

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 Alnaz Jiwa /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 4, para 3

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 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 2, para 22*

5. One of the most important tradition of the Ismaili faith is that all Ismailis give their oaths 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 4, paras 3 and 4*

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party’s Record, Tab 2, para 2*

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 4, para 5*

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 3

Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 3, para 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 4, para 5

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 4

8. As Imam of the Ismailis, the Aga Khan has absolute authority in interpreting the faith for the Ismailis to practice according to the Time and Age, and such guidance is given by the Imam through his Farmans. Accordingly, 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.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 21

9. One peculiarity of the Ismaili faith is that a Farman made by the Imam-of-the-Time remains effective and valid until that Farman is superceded by a new Farman. The Aga Khan specifically states that His Farmans are for the Jamats. On November 29, 1964, in Karachi, Pakistan, the Aga Khan said:

I have given you Farmans which I urge you to follow, because these Farmans I make are made for My Jamats.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 19

10. On March 4, 1981, in Nairobi, Kenya, when addressing the student Jamats, the Aga Khan said:

I have a feeling I may have been speaking at a level which is difficult for some of you to comprehend. If this is the case, I simply ask you to listen to this Farman at your own time more peacefully, and try to understand what I have been saying to you.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 19*

11. During His visit to Bombay in 1992, the Aga Khan said:

This is a complex Farman. ... think about it, discuss it with your children, discuss it with your grandchildren, if they are old enough to think in these terms, and prepare them to see the way ahead, wisely and properly...

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 19*

12. While searching for Farmans made by the Imam, Jiwa came across co-defendant Nagib Tajdin (hereinafter "Tajdin"), who provided Jiwa with Farmans made by the Aga Khan, copies of which he could not obtain from any institutional body. The first books were obtained by Jiwa in 1993 for his personal use. Shortly thereafter, Jiwa obtained more Farman books to distribute to friends and family members and has been distributing the Farman books as they were periodically published by Tajdin since 1993.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, paras 5-10*

13. Jiwa undertook the distribution of the Farman books to encourage other Ismailis to become better acquainted with their faith, and to becoming "true" Ismailis by enabling them to have access to the Farmans made by their Imam. Jiwa distributes these Farman books at the same price he paid for them, without keeping a cent in profits.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, paras 7-9*

14. Jiwa states that in distributing Farman books obtained from Tajdin to his families, friends,

and other Ismailis, Jiwa has not violated either the Ismaili Constitution or any Farmans of the Aga Khan, and these are two primary sources that all Ismailis are obliged to abide by.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 11*

15. 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 Aga Khan'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.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 12*

16. In 1986 the Aga Khan 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.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 13*

17. The institutions were vested with clearly defined powers of operation, and the Aga Khan urged the institutions and all Ismailis to abide by the New Constitution and *The Rules and Regulations* applicable to their country.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 16*

18. Accordingly, ever since the first Constitution ordained in 1900, Ismailis have always been governed by a Constitution, and over time, the Constitution has been updated by the Imam as times and circumstances changed.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 12*

19. The importance of the Constitution to the Ismailia Jamats was explained by the Aga Khan 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.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 16*

20. 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.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 11*

21. The Aga Khan 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."

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 12*

22. The Constitutions of various separate countries ordained in and after 1948 contained express Articles for the publication of Farmans (Jiwa 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.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, paras 14 and 15*

23. 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. 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 Aga Khan did not reserve this power for Himself.

*Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 17*

24. The Aga Khan has amended the Ismaili Constitution a number of times since ordaining it in 1986, and has not amended it to prohibit the activities complained of by this action, and had it been amended Jiwa would have immediately complied with the Constitution without question or reservation.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 39

25. There has never been any "complaint" by anyone prior to the announcement made at Jamatkhanas in Europe, Canada, Africa, and United States of America, on January 16, 2010, by Leaders International Forum concerning the distribution of the Farman books, even though Jiwa has openly been distributing these Farman books since 1993.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 37

26. On December 13, 2003, the Aga Khan said that knowledge had sometimes been buried on purpose and that the guidance that was given by the Imams of the Time should be reconstituted, "to inform ourselves". Farmans made by the Imams were always available to the Jamats, except in the recent years.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 20

27. On January 16, 2010, an announcement was made by institutional leaders regarding the publication of the Golden Edition. The announcement further stated that this activity (of distributing the Golden Edition) "constitutes a breach of the Ismailia Constitution...". As set out above, the Aga Khan has not made any Farmans respecting the printing of the Farmans, and the Constitution does not prohibit such activity. On the contrary, if the announcement was correct in that relevant institutions have been "entrusted" with responsibility, then such relevant bodies have failed to comply with the mandate to publish Farmans, as they have not published or distributed Farmans in the past about thirty or so years. Notably, the announcement did not state that the Imam had indicated or made a Farman that such

publications by private initiatives are prohibited.

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 4, para 33

28. Jiwa obtained Farman books from Tajdin and has been distributing the Farman books primarily to his family and friends, or other Ismailis only since the year 1992, and Tajdin undertook the publication and distribution of the Farman books after the Aga Khan had given consent and His blessings for the success of the work.

Affidavit of Alnaz Jiwa sworn June 16, 2010
Moving Party's Record, Tab 2, para 6

Affidavit of Karim Alibhay sworn April 28, 2010
Moving Party's Record, Tab 3, paras 5-19

Affidavit of Nagib Tajdin sworn May 7, 2010
Moving Party's Record, Tab 4, paras 11-15

29. Jiwa therefore seeks that this action be dismissed as he has distributed the Golden Edition with the Aga Khan's consent, authorization and Blessings given by Him on August 15, 1992, and on grounds of implied consent.

III - POINTS IN ISSUE

30. Whether there is a genuine issue for trial with respect to the claim filed by the plaintiff?
31. Whether the Aga Khan gave His consent and authorization on August 15, 1992, in Montreal to the publication and distribution of His Farmans by Tajdin?
32. Whether there is implied consent and authorization to distribute the Aga Khan's Farmans to His spiritual children?

IV- SUBMISSIONS

33. 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.
34. 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.
35. 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.
36. 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
37. 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

38. 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

39. 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.

40. 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, Moving Party’s Record, Tab 13

41. 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.
Moving Party’s Record, Tab 13

42. 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.”

43. 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.

44. 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.
45. 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.
46. 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.

47. As set out in the co-defendant Tajdin's Memorandum of Fact and Law, he was given consent by the Aga Khan to publish and distribute the Farmans, along with Blessings for the success of the undertaking, this defendant states that the express consent given to Tajdin provides this defendant with the consent to distribute the Farman books as all of the books distributed by this defendant were obtained from Tajdin.

48. Jiwa 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.

49. 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.

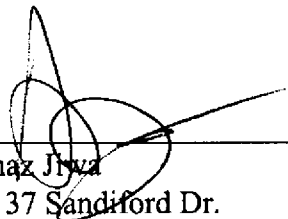
50. The forged signatures noted in these materials in support for the motion for Summary Judgement indicates that this action has not been brought by the Aga Khan, and as such this action must be dismissed on that ground alone.

IV - ORDER SOUGHT

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

Date: June 18, 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

MEMORANDUM OF FACT AND LAW

by the defendant Alnaz Jiwa

Motion returnable July 12, 2010

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