

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

**REVISED COMBINED MEMORANDA OF FACT
AND LAW OF THE PLAINTIFF**

**(Plaintiff's Rule 213 Motion for Summary Judgment and Response
to the Defendants' Motions for Summary Judgment)**

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TAB 1

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OF THE PLAINTIFF
(Plaintiff's Rule 213 Motion for Summary Judgment)**

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Defendants

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I. FACTS

A. Overview

1. This is a motion for summary judgment of the Plaintiff's claim for copyright infringement in relation to the Defendants' unauthorized reproduction of a book and mp3 audio bookmark entitled Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman (the "Infringing Materials"). The Infringing Materials reproduce, in substantial part, a series of original religious addresses and messages (viz. Farmans and Talikas), of which the Plaintiff is the sole and original author (the "**Literary Works**").
2. Essentially this is a case of flagrant infringement of a registered Canadian Copyright, acknowledged to be valid and admitted to be owned by the named plaintiff. The lack of any real defence has been purposively obscured by spurious allegations of fraud and forgery, and a persistent assertion that the proceedings are being pursued by counsel, without the authority or knowledge of the plaintiff, even after the attendance of the Plaintiff for examination for discovery on October 15, 2010 as reflected in the court record.
3. Both Defendants admit facts that establish the Plaintiff's Literary Works are entitled to copyright and are owned by the Plaintiff. The Defendants admit that the Plaintiff is the author of the Literary Works contained in the Infringing Materials. The Defendants admit that they publish, distribute and/or sell the Infringing Materials. The Defendants' defence is limited to two assertions: (i) their actions are justified since the Plaintiff provided consent, both express and/or implied, to the publication, distribution and sale of the Infringing Materials; and (ii) the Plaintiff did not authorize the commencement of the present action. The Defendants have finally advised the Court that they will not be arguing their allegations that the action is not authorized by the named Plaintiff. It was in support of this, now apparently abandoned argument, that certain carefully worded and flawed opinions about forgery have been proffered by the Defendants. The Defendants have, perhaps unintentionally, tried to limit their abandonment of this aspect of the case by saying that they abandon the allegations "for the purposes of the summary judgment motion only". The Defendants are free to abandon or cling to whatever allegations they see fit. That does not change the fact that the Plaintiff is entitled to summary judgment on false allegations made in the pleadings and to a finding that the allegations are both false and unsupported by any admissible evidence.

4. The Plaintiff's evidence on this motion demonstrates that the Defendants' defence clearly lacks foundation and is so doubtful that it does not deserve consideration by the trier of fact at a future trial. There is no defence of consent. Even if all evidence and statements of the Defendants are accepted to be true, their own evidence fails to meet the standard of "clear" consent required by Canadian law to operate as a proper defence to copyright infringement. The purported "consent" upon which the Defendants rely to publish, distribute and sell the Infringing Materials, relates to circumstances surrounding an earlier book, which the Defendant, Mr. Tajdin, agreed to stop selling, at the request of the Plaintiff, some 10 years before the release of the Infringing Materials.
5. The Plaintiff has repeatedly communicated to the Defendants that he does not, and has not ever consented to the unauthorized publication, distribution and sale of his Literary Works. Rather than abide by His Highness' clear instructions, the Defendants have doggedly pursued their motions for summary judgment despite having being presented with irrefutable evidence that the Plaintiff does not consent to the publication, distribution and sale of the Infringing Materials. The Defendants' defences are without merit and fail to present any genuine issue for trial. This motion should be granted accordingly.
6. The defendants have repeatedly asserted that:(a) communications to the Defendants from the Plaintiff confirming the absence of consent to their conduct were fabricated or forged by persons on his staff; (b) this action was commenced by a "Usurper Plaintiff"; and (c) an Affirmation of the plaintiff categorically answering the alleged defences, taken before two witnesses, and Notarized in this proceeding, was itself forged by a usurper of the plaintiff's identity.
7. The court record reflects the fact that the Plaintiff did attend in Canada to be questioned on October 15, 2010. Thereafter, the Court fashioned a procedure for the Defendants to introduce evidence relating to that discovery in this motion. According to the Prothonotary's September 24, 2010 Order, the Defendants have finished their discovery of the Plaintiff in this case, and no further evidence whatsoever has been submitted by them to contradict the Affirmation or support the allegations in their pleadings..

