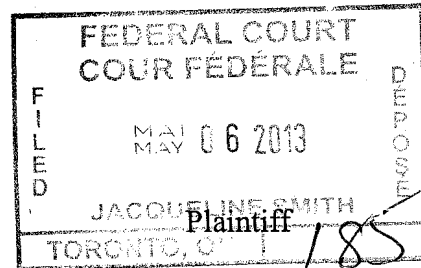


Court File No. T-514-10

**FEDERAL COURT**

BETWEEN:

**HIS HIGHNESS PRINCE KARIM AGA KHAN**



- 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 WRITTEN REPRESENTATIONS**

(re: Plaintiff's Rule 397 Motion to Reconsider the Order of Justice Tremblay-Lamer dated April 24, 2013)

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**Solicitors for the Plaintiff**

## PART I – FACTS

### A. Overview

1. This motion in writing for reconsideration of the Order of Madam Justice Tremblay-Lamer dated April 24, 2013 (the “**Production Order**”) arises in the context of a reference proceeding commenced by the Moving Party (Plaintiff) for an accounting of profits for copyright infringement of a book entitled “*Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman*” (the “**Golden Edition**”).
2. Paragraph two of the Production Order directs the Defendants to provide the Plaintiff with the names of ten purchasers of the infringing Golden Edition for the sole purpose of ascertaining the purchase price paid by them.
3. The Plaintiff seeks reconsideration of paragraph two of the Production Order pursuant to Rule 397 of the *Federal Courts Rules* on the grounds that paragraph two of the Production Order does not accord with the reasons given for it, and/or matters that should have been dealt with in the Production Order have been overlooked or accidentally omitted.
4. In particular, the Plaintiff requests reconsideration as to whether paragraph two of the Production Order accidentally omitted stating that the Plaintiff be entitled to select the ten purchasers of the “Golden Edition” whose names the Plaintiff wishes to receive, as stated in the part of the Referee’s order (paragraph six) that was intended to be upheld by the Production Order.

### B. Procedural History

5. 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.

6. By judgment dated March 4, 2011, Mr. Justice Harrington found the Defendants liable for infringing the Plaintiff's copyright by publishing and distributing the Golden Edition. The Golden Edition reproduced, in substantial part, a series of the Plaintiff's original religious addresses and messages (the "**Harrington Judgment**"). The Harrington Judgment was upheld on appeal to the Federal Court of Appeal. 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, aff'd 2012 FCA 12, leave to appeal to the S.C.C. denied on June 26, 2012.

7. The Harrington Judgment provided for a reference for the determination of damages or profits. The Plaintiff elected to pursue the Defendants' profits (the "**Reference Proceeding**").

*His Highness Prince Karim Aga Khan v. Nagib Tajdin et al.*, 2011 FC 14.

8. By direction of the Referee, Madam Prothonotary Milczynski, the Defendants attended an examination for discovery on November 8, 2011. Numerous questions were refused or taken under advisement by the Defendants. Absent virtually any original documentation or information enabling the Plaintiff to verify the quantity of Golden Edition books printed or the expenses incurred, the Plaintiff brought a motion to compel answers to the questions refused on discovery ("**Refusals Motion**").

Direction of Prothonotary Milczynski dated September 6, 2011.

9. The Refusals Motion was heard by the Referee on May 14, 2012. By Order dated October 29, 2012, the Referee ordered the Defendants to answer a number of outstanding questions, including the production of relevant documents ("**Referee Order**").

Order of Prothonotary Milczynski dated October 29, 2012 (**Tab 4**).

10. The Defendants filed a Notice of Motion to appeal the Referee Order returnable in Montreal on December 3, 2012. This motion was subsequently adjourned by the Defendants until April 15, 2013.

**C. The Production Order**

11. At the hearing of the Defendants' motion on April 15, 2013, Justice Tremblay-Lamer granted the Defendants' appeal of the Referee Order, in part, overturning all but one of the questions ordered to be answered by the Referee in the Referee Order.
12. At the request of the Court, the parties each made submissions in writing to Justice Tremblay-Lamer proposing separate draft orders.

Letter to Madam Justice Tremblay-Lamer from Counsel for the Defendants dated April 19, 2013 (Tab 5);

Letter to Madam Justice Tremblay-Lamer from Counsel for the Plaintiff dated April 22, 2013 (Tab 6).

13. On April 24, 2013, Justice Tremblay-Lamer issued the Production Order. Paragraph two of the Production Order states 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 (Tab 7).

14. The Plaintiff seeks reconsideration of the above paragraph two of the Production Order for the reasons set out below.

**PART II – SUBMISSIONS**

15. Rule 397 of the *Federal Courts Rules* permits the Court to reconsider its orders to rectify any failure to accord with the reasons given, inadvertent mistakes or omissions, or clerical errors:

**397(1) Motion to reconsider** – Within 10 days after the making of an order, or within such time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

**(2) Mistakes** – Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

*Federal Courts Rules*, SOR/98-106, as am., Rule 397 (Tab 11).

