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

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

I - NATURE OF THE MOTION

1. This is a motion for summary judgment brought by the plaintiff ("Imam") for a declaration that the plaintiff has a Copyright in His works; for a declaration that the defendants have infringed the Copyright; for an injunction retraining the defendants from infringing the Copyrights of the plaintiff; for an order delivering the infringing materials to the Institute of Ismaili Studies; for an order for a reference for the determination of damages, and any such damages to be payable to the AKDN Foundation; costs fixed in the amount of $30,000.00; and pre-judgment and post-judgment interest.

II - FACTS

2. This defendant will rely on the Memorandum of Fact and Law swerved and filed by him in support of his Motion for Summary Judgment to be heard at the same time as the plaintiff's motion, and as such will only set out additional facts and law to be relied on by him in this factum.

OVERVIEW:

3. The defendants have been distributing the plaintiff's works, known as "Farmans" which are oral Guidance made the Imam when He blesses His Jamats (congregation). The Jamats guide their life according to the Farmans made by their Imam, who has said that He makes Farmans for the Jamats, as not abiding by His Farmans has very serious consequences to the individual.

4. The defendants state that the Imam is not behind this litigation and that the litigation has been commenced and prosecuted by Sachedina, and documents submitted before and after April 6, 2010, when this litigation was filed, have been found by an handwriting and document examiner as one not signed or written by the Aga Khan.

5. On August 15, 1992, the Imam gave his consent (and blessings for the success of the work) to Tajdin to publish and distribute His works, the Farmans. The plaintiff at paragraph 84 of his factum enumerates 7 points from which he argues that no consent was given, or can be inferred.

6. In response, the defendants state that the consent given was to "continue" the work. The book presented to the Imam clearly indicated on it that it contained His Farmans, and that it was Volume I. Accordingly, whether the Imam opened the book or not is not relevant nor determinative of the issue. The argument made by the plaintiff that the Golden Edition was not released for publication until 2009 and could not have been the subject of consent is

erroneous. Consent was to"continue" the work, and the Golden Edition is the continuation of the work.

7. In response to paragraph 84(c) of the plaintiff's factum, the works subject of this action are "religious" works, and as such the argument made in that paragraph cannot support that the consent, given in religious context, is misplaced. Furthermore, the fact that no names were mentioned does not mitigate the consent issue, consent was given, and if the Imam wanted to inquire whom the consent was given, He could have asked for the information.

8. In response to paragraph 84(d), the word "ensemble" was used in future tense, the context was "then" we will see what can be done togther. Therefore, the future work under the context is not related to the Farman books, but to something to be identified. In fact, Sachedina and Aziz Bhaloo ("Bhaloo") did meet the defendant Tajdin to determine if any work could be undertaken together. That does not, though, take away or undermine the consent.

9. In response to paragraph 84(e), the consent given by the Imam was not given to a certian person or persons. An undertaking of this magnitude cannot be undertaken by a sole or singular person. The consent was not given to a person *per se*, but to the "work", in that the words spoken were, "continue this work", and *you* continue this work. If the Imam wanted to restrict the consent to a particular person, he could have done so.

10. In response to paragraph 84(f), the granting of *Mehmani* is personal. Bhaloo's evidence is a self-serving evidence, and contrived. The *Mehmani* has been recorded on DVD, and only the institutions have a copy of the ceremony. If Sachedina and/or Bhaloo discloses the DVD, the actual event can be determined, whether the Imam generally spends a few seconds or not is not determinative. The issue is whether the Imam communicated His consent to the distribution of His works, and it does not matter if He did it in a few seconds or an hour. The evidence is clear that He gave His consent. Other than self-serving contrived evidence, there is no credible evidence put into evidence to dispute that the consent was not given. An adverse inference should be taken for the failure to provide DVD recording of the *Mehmani*. The Imam does in a short time, Guide and Bless His spiritual children.

11. In response to paragraph 84(g), the letter written by Tajdin to the Imam does not "revoke" the previous consent given by the Imam. Tajdin wrote to the Imam a report, and is seeking permission to offer as a donation a copy to each Jamatakhana across the world. The seeking of "direction, wisdom, and guidance" is with respect to this project and future projects, but the supplication made by Tajdin to his Imam is a routine prayer all Ismailis make when they approach their Imam. However, the argument made in the plaintiff's factum misinterprets the plain and simple words: the seeking of direction is not same as seeking consent.

