

FEDERAL COURT OF APPEAL

BETWEEN:

COUR FÉDÉRALE
FEDERAL COURT
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NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

Date 10/10/11
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HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

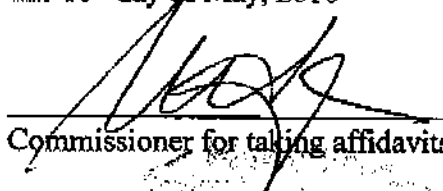
AFFIDAVIT OF SERVICE


I, Dafina Markowa, of the City of Toronto,, in the Province of Ontario, MAKE OATH AS

FOLLOWS:

1. I served the respondent with the moving party's reply written representations dated May 10, 2011, by sending a copy by fax to (416) 216-3930, to Ogilvy Renault LLP, solicitors for the respondent on May 10, 2011.

SWORN at the City of Toronto)
in the Province of Ontario)
this 10th day of May, 2010)


Commissioner for taking affidavits



Dafina Markowa

TRANSMISSION VERIFICATION REPORT

TIME : 05/10/2011 15:39
NAME :
FAX :
TEL :
SER.# : H0N451910

DATE, TIME	05/10 15:35
FAX NO./NAME	4162163930
DURATION	00:03:20
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JIWA & ASSOCIATES

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May 10, 2011

Via fax to (416) 216-3930

Ogilvy Renault LLP
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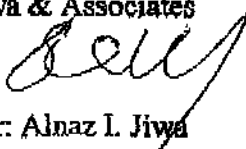
ATTENTION: Brian W. Gray

Dear Counsel:

Re: Court File No. A-59-11 and No. A-60-11

Please find enclosed Nagib Tajdin's Reply to Written Submissions.

Yours very truly,
Jiwa & Associates


Per: Alnaz I. Jiwa

Dockets: A-59-11
A-60-11

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

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Dockets: A-59-11
A-60-11

BETWEEN: FEDERAL COURT OF APPEAL

NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

**MOVING PARTY'S REPLY WRITTEN REPRESENTATIONS
(Motion to Stay Judgment)**

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FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

**MOVING PARTY'S REPLY WRITTEN REPRESENTATIONS
(Motion to Stay Judgment)**

1. In response to paragraph 5 of the respondent's written representations dated May 2, 2011, respondent's counsel concedes that at the heart of this dispute is an "alleged fundamental disagreement between the appellants and the Ismaili leadership (including Head of Jamati Institutions, Shafik Sachadina) over the collection, editing and distribution of Farmans". However, it is clear on the record that the named plaintiff gave His personal consent and authorization to the publication of the Farmans in 1992. The motions judge made a finding that the named plaintiff said, "continue doing what you are doing", and then the motions judge went on to speculate what was meant by that.
2. At paragraph 5 of the respondent's written representations, the respondent's counsel states that the editing and distribution of His Highness' works are a matter for His Highness. However, it is clear on the record that His Highness has publically stated that the institutional leaders have been given "full autonomy" by His Highness.
3. In any event, it is important to note that the only evidence filed in support of the respondent's motion for summary judgment are the two letters allegedly written by His Highness and the Affirmation allegedly signed by Him. However, the uncontradicted evidence of the expert retained by the appellants, shows that the letters in question and the

Affirmation were not signed by His Highness. The evidence also shows that letters in question came after the previous 10 Farman books were published by Tajdin during the past 18 years and after the Golden Edition, the last book subject of this lawsuit, had been already published by Tajdin.

4. It is also noteworthy that in response to this motion for stay, no evidence has been given by His Highness to oppose the motion, and as noted above, the two letters and the Affirmation have been shown to be forged (not signed by His Highness.)
5. In response to paragraph 6 of the respondent's written representations, although counsel seems to suggest that the judgment granted does not prevent Tajdin "from reading Farmans made available through authorized sources", the judgment does *not give the exemption* and is much broader than what is now being interpreted.
6. In response to paragraph 7 of the respondent's written representations, His Highness (not surprisingly) has not given *any* evidence to establish what inconvenience He would suffer. It was known on January 1, 2010, that Tajdin had already published the Golden Edition, but no attempts were made by the named plaintiff to seek an interlocutory injunction against the appellants either before issuing the claim, or after issuing the claim on April 6, 2010, when evidence was led to show that the moving party had been distributing Farmans continuously since 1992.
7. The fact that the named plaintiff had chosen not to seek an interlocutory injunction as from January 1, 2010, to the date of the judgment in January of 2011, confirms that the named plaintiff would not suffer any inconvenience.
8. In response to paragraph 17 of the respondent's written representations, Tajdin has shown that there are serious issues to be argued, namely that His Highness had given His authorization and consent to the publishing His Farmans when the first book was presented

to Him.