16. The language of paragraph two of the Production Order, for which reconsideration is now sought, purports to set aside the Referee Order, with one “sole exception”: the Defendants are to provide the Plaintiff with the names of ten (10) purchasers of the Golden Edition, 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.” (Emphasis added.)

Order of Justice Tremblay-Lamer dated April 24, 2013 (Tab 7).

17. As presently drafted, paragraph two of the Production Order above could lend to an interpretation that the Defendants may provide the Plaintiff with the names of **any** ten purchasers of the Golden Edition, thus rewriting the question ordered answered by the Referee.

18. This aspect of the Production Order is thus inconsistent with the part of the Referee Order that it was intended to uphold.
19. Paragraph six of the Referee Order specified that the Plaintiff be allowed to select the ten purchasers whose names it wishes to receive from one of the document productions in this Reference Proceeding, as follows:

“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.” (Emphasis added.)

Order of Prothonotary Milcynski dated October 29, 2012 (Tab 4).

20. It is important that the Plaintiff be able to select the purchaser names from the “Golden Edition Spreadsheet” since it is the high-volume purchasers who are of most interest to the Plaintiff, *i.e.*, those who purchased 100 or more books, as opposed to those who only purchased a handful of books. Unfortunately, it is not clear that this aspect of the Referee Order was incorporated into the Order.

Letter to Madam Justice Tremblay-Lamer from Counsel for the Plaintiff dated April 22, 2013 (Tab 7).

21. The Plaintiff submits that this omission does not accord with other language of the Production Order which refers to setting aside the Referee Order with a “sole exception”. Rather, the language of the Production Order indicates that this particular aspect of the Referee Order was intended to be adopted.

*Atomic Energy of Canada Ltd. v. Areva NP Canada Ltd.* (2009), 78 C.P.R. (4<sup>th</sup>) 396 at paras. 4-7 (F.C.T.D.) (Tab 8).

22. The paragraph two language of the Production Order is ambiguous since it can be interpreted to allow the Defendants to produce any ten purchaser names, contrary to paragraph six of the Referee Order. Since paragraph six of the Referee Order was intended to be upheld by the Production Order, this inconsistency between the two orders was a matter that should have been dealt with, but was overlooked or accidentally omitted.

*Wyeth Canada v. Ratiopharm Inc.* (2007), 62 C.P.R. (4<sup>th</sup>) 259 at paras. 9-10 (F.C.A.) (Tab 9).

23. The Plaintiff submits that reconsidering paragraph two of the Production Order to make it consistent with paragraph six of the Referee Order will bring certainty to this matter, thereby securing a just, most expeditious and least expensive resolution of this issue.
24. The filing of a motion for reconsideration does not stay the filing of a notice of appeal. As a result, the Plaintiff has also served and filed a Notice of Appeal of the Production Order dated May 6, 2013.

*Pharmascience Inc. v. Canada (Minister of Health)* (2004), 28 C.P.R. (4<sup>th</sup>) 27 at paras. 14-17 (F.C.A.) (Tab 10).

### C. PART III – ORDER SOUGHT

25. For the foregoing reasons, the Plaintiff respectfully requests :

- (a) An Order reconsidering paragraph two of the Order of Justice Tremblay-Lamer dated April 24, 2013, 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”, [as set out in paragraph six of the Order of Prothonotary Milczynski dated October 29, 2012], for the sole purpose of ascertaining the purchase price paid by them.”

- (b) 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 6<sup>th</sup> day of May, 2013.

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**Solicitors for the Plaintiff**



**TO: THE ADMINISTRATOR**  
Federal Court

**AND TO: Me JEAN-PHILIPPE GERVAIS**  
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[jpgervais@medicil.com](mailto:jpgervais@medicil.com)

**Solicitor for the Defendants**

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 WRITTEN REPRESENTATIONS**  
(re: Plaintiff's Motion to Reconsider the Order of  
Justice Tremblay-Lamer dated April 24, 2013)

---

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Golden Edition Shipped out from the Printer

