

**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

**MEMORANDUM OF FACT AND LAW**  
(of the defendant Nagib Tajdin /moving party)

**I - NATURE OF THE MOTION**

1. This is a motion for summary judgment dismissing the plaintiff's action.

**II - FACTS**

2. The plaintiff is the spiritual father (hereinafter the "Aga Khan" or the "Imam") of this defendant, who is a follower of the Aga Khan. Farmans are given orally by the Aga Khan to Ismailis when He grants them an audience, and they immediately become binding upon all Ismailis across the world whether or not such a follower was present to hear the Farman in person.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 3*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 5, paragraph 4*

3. In this action the plaintiff alleges that this defendant has infringed the plaintiff's copyright and moral rights relating to the publication under the name of *Golden Edition of Kalame Imam-e-zaman* (hereinafter the "Golden Edition") which contains the plaintiff's Guidance

(hereinafter “Farmans”) given by the Imam to the Ismailis (who are followers of the plaintiff).

*Statement of Claim dated April 6, 2010, Moving Party’s Record, Tab 6*

4. The Aga Khan is the present Imam of the Ismailis and is the bearer of the Noor, a word that means “The Light”, and the Noor has been handed down in direct decent from Prophet Mohamed (may peace be upon Him).

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party’s Record, Tab 5, paragraph 22*

*Statement of Defence of Alnaz Jiwa  
Moving Party’s Record, Tab 8, paragraph*

5. One of the most important tradition of the Ismaili faith is that all Ismailis give their oath of allegiance to their Imam before they are accepted into the Ismaili faith, and in return, the Imam also reciprocates by giving His promise to protect and guide the Ismailis. This defendant has given his oath of allegiance to the Aga Khan, and states that he has an immense love and respect for the Aga Khan, and will never disobey or in any way of form displease Him.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party’s Record, Tab 2, paragraphs 3 and 4*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party’s Record, Tab 5, paragraphs*

6. One of the essential obligations of Ismailis is to abide by the Farmans, which are generally delivered by the Aga Khan orally when He visits His Jamats (congregation). Occasionally, the Aga Khan might send a brief written message to the Jamats or individual Ismailis, which is known as Talika.

*Affidavit of Nagib Tajdin sworn May 7, 2010*

*Moving Party's Record, Tab 2, paragraph 5*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 5, paragraph 3*

*Affidavit of Karim Alibhay sworn April 28, 2010  
Moving Party's Record, Tab 4, paragraph 14*

7. A Farman remains valid until and unless superceded by a new Farman, and becomes binding immediately on all Ismailis wherever they may be living, unless the Imam restricts a Farman for a particular Jamat or a particular segment of the Jamat, and when the Imam restricts a Farman, He indicates such a restriction when making that Farman.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 5*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 5, paragraph 4*

8. One difficulty this defendant encountered over the years was the lack of accessibility to Farmans as often Farmans made in one area, such as Pakistan, were never made available to the Jamats residing in other areas, such as Canada, or Africa. Over a period of many years, this defendant sought and collected Farmans from various sources, individual Ismailis or the institutional leaders from local areas and across the world.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraphs 7-10*

9. Many of this defendant's friends, neighbours, other Ismailis, including the institutional leaders who had given him copies of written Farmans, or audio tapes (which were then transcribed by this defendant) routinely sought copies of the Farmans from this defendant's collection for their use. This defendant freely gave away such copies to anyone (only Ismailis) who asked for copies of the

Farmans.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraphs 11, 12*

10. Subsequently, this defendant compiled Farmans from his collection and published the first Farman book, with a red cover and titled, KALAM-E-IMAM-E-ZAMAN - FARMANS TO THE WESTERN WORLD, Volume 1 (the "First Farman Book") which contained Farmans made by the Imam to the Western world, and was published on August 14, 1992.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraphs 13, 14 and Exhibit A*

11. This defendant's desire was to seek Guidance from the Aga Khan before commencing distribution of the First Farman Book, and would have destroyed the published books if the Aga Khan either was unhappy with the print, or did not want this defendant to distribute His Farmans in a book format.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 14*

12. The Aga Khan was scheduled to visit the Montreal Jamats on August 15, 1992, and the institutional leaders had decided that only about 20% of the Jamats would be allowed to attend personally before the Imam during His visit, and also decided that the Jamats who would be allowed to attend before the Imam would be chosen alphabetically. As this defendant's last name started with "T", he was not chosen to attend before the Imam to present a *Mehmani*, which is a religious ceremony when an Ismaili (usually with his spouse, or a family member) gets to present himself with an offering usually a plate of dry fruits, and seeks the Imam's Blessings and Guidance. The Imam accepts the follower in His presence, and bestows Blessings and Guidance upon him. This is a very auspicious occasion for any Ismaili to present himself or herself in the presence of his or her Imam.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 15*