12. In response to paragraph 84(h), the Affirmation is relied on by the plaintiff. However, the plaintiff's counsel, has chosen not to file the Affirmation as evidence, thus precluding the defendants from cross-examining the plaintiff. Furthermore, the Affirmation is *not signed*

by the Imam. The factum states that two persons have sworn and filed affidavits attesting to the fact that the Aga Khan signed the Affirmation. The affiants have not provided a copy of the passport, or any other photo identification or any credible evidence to make a clear determination as to who appeared before them, although the defendants had alleged in their Statement of Defence that the Imam had not authorized this litigation.

13. Sachedina has sent two other letters purporting to have been signed by the Aga Khan, and one letter is said to have inserted a handwritten sentence (ending in a coma) to highlight that the Imam Himself wrote and signed the letter.

14. An expert has opined that the Imam has not signed the Affirmation as well as the first letter, and he also opined that the handwriting on the second letter has not been penned by the Aga Khan on that letter.

15. The Imam's brother, Prince Amyn Mohamed ("Prince Amyn") who is said to have sent a letter to Tajdin. However, the letter is not signed by Prince Amyn, and contains an error. Tajdin's name is Nagib, and Prince Amyn's email, not sent from His email account, spells the name as Naguib. Only Sachedina spells Nagib's name as Naguib, which indicates that Sachedina is the one who penned the email, purporting to be from Prince Amyn.

16. Accordingly, despite the dozen or so tabs of materials filed in this litigation by Bhaloo and Sachedina, not one credible document shows that the Imam has revoked the consent He gave

on August 15, 1992. Sachedina's statements that the Imam has told Him "frequently" is a contrived statement and is not supported by the Ismaili Constitution, by Ismaili traditions going back to about 1,400 years, or by any Farman made by the Imam.

17. Bhaloo and Sachedina's evidence that they went to meet Tajdin to tell him that the Imam has asked that he stop distributing Farmans, and that Tajdin did stop distributing Farmans is also false, in that they went to discuss what other projects they could work togther, in accordance with the Guidance given by the Imam on August 15, 1992. Tajdin was not informed by them to stop, and he did not stop, but continued distributing Farmans. On the contrary, Sachedina told Tajdin and his family that the Imam had asked him to convey the Imam's Blessings and appreciation for the services offered by them.

18. An announcement was made by the Leaders International Forum ("LIF"), which is said to have been authorized by the Imam, indicating that the Imam had no alternative but to bring ths action as the defendants refused to follow His letters (now found to have been forged), and the letter written by Prince Amyn (shown to be forged as well). However, the Imam does have simple and effective ways to stop the distribution of His Farmans, *if he chooses to do so.* One way is to amend the Ismaili Constitution, which would be binding on all Ismailis.

19. All the activities undertaken by Sachedina, including the various forgeries, convinces the defendants that the Aga Khan is not behind this ligation, that He has not prohibited the

dissemination of His Farmans, that He gave His consent, and including implied consent, and has not revoked it.

II - POINTS IN ISSUE

20. a. Whether there is a genuine issue for trial with respect to the claim filed by the plaintiff.

b. Whether the Aga Khan gave His consent and authorization on August 15, 1992, in Montreal to the publication and distribution of His Farmans.

c. Whether there is implied consent and authorization to distribute the Aga Khan's Farmans to His spiritual children.

d. Whether there is any credible evidence proffered by the plaintiff in seeking to obtain summary judgment on his claim.

e. Whether this motions should be tried as a summary trial on the issue of whether the plaintiff gave His consent on August 15, 1992.

IV- SUBMISSIONS

21. 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.

22. 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.

23. 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.

24. 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"
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> *Koslowski v. Courrier,* 2009 CarswellNat 2902, 2009 FC 883, at para. 15.

25. 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;
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> 3. each case should be interpreted in reference to its own contextual framework [...];
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> 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.
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> *Koslowski v. Courrier*, supra at para. 16

26. 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. Courrier, supra at para. 17

27. 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.

28. 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." [emphasis added]

> *Netupsky v. Dominion Bridge Co.* 1969 CarswellBC 76, 58 C.P.R. 7, 5 D.L.R. (3d) 195, at para. 98

29. 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. [emphasis added]

> *Netupsky v. Dominion Bridge Co.* at para. 99.

