

**FEDERAL COURT OF APPEAL**

BETWEEN:

**NAGIB TAJDIN and ALNAZ JIWA**

Appellants

- and -

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

Respondent

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**MOTION RECORD OF THE RESPONDENT**

(Appellant's Motion to Stay Paragraphs 4-9 of the Judgment dated January 13, 2011)

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# INDEX

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**INDEX**

<b>Tab</b>	<b>Description</b>	<b>Pages</b>
1.	Affidavit of Bola Sholubi sworn dated May 2, 2011	1-2
A.	Affidavit of Shafik Sachedina sworn June 25, 2010	3-13
	A. Print-out of background information on His Highness the Aga Khan retrieved from the AKDN website located at < <a href="http://www.akdn.org">http://www.akdn.org</a> >	14-16
	B. ITREB's Farman dissemination policy for Canada	17-19
	C. Representative copy of a letter from the Ismaili Talika and Religious Education Board (ITREB) at His Highness' Secretariat in Aiglemont dated May 26, 2008	20-21
	D. Cover, title pages, and table of contents of <i>Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman</i>	22-42
	E. Copy of the first announcement by the Ismaili Leader's International Forum and the National Council dated January 16, 2010	43-44
	F. Letter dated January 4, 2010 from Nagib Tajdin to His Highness the Aga Khan	45-47
	G. Letter dated January 24, 2010 from His Highness the Aga Khan to Nagib Tajdin	48-50

<b>Tab</b>	<b>Description</b>	<b>Pages</b>
	H. E-mail dated January 26, 2010 from Nagib Tajdin to Ms. Michelle Parkes	51-52
	I. E-mail dated January 28, 2010 from Ms. Michelle Parkes to Nagib Tajdin	53-54
	J. Letter dated February 18, 2010 from His Highness the Aga Khan to Nagib Tajdin	55-57
	K. Correspondence dated March 17, 2010 and April 2, 2010, respectively, between Nagib Tajdin and Prince Ayn Aga Khan	58-60
	L. Copy of the Announcement dated April 15, 2010 by the Ismaili Leaders' International Forum	61-65
B.	Direction of Prothonotary Tabib dated November 2, 2010	66-69
C.	Affirmation sworn by the Aga Khan on May 12, 2010 in this action	70-72
2.	Respondent's Written Representations dated May 2, 2011	73-88
<b><u>Case Law</u></b>		
3.	<i>RJR-MacDonald Inc. v. Canada (A.G.)</i> , [1994] 1 S.C.R. 311	89-132
4.	<i>Apotex Inc. v. Wellcome Foundation Ltd.</i> (2003), 29 C.P.R. (4th) 489 (F.C.)	133-140
5.	<i>Bishop v. Stevens</i> [1990] 2 S.C.R. 467	141-162
6.	<i>Granville Shipping Co. v. Pegasus Lines Ltd. S.A.</i> , [1996] 2 F.C. 853 (T.D.)	163-181
7.	<i>Wall v. Brunell</i> (2000), 7 C.P.R. (4th) 321 (F.C.A.)	182-184
8.	<i>Centre Ice Ltd. V. National Hockey League et al.</i> (1994), 53 C.P.R. (3d) 34 (F.C.A.)	185-206
9.	<i>Dywidag Systems v. Garford Property</i> 2010 FCA 232	207-210
10.	<i>Bell Canada v. Rogers Communications Inc. et al.</i> (2009), 76 C.P.R. (4th) 61 (Ont.Sup.Ct.)	211-230
<b><u>Statute and Regulations</u></b>		
11.	<i>Federal Courts Rules</i> , Rule 214	232
12.	<i>Federal Courts Rules</i> , Rule 215(2)(b)	233
13.	<i>Federal Courts Rules</i> , Rule 216(4)	234-235

**TAB 2**

Court File No. A-59-11  
A-60-11

**FEDERAL COURT OF APPEAL**

BETWEEN:

