’s copyright by publishing and distributing the Golden Edition and for damages or an accounting of the Defendants’ profits.
9. Mr. Justice Harrington found Mr. Tajdin, and his co-defendant Mr. Jiwa, liable for copyright infringement and granted summary judgment in favour of the Plaintiff with reasons on January 7, 2011 and a formal judgment on March 4, 2011 (“**Harrington Judgment**”).

His Highness Prince Karim Aga Khan v. Nagib Tajdin et al., 2011 FC 14 [“Harrington Judgment”].

10. The Harrington Judgment was upheld by the Federal Court of Appeal by Judgment and Reasons for Judgment dated January 16, 2012.

Nagib Tajdin v. His Highness Prince Karim Aga Khan / Alnaz Jiwa v. His Highness Prince Karim Aga Khan, 2012 FCA 12.

11. Mr. Tajdin and Mr. Jiwa are presently seeking leave to appeal the Judgment of the Federal Court of Appeal to the Supreme Court of Canada.

C. The Reference Proceeding

12. The Harrington Judgment provided for a reference for the determination of damages or profits, as follows:

There shall be a reference to a judge or other person designated by the Chief Justice of the Federal Court for the determination of damages or profits owing to the plaintiff, with any such damages or profits payable to the plaintiff for use by the Aga Khan Development Network (AKDN) Foundation, or such other non-profit organization or purpose as he may see fit. Directions regarding the conduct of the reference shall be made by the referee designated by the Chief Justice.

Pre-judgment and post-judgment interest on any amount awarded in the reference for damages or profits shall be paid to the plaintiff as determined in accordance with the reference.

Harrington Judgment, *supra*.

13. By Order of the Chief Justice dated March 16, 2011, Madam Prothonotary Milczynski was designated as the Referee for the purpose of determining the quantum of damages or profits referred to in the Harrington Judgment.
14. On March 29, 2011, the Plaintiff 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.

15. The Statement of Issues set out the following detailed issues for determination on the Reference Proceeding:
 - (a) What is the total number of books and MP3 audios that were printed and produced?

- (b) 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")?
 - (c) What revenues were made by the Defendants from the Impugned Sales?
 - (d) What costs are properly deductible by the Defendants from the revenues made in respect of the Impugned Sales?
 - (e) What award of pre-judgement and judgment interest under sections 36 and 37 of the Federal Courts Act are applicable?
16. The Defendants sought to stay the Harrington Judgment and in particular the Reference Proceeding pending their appeal on the merits. The Federal Court of Appeal by the Order of Mr. Justice Manville dated May 19, 2011 refused to stay the reference.
17. Following a case management conference ("CMC") held on June 16, 2011, the Referee directed Mr. Jiwa to deliver an affidavit of documents within 30 days. Mr. Tajdin was directed to deliver an affidavit of documents by August 22, 2011. The Referee scheduled a subsequent CMC for the end of August.

Court Docket for T-514-10, Exhibit to the Cross-examination of Nagib Tajdin, taken on October 17, 2011 ("Tajdin Cross-examination Transcript").

D. Inadequate Document Production in the Reference Proceeding by Tajdin

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 the following documents as schedules to his Reply:

Schedule A – spreadsheet purporting to be travel expenses incurred by N. Tajdin for collecting Infringing Materials;

Schedule B – spreadsheet purporting to be revenue and expenses associated with the Infringing Materials;

Schedule C – cheque and associated correspondence purporting to be with respect to the payment of costs, as ordered by the Judgment.

Nagib Tajdin Reply to the Plaintiff's Statement of Issues.

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

“All documents have been given to the Plaintiff's counsel, Mr. Gray, on October 4, 2010.¹ In fact, the only documents that were not produced are the expenses incurred during the past 15 years because those were not kept, as this was a deficit project of religious nature”.

Nagib Tajdin Reply to the Plaintiff's Statement of Issues.

20. Mr. Tajdin delivered a Supplementary Affidavit of Documents on August 22, 2011. Mr. Tajdin's productions to date are deficient in many respects, including:

- (a) Mr. Tajdin produced a spreadsheet with information on revenue and expenses pertaining to the Golden Edition. Mr. Tajdin admitted that he prepared this document himself after the commencement of the Reference Proceeding. He further admitted that this spreadsheet is based on estimated financial information and was not prepared from original documents. Mr. Tajdin refused to disclose what he did with the book revenues he received.

Document showing revenue and expenses of the Golden Edition, Tajdin Cross-Examination Transcript, Exhibit 5;

Tajdin Cross-Examination Transcript, p. 14, Q. 54-57, lines 10-23; p. 15, Q. 61-62, lines 17-23; pp. 18-19, Q. 72, 78-79, lines 1-7, lines 4-10.

