

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

WRITTEN REPRESENTATIONS
(of the defendant Nagib Tajdin /moving party)

I - NATURE OF THE MOTION

1. This is a motion for (i) an order pursuant to s.50(1)(b) of the *Federal Courts Act*, staying the parties' cross-examinations and other proceedings in support of the motions for summary judgment brought by the parties; (ii) an order pursuant to Rule 90(2) of the *Federal Court Rules* requiring the attendance of the named plaintiff (the "Imam") for an oral examination in Paris, France, within 21 days of the order being pronounced by this court; and (iii) pursuant to Rule 233 requiring the Imam to serve his affidavit of documents within 15 days after the date fixed for the oral examination, if he does not attend at the place and time fixed for his oral examination.

II - FACTS

2. This action was filed by the plaintiff on April 6, 2010, defended by the defendants on April 29, 2010, and reply served on both defendants on May 25, 2010, amended (correcting minor grammatical errors) reply to Tajdin's defence on June 17, 2010. The plaintiff has failed to file his affidavit of documents which was due on July 17, 2010.

Affidavit of Nagib Tajdin, sworn July 29, 2010
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3. The plaintiff asserts that the defendants have infringed His copyright by distributing His works, known as "Farmans" which are oral Guidance made by Him as Imam when He blesses His Jamats (congregation, "Ismailis"). The Ismailis guide their life according to the Farmans made by their Imam, who has said that He makes Farmans for the Jamats, and that not abiding by His Farmans has very serious consequences to the individual.
4. The defendants have maintained that the Imam is not behind this litigation and that the litigation has been commenced and prosecuted by Shafik Sachedina ("Sachedina") who was appointed as Head of the Imam's Secretariat in or about December 1996.
5. The defendants further claim (and have given evidence) that on August 15, 1992, the Imam gave His consent (with blessings for the success of the "work") to Tajdin to publish and distribute His works, the Farmans, and, in any event, by virtue of being His Spiritual Children, they have an implied consent to the distribution of the Farmans, and as such are not infringing the Imam's copyrights.
6. The defendants also allege that based on the consent given by the Imam, they have distributed the Farmans openly and continuously since 1992, and, therefore, the limitations period bars the plaintiff from bringing this action, as well as on grounds of laches.

7. Nonetheless, despite any legal arguments available to the defendants, the defendants have maintained all along that *if* the Imam really desires that the defendants cease the activities complained of, the defendants would do so immediately and without any reservations stop the activities complained of. However, all attempts by Tajdin in seeking direct confirmation from the Imam has been thwarted by Sachedina.

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8. Sachedina has sent, or caused to be sent, four documents to Tajdin, three of which are purporting to have been signed by the Imam, and one has purportedly been sent by the Imam's brother. The defendants have filed experts reports indicating that the three documents purportedly signed by the Imam are not signed or written by the Imam. The defendants have also alleged that the Imam's brother did not sent the correspondence purportedly sent by him.
9. The defendants filed a motion for summary judgment, which has been defended by the plaintiff, who also brought his own motion for summary judgment. In support of their motion and to oppose the plaintiff's motion, the defendants filed their personal affidavits, affidavit of the person who personally presented the very first Farman book (in public) published in 1992 to whom the Imam gave the consent to continue the work with blessing for the success of the work, and affidavit of other witnesses, including the expert who has provided his opinion.

10. Remarkably, the Imam did not file His personal affidavit either in support of the plaintiff's motion or to oppose the defendants' motion, but instead filed two affidavits - one by Sachedina and the other by Aziz Bhaloo ("Bhaloo") who had helped organized the Imam's visit to Canada in 1992. The plaintiff also filed two other affidavits (one of a lawyer and the other of a notary public) who both stated that they observed the named plaintiff sign an Affirmation, which is attached as an exhibit to their affidavits. Notably, this Affirmation has not been filed as evidence thus precluding the defendants from cross-examining the Imam.

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11. None of the affiants who filed their affidavits in support of or to oppose the motions for judgment has any personal knowledge about the two critical and essential issues raised in this litigation, on whether the Imam gave His consent to the distribution of His Farmans, and on the issue of implied consent. Furthermore, the Affirmation purportedly signed by the Imam does even deny that He had given His consent to the distribution of His Farmans in 1992.

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12. Furthermore, the plaintiff has not produced a video recording (which is in the possession and control of the named plaintiff's institutional leaders, and sought by the defendants) taken of the time when the Imam gave His consent to the distribution of the first Farman book was presented to the Imam in August 1992 which would clearly indicate the presentation of the first Farman book to the Imam and the conversation between the presenter and the Imam, but to date the video has not been produced.