B. The Plaintiff's Literary Works

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

Affidavit of Shafik Sachedina, sworn June 25, 2010, ["Sachedina Affidavit"] at para. 4, Exhibit "A".

9. As Imam of the Ismaili community, the Plaintiff (or sometimes "His Highness") is constantly engaged in significant diplomatic, religious and charitable commitments in all parts of the world. His Highness' duties include diplomatic initiatives to promote international development, world peace, and education to further the cause of understanding of the religion of Islam, its art and culture, in the non-Islamic world.

Sachedina Affidavit, paras. 5-8.

10. His Highness has been, and continues to be, engaged in setting up universities and other institutions of higher learning in the Islamic world. He also contributes to founding museums and institutes to study Islamic culture in the non-Islamic world. Further, His Highness is frequently asked to mediate or advise on international conflicts.

Sachedina Affidavit, paras. 7-8.

11. As the religious leader of the Shia Imami Ismaili Muslims, His Highness has concern for the spiritual well being of the community and gives advice and guidance to the community on religious matters.

Sachedina Affidavit, paras. 4-6.

12. A "Farman" is an address by His Highness as Imam to his community. A "Talika" is a brief, written religious message conveyed by His Highness to his community. His Highness' Farmans and Talikas are collectively referred to herein as the "Literary Works".

Sachedina Affidavit, para. 9.

13. Article 8 of The Constitution of the Shea Imami Ismaili Muslims provides for the creation of Ismaili Tariqah and Religious Education Boards (ITREB) for the territories. Under the direction and guidance of His Highness, these entities are mandated to provide for all matters of religious education and for the research and publication of books and materials, at all levels of the Jamat (Ismaili community). Further, His Highness has approved an ITREB policy which provides for the procedure for the authorized dissemination of his Literary Works to the Jamat through the ITREB: no other individual or institution is authorized to disseminate, publish, distribute or otherwise sell the Plaintiff's Literary Works. Ultimately, matters of publication and dissemination, constitutionally remain subject to His Highness' direction and guidance.

The Constitution of the Shea Imami Ismaili Muslims, Exhibit 10 to the Cross-Examination of Shafik Sachedina on his affidavit sworn June 25, 2010; Sachedina Affidavit, at paras. 10-13 and the Farman Dissemination Policy for Canada, Exhibit "B" to the Sachedina Affidavit.

14. A Certificate of Copyright Registration in the unpublished literary works titled "Farmans" issued to Prince Karim Aga Khan on June 23, 2010 and has been filed with the Court.

Certificate of Copyright Registration dated June 23, 2010; Revised Combined Motion Record of the Plaintiff, Tab 8.

C. The Plaintiff does not consent to the Defendants' use of his Literary Works

(i) No consent to use of other Farmans

15. In and around the mid-1990's, the Plaintiff first learned that the Defendant, Mr. Tajdin, had published some books purporting to contain His Highness' Farmans. His Highness advised the Head of the Department of Jamati Institutions at his Secretariat, Mr. Shafik Sachedina, that he did not authorize the publication of his Farmans by the Defendant and further instructed Mr. Sachedina to contact Mr. Tajdin to resolve this issue on his behalf.

Sachedina Affidavit, para. 14.

16. In October 1998, Mr. Sachedina and Aziz Bhaloo, then President of the Ismaili Council for Canada, met with Mr. Tajdin in Montreal to discuss Mr. Tajdin's unauthorized publication and distribution of Farman books.

Affidavit of Azim M. Bhaloo, sworn June 23, 2010 ["Bhaloo Affidavit"], paras. 3-4; Sachedina Affidavit, paras. 15-16.