*Affidavit of Karim Alibhay sworn April 28, 2010  
Moving Party's Record, Tab 4, paragraphs 5, 6*

13. On August 15, 1992, this defendant asked a very dear friend of his, Karim Alibhay (hereinafter "Karim"), who was chosen to attend before the Imam, and gave him a copy of the First Farman Book to present to the Imam during his *Mehmani*, and requested that he seek guidance from the Imam.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 16*

*Affidavit of Karim Alibhay sworn April 28, 2010  
Moving Party's Record, Tab 4, paragraphs 7, 8*

14. On August 15, 1992, during the *Mehmani* when Karim presented himself before the Imam, the Imam blessed him and his family, and thereafter the Imam looked at the First Farman Book, then He then placed His hand on the book, at which point Karim asked the Imam in French: "Mowlana Hazar Imam, que pouvons nous faire pour l'Imamat?" [Mowlana Hazar Imam - our Lord, the present Imam - what else can we do to serve the Imamat?]. The Imam came closer to Karim, placed His right hand on his shoulder and His left hand again on the First Farman Book (which was in red cover) and responded in French: "Continuez ce que vous faites" (continue what you are doing), "réussissez ce que vous faites" (succeed in what you are doing), and then ended by saying "et ensuite nous allons voir ce qu'on peut faire ensemble" (and then we will see what we can do together)

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 17*

*Affidavit of Karim Alibhay sworn April 28, 2010*

*Moving Party's Record, Tab 4, paragraphs 9-15*

15. This defendant was present in the hall on the day in question during the Mehmani ceremony, and was very excited when he saw Karim attending before the Imam, and observed the Imam placed His hand three times on the First Farman Book, and saw the Imam speaking to Karim. This event was video taped and the local institutional leaders have a copy of the said *Mehmami* presentation, which would show the presentation of the *Mehmami* by Karim .

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 17*

*Affidavit of Karim Alibhay sworn April 28, 2010  
Moving Party's Record, Tab 4, paragraphs*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 5, paragraphs*

16. Thereafter, this defendant commenced distributing the First Farman Book, and later distributed the following Farman books on or around the following dates:
- a. Kalam-e Imam-e -Zaman, Volume 2, printed with a green cover on December 13, 1993, which contained Farmans to Asia and Middle East;
  - b. Precious Guidance, Volume 1, Volume 3, in March 21, 1994;
  - c. Kalam-e Imam-e -Zaman, Volume 3, printed with a blue cover on December 13, 1994, which contained Farmans to Africa; and
  - d. Precious Guidances: Vol. 2, 3, and 4, on March 21, 1998.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 19*

17. In addition, this defendant also published *Khangi* Farmans transcribed from *Khojki* script to *Gujrati* Script, and *Bahere Rahemat* which was also transcribed from *Khojki* script to *Gujrati* Script, and both of these contained Farmans made by our former Imam, Sir Sultan Mahomed Shah Aga Khan.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 20 and Exhibit B*

18. From 1992 to the date of the publication of the Golden Edition, this defendant was distributing the Farman books openly to Ismailis, and was never asked by the Aga Khan at any time to stop the distribution of the Farman books.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraphs 22, 34*

19. In November of 1998, this defendant gave a copy of all of the Farmans he had published in the Farman books referred to in paragraph 10, and 16 (a) and (c), and a copy of the Farmans not previously published to the Head of the Secretariat, Dr. Shafik Sachedina (hereinafter "Sachedina"), to enable him to publish and distribute a Farman book so that the distribution of the Farmans could be expanded to all Ismailis across the world. Thereafter, in January of 1999, Sachedina informed this defendant that the Aga Khan had approved the publication of the Farmans.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 23*

20. This defendant published a white color hardcover book, KALAM-E IMAM-E-ZAMAN - GOLDEN EDITION [1957-2009] (hereinafter the "Golden Edition"), which contained all of the Farmans published in the Farman books referred to in paragraph 10, and 16 (a) and (c) with newer Farmans made after the last book was published with an updated index, and he commenced distributing the Golden Edition on December 13, 2009, (birthday of the Aga Khan).