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13. The plaintiff's counsel has not served his client's affidavit of documents and is refusing to produce the Imam, either for cross-examination on His Affirmation or for examination of discovery.

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14. The plaintiff's counsel informed the defendants that he had instructed the Imam not to attend for the examination for discoveries the defendants scheduled for July 30, 2010, on the reasoning that if either of the parties is successful in the motions for judgment, then discoveries of documents and examination of the plaintiff would not be required.

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15. However, the defendants have stated and hereby repeat that the named plaintiff, the Imam, is not behind this litigation and that the litigation is directed by Sachedina. The defendants maintain that if the named plaintiff, the Imam, informs the defendants that He is behind he litigation, and that He desires the defendants to stop the activities complained of, then these defendants would immediately cease the activities despite the earlier consent given by the Imam.

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16. The defendants do not believe that the Imam is the operating mind behind this litigation or the desire to stop the infringing activities for many reasons, *some* of which are:

- a. As Imam of the Ismailis (followers of the Imam), the named plaintiff has absolute authority in interpreting the faith for the Ismailis to practice according to the Time and Age, and it is incumbent upon Ismailis to follow closely every word of every Farman delivered by their Imam, and non obedience of Farmans with respect to religious matters have serious consequences to an Ismaili. The Imam has said as follows: I have given you Farmans which I urge you to follow, because these Farmans I make are made for My Jamats;
- b. The Ismailis have been governed by a Constitution which all Ismailis are obliged to abide with "in letter and spirit". The first Constitution was ordained in 1900 by the Imam's grandfather, Sir Sultan Mahomed Shah Aga Khan ("Sultan Mahomed Shah"), who was the 48th Imam of the Ismailis, and each country was given its own Constitution.
- c. In 1986 the Imam ordained one Constitution which became applicable to all worldwide Ismailis after undertaking a three and one-half year review of all of the various Constitutions then applicable to His Jamats worldwide, with Rules and Regulations adapted for each country, which radically changed the organization of the institutions governing the Jamats, as well as the religious aspects of the Jamats and personal law relating to the Ismailis. The institutions were vested with clearly defined powers of operation, and the Imam urged the institutions and all Ismailis to abide by the New Constitution and *The Rules and Regulations* applicable to their country.
- d. The importance of the Constitution to the Ismailia Jamats was explained by the Imam shortly after He had ordained the Constitution of 1986, in Gilgit, Pakistan, on November 21, 1987, as follows:

The Imam and leaders of the Jamat have worked for three and a half years on the new Constitution of the Jamat. The Constitution starts on the premise that every Murid,

wherever he lives and wherever the Imam is, has a bond with the Imam-of-the-Time. And therefore the Constitution links every Murid to the Imam-of-the-Time. In the same way, the rules and regulations have been designed to take into account national law in various countries, old traditions and habits, new needs.

But basically, the new Constitution provides that every Murid has the same relationship to the Imam-of-the-Time in the administration of Jamati matters and that is, I think, a very important step. [Emphasis added] ...

The Constitution has not been designed as an instrument of uncaring direction. On the contrary, it is an instrument seeking to respond to the needs of the Jamat in a manner which will serve the purpose and the interests of the Jamat. The Constitution has been designed, therefore, to serve. And it is in that spirit that I would wish the leadership of the Jamat to conceive of this document. It is a document aimed at serving the Jamat.

- e. All aspects of an Ismaili's life concerning religious matters, personal law (an Ismaili can obtain a divorce from his own institution if the local law permits the exercise of such powers), etc. are governed by the Constitution. The powers and authorities of various institutional bodies are all governed by the Constitution. The Constitution also provides for taking disciplinary action (with rights of appeal) against any Ismaili, and provides for various forms of penalties, including a provision for an Ismaili to be excommunicated from the community.
 - f. The Imam reminded the Jamats and the leaders of various institutional bodies that "unless the officers and the Jamats themselves live by the Constitution, then there is no point in having one whatsoever."
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- g. The Constitutions of various separate countries ordained in and after 1948 contained express Articles for the publication of Farmans (Tajdin has no knowledge if the Constitution in force prior to 1948 dealt with the powers for publishing Farmans). The previous Constitutions, prior to the new one ordained in 1986, contained the following articles:

"HOLY FARMAN AND THE CONSTITUTION"

7. The Ismailia Association shall record, compile and certify Holy Farman.
8. The Ismailia Association in consultation with the Supreme Council shall be responsible for publication of Holy Farman.
9. Copies of Holy Farman shall be forwarded by the Ismailia Association to the Supreme Council.
- 10 Any Holy Farman certified by the President of the Supreme Council shall be conclusive evidence thereof.