17. Mr. Sachedina impressed upon Mr. Tajdin that no Farmans should be published without His Highness' approval. Before the end of the meeting, Mr. Tajdin stated that he would no longer publish and distribute the Farman books. To Mr. Sachedina's knowledge the matter had been resolved. Mr. Sachedina and Mr. Bhaloo's evidence is consistent with the Defendant, Mr. Tajdin's own statement in a letter he later addressed to the Plaintiff on January 4, 2010 whereby: (i) Mr. Tajdin includes a summary of his Farman projects showing that no Farman books were in fact released after 1998 until the Infringing Materials in 2009; and (ii) Mr. Tajdin requests His Highness' "authorization" and "guidance" with respect to the distribution of the Infringing Materials. On cross-examination, Mr. Tajdin admitted that the January 4, 2010 letter contains an accurate description of his printed Farman projects and that this letter was the first time that he wrote to His Highness about them.

Bhaloo Affidavit, para. 7; Sachedina Affidavit, paras. 15-16 and Exhibit "F". Transcript of the cross-examination of Nagib Tajdin on his affidavits sworn May 7, 2010, June 16, 2010 and July 13, 2010 ["Tajdin Cross"], pp. 12-13, Q. 56-59 and p. 13, Q. 60-65, 68.

18. At no time did Mr. Sachedina, either on his own behalf or on the behalf of the Aga Khan, ever consent to the publication of any Farmans by the Defendants and Mr. Tajdin has conceded that Mr. Sachedina has no power to consent to the publication of Farmans in any event.

Bhaloo Affidavit, para. 7; Sachedina Affidavit, para. 17; Tajdin Cross, pp. 95-96, Q. 560.

(ii) *No consent to Infringing Materials*

19. At the end of December 2009, Mr. Sachedina learned that the Defendants were now publishing and distributing another book of unauthorized Farmans entitled "Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman" and accompanying mp3 audio bookmark (the "**Infringing Materials**"). The translation of this title is "The Words of the Imam of the Time." Mr. Sachedina promptly contacted Mr. Tajdin to request that the Infringing Materials be withdrawn from circulation with an apology to His Highness. Mr. Tajdin responded that he would abide by

this request if he received instructions directly from His Highness. Mr. Sachedina suggested that Mr. Tajdin write to His Highness and advised His Highness of the circumstances accordingly.

Sachedina Affidavit, paras. 18-19 and 20.

20. Mr. Tajdin did not stop the distribution of the Infringing Materials. Accordingly, on January 16, 2010, the Plaintiff authorized an announcement to be read out globally in all Ismaili Jamatkhana's advising that the Infringing Materials were unauthorized and should not be supported. Mr. Tajdin admitted that the announcement had been made, however, he insisted that it was authorized by Mr. Sachedina and not by His Highness, despite acknowledging that Mr. Sachedina does not actually have the authority to send such an announcement. Mr. Jiwa also acknowledged that the announcement was made and that the leaders cautioned against buying the book as it was unauthorized.

Sachedina Affidavit, para. 22, Exhibit "E"; Tajdin Cross, p. 57, Q.332, pp. 57-58, Q. 333-339 and p. 59, Q. 341-343; Transcript of the cross-examination of Alnaz Jiwa on his affidavits sworn June 16, 2010 and July 16, 2010 ["Jiwa Cross"], pp. 49-50, Q. 257-259.

21. By letter dated January 4, 2010, and received by His Highness on January 20, 2010, Mr. Tajdin sought "guidance" by letter for the first time from the Imam with respect to the publication of the Infringing Materials and requested an audience with the Plaintiff. Mr. Tajdin's letter enclosed a copy of the Infringing Materials.

Sachedina Affidavit, paras. 23-24; Tajdin Defence, para. 37; Tajdin Cross, p. 13, Q. 60-65 and 68.