9. Although the motions judge speculated about what His Highness might have meant by the words, "continue doing what you are doing", there is not evidence at all to seek to restrict the words spoken, or to explain away the words spoken. Counsel in his written representations has also not addressed these issues (cannot do so when there is no evidence to support it) makes the issues for appeal that much stronger.
10. The threshold for determining the serious issues is low, and it is noteworthy that respondent's counsel has not refuted the serious issues raised by Tajdin in his written representations, such as: (i) the consent given in 1992; (ii) the new Ismaili Constitution removing the previously express jurisdiction vested in the Institutions to publish Farmans and no article prohibits the activities complained of; (iii) the fact that His Highness has urged all Ismailis to abide by His Farmans and to listen them and to study them while He has not made any Farmans to prohibit the activities complained of; (iv) the fact that Ismailis are urged to abide by His Highness' Farmans and the Ismaili Constitution - and there are no restrictions (as were in the old Constitutions) with respect to these matters in any Farmans or the Ismaili Constitution.
11. Furthermore, the appellants relied on the fact that when giving their oath of allegiance, His Highness also promises in return that He would Guide his flock, and as such there is implied consent (again no evidence was led at all to refute this ground) which is an issue for determinations.
12. The Federal Court of Appeal has held that authorization is a complicated matter and should be decided at a trial.
13. In response to paragraph 21 of the respondent's written representations, Tajdin submits that the motions judge is not permitted to conduct a trial by affidavits and is prohibited

from making inferences from contested evidence. Tajdin submits that the motions judge seriously erred when he held that the experts' evidence was contradictory when it was not. If contradictory, the motions judge is precluded from choosing one over the other, but the respondent's expert did not contradict the appellants' expert's evidence.

14. In response to paragraph 22 of the respondent's written representations, Federal Court of Appeal have held in many cases that rules for motions for summary judgment do not require that *all evidence be submitted* in responding to a motion for summary judgment. Counsel's arguments satisfy the test for a serious issue to be tried in that he can seek to convince the Federal Court of Appeal to overrule previous decisions and require responding parties to bring *all* evidence to oppose a motion for summary judgment.
15. Furthermore, the Direction given in respect to the discovery evidence expressly allowed the respondent to bring a motion if He wished to introduce evidence, in effect, reversing the Rules governing the introducing evidence from a discovery, whereby only the party discovering can do so.
16. Here, the Direction reversed the Rules; however, respondent's counsel chose not to introduce any evidence. The issues raised, therefore, are serious: (i) whether a motions judge can draw an adverse inference when jurisprudence has repeatedly held that responding parties do not have to bring all their evidence when opposing a motion for summary judgment; (ii) whether a motions judge can draw an inference when *both parties could have filed that evidence*, and (iii) whether in circumstances when both parties agreed to have the motion heard on the evidence already filed, a motions judge can draw an adverse inference.
17. These matters raised by respondent's counsel establish that these issues have to be reviewed by the Court of Appeal and are not frivolous.

18. In response to paragraph 30 of the respondent's written representations, Tajdin submits that consent and authorization are interchangeable words and portray similar meanings and that a trial would be required to determine what was meant by His Highness when He said, "continue doing what you are doing". Furthermore, although respondent's counsel states that authorization was not pleaded, legal concepts do not have to be pleaded, only facts are to be pleaded and facts were pleaded in respect to this issue.
19. In response to paragraph 37 and onwards, it is important to appreciate that the appellants are not seeking to stay the whole judgment, but only are seeking to stay the provisions of paragraphs 4 through 9 of the judgment. Tajdin submits that the material facts established that Shafik Sachedina wishes to seek names of the individuals to whom the Farman books had been sold, but the judgment did not require the return of the books already distributed.
20. The cases cited by respondent's counsel are distinguishable in that there are different considerations when a judgment is issued for injunction and damages at a trial, and it is a different matter when damages for infringement are to be determined later (as set out in the main written representations).
21. Furthermore, all of the cases cited by respondent's counsel are also distinguishable in that all of the cases were in respect to profit making enterprises, while Tajdin's service was a service to the community oriented venture undertaken to serve and not to make money. Tajdin has said in his evidence that it would take a lot of time and expense to gather all of the financial records to produce for accounting purposes.
22. Furthermore, His Highness is a very generous person, and the demand for profits (when the project as per Tajdin's affidavit was run in deficits) is a demand made by Shafik Sachedina and others as a vindictive procedure and not one made by His Highness. Had this been His Highness' demand, He would have given an affidavit to explain why He is seeking, especially when the instructions given by Him in 1992, led Tajdin to publish and

distribute the Farman books. .

