



Court File No. T-514-10

**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

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**

Defendants

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**PLAINTIFF'S (RESPONDING PARTY'S) WRITTEN SUBMISSIONS**  
(Defendants' Motion appealing an order to compel answers arising out of an examination of discovery of the Defendants and for confidentiality)

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## 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. The Defendants seek to appeal or stay the Referee’s Order dated October 29, 2012 respecting the production of relevant documents and ordering questions to be answered arising from an examination for discovery in this Reference Proceeding (the “**Refusals Order**”).

### B. Procedural History of the Main Action

3. 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 a book and mp3 audio bookmark entitled *Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman* (“**Golden Edition**”) and for damages or an accounting of the Defendants’ profits. 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.
4. 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**”]

5. The Harrington Judgment was upheld by the Federal Court of Appeal by Judgment and Reasons for Judgment dated January 16, 2012. On the Appeal Mr. Tajdin was represented by counsel.

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

6. Mr. Tajdin and Mr. Jiwa sought leave to appeal the Judgment of the Federal Court of Appeal to the Supreme Court of Canada which was denied on June 26, 2012.

**C. Procedural History of the Reference Proceeding**

7. 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*.

8. 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.
9. 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 [Defendant's Motion Record, pp. 63-72]

10. 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-judgment and judgment interest under sections 36 and 37 of the Federal Courts Act are applicable?

11. 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 Order of Mr. Justice Mainville dated May 19, 2011 refused to stay the reference.

**D. Initial Document Production in the Reference Proceeding by Tajdin**

12. 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 – a self-prepared spreadsheet purporting to be travel expenses incurred by N. Tajdin for collecting Infringing Materials;

Schedule B – a self-prepared 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, including schedules

[Landeta Affidavit, Exhibit B, Plaintiff's Responding Motion Record Tab 3]

13. 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, *supra*.

**E. The Referee Direction**

14. On August 26, 2011, the parties attended a CMC, in person, at the Federal Court with the Referee.
15. On September 6, 2011, the Referee issued the following Direction (the "Referee Direction"):

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

[Landeta Affidavit, Exhibit C, Plaintiff's Responding Motion Record,  
Tab 4]

16. Mr. Tajdin did not comply with the Referee Direction to produce unredacted copies of relevant documents prior to October 7, 2011, nor did he seek to have the Referee Direction stayed pending his appeal.

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

17. Mr. Tajdin appealed the Referee Direction pursuant to Rule 51 of the *Federal Courts Rules*.
18. 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"]

[Landeta Affidavit, Exhibit D, Plaintiff's Responding Motion Record,  
Tab 5]

19. 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.

[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, *supra*, paras. 4, 41-43, 46.

20. 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.
21. Notwithstanding the Referee Direction to produce unredacted relevant documents, notwithstanding unsuccessful appeals to this Court and to the Court of Appeal from that Direction, and notwithstanding that no stay of that Direction is now or has ever been in place, the Defendant Tajdin has still not produced unredacted copies of all relevant documents, including even the documents that were included, and therefore arguably admitted to be relevant, in Mr. Tajdin's own Affidavit of Documents and Supplementary Affidavit of Documents.

22. Mr. Tajdin's productions to date were and continue to be deficient in many respects, Mr. Tajdin has refused to answer any questions on the self-prepared financial documents he has produced, instead he simply expects the Plaintiff to rely on his own assertion (without evidence) that he made no money and that the project was a deficit project.
23. 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

[Landeta Affidavit, Exhibit E, Plaintiff's Responding Motion Record, Tab 6]

Tajdin Cross-Examination Transcript, Exhibit 10 Print-out of Golden Edition advertisement from www.ismaili.net,

[Landeta Affidavit, Exhibit G, Plaintiff's Responding Motion Record, Tab 8]

24. 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 Materials. 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

[Landeta Affidavit, Exhibit E, Plaintiff's Responding Motion Record, Tab 6]

Tajdin Cross-Examination Transcript, Exhibit 5

[Landeta Affidavit, Exhibit F, Plaintiff's Responding Motion Record, Tab 7]