22. In response to this letter, and at the request of His Highness, Mr. Sachedina contacted Mr. Tajdin again to advise of His Highness' instructions that he immediately withdraw the Infringing Materials. Mr. Tajdin again advised that he would only comply if he received instructions directly from His Highness. As a result, the Plaintiff decided to contact Mr. Tajdin directly by letter dated January 24, 2010 whereby he stated:

"I, therefore, expect you, and the other murids who are working with you, immediately to take all the necessary measures to recall and to withdraw from circulation your recent publication and the accompanying mp3 device, and cease their printing and distribution. Also, I would like you to deliver all remaining

stocks of these materials to the Institute of Ismaili Studies at 210, Euston Road, London NW1 2DA.”

Sachedina Affidavit, paras. 25-26, Exhibit “G”.

23. Mr. Tajdin agreed on cross-examination that the January 24, 2010 letter states that His Highness does not consent to Mr. Tajdin publishing his Farmans, and if the letter is genuine, he has no consent to publish the Golden Edition. Indeed, he stated that if the letter is genuine, that ends the lawsuit.

Tajdin Cross, pp. 22-25, Q. 124-134, p. 26, Q. 140.

24. Despite putting forward flawed expert evidence that the January 24, 2010 letter was not signed by His Highness, Mr. Tajdin has steadfastly refused to provide to the Plaintiff the original January 24, 2010 letter from His Highness for inspection by the Plaintiff’s lawyers or expert for the stated reason that he believes the letter would “self-destruct”.

Tajdin Cross, pp. 18-21, Q. 98-114.

25. On the Plaintiff’s instructions, Mr. Sachedina contacted Mr. Tajdin again to ascertain his reaction to the letter dated January 24, 2010. Mr. Tajdin confirmed to Mr. Sachedina that he would follow His Highness’ instructions to withdraw the Infringing Materials. Mr. Sachedina offered to assist with any costs in withdrawing the Infringing Materials.

Sachedina Affidavit, para. 27.

26. Shortly after this conversation, however, Mr. Tajdin again reiterated his request that he had to meet with the Plaintiff in person in order to comply with his request to cease the infringement. Again, it was communicated to Mr. Tajdin that this was not possible due to the Plaintiff’s extreme workload, but that Mr. Tajdin was welcome to communicate with the Plaintiff by letter.

Sachedina Affidavit, paras. 28-31, Exhibits “H”-“I”.

27. The distribution of the Infringing Materials continued, and on the instructions of His Highness, Mr. Sachedina spoke with Mr. Tajdin again. At this time, Mr. Tajdin stated that he believed the

letter from His Highness dated January 24, 2010 to be a forgery. This time, Mr. Tajdin demanded a meeting with His Highness.

Sachedina Affidavit, paras. 32-34.

28. After Mr. Sachedina reported this conversation to the Plaintiff, the Plaintiff wrote a second letter to Mr. Tajdin dated February 18, 2010 to confirm that he was the signatory of the letter dated January 24, 2010 and again requesting Mr. Tajdin to comply with his earlier instructions to cease infringing the Literary Works. Mr. Tajdin alleged that this second letter was also a forgery, despite seeking and receiving direct assurances from His Highness' brother, Prince Amyn, to the contrary. Mr. Tajdin has refused to produce the original copy of the February 18, 2010 letter for the same reasons that he refused to produce the January 24, 2010 letter.

Sachedina Affidavit, paras. 35-36, Exhibits "J"- "K"; Tajdin Cross, pp. 40-41, Q. 233-235.

(iii) No consent - authorization to commence action in Canada

29. Given the history of unacceptable behaviour in the face of letters directly from His Highness and his brother, as well as the allegations of forgery showing an absence of good faith by Mr. Tajdin, His Highness did not believe it was appropriate to respond to these demands by granting an audience to Mr. Tajdin. He decided that Mr. Tajdin's allegations had overstepped acceptable comment and issued instructions to file a Statement of Claim with the Federal Court in Canada.

Sachedina Affidavit, para. 37.

30. In light of this grave and unprecedented step, His Highness authorized that a second announcement be made to Ismaili communities, but only in the four countries most likely to be affected by this matter (Canada, Kenya, the U.K. and the U.S.A.), advising of the sequence of events leading to filing the Statement of Claim. Mr. Sachedina was also authorized to give a briefing on this matter to the Ismaili Community's senior global leadership. Mr. Tajdin acknowledged on cross-examination that the announcement in respect of the Golden Edition was made, but again claimed that it was authorized by Mr. Sachedina despite the fact that he has no authority to do so without consulting His Highness.