23. In response to paragraph 44 of the respondent's written representations, the demand by respondent's counsel is accounting for profits and seeking names of the individuals to whom the books had been sold, when the Judgement did not require the return of the Farman books already sold.
24. In response to paragraph 45 of the respondent's written representations, Tajdin did not keep accounting records, and he did not file tax returns. However, if accounting for profits has to be undertaken, then Tajdin has to go back to his credit card, bank statements, travel agents, etc., to obtain the expenses incurred in the process to ensure that expenses are deducted from the payments received from the distribution, failing which all revenues would unjustly be considered profits.
25. Tajdin has a legal right to defend the procedures and seek to deduct all of his reasonable expenses incurred in the project. It appears a further intimidation and unjust pressure to force an accounting without allowing Tajdin to gather evidence. It becomes an unjust venture in light of the fact that Sachedina knew in 1998 that Tajdin was distributing the Farman books, and Sachedina did not even once seek accounting or ask that receipts be kept by Tajdin.
26. His Highness would not impose such hardships on his spiritual child, particularly after having said to "continue doing what you are doing" in response to a question asked while showing the first Farman book published by Tajdin in 1992.
27. In response to paragraph 56 of the respondent's written representations, respondent's counsel continues to rely on letters and Affirmation which have been alleged to be forged. As noted above, these issues are serious and require a trial to determine whether fraud is being perpetrated in this action.

28. It is noteworthy that despite the appellants' consistently asserting that these documents have been forged, neither His Highness nor the expert retained by respondent's counsel contradicted the evidence of the experts retained by the appellants that the letters and the Affirmation were not signed by His Highness
29. Tajdin submits that only a trial can resolve these issues.

Dated at Nairobi, Kenya, this 10th day of May, 2011



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Solicitors for the Plaintiff

FEDERAL COURT OF APPEAL

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Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

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MOVING PARTY'S REPLY WRITTEN
REPRESENTATIONS
(Motion to Stay Judgment)

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From: WhyteNowak, Allyson [mailto:awhytenowak@ogilvyrenault.com]
Sent: Tuesday, May 03, 2011 12:14 PM
To: 'Nagib Tajdin'; 'Nagib Tajdin'
Cc: 'Jiwa Law Office'; Gray, Brian
Subject: RE: A-59-11 - Responding Motion Materials

Mr. Tajdin,

Thank you.

I'm afraid that pursuant to Rule 7(2) we are only permitted to consent to an extension of up to half of the period sought to be extended. Since Rule 369(3) provides for the filing of a Reply within 4 days after being served with the respondent's motion record, we can only consent to an additional 2 days, which we hereby consent to. Any further extension of time will have to be sought from the court.

Allyson

Allyson Whyte Nowak
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From: Nagib Tajdin [mailto:nagib@tajdin.com]
Sent: May 3, 2011 11:22 AM
To: WhyteNowak, Allyson; 'Nagib Tajdin'
Cc: 'Jiwa Law Office'
Subject: RE: A-59-11 - Responding Motion Materials

Hello Allyson,

Just a reminder, when you send your email from Toronto time 5pm, it is already past midnight in Nairobi.

There is no problem for your request, you can file today.

Also I will need to be able to file my reply by Tuesday if you can confirm. Thanks

Nagib

From: WhyteNowak, Allyson [mailto:awhytenowak@ogilvyrenault.com]
Sent: Tuesday, May 03, 2011 8:57 AM
To: 'Nagib Tajdin'; 'Nagib Tajdin'
Cc: 'Jiwa Law Office'
Subject: FW: A-59-11 - Responding Motion Materials

Mr. Tajdin,

May we please hear from you in connection with our request?

Allyson

Allyson

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Ogilvy Renault joins Norton Rose Group on June 1, 2011 / Le 1^{er} juin 2011, Ogilvy Renault se joint au Groupe Norton Rose



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From: WhyteNowak, Allyson
Sent: May 2, 2011 4:38 PM
To: 'Nagib Tajdin'; 'Nagib Tajdin'
Cc: 'Jiwa Law Office'
Subject: A-59-11 - Responding Motion Materials

Mr. Tajdin,

I am writing to seek your consent to allow us to re-file our Responding Motion Record tomorrow. The Court has rejected the copy our process server attempted to file because it was copied double-sided.

I have spoken to Mr. Jiwa by phone and he has consented.

Please let me know if we have your consent as well,

Allyson

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