Articles 7 to 12 above reproduced from the *Constitution of the Shia Imami Ismailis in Europe, Canada, and the United States of America* (incorporating recent amendments), July 1976, published by His Highness the Aga Khan Shia Imami Ismailia Supreme Council for Europe, Canada, and the United States of America.

- h. The Ismailia Association referred to in paragraph 22 above, was renamed *Tariqah and Religious Education Boards* ("ITREB") when the New Constitution was ordained in 1986.
17. Notably, unlike all previous Constitutions, the New Constitution did not vest the responsibility of recording, compiling, certifying and publishing Farmans to ITREB, the institution vested with powers over religious matters, or to any other institution. Furthermore, the Imam did not reserve this power for Himself.
 18. The Imam has amended the Ismaili Constitution a number of times since ordaining it in 1986, the last time it was amended was in 1998, at Lisbon, Portugal, and has not amended it to prohibit the activities complained of by this action, despite the self serving affidavit sworn by

Sachedina that the Imam had in mid 90s “frequently” told him to get Tajdin to stop the infringing activities.

19. Alternatively to amending the Constitution, the Imam can easily supercede the Ismaili Constitution by making a Farman, which would have the legal effect of overriding the Ismaili Constitution (such a provision exists in the Constitution), but has not to do so to date.
20. Other than Sachedina’s self serving statements, and his providing the above mentioned documents which according to document and handwriting examiner are not signed or written by the Imam, there is nothing to indicate that the Imam desires the activities to stop, or that the Imam has revoked the consent which He gave on August 15, 1992, to “continue” the work and to succeed in doing it, and relying on that consent, the defendants have been distributing the Farmans since 1992.
21. The bringing of this action has caused extreme difficulties for the these defendants with death threats made against them, and the majority of the Ismailis are considering them as “satans” for fighting their Imam. A website “<http://lawsuit2010.com/index.html>” is as an example of the manner these defendants are being vilified in the public.

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22. Unfortunately, the plaintiff’s counsel and Mr. Sachedina have been making public statements to Ismailis and to Ismaili based news service to intimidate and cause further unimaginable stress to these defendants; as an example, within a day or so of the issuing of the claim or even before the claim was served on these defendants in accordance with the Rules, the claim was circulated by way of a mass email campaign to advertize to the worldwide Ismailis of the Imam suing His “spiritual children”, which has never happened in over 1,400 years of Ismaili history. These type of actions are devised to humiliate and intimidate not only these defendants but their families as well.

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23. As indicated earlier, there are three motion for summary judgment - two by the defendants and one by the plaintiff for judgment, and twelve affidavits have been filed in support of the motions, and four to six days will be required for cross-examinations, with three witnesses travelling from Kenya, with attendant costs, an expert will be examined on his four reports, along with possible motions for refusals, undertakings, etc..

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24. Once the cross-examinations are completed, the hearings on the three motions will be held. The plaintiff's counsel estimates that he will require one hour to argue the three motions, while the defendants estimate that two to three days might be required to argue the motions.

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25. After the cross-examinations are completed, this defendant will return back to his home in Kenya, and will have to travel again to Toronto to attend for and argue the motions, which will impose an enormous burden on this defendant, as he operates a bakery business in Kenya, and he has to close the business during August of 2010 to enable him to attend for the cross-examinations.

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26. To avoid the enormous waste of judicial resources, and to avoid the wastage of legal costs, and the costs of time and money *for the parties*, the defendants served the plaintiff's counsel with a Direction to Attend, requiring the Imam to be produced for discoveries on July 30, 2010, along with a certified cheque of \$20,000.00 for conduct money, with an offer that the date for the examinations could be changed to accommodate the Imam's schedule, and that if He desired, His examinations could be held in Paris. As noted above, the plaintiff's lawyer has instructed the plaintiff not to attend for examinations.

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27. These defendants state that to secure "the just, most expeditious and least expensive" determination of this proceeding will be achieved by ordering an examination of discoveries of the Imam, as a five minute meeting with the Imam will be all that will take to satisfy the defendants that the Imam is behind this litigation and that He desires the defendants to cease the activities complained of.