Defendant's response number 38, Refusals Chart attached to Refusals Order

[Landeta Affidavit, Exhibit A, Plaintiff's Responding Motion Record, Tab 2]

**G. Discovery of Messrs. Tajdin and Jiwa**

25. The defendants did attend for an examination on discovery on November 8, 2011 pursuant to the Referee Direction, but that examination was difficult because at that time Mr. Tajdin had still not produced relevant unredacted documents pursuant to the Referee Direction.
26. On that discovery, Mr. Tajdin refused to produce virtually any original documents, including any information or documents identifying the printer of the book and any information or documents that would enable the Plaintiff to verify the quantity of books printed or the expenses incurred. It should be noted that the printer's name is not on any copies of the Golden Edition. Mr. Tajdin has since identified the printer. Mr. Tajdin has produced self-prepared spreadsheets of purported financial data that he compiled on the Golden Edition. No contemporaneously existing documents verifying original sources for the financial information contained in these spreadsheets have been produced.

Tajdin Discovery Transcript, Exhibits 1 and 2

[Landeta Affidavit, Exhibits H and I, Plaintiff's Responding Motion Record, Tabs 9 and 10]

27. In short, Mr. Tajdin reiterated the same positions he had adopted on his cross-examination with respect to his appeal of the Referee Direction. 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. He will also not give the Plaintiff verifiable information relating to expenses.

Tajdin Discovery Transcript, p. 43, Q. 156; pp. 46-47, Q. 167-168; p. 48, Q. 172; pp. 90-92, Q. 362-368

[Defendants' Motion Record, pages 102-103; 114-115]

28. Numerous questions were thus refused or taken under advisement, as set out in the Refusals Chart. A Notice of Motion dated April 19, 2012 was filed by the Plaintiff to compel answers to the refusals (the "Refusals Motion" ). A hearing was held on April 24, 2012 at which time Mr. Tajdin was represented by a solicitor Ms. Rose Noel, but the Refusals Motion was adjourned to a special sitting on May 14, 2012. In addition at that hearing the Defendant Tajdin's Motion for a confidentiality order filed on April 23, 2012 was adjourned pending disposition of the Refusals Motion.
29. On May 14, 2012 a hearing was held and on October 29, 2012 the Referee made the Refusals Order respecting the production of relevant documents and ordering questions to be answered arising from an examination for discovery in this Reference Proceeding.
30. On November 8, 2012, the defendants filed a Notice of Motion appealing the Refusals Order returnable on Montreal on December 3, 2012. On November 29, Mr. Tajdin retained the services of a lawyer, Mr. Archambault who adjourned the appeal. In December Mr. Tajdin retained the services of a different lawyer Mr. Gervais, who has now scheduled this appeal to be heard in Montreal on April 15, 2013.
31. Finally on this appeal Mr. Tajdin has produced the invoices from the printer and they show delivery of the Golden Edition to a party not mentioned heretofore in any material from Mr. Tajdin. Mr. Tajdin has asserted in this new evidence that this is a medical clinic belonging to his sister. There are still no contemporaneous documents showing sales to a single customer by Mr. Tajdin.
32. In addition, Mr. Tajdin refused initially to search for relevant documents in the e-mail mailboxes that he uses. However, at the hearing of the Refusals Motion, when confronted with the refusals motion, he then asserted that he has searched his e-mail accounts and was unable to locate other relevant information.

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

[Defendants' Motion Record, pages 96-97; 99]

Refusals Order paragraph 11

[Landeta Affidavit, Exhibit A, Plaintiff's Responding Motion Record, Tab 2]

33. Mr. Tajdin has produced only a few isolated selected e-mails mostly with redactions. Of the few he produced with redactions he now informs us that he has not retained the unredacted e-mail and so cannot produce it. At no point during the original direction to produce unredacted documents and the appeals to Russell J. or to the Federal Court of Appeal did Mr. Tajdin say he did not have the unredacted document requested. Only now after he has been ordered to produce it and on this appeal has he made this disclosure.