**NAGIB TAJDIN and ALNAZ JIWA**

Appellants

- and -

**HIS HIGHNESS PRINCE KARIM AGA KHAN**

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**RESPONDENT'S WRITTEN REPRESENTATIONS**  
(Motion to Stay Paragraphs 4-9 of the Judgment dated January 13, 2011)

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**PART I – OVERVIEW OF THE MOTION**

1. These Written Representations are filed on behalf of the Respondent, His Highness Prince Karim Aga Khan ( "His Highness" or the "Respondent") in response to the motion brought by the Appellant, Nagib Tajdin (the "Appellant Tajdin") to stay paragraphs 4 through 9 of the Judgment dated January 13, 2011(the "Judgment") of The Honourable Mr. Justice Harrington (the "Motions Judge").

2. The Judgment granted His Highness' motion for summary judgment declaring that copyright exists in his Farmans (religious addresses) and Talikas (brief written messages) and finding that the Appellants had infringed his copyright by the publication and distribution of a book, known as the Golden Edition, which contained His Highness' Farmans and Talikas and that the Respondent had not consented to said publication and distribution.

3. The Appellant Tajdin seeks to expedite the appeal and His Highness consents to this requested relief. Ismailis worldwide would benefit from a speedy resolution of this legal proceeding.

4. The Appellant Tajdin also seeks to stay the following paragraphs of the Judgment: paragraph 4 declaring the Appellants to have infringed His Highness' copyright; paragraph 5 which grants a permanent injunction prohibiting the Appellants from *inter alia*, producing, publishing, selling, giving away, promoting, distributing and selling any work that infringes His Highness' copyright; paragraph 6 which requires delivery up; paragraph 7 which orders a reference into the damages or profits suffered as a result of the Appellants' infringing activities; paragraph 8 which grants pre-judgment and post-judgment interest; and paragraph 9 which awards the Respondent costs in the amount of \$30,000. His Highness opposes this relief completely, except that he is willing to have the costs award paid into court pending a determination of the appeal. The Respondent will ensure the preservation and safe-keeping of any documents or materials delivered-up or produced by the Appellants during the same period.

5. The Appellant Tajdin has failed to show that there is a serious issue to be tried on this appeal. Rather, his evidence candidly reveals that the appeal is vexatious and a continuation of the Appellants' transparent efforts at every opportunity to use this case to prosecute a personal vendetta against persons who are not, nor ever have been, parties to it. At the heart of this dispute is an alleged fundamental disagreement between the Appellants and the Ismaili leadership (including Head of Jamati Institutions, Shafik Sachedina) over the collection, editing and distribution of Farmans. These matters can not be resolved on this appeal. The editing and distribution of His Highness' works are a matter for His Highness. The fact that Tajdin may object to what others are doing or not doing with the Respondent's work does not give Tajdin any right himself to deal with those works. The Appellant Tajdin's perverse stated aim to "protect" His Highness from the very legal action His Highness commenced, while increasing exponentially his costs and the time of the Federal Courts, further reveals the frivolous nature of this appeal.



6. The Appellant has failed to show that he would suffer irreparable harm if a stay were not granted. The Judgment does not prevent the Appellant from practicing his faith, on the contrary it requires that he follow the laws of Canada in the matter of copyright, but it does not reach, nor does it attempt to reach, issues related to the established Ismaili policy of personally accessing, reading or studying Farmans and Talikas as all Ismailis must do, as opposed to publishing and distributing unauthorized copies. The Appellant misunderstands the fundamental nature of copyright which does not prevent him from reading Farmans made available through authorized sources.

7. Finally, the balance of convenience favours the continued operation of the Judgment, a judgment which supports the views expressed by His Highness in his January 24, 2010 letter to the Appellant Tajdin which described the publication of the Golden Edition as “a serious and absolutely unacceptable breach of the Imam’s right and responsibility, established over many centuries, to safeguard the integrity of his communications to the Jamat.”