Transcript of the Examination for Discovery of N. Tajdin taken November 8, 2011 (“Tajdin Discovery Transcript”) p. 46, Q. 167-168, p. 48, Q. 172.

¹ Mr. Tajdin's Affidavit of Documents dated October 4, 2010 addressed the merits of the proceeding, and was submitted prior to the commencement of the Reference Proceeding.

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;

Tajdin Cross-Examination Transcript, Exhibit 5.

E. Inadequate Document Production by Mr. Jiwa

21. Mr. Jiwa also delivered an Affidavit of Documents on July 18, 2011. His Affidavit identified a mere five documents as being in his possession, power or control and relevant to the proceeding.

Jiwa Affidavit of Documents, Cross-examination of Alnaz Jiwa, taken on October 19, 2011 ("Jiwa Cross-examination Transcript"), Exhibit 1.

22. The five documents produced by Mr. Jiwa, are similarly deficient:

- (a) Mr. Jiwa has produced: (1) two e-mails advertising the purchase of the book; (2) a single copy of a Canada Post way bill; (3) a single cheque; and (4) further to the Judgment, a copy of a letter to the Ismaili Tariqah and Religious Education Board for Ontario enclosing 18 copies of the book.

Jiwa Affidavit of Documents and Supplementary Affidavit of Documents, Jiwa Cross-Examination Transcript, Exhibits 1 and 2.

F. The Referee Order

23. On August 26, 2011, the parties attended a CMC, in person, at the Federal Court with the Referee.
24. On September 6, 2011, the Referee issued the following Order (the "Referee Order"), which was the subject of the appeal before Justice Russell:

Further to the case management teleconference (sic) held on August 26, 2011 and upon reading correspondence from the parties, the following timetable shall govern the next steps in the proceeding:

1. Counsel for the Plaintiff will deliver a letter to the Defendants by September 2, 2011, listing the categories of relevant documents and specific documents to be produced in this Reference.
2. The Defendants, Mr. Tajdin and Mr. Jiwa, will deliver a supplementary affidavit of documents, including delivery of 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, to Counsel for the Plaintiff by October 7, 2011.
3. Mr. Tajdin and Mr. Jiwa will make themselves available for discovery in Toronto on November 8 to 9, 2011.
4. A case management conference will be held with the parties at the Federal Court at 180 Queen Street West, 4th Floor, Toronto, Ontario on November 15, 2011 at 9:30 a.m.

Referee Order, Affidavit of A. Jiwa, sworn September 16, 2011 ("Jiwa Affidavit").

25. It should be noted that the Referee Order dealt with the production of documents and scheduling of discovery only. It did not deal with proper questions on discovery or whether those questions should be answered, hence this motion.
26. Mr. Jiwa served a supplementary affidavit of documents on October 7, 2011. This affidavit contained unredacted versions of the same five documents he produced in his first affidavit of documents.

Jiwa Cross-Examination Transcript, pp. 8-11, Q. 35-50, Exhibits 1 and 2.

27. Mr. Tajdin has not complied with the Referee's Order to produce unredacted copies of documents prior to October 7, 2011, or at all, nor has he ever sought to have the Referee's Order stayed pending his appeal to Russell J., or to the Federal Court of Appeal.

Tajdin Cross-Examination Transcript, pp. 34-35, Q. 150-151, 155, lines 8-14, 5-17.

G. **Mr. Justice Russell's Order**

28. Mr. Tajdin appealed the Referee's Order pursuant to Rule 51 of the *Federal Courts Rules*.
29. On October 26, 2011, Russell J. issued an Order dismissing Mr. Tajdin's appeal 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) ["Russell Order"].

30. In dismissing Mr. Tajdin's appeal, Russell J. held, *inter alia*, that Mr. Tajdin's production in the Reference Proceeding is deficient. He noted that few original documents have been produced. There are no documents identifying the printer of the infringing work, no documents that enable the Plaintiff to verify the quantity of books printed or expenses incurred:

[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.

[...]

[46] In my view, this motion was completely unnecessary. All the Referee has done is to order that relevant documents be produced in the usual way. Mr. Tajdin presented no case that would justify redaction, which is why the Referee ordered that the documents be unredacted. Disclosing the name of the printer in trust to the Referee is no assistance to the Plaintiff in overcoming the problems that Mr. Tajdin has caused by failing to keep or produce records of significant relevant transactions.

Russell Order, paras. 4, 41-43, 46.

31. Of note is Mr. Justice Russell's conclusion that because Mr. Tajdin cannot or will not produce any records to prove essential matters relating to profits, it has become necessary for the Plaintiff to verify this information from third parties. This obviously suggests that the Defendants should answer questions relating to names and locations of possible financial records.
32. While the question of production of documents is under appeal by Mr. Tajdin to the Federal Court of Appeal, the issue of unanswered questions from the discovery has not been decided by the Referee. Given the probable fact that Mr. Tajdin (or Mr. Jiwa) will appeal any order to the highest level possible to delay disclosure, it is necessary to have a ruling on the unanswered questions now to avoid any further delay.

