

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN

Appellant/Defendant

- and -

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent/Plaintiff

MOTION RECORD OF THE RESPONDENT/PLAINTIFF
(Motion to Dismiss the Appeal)

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TAB 1

Court File No. A-59-11

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN

Appellant/Defendant

- and -

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent/Plaintiff

NOTICE OF MOTION
(Motion to Dismiss the Appeal)

TAKE NOTICE that the Plaintiff, His Highness Prince Karim Aga Khan, brings this motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, to dismiss the appeal in Federal Court of Appeal Court File No. A-59-11 as premature. A companion motion has been filed with respect to Federal Court of Appeal File No. A-60-11.

THE MOTION IS FOR:

1. An Order dismissing the appeal in Federal Court of Appeal Court File No. A-59-11; and
2. Costs of this motion.

THE GROUNDS FOR THE MOTION ARE:

3. The Plaintiff, His Highness Prince Karim Aga Khan ("His Highness" or the "Plaintiff") commenced an action (Federal Court File No. T-514-10) in the Federal Court alleging that the named defendants, Nagib Tajdin ("Tajdin") and Alnaz Jiwa ("Jiwa") (collectively, the "Defendants"), together with unnamed defendants, had infringed his copyright.

4. The Defendants and the Plaintiff filed motions for summary judgment. These motions were heard by The Honourable Mr. Justice Harrington on December 7 and 8, 2010. At the conclusion of the hearing, Justice Harrington took his decision under reserve.
5. On January 7, 2011, Justice Harrington delivered Reasons for Judgment granting the Plaintiff's motion for summary judgment and dismissing the Defendants' motion for summary judgment (the "Reasons for Judgment").
6. Paragraph 77 of the Reasons for Judgment provided as follows:


[77] In accordance with Rule 394 of the *Federal Courts Rules*, I direct the plaintiff to prepare for endorsement a draft judgment to implement these conclusions, approved as to form and content by Messrs Tadjin and Jiwa, or if the parties cannot agree, to bring on a motion for judgment in accordance with Rule 369.

7. After trying unsuccessfully to obtain the Defendants' approval as to the form and content of a draft judgment, the Plaintiff served and filed a motion for judgment in writing on February 8, 2011.
8. The Plaintiff's motion for judgment in Federal Court File T-514-10 remains outstanding.
9. To-date, Mr. Justice Harrington's judgment has not issued.
10. On February 8, 2011, the Defendants filed notices of appeal seeking to appeal the "order" of Justice Harrington dated January 7, 2011 and amended on January 13, 2011, "by which the plaintiff's motion for summary judgment was allowed".
11. The appeal herein is premature and the Federal Court of Appeal lacks jurisdiction to hear it in the absence of a final judgment.
12. The Defendants can be expected to have additional grounds of appeal relating to the form of the final judgment, which will necessitate the filing of amended notices of appeal, and which would likely delay the timing of the appeal. Accordingly, if this Appeal is not struck, the proceedings will be unnecessarily complicated and entail additional expenses to the parties and the Court in time and resources.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Bola Sholubi sworn February 14, 2011; and
2. Such further and other material as counsel may advise and this Honourable Court may permit.

February 14, 2011



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Court File No: A-59-11

FEDERAL COURT OF APPEAL

B E T W E E N:

NAGIB TAJDIN

Appellant/Defendant

- and -

**HIS HIGHNESS
PRINCE KARIM AGA KHAN**

Respondent/Defendant

NOTICE OF MOTION
(Motion to Dismiss the Appeal)

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Solicitors for His Highness
Prince Karim Aga Khan

TAB 2

Court File No. A-59-11

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN

Appellant/Defendant

- and -

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent/Plaintiff

AFFIDAVIT OF BOLA SHOLUBI

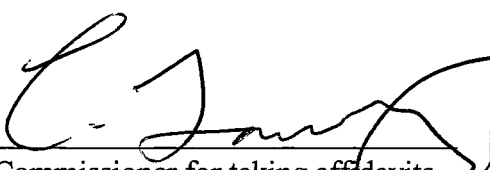
(sworn February 14, 2011)

I, Bola Sholubi, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a law clerk in the Intellectual Property Group of Ogilvy Renault LLP, solicitors for the Plaintiff. I am assisting the lawyers with primary responsibility for this file and have personal knowledge of the facts set out in this affidavit except where I have received information from others in which case I have stated the source of that information and that I believe it to be true.
2. Attached as **Exhibit "A"** to my affidavit is a copy of the Reasons for Judgment of The Honourable Mr. Justice Harrington dated January 7, 2011.
3. Attached as **Exhibit "B"** to my affidavit is a copy of the Interlocutory Injunction Order of Mr. Justice Harrington dated January 7, 2011.
4. Attached as **Exhibit "C"** to my affidavit is a copy of corrected Reasons for Judgment of Mr. Justice Harrington received January 13, 2011.