## **PART II – THE FACTS**

8. His Highness is the spiritual leader of the Shia Imami Ismaili Muslims. There are approximately 15 million Ismailis worldwide, located in over 25 countries. His Highness succeeded his grandfather, Sir Sultan Mahomed Shah Aga Khan, to become the 49<sup>th</sup> hereditary Imam on July 11, 1957.

Reasons for Judgment of The Honourable Mr. Justice Harrington dated January 13, 2011 (“Reasons for Judgment”) paras. 2 and 3, Exhibit “C” to the Affidavit of Helen Petroulakis sworn April 13, 2011 (the “Petroulakis Affidavit”); Motion Record, Tab 2C, p. 33.

9. His Highness commenced this action (Federal Court File No. T-514-10) in the Federal Court alleging that the Appellant Tajdin and Alnaz Jiwa (the “Appellant Jiwa”) (collectively, the “Appellants”), together with unnamed defendants, had infringed his copyright in his Farmans and Talikas.

Reasons for Judgment, para. 21, Exhibit “C” to the Petroulakis Affidavit; Motion Record, Tab 2C, p. 38.

10. The Ismaili community receives Farmans in the first instance at its places of religious gatherings and, thereafter, may continue to consult the texts in those places. Finally, the Community is given access to His Highness' Farmans in written form through appropriate Ismaili institutions under a process approved by His Highness. This process provides that, following His Highness's personal approval, the published Farmans are disseminated to the Ismaili community by the Jamati institutions appointed under the provisions of the Ismaili Constitution. The Ismaili Tariqah and Religious Education Board (ITREB) is authorized to disseminate Farmans.

Affidavit of Shafik Sachedina sworn June 25, 2010 ("Sachedina Affidavit"), para. 10 and Exhibits "B" (ITREB Canada Dissemination Process) and "C" (ITREB letter dated May 26, 2008); Exhibit "A" to the affidavit of Bola Sholubi, sworn April 29, 2011; Responding Motion Record, Tab 2A, p. 6 and Tabs 2AB and 2AC, pp. 18-19 and p. 21.

11. The ITREB distribution process ensures not only that Farmans are made available to Ismailis, but it is specifically intended by the Imam, the Respondent, to ensure that Farmans are disseminated only by the authorized institutions with the Imam's approval in order to safeguard the integrity of the Imam's communications.

Sachedina Affidavit, para. 11; Responding Motion Record, Tab 2A, p. 7.

12. The Judgment under appeal granted His Highness' motion for summary judgment and dismissed the Appellants' motions for summary judgment. The Motions Judge declared that copyright existed in His Highness' Farmans and Talikas, found the Appellants to have infringed his copyright, and ordered a variety of relief, including an interlocutory and permanent injunction, a reference as to damages, and costs.

Judgment, Exhibit "B" to the Stay Affidavit; Motion Record, Tab 2A, pp. 27-30.

### **PART III - ISSUES**

13. The sole issue to be determined on this motion is whether the Appellant Tajdin has satisfied the test for the granting of a stay established by the Supreme Court of

Canada in *RJR-MacDonald Inc. v. Canada (A.G.)*. In order to do so, the Appellant bears the burden to show that:

- (a) there is a serious issue to be tried;
- (b) he will suffer irreparable harm if a stay is not granted; and
- (c) the balance of convenience favours the granting of a stay.

*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at 334

#### **PART IV- SUBMISSIONS**

14. The Respondent submits that the Appellant Tajdin has failed to satisfy the test for a stay and his request to stay the operation of paragraphs 4-9 of the Judgment should be dismissed.

15. The Respondent has relied in these submissions on evidence adduced in the affidavit of Shafik Sachedina, sworn on June 28, 2010 in support of the Respondent's motion for summary judgment. In *Apotex Inc. v. Wellcome Foundation Ltd.*, Justice von Finckenstein held that it is permissible for the Court to take into consideration documents that are part of the public record, including both pleadings and affidavits which form part of the court file.