Sachedina Affidavit, paras. 38-39, Exhibit “L”; Tajdin Cross, p. 57, Q. 332, pp. 60-62, Q. 353-362 and p. 59, Q. 341-343.

D. Litigation History

31. The Plaintiff commenced this action by Statement of Claim dated April 6, 2010. By this action, the Plaintiff seeks: (i) a declaration that copyright subsists in his Literary Works; (ii) a declaration that the Defendants have infringed the Plaintiff’s copyright in his Literary Works; (iii) injunctive relief; (iv) delivery up; and (v) damages, *inter alia*.

Affidavit of Christian Landeta, sworn June 28, 2010 (“Landeta Affidavit”), para. 2, Exhibit “A”.

32. On April 29, 2010, the Defendants, Alnaz Jiwa and Nagib Tajdin, each served and filed a Statement of Defence. On May 25, 2010, the Plaintiff served and filed: (i) a Reply to the Statement of Defence of Mr. Jiwa; and (ii) a Reply to the Statement of Defence of Mr. Tajdin.

Landeta Affidavit, paras. 3-4, Exhibits “B”-“C”; and Landeta Affidavit, paras. 5-6, Exhibits “D”-“E”.

33. On June 21, 2010, the Defendants each served and filed a motion for summary judgment to dismiss this action on the grounds that: (i) the Plaintiff provided consent, express and/or implied to the publication, distribution and sale of the Infringing Materials; and (ii) the Plaintiff did not authorize the commencement of this action. In the Defendants’ motions for summary judgment and on cross-examination, neither Defendant has contested that copyright subsists in the Plaintiff’s Literary Works. Both Defendants acknowledge that the Plaintiff is the author of the Literary Works. The Defendants have agreed for the purposes of the motion for summary judgment only, not to argue that the Plaintiff did not authorize this action.

Landeta Affidavit, paras. 9-10, Exhibits “G”-“H”; Direction of Prothonotary Tabib dated November 18, 2010.

34. On cross-examination Mr. Tajdin admitted that if the Statement of Claim is authorized by His Highness, Mr. Tajdin will accept that he does not have consent to publish the book.

Tajdin Cross, p. 77, Q. 439-441.

E. The Defendants' Admissions

(i) *Plaintiff is the Author of Infringing Materials*

35. Both Defendants admit the allegation at paragraph 4 of the Statement of Claim: "A 'Farman' is an address by the Aga Khan as Imam to his community. A 'Talika' is a brief, written religious message conveyed to his community by the Aga Khan". As a result, both Defendants admit that the Plaintiff is the author of the Infringing Materials.

Statement of Defence of Mr. Jiwa, dated April 28, 2010 in Landeta Affidavit, para. 4, Exhibit "C" ["Jiwa Defence"] para. 1, see also paras. 9, 48, 71; Statement of Defence of Mr. Tajdin, dated April 25, 2010 in Landeta Affidavit, para. 3, Exhibit "B" ["Tajdin Defence"], para. 1, see also paras. 3(a) and 3(j).

36. Further, the Defendants have published and/or distributed and sold a work in which they have asserted that the Aga Khan is the author. The title of the Infringing Materials, "Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman" means "Words of the Imam of the Time" thereby attributing authorship to His Highness. Both Defendants state that they have faithfully reproduced the Plaintiff's Literary Works.

Jiwa Defence, paras. 1, 42, 55, 62, 63; Tajdin Defence, paras. 22, 27, 28; Sachedina Affidavit, para. 18, Exhibit "D".

(ii) *Infringing Materials are Works in which Copyright may subsist*

37. Both Defendants admit the allegation at paragraph 7 of the Statement of Claim: "The Plaintiff, the Aga Khan, is a citizen of the United Kingdom and a resident of France". As a result, both Defendants admit that the Plaintiff is a qualified author for the purpose of the *Copyright Act*, R.S.C. 1985, c. C-42 ("*Copyright Act*").