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 21 and Exhibit C*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 2*

21. On January 1, 2010, Sachedina emailed this defendant asking him to call him (Sachedina). When this defendant spoke with Sachedina, he was angry at this defendant for publishing the Golden Edition, and said that as he (Sachedina) had agreed to print the Farmans, he demanded to know why this defendant published it, and demanded this defendant to recall and stop the distribution of the Golden Edition.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 30*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 2*

22. Sachedina continued calling this defendant between January 2<sup>nd</sup> and January 24<sup>th</sup>, demanding that this defendant withdraw the Golden Edition from distribution, and continued to express his anger at this defendant for refusing to withdraw the Golden Edition.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraphs 31, 32*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 2*

23. On January 16, 2010, Sachedina used his authority as the head of Secretariat and through the Ismaili Leaders International Forum (hereinafter "LIF") sent an announcement to be read in all the Jamatkhanas (congregation) worldwide to inform the Jamats that the Golden Edition was not "authorized" and discouraged the Jamats to purchase it. Notably, the announcement did not say that the Aga Khan had not authorized the Golden Edition.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 33 and Exhibit D*

24. In response to the angry responses of Sachedina, this defendant informed him that he (this



defendant) had sent correspondence dated January 4, 2010, to the Aga Khan seeking His Guidance with respect to the Golden Edition and of future projects, and was waiting for the Imam's Guidance.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 37*

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 3 and Exhibit A*

25. Subsequently, Sachedina called this defendant and requested to be given a copy of the defendant's correspondence sent to the Aga Khan, informing this defendant that he (Sachedina) could not locate it at the Secretariat of the Aga Khan, and wanted to know how and when the letter was sent to the Aga Khan. This defendant informed Sachedina that he had delivered the correspondence to the Aga Khan Council in Kenya for delivery to the Aga Khan's Secretariat.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 4*

26. A week or so later, this defendant received by email from Ms. Parks, enclosing a letter dated January 24, 2010, purportedly signed by the Aga Khan (hereinafter the "First Letter"), demanding that this defendant recall and withdraw all Golden Edition books and to deliver all remaining stocks of the books to the Institute of Ismaili Studies. As this letter contradicted the Imam's Guidance and blessings given in Montreal during the *Mehmani* in 1992 referred to in paragraphs 14 and 15 above, and as the language in the First Letter seemed unlike language normally used by the Aga Khan, and as it also contained factual errors, this defendant retained two handwriting and document examination experts to determine if the signature on the First Letter was actually signed by the Aga Khan.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 1 and 2*

Affidavit of Karim Alibhay sworn April 28, 2010  
*Moving Party's Record, Tab 4, paragraphs 6, 7, and Exhibit B*

27. One of the expert, Graziella Petinatti, signed a report on February 4, 2010, and stated that, "Given these numerous dissimilarities, we conclude that there is a **strong probability** that the disputed signature is a **forgery**." [emphasis original].

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 7 and Exhibit C*

28. The second expert, Wendy Carlson, also signed a report on February 8, 2010, finding in non equivocal terms that, "a different person authored the signature on the questioned document. Someone did indeed forge the signature of the Aga Khan".

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 8 and Exhibit D*

29. Subsequently, Sachedina telephoned this defendant shortly after this defendant sent an email to Ms. Parks concerning the forged signature, and this defendant asked him as to why he had sent a letter purported to be from the Aga Khan with a forged signature, to which Sachedina reacted in a very hostile manner threatening to ruin this defendant's reputation in the worldwide Jamat (congregation).

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 9, 10  
Affidavit of Alnaz Jiwa sworn June 18, 2010, Exhibit A*

30. On February 18, 2010, this defendant received another letter purported to be from the Aga Khan, repeating that the first signature was not forged and reporting in almost the same

sentences uttered by Sachedina in our telephone conversation.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 11*

31. This statement of claim in this action for copyright infringement was issued on April 6, 2010, and is similar in content to the First Letter, and was immediately circulated widely to thousands of Ismailis worldwide by way of mass email campaign the same day it was filed in court, and also publicized through an Ismaili journalist, who operates a news reporting web site out of Vancouver.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 12, 13*

32. The mass circulation of the statement of claim was made even before it was personally served on the defendants. In fact, the claim was served on this defendant almost a month after, and only after his statement of defence was filed, although his whereabouts were well known to Sachedina, and the Aga Khan Secretariat. Announcements of this action were read in all Jamatkhana (congregation) of countries where this defendant is well known, fulfilling the threats made by Sachedina to ruin this defendant's reputation.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 12-14*

33. On May 14, 2010, the counsel of the plaintiff sent a photocopy of an Affirmation (hereinafter "Affirmation") to the defendants by email, purported to have been signed in Boston by the Aga Khan in front of a Notary Public, along with threats to circulate it widely, and also stated that the Aga Khan signed the Affirmation in the presence of his friend who is a senior lawyer