*Apotex Inc. v. Wellcome Foundation Ltd.* (2003), 29 C.P.R. (4th) 489 at 493 (F.C.)

#### **(i) There is no serious issue to be tried**

16. The Respondent acknowledges that in determining whether an issue is a "serious question", the court need only be satisfied that the issues on appeal are not frivolous or vexatious.

*RJR McDonald, supra* at 337

17. The Respondent submits that the issues raised on this appeal are frivolous and vexatious. The affidavit of Nagib Tajdin filed in support of this motion ("Tajdin Stay Affidavit") reveals that he is pursuing this appeal for reasons unrelated to the merits of

either the underlying action or the appeal and in most cases involving persons who are not parties to the action:

- (a) **paragraph 10:** “The intention of my Appeal is therefore only to correct the wrongs done to the named Plaintiff, to His community and to me by a few powerful persons in our community...”.
- (b) **paragraph 28:** “Therefore, these certain persons in positions of power have taken this step (even by forging the Imam’s signature), due to their desire to silence me as I bring to the followers the actual words of their Imam without any editing or changes.”
- (c) **paragraph 44:** “The issue of persons other than the Imam controlling the evidence and the proceeding of the case is a serious issue for trial because the whole lawsuit was launched against me following threats by Sachedina to discredit me.”
- (d) **paragraph 47:** “...the resulting judgment should not be imposed before the appeal is heard in the interest of justice, because it presents the risk that any relief is likely to be misused by persons other than the Imam in order to cause irreparable harm to countless individuals including to the plaintiff and his community”.
- (e) **paragraph 56** “This demand [the requisition for discovery and an accounting of damages filed in this action] is vexatious and harassment of me by Sachedina”.
- (f) **paragraph 78:** “Sachedina and his few supporters are adamant to making a point in our community to make sure that no one ever challenges them as we have done, by harassing us and making us an example so that no one dare stand up and take them to task for the forgeries committed.”

18. These paragraphs also reveal that the Appellant Tajdin continues to deny that His Highness (as opposed to Head of Jamati Institutions, Shafik Sachedina) authorized this action. The evidence of the Appellant Tajdin further reveals what can only be described as a vendetta against Mr. Sachedina which further supports a finding that this appeal is both frivolous and vexatious.

19. As to the serious issues to be tried which have been identified by the Appellant Tajdin, it is submitted that these do not satisfy even the low threshold of merit required to support a stay of the Judgment. In the paragraphs which follow, the Appellant Tajdin’s

grounds of appeal are set out followed by the Respondent's submissions as to why none of them present a serious issue to be determined on appeal:

**(i) The Motions Judge reversed the onus of proof on the matter of consent (Appellant's Written Representations, para. 25).**

20. There is no serious issue to be tried in this ground of appeal: the Appellant Tajdin cites the Federal Court of Appeal authority of *Positive Attitude Safety System Inc. v. Albion Sands Energy Inc.*, 2005 FCA 332, an authority which the Motions Judge accurately explained at paragraphs 33-34 of the Judgment did not stand for the proposition upon which the Appellants sought to rely. The Motions Judge quite properly applied the Supreme Court authority in *Bishop v. Stevens* [1990] 2 S.C.R. 467 at 485 in holding that the Appellants bear the burden of establishing their defence of consent. In any event, nothing turns on the issue of onus as the grounds of alleged consent were thoroughly canvassed and considered by the Motions Judge.

**(ii) The Motions Judge relied on inadmissible hearsay and double hearsay without any evidence of necessity and reliability (Appellant's Written Representations, paras. 26, 34, 35, 36 and 37).**

21. There is no serious issue to be tried in respect of this ground of appeal: the Motions Judge stated at paragraph 9 of the Judgment that, "[a]lthough there are credibility issues in the motions as pleaded before me, they are not, in my opinion, germane". The Motions Judge correctly determined that he did not need to determine the issues of credibility to decide the motion.