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28. In May of this year, the Imam visited Toronto. This defendant wrote to the plaintiff's counsel to arrange a five-minute meeting with the Imam with a written acknowledgment that if the Imam asks this defendant to stop the activities complained of, he would immediately stop he activities complained of despite the huge immense loss he would suffer, had a five-minute meeting been arranged, this matter would have been resolved a long time ago and would have saved the parties a lot of money, time and also saved judicial resources.

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29. This defendant cannot believe that a real plaintiff would instruct his counsel to continue the litigation and refuse to meet a defendant, who simply seeks to ensure that the named plaintiff is actually the one who is seeking to stop the activities complained of and that upon verification, any infringing activity would be ceased immediately. To date all attempts for such verification has been thwarted by Sachedina.

III- SUBMISSIONS

30. s. 50(1)(b) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), grants this court a discretion "to stay proceedings where it is in the interest of justice to do so". It is a well-established principle that the judicial discretion to grant a stay of proceedings is one

which ought not to be exercised except under special circumstances and that the onus is on the party seeking the stay to show that such special circumstances exist: *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* (1981), 54 C.P.R. (2d) 218.

Reading & Bates Construction Co. v. Gaz inter-Cité Quebec Inc. supra at para. 8.
1984 CarswellNat 875, 2 C.P.R. (3d) 266

31. The category of special circumstances never closes for each case must be determined by its particular facts but among the circumstances having to be considered would be the avoidance of duplication of litigation and the prevention of frivolous and vexatious litigation. The mere balance of convenience will not suffice ... To establish that the action is vexatious in point of fact the applicant for the order of stay must satisfy the court not only that the continuance of the action would work an injustice to the defendant because it would be oppressive to him but also that the stay would not cause any injustice to the plaintiff. The onus of proof that these conditions exist lies on the applicant for the order of stay: *Weight Watchers Int'l Inc. v. Weight Watchers of Ontario Ltd.* (1972), 5 C.P.R. (2d) 122, 25 D.L.R. (3d) 419; *Dominion Mail Order Products Corp. v. Weider* (1976), 28 C.P.R. (2d) 27, [1977] 1 F.C. 141.

Reading & Bates Construction Co. supra at para. 9.

32. This defendant submits that this court should exercise its discretion and stay all proceedings, namely the cross-examinations on the twelve affidavits, the setting the motions for summary judgment motions for argument, and the production of Affidavit of Documents for a period of 30 days, or until the named plaintiff has been produced, pursuant to Rule 90(2), for an Examination for Discovery, and that the Examination of the named plaintiff to take place within 30 days of the order being made, and the examination to be held in Paris, France, as this is the most expeditious and least expensive manner to resolve the issues raised by this litigation.
33. With respect to savings of enormous costs, time for the various parties and witnesses, and the avoidance of utilizing scarce judicial resources is a relevant and special circumstance which this court should factor when determining if a stay should be granted. Collier J. in *Hirsh Co.*

v. Spacemaker Ltd. Et Al., after reviewing the facts of the case, held that, “I can foresee an avoidable increase of some time and some cost, if matters remain dormant until the appeal is heard” and granted a stay until the appeal was heard [emphasis added].

Hirsh Co. v. Spacemaker Ltd., 1987 CarswellNat 708,

15 C.I.P.R. 250, 18 C.P.R. (3d) 48

34. The defendants in this matter submit that avoiding cross-examinations on twelve affidavits, along with cross-examinations of at least one, and probably two experts (as the plaintiff is now seeking to file further evidence after he has undertaken the defendant’s cross-examinations), costs for transcripts, possible motions for undertakings and/or refusals, preparing new memorandum of facts and law, two to three days will be required to argue the three motions, would all be avoided to the benefit of all of the parties, *including the plaintiff*, if a stay is granted and discoveries of the named plaintiff, the Imam, is ordered, and that it would be unjust to permit the proceedings to be prosecuted by or in the name of a named plaintiff.
35. This defendant submits that if at the discoveries the Imam confirms that He is indeed the actual plaintiff, that He desires that Tajdin cease the activities complained of, Tajdin would immediately cease the activities complained of and the cross-examinations and the hearing of the motions will no longer be required. This position has been submitted by the defendants in their Statement of Defence and in their evidence, and the matter could and would be immediately resolved without resorting to costly litigation and without the expenditure of so much time and resources in the moving ahead with the litigation.
36. Furthermore, this defendant submits that if the named plaintiff is produced for examinations and confirms that He is the actual plaintiff, then the named plaintiff would get the relief He is seeking by His motion for summary judgment without the expenditure of money, time and scarce judicial resources, and that this court should take steps to allow for most expeditious and least expensive route to resolving this dispute.