(although it was notarized by an unknown notary public). This defendant sent two emails to the plaintiff's counsel requesting to be given the name and address of the senior lawyer, name and address of the notary public, name and address of the personal secretary all of whom were said to be present at the time the Aga Khan is alleged to have signed the Affirmation, along with the place where it was signed, however, counsel has declined to disclose this information.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 15 and Exhibit E*

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 5, paragraphs 26-28*

34. These and other points aroused this defendant's suspicion on the authenticity of the Affirmation, as it is unlikely that the Aga Khan would instruct His counsel to threaten the defendant. This defendant has followed the Aga Khan and His activities very closely, and knows that the Aga Khan does not act with such vengeance against anyone, let alone against His own spiritual children.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 16 and 17*

35. The Aga Khan announced a visit to Toronto in the last week of May of 2010, and this defendant wrote to the counsel of the plaintiff on May 16, 2010, asking to arrange a five minutes meeting with the Aga Khan so that this defendant could seek his Imam's direct instructions, along with giving a commitment in writing to abide by any instructions directly given by the Aga Khan.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 18*

36. On May 25, 2010, this defendant flew to Toronto all the way from Nairobi, Kenya, to be present and available if the plaintiff's counsel arranged the meeting with the Aga Khan as requested by this defendant. Counsel did not arrange the meeting during the time the Aga Khan was present in Toronto.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 19, 20*

37. Since the Affirmation also contradicted the Imam's Guidance previously given to this defendant, and since the signature on the First Letter has been determined by two experts as being forged, the defendants retained a further document and handwriting expert to analyze the January Letter and the Affirmation. The plaintiff's counsel initially refused to provide the original Affirmation, and after persistently asking for it, he reluctantly agreed to release the original of the Affirmation upon Jiwa giving his undertaking that it would be returned within ten days.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 21*

38. Both the First Letter and the Affirmation, along with about 20 known signatures were delivered to Graham P. Ospreay, a highly qualified and experienced document and handwriting examiner, for analysis, who subsequently gave his report on June 9, 2010, stating that the Aga Khan **had not signed** the two documents in question. All four expert reports by three different experts have confirmed that the signatures purporting to be that of

the Aga Khan were forged signatures. To date, no real signature of the Aga Khan, the named Plaintiff, can be seen on any document related to this lawsuit.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraphs 22, 23, and Exhibits F and G*

39. This defendant has undertaken these activities due to immense love and affection for his Imam and His Jamats, and will do whatever his Imam asks this defendant to do, and as such this action would not be necessary if it is actually the Imam's wish not to publish and distribute His Farmans. This defendant's love, respect, obedience for the Imam has no bounds, and he considers the Imam as the Master of his material and spiritual life and upon one gesture of the Imam, this defendant is willing to give Him all his time, wealth – present and future, intellect, life, capabilities, work, dignity and soul.

*Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010  
Moving Party's Record, Tab 3, paragraph 26*

40. The question of disobeying the Imam or to act against any of His wishes, therefore, has never arisen in this defendant's mind. Whatever wealth this defendant has or will have in future is surrendered unconditionally to the Imam whose love and protection he trusts.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 2, paragraph 4*

41. This defendant therefore seeks that this action be dismissed as he has published and distributed the Golden Edition with the Aga Khan's consent, authorization and Blessings given by the Aga Khan on August 15, 1992.

### III - POINTS IN ISSUE

42. Whether there is a genuine issue for trial with respect to the claim filed by the plaintiff?
  
43. Whether the Aga Khan gave His consent and authorization on August 15, 1992, in Montreal to the publication of His Farmans by this defendant?

### IV- SUBMISSIONS

44. Rule 213 (2) provides that a defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.
  
45. Rule 215 provides that a response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.
  
46. Rule 216. (1) provides that where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim, the Court shall grant summary judgment accordingly.
  
47. In *Rachalex Holdings Inc. v. W & M Wire & Metal Products Ltd.*, 2007 FC 502, 157 A.C.W.S. (3d) 629 (F.C.), the court set out the test for summary judgment at para. 8 (citing

the decision in *Spenco Medical Corp. v. EMU Polishes Inc.*, 2004 FC 963 (F.C.) at paras. 6-8):

...The Court is not to grant summary judgment where it is shown that there is a genuine issue for trial. However, Rule 216(3) specifically permits this Court to grant summary judgment even where there is a genuine issue for trial so long as the Court "is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law"

*Koslowski v. Courier*, 2009 CarswellNat 2902, 2009 FC 883, at para. 15.  
*Moving Party's Record, Tab 11*

48. In *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853 (Fed. T.D.), Madam Justice Tremblay-Lamer set out the general principles applicable to a motion for summary judgment at paragraph 8:

[8] I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al.*, [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (T.D.));
2. there is no determinative test [...] but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie* [ (1990), 75 O.R. (2d) 225 (Gen. Div.)]. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
3. each case should be interpreted in reference to its own contextual framework [...];
4. provincial practice rules (especially Rule 20 of the *Ontario Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation [...];
5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court [...];



6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so [...];

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge [...] The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved.