**(iii) The Motions Judge went beyond the evidence on the record and made certain adverse inferences although jurisprudence and rules do not require that a party responding to a motion for summary judgment file all of its evidence (Appellant's Written Representations, para. 27).**

22. There is no serious issue to be tried in respect of this ground of appeal: the Respondent assumes that the Appellants are referring to the adverse inference drawn by

the Motions Judge from the Appellants' failure to produce the transcript of their examination for discovery of His Highness. Rule 214 of the *Federal Courts Rules* requires that a party responding to a motion for summary judgment "set out specific facts and adduce the evidence showing that there is a genuine issue for trial." Further, the case law is clear, however, that a Respondent must in fact put its "best foot forward" on a motion for summary judgment. Further, Rule 216(4) expressly permits a motions judge to draw an adverse inference if a party fails to file responding or rebuttal evidence. At the time of the Examination for Discovery of His Highness, the Appellants had the Affirmation from His Highness, and therefore had an opportunity to cross-examine on it.

**(iv) The Motions Judge conducted a trial of affidavits, by making findings of fact, by drawing inferences on contested evidence and by failing to determine if there were genuine issues requiring trial (Appellant's Written Representations, para. 28).**

23. There is no serious issue to be tried in respect of this ground of appeal: summary judgment motions are by their nature determinations made on affidavit evidence and it is the duty of a motions judge as a trier-of-fact to make findings of fact. It is also within the purview of a trier-of-fact-to draw inferences.

*Granville Shipping Co., supra* at 860

*Wall v. Brunell* (2000), 7 C.P.R. (4<sup>th</sup>) 321 at 322 (F.C.A.)

24. The Motion's Judge cannot be said to have erred in failing to determine if there were genuine issues requiring trial: at paragraph 8 of the Judgment he states that the moving parties are "obliged to set out facts showing that there is no genuine issue for trial" and at paragraph 11 the Motions Judge states, "I am satisfied that the tests have been met...".

**(v) The Motions Judge made errors of fact such as the conclusion that Jiwa was in any way involved in the publication of the Golden Edition (Appellant's Written Representations, para. 29).**

25. There is no serious issue to be tried in respect of this ground of appeal: At paragraph 70 of the Judgment the Motions Judge merely finds that “the defendants have infringed copyright”; there is no specific finding that the Appellant Jiwa was found to have “published” the Golden Edition. Nor was such a finding made at paragraph 13 of the Judgment in which the motions judge merely held that “Mr. Tajdin had been collecting, publishing and disseminating His Highness’ Farmans to Ismaili communities. More recently he has been assisted by Mr. Jiwa”. There was, however, more than sufficient basis for the finding that Jiwa had infringed His Highness’ copyright: at paragraph 37 of the Appellant Jiwa’s Statement of Defence, he admits that he has been distributing Tajdin’s Farman books since 1993.

Statement of Defence of Alnaz Jiwa, para. 37; Exhibit “F” to the Petroulakis Affidavit; Motion Record, Tab 2F, p. 82.

- (vi) **The Motions Judge speculated on the meaning of what the Imam meant when he said “Continue doing what you are doing” and erred by stating that he did not have any expert evidence with respect to the meaning of gestures which the Appellants sought to rely on, though Alibhay’s evidence was not challenged or contradicted (Appellant’s Written Representations, para. 30).**

26. There is no serious issue to be tried in respect of this ground of appeal: it was the role of the Motions Judge to give meaning to the phrase upon which the Appellants based their defence of consent. At paragraph 44 of the Judgment, the Motions Judge noted that the Appellants had argued that it would be difficult for a non-Ismailis “to fully appreciate” the context in which the asserted consent had been given. The Motions Judge was correct to note that without the assistance of expert evidence on this point, he was left to discern the meaning of the words spoken based on their ordinary meaning (Judgment, para. 45). It is not an error of law for a motions judge to determine issues of fact and mixed fact and law. Even if the motions Judge were wrong on that point, he decided that Alibhay’s evidence could not constitute consent to publish *future* books, such as the Golden Edition (Judgment, para. 46) thus making this ground of appeal of no consequence.