30. As stated above, consent can be implied from the circumstances. The Aga Khan has stated that He makes Farmans for Ismailis, and expects Ismailis to abide by every word of His Farmans, adding that non compliance by an Ismaili equate to that Ismaili from losing the right to be a "member of the Jamath."

31. As also noted above, 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.

32. The constitutional framework over a period at least from 1948 (and possibly earlier) to 1986 contained Articles which governed the recording, compiling and publication of Farmans. This evidences that the Constitution has jurisdiction over the publication of the Farmans, and that had the Aga Khan wished to prevent the publication and/or the distribution of His Farmans by other than the institutional bodies, He could have done so by adding an Article in the constitution as was previously achieved by Him in the previous Constitutions.

33. In addition to the above, the Aga Khan accepts Oaths of Allegiance from His followers, and in return, He gives His pledge that He will Guide and Protect His followers, and inherent in the exchange of promises between a spiritual father and His children, is that His followers have implied consent to have access to the Farmans, to discuss, study, and share His Farmans with their family members, friends and fellow Ismailis, an activity actually encouraged by the Imams.

34. As set out in the case *Netupsky v. Dominion Bridge Co.*, supra., the various Farmans, Articles of the Ismaili Constitution, and the promises exchanged between the spiritual father and His spiritual children provides implication of consent to the distribution of His Farmans, both for personal use and for the dissemination among the Ismailis.

35. The Imam gave consent to publish and distribute His Farmans, along with Blessings for the success of the undertaking, and as such the express consent given provides this defendant with the consent to distribute the Imam's Farman, and not just one initial book that was

presented to the Imam, but Farmans delivered by the Imam to His Jamats, for distribution of to His Jamats.

36. Tajdin denies that he has infringed the *Copyright Act* in any manner and form. The Farmans are made by the Aga Khan for His Jamats, with the intention for the Jamats to follow each word of His closely and to abide by the Guidance given by Him. The Imam encourages His followers to read or listen to His Farmans, and also encourages His followers to discuss Farmans, to write to each other about the Farmans.

37. If the activities of distributing the Aga Khan's Farmans are infringing the *Copyright Act,* then for example, whenever any Ismaili writes or emails a copy of a Farman to his or her child who is attending University away from home (an activity which is actually encouraged by the Imams) that Ismaili would then be guilty of infringing on the Aga Khan's copyright, and be contrary to the very essence of Ismailism.

38. The forged signatures noted in these materials in support for the motion for Summary Judgement indicates that this action has not been brought by the Aga Khan, and as such this action must be dismissed on that ground alone.

39. Sachedina states that the plaintiff knew in the mid-nineties and frequently informed him about the infringing activities of Tajdin, yet this action was brought about 15 years later despite the fact that Tajdin and others have been distributing Farmans over the period to the

knowledge of the Sachedina and other institutional leaders. The issue raised by this litigation is not that *the* Golden Edition is the infringing book, it is the Farmans printed therein that is works infringed, and the Golden Edition contains all the Farmans previously distributed openly by Tajdin and a very few Farmans made during Golden Jubilee celebrations of the Imam. Accordingly, the activities complained of have been ongoing at least as of 1992 to date.

40. Jerome A.C.J. in rendering his decision in the case of *1013579 Ontario Inc. v. Bedessee Imports Ltd.* held that, "I am satisfied that the plaintiff's purchases over several years of the defendant's wares which bore the "Cow & Grill" mark, and the fifteen year delay in pursuing an action in trade-mark infringement constitute acquiescence of the defendant's use of trade-mark. There is no question of fact and law which need be referred to trial, and dismissed the action.

> *1013579 Ontario Inc. v. Bedessee Imports Ltd.*, 1996 CarswellNat 901, 68 C.P.R. (3d) 486

41. Accordingly, this defendant submits that the motion of the plaintiff be dismissed, and the the defendant's motion dismissing the action be allowed, without costs.

IV - ORDER SOUGHT

42. This defendant asks that the plaintiff's motion be dismissed.

43. In the alternative, this defendant asks that the matter be ordered to be summarily tried on the narrow issue of whether the Aga Khan gave His consent to distribute His Farmans on August 15, 1992, and whether consent, if held to have been given, extends to the Golden Edition.

Date: July 16, 2010

Respectfully submitted,

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MEMORANDUM OF FACT AND LAW

of the defendant Nagib Tajdin

responding to the Plaintiff's Motion

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