*Koslowski v. Courier*, supra at para. 16  
*Moving Party's Record, Tab 11*

49. The Federal Court of Appeal affirmed this test in *ITV Technologies Inc. v. WIC Television Ltd.*, 2001 FCA 11, [2001] F.C.J. No. 400 (Fed. C.A.), and quoted it with approval in *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, 316 N.R. 349 (F.C.A.), wherein the Court provided the guidelines specifically with respect to the application of Rule 216(3) at paras. 32-29. I summarized these guidelines in *Rachalex Holdings*, supra, at para. 8 as follows:

1. where an issue of credibility arises from evidence presented, the case should not be decided on summary judgment under rule 216(3) but rather should go to trial because the parties should be cross-examined before the trial judge (see paragraph 32 of *MacNeil Estate*);

2. under rule 216(3), motions judges can only make findings of fact or law provided the relevant evidence is available on the record and does not involve a "serious" question of fact or law which turns on the drawing of inferences (see paragraph 33 of *MacNeil Estate*);

3. Rule 216(3) permits a judge on a motion for summary judgment, after finding that a "genuine issue" exists, to conduct a trial on the affidavit evidence with a view to determining the issues in the action. However, this is not always possible, particularly where there are conflicts in the evidence, where the case turns on the drawing of inferences or where serious issues of credibility are raised (see paragraph 46 of *MacNeil Estate*);

4. Parties responding to a motion for summary judgment do not have the burden of proving all of the facts in their case; rather ... responding parties have only an evidentiary burden to put forward evidence showing that there is a genuine issue for trial ... (see paragraph 25 of *MacNeil Estate*).

*Koslowski v. Courier*, supra at para. 17  
*Moving Party's Record, Tab 11*

50. Section 27. (1) of the *Copyright Act* provides that it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

*Copyright Act*, R.S.C.. 1985, c. C-42.

51. Under the Copyright Act, consent can be orally given, and can also be implied from the circumstances. The learned author of *Fox's Canadian Law of Copyright and Industrial Design*, states that "Such permission for mere doing of an Act that would otherwise be an infringement of copyright may be given orally or by implication, and passes no interest." Referring to the case of *Muskett v. Hill* (1839) 5 Bing NC 649, 9 LJCP 201, 132 ER 1267, the court said that "A mere oral licence in the form of permission to do a thing "passes no interest, but only makes an action lawful which without it would be unlawful." The court further stated that "Such a licence, amounting to a mere dispensation, may in certain circumstances provide an equitable defence to an action of infringement."

*Netupsky v. Dominion Bridge Co.* 1969 CarswellBC 76, 58 C.P.R. 7, 5 D.L.R. (3d) 195, at para. 98, *Moving Party's Record, Tab 13*

52. The consent to publish and distribute "may be presumed from the circumstances", so long

as the inference of consent must be clear before it will operate as a defence and must come from the person holding the particular right alleged to be infringed.

*Netupsky v. Dominion Bridge Co.* at para. 99.  
Moving Party's Record, Tab 13

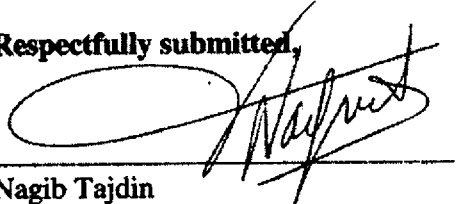
53. This defendant submits that according to s. 3 of the *Copyright Act*, the complained act is an "infringement" only if has been undertaken without the copyright holder's consent. Since the Imam gave his consent, authorization and Blessings, on August 15, 1992, before the distribution was commenced, the activities complained of are not infringing the rights of the Aga Khan, who it appears from the forged signatures, has not authorized this action.

#### IV - ORDER SOUGHT

54. This defendant asks that this action be dismissed without costs.

Date: June 18, 2010

Respectfully submitted,



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**FEDERAL COURT**

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BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

and

NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all  
others 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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**MEMORANDUM OF FACT AND LAW**

by the defendant Nagib Tajdin

Motion returnable July 12, 2010

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