H. Discovery of Messrs. Tajdin and Jiwa

33. Mr. Tajdin was examined for discovery on November 8, 2011. On that discovery, Mr. Tajdin refused to produce virtually any original documents, including no information or documents identifying the printer of the book, no information or documents that enable the Plaintiff to verify the quantity of books printed or the expenses incurred. Mr. Tajdin has produced spreadsheets of purported financial data that he compiled on the Golden Edition. No original sources for the financial information contained in these spreadsheets have been identified.

Tajdin: Discovery Transcript, Exhibits 1 and 2.

34. At his discovery on November 8, 2011. Mr. Tajdin reiterated the same positions he had adopted on his cross-examination with respect to his appeal of the Referee's Order. In particular Mr. Tajdin refused to disclose what he did with the book revenues he received. In fact he refused to even accept that the Plaintiff needed information about revenue at all or money received, once the number of books was ascertained.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172.

35. Mr. Tajdin still refuses to answer questions relation to the printing cost of the book and has not produced a single original document relating to the Golden Edition's basic printing costs. He will also not give the Plaintiff verifiable information relating to expenses.

Tajdin Discovery Transcript, pp. 90-92, Q. 362-368.

36. Mr. Tajdin refuses to search for relevant documents in the e-mail mailboxes that he uses.

Tajdin Discovery Transcript, pp. 18-20, Q. 67, 72-74; pp. 20-21, Q. 77-78, p. 29, Q. 106-107.

37. Mr. Tajdin has not kept accounting records of his dealings with the printing press.

Tajdin Discovery Transcript, p. 101-102, Q. 391-392.

38. Mr. Tajdin's expenses are an estimate because he did not keep any invoices or records.

Tajdin Discovery Transcript, pp. 102-104, Q. 394-402.

39. Mr. Jiwa was examined for discovery on November 8, 2011. For convenience, Mr. Jiwa agreed that his cross-examination transcript of October 19, 2011 with respect to Mr. Tajdin's appeal of the Referee's Order, would be accepted as part of his discovery.

Transcript of the Discovery of A. Jiwa taken on November 8, 2011 ("Jiwa Discovery Transcript"), p. 8, Q. 21-23.

40. Mr. Jiwa gave eight undertakings which he has not yet fulfilled, although such undertakings were identified and requested by e-mail from Counsel for the Plaintiff dated February 1, 2012.

Jiwa Discovery Transcript, pp. 21-22, Q. 76; pp. 22-23, Q. 80; p. 28, Q. 98; p. 51, Q. 194; p. 59, Q. 229; pp. 65-66, Q. 262; p. 69, Q. 282; p. 70, Q. 284.

41. Although Mr. Jiwa admitted that many people asked him about the book and contacted him to buy the book, Mr. Jiwa only located a single e-mail 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.

42. Mr. Jiwa is the manager/moderator of a list serve (i.e., e-mail distribution list) and has distributed offers to sell the book to the members of his list serve. As list serve moderator, Mr. Jiwa has access to the list serve, but he has not searched the list serve for any items relating to the Infringing Materials, nor has he made inquiries on how to search the list serve. Even though Mr. Jiwa gave an undertaking to search this distribution list, he has not yet done so.

Jiwa Cross-Examination Transcript, pp. 11-12, Q. 52-56, lines 13-11;
pp. 22-24, Q. 111-120, lines 20-11;

Jiwa Discovery Transcript, pp. 21-22, Q. 76.

43. 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 any names.

Jiwa Cross-Examination Transcript, pp. 24-25, Q. 122-125, lines 17-4;
pp. 28-29, Q. 150-153, lines 15-5.

44. Mr. Jiwa 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.

45. 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 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.

PART II – POINTS IN ISSUE

46. Should the Defendants be ordered to answer the questions refused and taken under advisement, as set out in the charts attached as Schedules “A” and “B” to the Plaintiff’s Notice of Motion dated April 19, 2012?

PART III – SUBMISSIONS

A. Standard on Examination for Discovery

47. 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.

Federal Courts Rules, SOR/98-106, Rule 157 [“*Federal Courts Rules*”].

48. A person being examined for discovery shall answer, to the best of the person’s knowledge, information and belief, any question that concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Rule 240, *Federal Courts Rules*, *supra*.

49. A person who is to be examined for discovery shall, before the examination, become informed by making inquiries of any person who might be expected to have knowledge relating to any matter in question in the action where it may be reasonably expected,

because of a relationship existing between a party and some third party, that a request for information will be honoured.

Rule 241, *Federal Courts Rules, supra*;

Eli Lilly and Co. v. Apotex Inc., [2000] F.C.J. No. 154 at para. 5 (F.C.T.D.).