**(vii) The Motions Judge made a finding of fact that the Imam signed the Affirmation and the letters (Appellant's Written Representations, para. 31).**

27. There are no serious issues to be tried in respect of these grounds of appeal: the Motions Judge did not make any such finding. Rather, he accepted the Affirmation for the purpose for which it was submitted, namely, to answer the allegation that Ogilvy Renault had not been authorized to institute the action (Judgment, para. 24). Further the Motions Judge was entitled in all the circumstances to conclude that the sum total of all the letters, public statements and affidavits showed that His Highness had authorized them. In addition, the Appellants had an opportunity to cross-examine His Highness on his Affirmation at His Highness' attendance on discovery.

Affirmation dated May 12, 2011; Exhibit "C" to the Sholubi Affidavit;  
Responding Motion Record, Tab 2C, p. 71.

**(viii) The Motions Judge erred in preferring one expert's evidence over the other and in holding that the expert evidence was contradictory (Appellant's Written Representations, para. 32).**

28. There are no serious issues to be tried in respect of these grounds of appeal: the Motions Judge did not make any finding as to the authenticity of the documents alleged to have been forged (other than to suggest at paragraph 25 that His Highness' appearance on discovery "should have put the forgery issue to rest") and he made no findings in respect of the expert evidence. The issues of forgery and expert evidence are not part of the ratio of the Judgment. In such circumstances, the use of the adjective "contradictory" at paragraph 19 of the Judgment is of no moment.

**(ix) He erred in determining issues of implied consent and authorization which are not suitable for determination on a motion for summary judgment (Appellant's Written Representations, para. 39).**

29. There is no serious issue to be tried in respect of this ground of appeal: the issue of implied consent was a question of mixed fact and law. Rule 215(2)(b) of the *Federal Courts Rules* expressly permits a motions judge to determine issues of law on a motion



for summary judgment. It is telling that the Appellants do not advance any grounds of appeal suggesting the Motions Judge erred in his very detailed constitutional analysis at paragraphs 47 to 56 of the Judgment.

30. There was no issue of “authorization” raised in the pleadings with respect to the copyrighted works. Authorization is a legal concept which is distinct from consent and not applicable to the circumstances upon which the Appellants based their defence.

**(x) The Judgment is too broad and not in accordance with the claim (Appellant’s Written Representations, para. 40).**

31. There is no serious issue to be tried in respect of this ground of appeal: The Appellant Tajdin argues that the Judgment precludes him from practicing his faith. Since this argument cannot operate as a defence to infringement, neither can it constitute a serious issue to be tried. If the Appellant really believes this, there are a number of available fora in which he can attempt to make this argument; this is not the proper place nor can the Appeal resolve such allegations.

32. In summary, the Respondent has not met, or even approached, the low threshold for demonstrating that he has a serious issue to be tried on this appeal.

**(ii) No Evidence of Irreparable Harm**

33. Irreparable harm involves either harm which cannot be quantified in monetary terms or harm for which there is no remedy.

*RJR McDonald, supra* at 341

34. The evidence must necessarily support a finding that the applicant would suffer irreparable harm; it cannot be founded on likelihood, speculation or inference.

*Centre Ice Ltd. V. National Hockey League et al.* (1994), 53 C.P.R. (3d) 34 at 52 (F.C.A.)

35. To establish irreparable harm, a moving party is required to file evidence at a convincing level of particularity that demonstrates a strong likelihood that unavoidable

irreparable harm will result unless a stay is granted. Irreparable harm must be established by clear and compelling evidence; “mere assertions” do not suffice.