5. Attached as **Exhibit "D"** to my affidavit is a copy of a print-out of the index for Federal Court File No. T-514-10 which I obtained from the Federal Court website.
6. I am advised by counsel for the Plaintiff, Ms. Whyte Nowak, and do verily believe that, after trying unsuccessfully to obtain the Defendants' approval as to the form and content of a draft judgment, the Plaintiff served and filed a motion for judgment in writing on February 8, 2011.
7. I am advised by Ms. Whyte Nowak that the Plaintiff's motion for judgment in Federal Court File T-514-10 remains outstanding and that to-date, Mr. Justice Harrington's judgment has not issued.
8. Attached as **Exhibit "E"** to my affidavit is a copy of the Notice of Appeal of Nagib Tajdin dated February 8, 2011 bearing Federal Court of Appeal File No. A-59-11.
9. Attached as **Exhibit "F"** to my affidavit is a copy of the Notice of Appeal of Alnaz Jiwa dated February 8, 2011 bearing Federal Court of Appeal File No. A-60-11.
10. I make this affidavit in support of the Plaintiff's motion to dismiss the appeal in Federal Court of Appeal Court File No. A-59-11 as premature and for no other purpose.

SWORN before me at the City of
Toronto, on February 14, 2011.


A Commissioner for taking affidavits


BOLA SHOLUBI

Christian Paul Landeta, a Commissioner, etc.,
Province of Ontario, for Ogilvy Renault LLP /
S.E.N.C.R.L., s.r.l., Barristers and Solicitors.
Expires October 29, 2013.

TAB 3

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN

Appellant/Defendant

- and -

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent/Plaintiff

WRITTEN REPRESENTATIONS
(Motion to Dismiss the Appeal)

PART I – OVERVIEW OF THE MOTION

1. The Plaintiff, His Highness Prince Karim Aga Khan (“His Highness” or the “Plaintiff”) brings this motion in writing to have the appeal herein dismissed.
2. The appeal was initiated by the Appellant, Nagib Tajdin, following the issuance of Reasons for Judgment delivered by The Honourable Mr. Justice Harrington on January 7, 2011 and amended on January 13, 2011.
3. The appeal is premature as Justice Harrington has yet to issue his judgment.
4. In the absence of a judgment to appeal from, this Court lacks jurisdiction to hear an appeal.

5. The Defendants can be expected to have additional grounds of appeal relating to the form of the final judgment, which will necessitate the filing of amended notices of appeal, and which would likely delay the timing of the appeal. Accordingly, if this Appeal is not struck, the proceedings will be unnecessarily complicated and entail additional expenses to the parties and the Court in time and resources.

PART II - FACTS

6. The Plaintiff commenced an action (Federal Court File No. T-514-10) in the Federal Court alleging that the named defendants, Nagib Tajdin (“Tajdin”) and Alnaz Jiwa (“Jiwa”) (collectively, the “Defendants”), together with unnamed defendants, had infringed his copyright.

Reasons for Judgment of The Honourable Mr. Justice Harrington dated January 7, 2011 (“Reasons for Judgment”) para. 6, Exhibit “A” to the Affidavit of Bola Sholubi sworn February 14, 2011 (the “Sholubi Affidavit”); Motion Record, Tab 2A, p. 11

7. The Defendants and the Plaintiff filed motions for summary judgment. These motions were heard by The Honourable Mr. Justice Harrington on December 7 and 8, 2010. At the conclusion of the hearing, Justice Harrington took his decision under reserve.

Reasons for Judgment, Exhibit “A” to the Sholubi Affidavit; Motion Record, Tab 2A, p. 35

8. On January 7, 2011, Justice Harrington delivered Reasons for Judgment granting the Plaintiff’s motion for summary judgment and dismissing the Defendants’ motion for summary judgment (the “Reasons for Judgment”). Paragraph 77 of the Reasons for Judgment provided as follows:

[77] In accordance with Rule 394 of the *Federal Courts Rules*, I direct the plaintiff to prepare for endorsement a draft judgment to implement these conclusions, approved as to form and content by Messrs Tajdin and Jiwa, or if the parties cannot agree, to bring on a motion for judgment in accordance with Rule 369.