50. 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.

51. In answering the questions relating to the profit earned by the defendants 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. On the other hand, the defendant, like any litigant, is entitled to be protected by the court from abusive and unnecessary intrusions into its private affairs”.

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

52. A question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party’s case or damage the case of its adversary.

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

B. Relevance of Plaintiff's Outstanding Questions

53. A Reference Proceeding was ordered to determine the profits made by the Defendants from the infringement. The Plaintiff is seeking answers to the questions refused or taken under advisement by the Defendants on examination for discovery, as identified at Schedules "A" and "B" to the Notice of Motion dated April 19, 2012. These outstanding questions are relevant to the issues in the Reference Proceeding for the reasons set out below.
54. Firstly, it must be determined how many infringing items were sold and the revenue received from the sales. Little information has been produced. Even when documents have been produced, it will be necessary to cross reference the information with third parties (or at least have the potential to do so) to prevent fabrication. By identifying the printer and any distributors, the Plaintiff will be able to at least attempt to corroborate the unsubstantiated statement of the Defendants as to how many books were sold.
55. The second basic issue is expenses. If the Defendants do not wish to deduct any expenses then they do not have to produce documents. However, the Defendants still insist on deducting expenses but refuse to provide documents or details about the expenses claimed to permit verification by the Plaintiff both as to the amount and relationship to the Golden Edition.
56. Thirdly, the sale price of the Golden Edition must be determined. The Defendants do not have invoices showing the price at which the Golden Edition books were sold. By going to third party customers and distributors to whom the books were sold, the Plaintiff can get some certainty as to the price that was received for the books.
57. Further, the Defendants have both asserted that they have given away books for free. In the case of Mr. Tajdin, the number of free books distributed is alleged to be 30 to 50% of the books sold. By having the names of persons who received such gifts, the Plaintiff will be able to verify these statements.

58. In addition the Defendants have not produced any books or records but apparently dealt mostly in cash. The Plaintiff has requested the names and location of bank accounts that were used to deposit cash and cheques received from the sale of the books. The Plaintiff may need to examine bank records to determine how much money was really received.
59. Finally the Defendant Tajdin has asserted that he had numerous expenses that he wishes to deduct from the profit that he received. The Plaintiff simply seeks to determine the basis for such expenses, in part to determine if they have been incurred and in part to determine that, even if they were incurred, that they reasonably related to the production of the Golden Edition and could reasonably be deducted from the profits received.
60. In summary, the questions relate to:
- (a) the quantity of books printed and/or the expenses incurred;
 - (b) details on the invoices referenced by the printer's statement of account;
 - (c) details that verify the number of print editions of the Golden Edition;
 - (d) the original sources of financial information used to prepare the spreadsheets of revenue and expenses produced by Mr. Tajdin; and
 - (e) e-mails, names of purchasers or distributors, or any other information to enable the Plaintiff to verify the Defendants' claims that books were given away for free or sold at a deficit, and the price at which they were sold.
61. The Plaintiff submits that there is a reasonable likelihood that this information will advance the Plaintiff's case or damage the Defendant's case.

62. Moreover, Mr. Tajdin has refused to confirm the extent of material redacted from his productions.

63. 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.

64. Because Mr. Tajdin cannot or will not produce any records to prove the number of books printed and the price at which they were sold, it may be necessary to verify this information from a third party, such as the printer.

65. The Plaintiff submits that the deficiencies in the Defendants' productions and discovery are clear. The Plaintiff has no information to ascertain or verify the number of books sold, the price of the books sold or the expenses incurred. The Plaintiff should not be required to assess an accounting of profits based solely on the unverified information submitted by the Infringer. The Plaintiff's only recourse is to verify information with third parties.

66. All of the information sought by the Plaintiff on this motion to compel is relevant to the accounting issues as defined in the Plaintiff's Statement of Issues. The Plaintiff respectfully submits that the questions asked on this discovery be ordered answered.

PART IV – ORDER SOUGHT

67. For the foregoing reasons, the Plaintiff (Moving Party) respectfully requests:

- (a) An Order requiring the Defendants to deliver answers to the questions refused or taken under advisement as identified in Schedules “A” and “B” attached to the Notice of Motion dated April 19, 2012, and all proper questions arising therefrom, within thirty (30) days of the Order of this Court;
- (b) Costs of this motion fixed at \$8,000; and
- (c) Such further or other relief as counsel may advise and as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of April, 2012.

Norton Rose Canada LLP

NORTON ROSE CANADA LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
P.O. Box 84
Toronto, Ontario M5J 2Z4
Canada

Brian W. Gray
Kristin E. Wall

Tel: (416) 216-4000
Fax: (416) 216-3930

Solicitors for the Plaintiff