*Dywidag Systems v. Garford Property* 2010 FCA 232 at paras. 14 and 15

36. It is necessary to consider the Appellant’s evidence of harm keeping in mind the paragraphs of the Judgment he seeks to stay:

**Paragraph 4: declaration of infringement**

37. There is no evidence, nor any argument specifically directed to the request to stay the operation of this paragraph.

38. Apart from the continued, wholly specious, assertion that this action is not authorized by His Highness, the Appellants’ defence to infringement is that they had the consent of His Highness to publish his Farmans and Talikas based on a statement (“[c]ontinue what you are doing, succeed in what you are doing and then we will see what we can do together”), a statement made at a religious ceremony in 1992 when the Golden Edition was not yet even in existence, to a person totally unconnected to the publication and distribution of the infringing materials and not a party to this action.

39. This defence is frivolous since it flies in the face of all credible evidence to the contrary, including:

- (a) personal letters from His Highness predating the litigation (which the Appellant Tajdin dismisses as forgeries);
- (b) announcements made in Ismaili institutions around the world both before and after the commencement of this action and even after the Judgment (which the Appellant Tajdin insists have been made without His Highness’ authorization);
- (c) the commencement of this action (which the Appellant Tajdin continues to believe is not authorized by His Highness);

- (d) His Highness' personal attendance at the October 15, 2010 examination for discovery (the events of which the Appellant Tajdin disputes).

Order of Prothonotary Tabib dated November 2, 2011; Exhibit "B" to the Sholubi Affidavit, pp. 67-69.

Tajdin Stay Affidavit, para. 75; Motion Record, Tab 3, p. 177.

**Paragraph 5: permanent injunction**

40. At paragraphs 51 and 83 of the Tajdin Stay Affidavit, Nagib Tajdin states that if the Judgment of Justice Harrington is enforced, he will be precluded from practicing his faith and he would "lose the right to remain part of the Jamat (followers)". The Court can infer merely from the fact that the Appellant Jiwa has not sought a similar stay of this provision, and also by the fact that the Appellant Tajdin did not seek a stay of the interlocutory judgment, that this is a "mere assertion" which fails to meet the clear and compelling evidentiary requirement.

41. Further and curiously, Mr. Tajdin in His Written Representations to this Court on this motion requests an Order which is different from the Order sought in the Notice of Motion. The Order he seeks relates only to the damage assessment and the delivery of additional documents, thus putting the lie to Mr. Tajdin's assertion that a religious motivation is behind this motion for a stay.

Written Representations, Part V, para. 1; Motion Record, Tab 4, p. 204.

42. The injunction does not prevent the Appellants from practicing their faith. The Appellants will continue to have access to Farmans and Talikas. As the evidence of Shahik Sachedina sworn in support of the Plaintiff's motion for summary judgment highlights, there is a process for the *authorized* distribution of Farmans by and through the Ismaili Tariqah and Religious Education Board (ITREB). That process is unaffected by the operation of the Judgment of Justice Harrington. The Judgment merely seeks to preclude the publication and distribution of *unauthorized* Farmans and Talikas.

43. Mr. Tajdin should not be specially treated. After the Judgment, Mr. Tajdin is in no different position than any other law abiding Ismaili. He will have access to authorized Farmans and Talikas through authorized channels.

**Paragraph 6: delivery up**

44. The evidence at paragraph 70 of the Tajdin Stay Affidavit is that there are no plates, moulds etc. to deliver up in accordance with the Judgment since “everything is in electronic format” and the Appellant claims to have already disclosed what is in his possession. Based on this evidence, compliance with this paragraph of the Judgment has already taken place and there can be no suggestion that its continued operation would irreparably harm the Appellant Tajdin.

Tajdin Stay Affidavit, para. 70; Motion Record, Tab 3, p. 177.