Letter from Gervais

[Defendant's Motion Record, Piece N, page 352]

Copy of the redacted e-mail Exhibit 2 Tab 1 from the Tajdin Discovery

[Landeta Affidavit, Exhibit I, Plaintiff's Responding Motion Record, Tab 10]

34. Mr. Tajdin has not kept accounting records of his dealings with the printing press. He has produced documents apparently reprinted or made up by the printing company at Mr. Tajdin's request after judgment had been rendered against him.

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

[Defendant's Motion Record, page 117]

35. Mr. Tajdin's expenses are an estimate because he did not keep any invoices or records or cheques or cash received.

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

[Defendant's Motion Record, pages 117-118]

36. Mr. Tajdin's production throughout has been incomplete and uncooperative. He has destroyed or not kept relevant documents. The information needs to be tested against multiple third party sources for accuracy and completeness.
37. 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 Direction, 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

[Defendant's Motion Record, page 168]

#### **H. Inadequate Document Production by Mr. Jiwa**

38. Although Mr. Jiwa admitted that many people asked him about the book and contacted him to buy the book, prior to the Refusals Order, Mr. Jiwa has 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.

[Landeta Affidavit, Exhibit J, Plaintiff's Responding Motion Record,  
Tab 11]

39. 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.

[Landeta Affidavit, Exhibit J, Plaintiff's Responding Motion Record,  
Tab 11]

40. 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.

[Landeta Affidavit, Exhibit J, Plaintiff's Responding Motion Record,  
Tab 11]

41. 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.

[Landeta Affidavit, Exhibit J, Plaintiff's Responding Motion Record,  
Tab 11]

**I. Referee's Careful Consideration of the Issues, Question by Question**

42. The Refusals Order resulted from a half day hearing at which the Plaintiff's had, at the request of Prothonotary Milczynski (acting as Referee and in accordance with the practice of the Court) grouped the questions into categories in a chart with a reference to the portion of the discovery transcripts in issue. This chart had then been sent to the Defendants who submitted their responding position on the chart. The Referee heard submissions on each group of questions and decided in her discretion what questions should be answered, had already been answered or should be deferred.

**PART II – POINTS IN ISSUE**

43. Was the Refusal's Order on questions ordered answered clearly wrong in the sense that the exercise of discretion was based on a wrong principle or a misapprehension of the facts?

**PART III – SUBMISSIONS**

**Standard of Review**

44. Discretionary orders of a Prothonotary (or Referee) ought not to be disturbed on appeal to a judge 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.

*AstraZeneca Canada Inc. v. Apotex Inc.*, 2011 FC 598 at para. 18.

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

45. The questions raised on this motion pertain to the conduct of discovery in this Reference Proceeding, namely answering questions refused or undertaken to be answered on the discovery and the production of unredacted documents. Such matters pertaining to discovery are not vital to the final issue of the case.

*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"*];

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

46. The Order was made upon hearing the submissions of the parties. The parties had lengthy arguments on the questions grouped by categories detailing their respective positions concerning the questions. The Referee considered the documents and discovery to date and the relevance of the information to a determination of an accounting of profits.

47. This Court is reluctant to interfere with an interlocutory order of a case management judge "who is intimately familiar with the history and details of a complex matter", and should only intervene based on "the clearest case of misuse of judicial discretion".

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

48. Akin to the obligation of a case management Prothonotary, a Referee is required to “adopt the simplest, least expensive and most expeditious manner of conducting the reference”.

*Federal Courts Rules*, SOR/98-106 [“*Federal Courts Rules*”], Rules 156 and 385(1)(a).

49. The Plaintiff submits that this Court should not disturb the Order on appeal unless it determines that the Order was clearly wrong in the sense that the exercise of discretion was based on a wrong principle or a misapprehension of the facts. Further, in view of the Referee’s intimate familiarity with the history and details of this Reference Proceeding, her Order should be afforded the same deference as that afforded by this Court to a case management Prothonotary.
50. Absent a “clear case of misuse of judicial discretion” the Order should not be disturbed. Ordering the Defendants Mr. Tajdin and Mr. Jiwa to answer relevant questions was a proper exercise of discretion and was not based on any misapprehension of the facts.