Jiwa Defence, para. 1, Tajdin Defence, para. 1

38. Mr. Jiwa further admits the allegation contained at paragraph 14 of the Statement of Claim: "The Aga Khan has been since birth a citizen of the United Kingdom. As a result, copyright exists in Canada and all Berne Convention countries worldwide in works authored by the Aga Khan". Mr. Jiwa accordingly admits that copyright exists in the Infringing Materials.

Jiwa Defence, para. 1

(iii) Defendants admit *prima facie* Infringement

39. Mr. Jiwa has admitted the following (a) paragraph 19 of the Statement of Claim: “The Aga Khan has not assigned or licensed the Literary Works or Readings to the Defendants”; (b) paragraph 26 of the Statement of Claim: “The Book and MP3 are composed of the following materials: (i) reproductions of a substantial part of the Plaintiff’s Literary Works described above; and (ii) reproductions of a substantial part of the Readings described above”; and the Farmans contained on the audio bookmark / MP3 are “in the Aga Khan’s voice”.

Jiwa Defence, paras. 1 and 42.

40. Mr. Tajdin states that the Farmans contained in the Infringing Materials “are transcribed verbatim without any changes” from the words of the Imam.

Tajdin Defence, at paras. 22, 27, 28.

41. Both Defendants admit to publishing, distributing and/or selling the Infringing Materials;

Jiwa Defence, at paras. 37-41, 52, 53, 55, 57, 59, 60, 61, 63, 71; Tajdin Defence, at paras. 10, 11, 12, 13, 14, 15, 22, 27, 29, 30-35, 36, 44, 46; Tajdin Cross, pp. 100-106; and Jiwa Cross, p. 31-32, Q. 147-154, p. 33, Q. 161, p. 34, Q. 166-168 and pp. 39-41, Q. 192-203.

42. Mr. Jiwa admits that since 1977, he has been told by the “Ismailia Association and the Ismaili Council, as well as from other sources, including religious lecturers and teachers...that the Aga Khan did not authorize the publication of the Farmans made by Him, and as such they could not give copies of Farmans to Jiwa”.

Jiwa Defence, para. 33.

43. Both Defendants admit the allegation contained at paragraph 24 of the Statement of Claim: “The Book indicates that it was printed in Canada. The Book does not identify the publisher of the book”. As a result, both Defendants admit that the Infringing Materials are published in Canada.

Jiwa Defence, para. 1, Tajdin Defence, para. 1; Tajdin Cross, p. 100, Q. 590-591 and pp. 105-106, Q. 630-631.

(iv) Defendants' Undertakings to Cease Infringing

44. Both Defendants undertook in their respective pleadings to cease publishing and distributing "His Farmans" upon satisfaction that this is the action so desired by the Plaintiff.

Jiwa Defence, paras. 3-4 and 77; Tajdin Defence, paras. 26, 54, 55, 59, 66.

F. Action is authorized by the Plaintiff

45. As stated above, the present action was commenced by Statement of Claim issued on April 6, 2010. His Highness, Prince Karim Aga Khan, is the sole plaintiff to this action.

Landeta Affidavit, para. 2, Exhibit "A".

46. On April 28, 2010, both Defendants served Statements of Defence containing allegations that the Statement of Claim was initiated by advisors to the Aga Khan or an "Usurper Plaintiff", without the authorization of His Highness. Both Statements of Defence also contained undertakings from each of the Defendants to cease publishing and distributing the Infringing Materials at the request of His Highness.

Jiwa Defence, paras. 6, 58; Tajdin Defence, paras. 4, 5, 56-64; and Jiwa Defence, paras. 3-4 and 77; Tajdin Defence, paras. 26, 54, 55, 59, 66.