**Paragraph 7: Reference as to damages**

45. The evidence in support of the request to stay the operation of the reference as to damages is contradictory: on the one hand, the Appellant Tajdin states that he did not keep records or financial statements in connection with his not-for-profit venture (para. 61); and on the other hand, Tajdin states that it would be a time consuming, expensive and “gargantuan” task to collect the necessary documents in Toronto, Montreal and Kenya (paras. 64-65). Even ignoring this contradiction in his evidence, it is not evidence of harm that cannot be compensated for in damages. It is submitted that issues relating to the collection of documents can never be evidence of irreparable harm.

46. The Appellant Tajdin’s suggestion that he does not have the time or ability to “just pack [his] bags and go” in order to tend to the gathering of documents and that such travel would pose a risk to his business and family (paras. 67 and 68) is contradicted by his own evidence that he has “had to travel extensively to places like Tajikistan, Afghanistan, India, United Kingdom, France, Pakistan, USA, Syria, Uganda, Tanzania, Madagascar, Ivory Coast” in order to gather Farmans and publish his books (para. 63).

47. The Appellant Tajdin also asserts that he needs to preserve evidence in the event of *possible* other proceedings including: a civil suit he *may* file against Mr. Sachedina; the possibility that he *may* report a recent message sent by His Highness to the Paris Police; and a disciplinary hearing he *may* face. Such speculative evidence is insufficient to meet the standard of proof required to show irreparable harm.

Tajdin Stay Affidavit, paras. 71-73. 75-77; Motion Record, Tab 3, pp. 177-178.

*Centre Ice Ltd., supra* at 52.

48. In any and all events, His Highness will ensure the preservation and safe-keeping of any documents or materials delivered-up or produced by the Appellants pursuant to the Judgment.

**Paragraph 8: pre-judgment and post-judgment interest**

49. There is no evidence, nor any argument directed to the request to stay the operation of this paragraph.

**Paragraph 9: costs**

50. The Appellant's evidence with respect to the costs awarded is that he has the ability to pay the award, but his complaint is that the award of costs was made to the Respondent as opposed to his charitable foundation as sought in the Statement of Claim. This does not constitute irreparable harm (Tajdin Stay Affidavit, paras. 52-55).

51. The Judgment ordered costs to be payable "forthwith" and the Appellants failure to either pay these costs, or to seek a stay of its operation in a timely fashion, are sufficient reason to deny this relief.

52. Despite this, His Highness is willing to agree to have the Appellants pay the costs into the Court pending a determination of the appeal.

(iii) **The Balance of Convenience favours the Continued Operation of the Judgment**

53. The third stage of the test for injunctive relief requires a determination of which of the two parties will suffer greater harm from the granting or refusal of the stay pending determination on the merits.

*RJR McDonald*, supra at 342

54. The Respondent submits that it is open to the Court to consider the apparent strengths and weaknesses of the parties' cases in determining this aspect of the test for a stay as is done in the context of applying the *RJR-MacDonald* test on a motion for an interlocutory injunction.

*Bell Canada v. Rogers Communications Inc. et al.* (2009), 76 C.P.R. (4<sup>th</sup>) 61 at para. 48 (Ont.Sup.Ct.)

55. The Appellants are pursuing this appeal for reasons unrelated to the merits of the action, for reasons that perversely include the protection of His Highness from his own legal action and patently designed to prosecute a vendetta against persons not party to this action.

56. The Judgment constitutes an important step in the protection of the copyright held by His Highness in his religious addresses and messages as the spiritual leader of millions of Shia Imami Ismaili Muslims worldwide. In his January 24, 2010 letter to the Appellant Tajdin, His Highness described the publication of the Golden Edition as "a serious and absolutely unacceptable breach of the Imam's right and responsibility, established over many centuries, to safeguard the integrity of his communications to the Jamat."

**PART IV - ORDER SOUGHT**

57. For the foregoing reasons, His Highness requests an order granting the relief sought to expedite the appeal, and otherwise dismissing the motion seeking to stay the operation of paragraphs 4-9 of the Judgment.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated this 2<sup>nd</sup> day of May, 2011

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