#### **Whether Written Reasons are Required**

51. The Defendants invite the Court to ignore the applicable standard of review and to proceed *de novo* on the basis that the Refusals Order – which disposed of a simple and routine refusals motion – was not accompanied by written reasons.
52. This Court’s case law stands for the opposite proposition. The fact that Refusal’s Order was not accompanied by written reasons does not entitle the Defendants to have his motion heard *de novo*.

*Pharmaceutical Partners of Canada v. Faulding (Canada) Inc.* (2002), 21 C.P.R. (4<sup>th</sup>) 166, at para. 9,

See also *General Electric Co. v. Wind Power Inc.* (2003), 25 C.P.R. (4<sup>th</sup>) 490, at para. 5; and

*Anchor Brewing Co. v. Sleeman Brewing & Malting Co.* (2001), 15 C.P.R. (4<sup>th</sup>) 63 at paras. 19-32.

53. The Defendants rely, however, on the reasons for judgment of the majority of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, in order to argue that no deference should be shown to the Refusals Order.
54. On a proper reading, the majority's reasons in *Merck Frosst Canada Ltd. v. Canada (Health)*, *supra*, offer no support for the Defendants' argument. Justice Cromwell's reasons stand, in fact, for the opposite proposition: the relevant standard of appellate review applies despite deficiencies in a lower courts reasons for judgment.
55. In *Merck Frosst Canada Ltd. v. Canada (Health)*, *supra*, the Court held that appellate intervention was justified on account of errors of law and palpable and overriding errors of fact in accordance with to the well-known standard of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. Having identified reviewable errors, the Court further held that the Federal Court of Appeal was, in the circumstances, justified in proceeding with its own analysis of the record in lieu of remitting the matter for a 3<sup>rd</sup> hearing before the Federal Court.

*Merck Frosst Canada Ltd. v. Canada (Health)*, *supra*, paras. 36-39, 55, 124-126, 171, 178, 182 and 222.

56. If anything, *Merck Frosst Canada Ltd. v. Canada (Health)*, *supra* supports the Plaintiff's contention that absent reviewable error in accordance with the applicable standard of review -- in the present case, the exercise of discretion based on a wrong principle or a misapprehension of the facts -- this Court ought not to interfere with the Refusals Order.

### **Standard on Examination for Discovery**

57. 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*

58. 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*.

59. 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.).

60. 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.

61. 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. 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.

62. 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.

#### **Whether Price of Books is Admitted.**

63. In their written submissions, the Defendants contend that they cannot be examined as to the price at which they sold copies of the Golden Edition books as there is an admission of fact that the books were sold for \$50. The defendants rely on Rules 240 and 242 which limit the scope of discovery to questions that are "relevant to any unadmitted allegation of fact in a pleading filed by the party or by the examining party". The Defendants' argue that by stating, in their respective replies to the Plaintiff's Statement of Issues, that they sold the Golden Edition books for \$50, the so-stated price has become an admitted allegation of fact that is not subject to discovery.
64. The Defendants' purported admission relates to the following allegation of fact in the Plaintiff's Statement of Claim:

25. The Defendants promote the Book for sale on their respective websites for \$50.00 CAD a volume, to be purchased in multiples of four volumes. The MP3 is offered as a free gift with each book.

[Defendant's Motion Record, pages 19-29]

65. The text of paragraph 25 of the Plaintiff's Statement of Claim is clear. It alleges that on their websites the Defendants promoted the sale of the Golden Edition book for \$50.

Nowhere in that paragraph, or, for that matter, elsewhere in the Statement of Claim, is it alleged that the Defendants effectively sold the Golden Edition books at that price, nor in effect is it asserted, or could it be known by the Plaintiff whether all books are sold at that price. There is no price on the book and the verifiable evidence of money received from the sale is lacking.