37. Furthermore, in the motions for judgment filed by all parties, the named plaintiff has not given any direct evidence to challenge the defendant's witnesses' direct evidence that the Imam had given His consent, and is relying on hearsay and double hearsay evidence. The issues of implied consent, laches and limitations period may not be issues appropriate for a motion for judgment. Therefore, by staying the motions and ordering discoveries, the plaintiff will be assured to obtain what he seeks with the minimum of costs and inconvenience to all concerned.
38. The plaintiff's counsel's reasoning in instructing his client not to attend for examination as scheduled on the grounds that if either party won the motion the discoveries would not be necessary is a flawed argument as he has failed to take into account that both parties' motion may not be successful, or that the defendant's motion might be successful since the named plaintiff has not given any direct evidence, and an adverse inference could be made against Him. By granting a stay as requested, the plaintiff cannot and will not be prejudiced.
39. Not only will the plaintiff not be prejudiced by a stay being ordered, but the stay as proposed is actually to the plaintiff's benefit. The motions for judgment has raised issues of direct consent by the Imam, implied consent, laches, and limitations period which makes the obtaining judgment by way of summary motions tenuous, and not guaranteed. This appears evident as the plaintiff did not even bring a motion for an interim injunction and/or motion for judgment, and brought his summary judgment motion in response to the defendant's motions.
40. In the alternative, the defendants ask that the plaintiff be ordered to attend for discoveries within 21 days as the bringing of the motions for summary judgment does not stay the rules concerning the serving of the affidavit of documents and attending for discoveries.

41. Rule 90(2) provides that, “Where a person to be examined on an oral examination resides outside Canada, the time, place, manner and expenses of the oral examination shall be as agreed on by the person and the parties or, on motion, as ordered by the Court.” There is no rule which stays the operation of Rules 90(2) and 223(1) upon the bringing motions for summary judgment. Rule 223(1) provides that, “Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.” [emphasis added].
42. Accordingly, this defendant submits that even if a stay is not granted, the plaintiff be ordered to attend for examinations for discovery and be compelled to serve his affidavit of documents on the grounds that the bringing of motions for summary judgment do not stay the rules respecting the examinations and serving of the affidavit of documents.
43. In *Trans-Canada Medical Management Inc. v. Varenbut*, the court held that the filing of motion for summary judgement by a party does not automatically stay the other party’s rights to holding discovery or in obtaining the other’s party’s affidavit of documents. The court goes on to hold that there was no conflict between the summary motion rules and the discovery rules, and that they operate complimentary to each and neither has precedence, saying that discoveries and summary motions can proceed simultaneously.

Trans-Canada Medical Management Inc. v. Varenbut
2003 CarswellOnt 4549, 5 C.P.C. (6th) 344
44. In *Laurentian Bank of Canada v. Herzog*, the court held that there is no reason why a litigant should receive documents at cross-examinations on the affidavits filed for motion for summary judgment, holding that the litigant is entitled to receive the affidavit of documents as of course even if a motion for summary judgment is brought by the other party. The court further stated that there is no “suspension of this obligation because of an intended or pending motion for summary judgment”, and said that there is no express exception in the rules in favour of rules governing motions for summary judgment.

Laurentian Bank of Canada v. Herzog
199 CarswellOnt 2776, 42 C.P.C. (4th) 269


45. This defendant therefore states that the proceedings ought to be stayed for a 30 days period or until the named plaintiff is produced for discoveries, and in the alternative, that the named plaintiff be produced for discoveries and compelled to produce his affidavit of documents within 15 days of this order.

IV - ORDERS SOUGHT

46. This defendant asks for an order:
- a. that the cross-examinations and other steps scheduled for the motions for the summary judgment be stayed for a period of 30 days or until the named plaintiff is produced for examinations of discovery;
 - b. That the named plaintiff be examined produced for examinations within 21 days of the date of the order in Paris, France; and
 - c. in the alternative, the named plaintiff shall attend for examinations of discovery and produce his affidavit of documents within 15 days of the date of the order.

Date: July 29, 2010

Respectfully submitted,



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FEDERAL COURT

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

WRITTEN REPRESENTATIONS

**of the defendant Nagib Tajdin (moving party)
for the Motion by this defendant**

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