(i) The Plaintiff's Affirmation

47. On May 12, 2010, at the request of counsel for the Plaintiff, Mr. Daniel Gleason, a lawyer at the Boston law firm of Nutter McClennen & Fish LLP, met with His Highness at the Mandarin Oriental Hotel in Boston, Massachusetts for approximately 20 minutes. The purpose of this meeting was for Mr. Gleason to present an Affirmation to the Plaintiff, to assure himself that His Highness understood its contents, and to obtain the Plaintiff's signature thereon. Mr. Gleason was accompanied to this meeting by Ms. Jennifer Colman, a Certified Notary Public for the Commonwealth of Massachusetts.

Affidavit of Daniel J. Gleason, sworn June 1, 2010 ["Gleason Affidavit"], paras. 1-2; Affidavit of Jennifer A. Colman, sworn June 1, 2010 ["Colman Affidavit"], paras. 1-2.

48. Mr. Gleason and Ms. Colman were greeted at the Mandarin Oriental by the Aga Khan's personal assistant, Sherbanoo Moledina, and were escorted to His Highness' suite, where they were introduced and engaged in a brief social conversation with His Highness. His Highness then presented his French Diplomatic passport for examination by both Mr. Gleason and Ms. Colman. Mr. Gleason and Ms. Colman next presented three copies of the Affirmation to His Highness who assured them, after he had read it, that he understood its contents and was prepared to sign.

Gleason Affidavit, para. 3; Colman Affidavit, para. 3; and Gleason Affidavit, para. 4; Colman Affidavit, para. 3.

49. At that point, Mr. Gleason and Ms. Colman watched His Highness sign each of the three copies of the Affirmation. Ms. Colman then affixed her notary seal on each signed document, thereby confirming his signature to be genuine. The executed Affirmation dated May 12, 2010, states as follows:

Gleason Affidavit, para. 5; Colman Affidavit, para. 3.

AFFIRMATION

I, Prince Karim Aga Khan, do solemnly affirm pursuant to sections 14 and 15 of the Canada Evidence Act as follows:

1. I am the Plaintiff in Court File No T-514-10 filed in the Federal Court of Canada. I have personally reviewed and approved the contents of the Statement of Claim filed with the Court in this case.
2. I have retained the firm of Ogilvy Renault LLP to act as my solicitors on my behalf and have authorized the action for copyright infringement against the named defendants.
3. I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the Statement of Claim.
4. I have informed one of the defendants Nagib Tajdin in two letters which I have written to him of my instructions to stop the unauthorized publication and to deliver up the undistributed books. In the second letter I purposively added a handwritten note in order to show that the letter came from me personally.
5. I authorized the Ismaili Leaders International Forum (LIF) to inform my Community about this matter and I know that this communication reached both Mr. Jiwa and Mr. Tajdin.

Aga Khan.

Now appeared before me on this 12th day of May, 2010, Prince Karim Aga Khan, a person who did identify himself to me by means of *a passport (Republique and France)* and who did sign and solemnly affirm the above.

Jennifer A. Colman

Notary Public in and for the Commonwealth of Massachusetts [Please put name and official title and seal]

50. Other than His Highness' personal assistant, who did not participate in the meeting itself, no one else was present when Mr. Gleason and Ms. Colman obtained the Plaintiff's signature on the Affirmation. At no time during this meeting did the Plaintiff have any difficulty understanding the purpose of the Affirmation or demonstrate any hesitation in freely affixing his signature to it.

Gleason Affidavit, para. 6; Colman Affidavit, para. 3; and Gleason Affidavit, para. 7; Colman Affidavit, para. 3.

51. The Defendants have received a copy (and Mr. Jiwa has received the original) of the Affirmation sworn by the Plaintiff. Mr. Tajdin admits that if the Affirmation was signed by His Highness, it clearly expresses his wish that Mr. Tajdin cease publishing the Farmans. However, Mr. Tajdin refuses to believe that it was in fact signed by His Highness. Indeed he stated that even if 10 million people confirm that it is His Highness' writing, he will not accept it. Mr. Jiwa is of the view that Mr. Gleason is either mistaken, lying or the victim of identity fraud.