DATE	DESTINATION	ERRE BOOKS INCLUDED	QTY BOOKS	Nbr. BOITES	Poids	Prix	Essence	Autres Frais	Frais Caution	Frais Decl Douane	Frais Traitement Marchand	T.P.S. TXS.	T.V.Q. TXS.	EN \$ US	Convert In Can. \$	sous TOTAL \$ Can.	TOTAL	
31/07/2010	Canada		4	1	9	15.98	1.04	7.5									\$ 37.02	
	Canada		8	2	18	20.43	1.33	7.5									\$ 41.76	
	Canada		12	3	27	15.13	1.63	7.5									\$ 46.76	
	USA		4	1	9	19.79	1.68	7.5									\$ 41.47	
	USA		4	1	9	19.79	1.68	7.5									\$ 37.02	
	Canada		4	1	9	15.98	1.04	7.5									\$ 17.05	\$ 262.55
31/07/2010	Canada				0.25	43.68	5.68										\$ 55.72	\$ 55.72
15/07/2010	USA		92	23	209				6	37.75	\$ 25.00						\$ 68.75	\$ 71.41
	USA		24		57				6	24.75	\$ 2.00						\$ 32.75	\$ 34.02
	USA		36		76				6	24.75	\$ 2.00						\$ 32.75	\$ 34.02
	USA		116		260				6	37.75	\$ 25.00						\$ 68.75	\$ 71.41
27/07/2010	Canada		100	25	227.5	164.55	10.7	73.5									\$ 13.53	\$ 262.28
	Canada		100	25	225	162.79	10.58	73.5									\$ 13.53	\$ 260.40
	USA		4	1	9	24.41	2.07	7.5									\$ 33.98	\$ 33.98
	USA		4	1	9	24.41	2.07	7.5									\$ 34.02	\$ 116.66
	USA		16	4	36	69.25	5.89	7.5									\$ 102.27	\$ 102.27
	USA		12	3	27	55.99	4.76	7.5									\$ 71.41	\$ 241.51
	USA		44	11	99	149.86	12.74	7.5									\$ 530.53	\$ 530.53
	Canada		200	50	454.5	332.93	21.64	148.5									\$ 71.41	\$ 301.83
	USA		52	13	118.5	177.81	15.11	37.5									\$ 32.93	\$ 32.93
	USA		4	1	9	23.44	1.99	7.5									\$ 28.97	\$ 28.97
	USA		4	1	9	19.79	1.68	7.5									\$ 25.07	\$ 25.07
	Canada		4	1	9	15.98	1.04	7.5									\$ 25.07	\$ 25.07
	Canada		4	1	9	15.98	1.04	7.5									\$ 35.91	\$ 35.91
	Canada		12	3	27	25.13	1.63	7.5									\$ 24.98	\$ 24.98
	Canada		4	1	9	15.9	1.03	7.5									\$ 24.98	\$ 2,056.37
24/07/2010	Canada		200	1000	250	2250	625										\$ 31.25	\$ 656.25
22/07/2010	Canada		80	100	1900	534.71	34.75	285									\$ 43.66	\$ 854.46
	Canada		80	20	400	114.71	7.45	58.5									\$ 8.73	\$ 180.66
	Canada		200	50	1000	282.71	18.37	148.5									\$ 21.83	\$ 449.58
																	\$ 74.22	\$ 1,484.70
2010-12-02	USA		4	1	9.5	20.4	1.68	7.5									\$ 29.58	\$ 29.58
15/07/2010	USA		100	25	227.5	256.7	21.18	73.5									\$ 77.31	\$ 351.38
16/07/2010	Canada		40	10	90	67.75	4.07	28.5									\$ 3.00	\$ 103.32

Date	Country	Quantity	Unit Price	Total Price	Other Charges	Final Total
17/02/2010	UK	4	1	9	121.12	127.2
17/02/2010	Canada	100	25	225	141.31	848
17/02/2010	Canada	60	75	675	45.43	5.91
17/02/2010	UK	8	2	18	190.52	20
17/02/2010	UK	4	1	9	121.12	12.72
18/02/2010	USA	8	2	18	30.29	2.5
18/02/2010	Canada	4	1	9	15.96	0.86
18/02/2010	UK	4	1	9	121.12	12.72
18/02/2010	USA	24	6	54	90.54	7.47
18/02/2010	USA	4	1	9	121.12	12.72
19/02/2010	UK	4	1	9	121.12	12.72
19/02/2010	USA	4	1	9	20.58	1.7
19/02/2010	Canada	8	2	18	21.24	1.27
19/02/2010	USA	12	3	27	58.22	4.8
2010-01-09	Canada	4	1	9.5	16.91	1.18
2010-02-08	UK	4	1	9.5	124.95	14.37
2010-12-08	USA	8	2	19	42.05	3.57
2010-12-09	USA	4	1	10	21.08	1.79
2010-12-09	UK	4	1	9	121.12	13.93
19/2/2010	USA	8	2	18	38.27	3.25
19/02/2010	USA	8	2	18	38.27	3.25
19/02/2010	USA	4	1	9	23.44	1.99
19/02/2010	USA	4	1	9	38.27	3.35
21/02/2010	Russia	12	3	27.5	200	17
23/02/2010	USA	8	2	18.5	39.27	3.34
30/02/2010	USA	8	2	18	36.8	3.13
2010-01-04	USA	8	2	18	36.8	3.13
2010-01-04	USA	8	2	18	36.8	3.13
2009-10-12	Africa	68	200			
2009-04-12	Canada	120	600			
2010-01-10	Africa (193 to IIREB)	193	200			
Customs and taxes						
VARIOUS SIMPDER OUT						
from the Printer for free						
		400		400		\$854
VARIOUS SIMPDER OUT						
from the Printer for free						
		400		400		\$854
VARIOUS SIMPDER OUT						
from the Printer, this						
minimum estimate as						
these may have been						
separated into multiple						
		173		436		\$854
TOTAL						
		1734		5500		\$ 17,219.96