Reasons for Judgment, Exhibit "A" to the Sholubi Affidavit; Motion Record, Tab 2, Exhibit "A", p. 33

9. After trying unsuccessfully to obtain the Defendants' approval as to the form and content of a draft judgment, the Plaintiff served and filed a motion for judgment in writing on February 8, 2011.

Sholubi Affidavit, para. 6; Motion Record, Tab 2, p. 7

10. The Plaintiff's motion for judgment in Federal Court File T-514-10 remains outstanding.

Sholubi Affidavit, para. 7; Motion Record, Tab 2, p. 7

11. To-date, Mr. Justice Harrington's judgment has not issued.

Court Index for Federal Court File No. T-514-10, Exhibit "D" to the Sholubi Affidavit; Motion Record, Tab 2, Exhibit "D", pp. 94-129

12. On February 8, 2011, the Defendants filed notices of appeal seeking to appeal the "order" of Justice Harrington dated January 7, 2011 and amended on January 13, 2011, "by which the plaintiff's motion for summary judgment was allowed".

Notice of Appeal of Nagib Tajdin dated February 8, 2011, Exhibit "F" to the Sholubi Affidavit; Motion Record, Tab 2, Exhibit "F", pp. 150-161

PART III – ISSUE TO BE DETERMINED

13. The issue before the Court on this motion is whether the appeal herein should be dismissed by reason that it is premature in the absence of a judgment having issued from which to appeal from.

PART IV – ARGUMENT

14. The Federal Court of Appeal’s jurisdiction to hear appeals from the Federal Court is provided by subsection 27(1) of the *Federal Courts Act* which states:

27. (1) Appeals from Federal Court –

An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:

- (a) a final judgment¹;
- (b) a judgment on a question of law determined before trial;
- (c) an interlocutory judgment; or
- (d) a determination on a reference made by a federal board, commission, or other tribunal or the Attorney General of Canada.

Further, section 27(2)(b) provides:

27. (2) Notice of Appeal –

An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal:

- (b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

15. Accordingly, an appeal only lies from a final judgment and the time runs from the pronouncement of the judgment or determination appealed from or within any further time that a judge may fix or allow.

16. Further, Rule 394 referred to in Mr. Justice Harrington’s Reasons for Judgment makes it clear that the Court shall settle the terms of “and pronounce the judgment” only upon return of the motion under Rule 369 which the Plaintiff has commenced.

1. _____

¹ Note that the term “judgment” is not defined in section 2 of the *Federal Courts Rules*, however, the term “order” is defined to include a judgment.

17. There is ample Federal Court of Appeal authority which distinguish *reasons for judgment* from a *judgment* and which hold that an appeal can only be taken from the pronouncement of a judgment and not from a judge's reasons.

Canada Trustco Mortgage Company v. Her Majesty The Queen, 2008 FCA 382 at paras. 3 and 4

Armonikos Corporation Ltd. v. Saskatchewan Wheat Pool 2002 FCA 444 at paras. 7, 8 and 11

Ratiopharm Inc. v. Pfizer Canada Inc. 2007 FCA 261 at paras. 6 and 12

Breslaw v. Canada (A.G.) 2005 FCA 152 at para. 3

18. Paragraph 52(a) of the *Federal Courts Act*, enables the Court to quash a proceeding in cases over which it has no jurisdiction. It states:

52. Powers of Federal Court of Appeal - The Federal Court of Appeal may

- (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;

19. In *Ratiopharm Inc. v. Pfizer Canada Inc.* 2007 FCA 261, the Federal Court of Appeal considered that ratiopharm's appeal was not within the jurisdiction of the Court under subsection 27(1) of the *Federal Court Act* on the basis of its conclusion that ratiopharm's appeal was not against a judgment of the Federal Court, but against the reasons for judgment. The Court therefore granted Pfizer's motion to quash and dismissed ratiopharm's appeal, with costs.
20. Until a judgment issues, the appeal herein is premature and the Federal Court of Appeal lacks jurisdiction to hear it.
21. The Defendants can be expected to have additional grounds of appeal relating to the form of the final judgment, which will necessitate the filing of amended notices of appeal, and which would likely delay the timing of the appeal. Accordingly, if this Appeal is not struck, the proceedings will be unnecessarily complicated and entail additional expenses to the parties and the court in time and resources.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this day of 14th day of February, 2011.



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Court File No. A-59-11

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