66. Moreover, even if paragraph 25 of the Plaintiff's Statement of Claim could be construed as an allegation of fact that the Defendants effectively sold the Golden Edition books for \$50 a volume (which it cannot), paragraph 25 has never been admitted by the Defendants.
67. Pursuant to Rule 183(a), the Defendants were required in their defence to "admit every allegation of material fact of every adverse party that is not disputed". Although other paragraphs are admitted or denied, the Defendants' respective Statements of Defence contain no admission of paragraph 25 of the Plaintiff's Statement of Claim. Indeed Mr. Tajdin makes no mention of the selling price of the Golden Edition at all in his Defence. Mr. Jiwa says he buys books at \$50 and sells them at \$50 but makes no statement about the selling price of the other copies of the Golden Edition.
68. Moreover, Rule 184(1) provides that "All allegations of fact in a pleading that are not admitted are deemed to be denied". To the extent that the allegation made in paragraph 25 of the Statement of Claim was not disputed by the Defendants, they were required to specifically admit it. Having not done so, the Defendants are deemed to have denied that allegation. The Defendants cannot today claim that it constitutes an admitted allegation of fact in order to escape discovery. On the contrary, by stating in their replies to the Plaintiff's Statement of Issues that they sold the Golden Edition books for \$50, the Defendants have specifically put the purchase price of the books at issue in the Reference. The Plaintiff is entitled to discover the Defendants on this issue.

### Relevance of Plaintiff's Outstanding Questions

69. A Reference Proceeding was ordered to determine the profits made by the Defendants from the infringement. The Plaintiff was seeking answers to the questions refused or taken under advisement by the Defendants on examination for discovery, as now identified in the attachment to the Refusals Order (the "Refusals Chart"). These outstanding questions are relevant to the issues in the Reference Proceeding for the reasons set out below.
70. 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 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 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.

Discovery of Tajdin, Exhibit 2, Tab 8.

[Landeta Affidavit, Exhibit I, Plaintiff's Responding Motion Record  
Tab 10]

71. The second basic issue is expenses. If the Defendants do not wish to deduct any expenses then some of those documents will not be relevant. However, some expenses will tend to provide secondary evidence of 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. In the absence of books of account and given the secretiveness of the Defendants, what few documents there are must be examined to try and establish the truth and to permit verification by the Plaintiff both as to the number of books sold and the revenue so generated.

72. Thirdly, the sale price of the Golden Edition must be determined. The Defendants 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. The Defendants collectively have produced only one cheque showing payment received from a customer and this shows a payment of \$70 which the Defendants say includes the cost of shipping. Some of the books may have been sold at \$50 but there has so far been no documents independently verifying this price.
73. When asked to provide a letter authorizing Plaintiff's counsel to verify the PayPal account information, Mr. Tajdin refused on the basis of relevance. When asked to produce documents about the cash and cheques he received, Mr. Tajdin initially refused on the basis of relevance and then submitted that he had not kept accounts or copies of any cheques.

*Defendant's responding position on the Refusals Chart Number 8 and number 38.*

[Landeta Affidavit, Exhibit A, Plaintiff's Responding Motion Record, Tab 2]

74. 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.
75. 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 regarding the number of books sold and the price at which they were sold.
76. The Plaintiff submits that there is a reasonable likelihood that this information will advance the Plaintiff's case or damage the Defendant's case, or at least lead to a train of inquiry which will produce relevant information.
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.

[Landeta Affidavit, Exhibit F and G, Plaintiff's Responding Motion Record, Tabs 7 and 8]

Exhibit 2 tab 9 to Tajdin Discovery

[Landeta Affidavit, Exhibit I, Plaintiff's Responding Motion Record, Tab 10]

78. The Plaintiff submits that the deficiencies in the Defendants' productions and discovery are clear. The Plaintiff has little 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.

79. 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.
80. The questions posed by the Plaintiff impose no onerous or unreasonable burden upon the Defendants. Once provided, the information sought by the Plaintiff will be protected from extraneous use by the implied undertaking. Given the Defendant's disregard of their discovery obligations in the Reference Proceeding and their lack of cooperation and transparency, it is manifest that the Refusals Order represents a perfectly appropriate exercise of the Referee's discretion and one that ought not to be interfered with.

#### **PART IV – ORDER SOUGHT**

81. For the foregoing reasons, the Plaintiff (Moving Party) respectfully requests an Order:
- (a) dismissing the Defendants' motion;
  - (b) costs of this motion; and
  - (c) such further or other relief as counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of April, 2013.

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