Landeta Affidavit, paras. 7 and 8, Exhibit "F"; Tajdin Cross, p. 68, Q. 396 and p. 70, Q. 402-404; Jiwa Cross, pp. 22-24, Q. 106-116.

52. Mr. Tajdin and Mr. Jiwa have both declined to cross-examine Mr. Gleason or Ms. Coleman on their affidavits, despite the Plaintiff's offer to have them do so. Insofar as the Defendants question the credibility or accuracy of the affidavit of Mr. Gleason and Ms. Coleman, they should have cross-examined them. Their assertions of forgery and identity fraud represent a collateral attack on their credibility and without cross-examination, contradict the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).
53. The Defendants also conducted a discovery of the Plaintiff on October 15, 2010. No evidence from that discovery has been put before this Court.

II. THE ISSUE TO BE DETERMINED

54. There remains only one issue for determination on this motion for summary judgment: is there a genuine issue for trial that the Plaintiff consented to the Defendants' use of his copyrighted Literary Works? This is also the sole issue left to be resolved on the Defendants' respective motions for summary judgment dated June 21, 2010.
55. The Plaintiff submits that the issue of consent is dispositive of this action. Should this Court find that there is no genuine issue for trial on this issue, then the Plaintiff's motion for summary judgment should be granted accordingly.

III. SUBMISSIONS

A. Law on Summary Judgment

56. A plaintiff may bring a motion for summary judgment on all issues raised in the pleadings at any time after the defendant has filed a defence, but before a trial date has been scheduled.

Federal Courts Rules, SOR/98-106, as am. [Federal Courts Rules], Rule 213.

57. A court should grant a plaintiff's motion for summary judgment where it is satisfied that there is "no genuine issue for trial" with respect to the defence. The test for granting summary judgment is whether the defendant's defence "is so doubtful that it does not deserve consideration by the trier of fact at a future trial".

Premakumaran v. Canada (2006), 270 D.L.R. (4th) 440 at para. 8, 2006 FCA 213 (F.C.A.) [*Premakumaran*]; *Federated Co-Operatives Ltd. v. Canada*, [1999], 165 F.T.R. 135 at para. 7, aff'd 2001 FCA 23, 200 F.T.R. 106, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 183; *Entral Group International Inc. v. McCue Enterprises*, 2010 FC 606 at para. 39 [*Entral*].

58. The moving party is not required to show that the case "cannot possibly succeed", but only that the case is "clearly without foundation".

Premakumaran, supra at para. 8.

59. Pursuant to Rule 214, the responding party on a motion for summary judgment bears an evidentiary burden to establish a genuine issue for trial:

214. Facts and evidence required – A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

Federal Courts Rules, *supra*, Rule 214; *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.* (1999), 1 C.P.R. (4th) 88 at para. 12 (F.C.T.D.); *NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)* (1998), 85 C.P.R. (3d) 328 at paras. 4-5 (F.C.A.) [*NFL Enterprises*].

60. As a result, the responding party "may not rest on the mere allegations of denials of its pleadings", but must provide evidence establishing a genuine issue for trial.

White v. Canada, [1998] 152 F.T.R. 39 at para. 25, aff'd [1999] F.C.J. No. 2024 (F.C.A.); *Koslowski v. Courier*, 2009 FC 883 at para. 13; *Film City Entertainment Ltd. v. Golden Formosa Entertainment Ltd.*, 2006 FC 1149 at para. 17 [*Film City*].

61. Summary judgment can be granted based on the admissions made by the defendant in the statement of defence, or elsewhere in the evidence.

Canusa Systems Ltd. v. Canmar Ambassador (The) [1998], 146 F.T.R. 314 at paras. 2, 4, 11, 14 (F.C.T.D.) [*Canusa*]; *Wing v. Van Velthuisen* (2000), 9 C.P.R. (4th) 449 at paras. 44, 47-48, 52, 60, 64 (F.C.T.D.) [*Wing*].

62. In *Canusa, supra*, *Canusa* brought a motion for summary judgment in an action for breach of contract against Leman. *Canusa's* tubing was damaged during ocean shipment that had been arranged by the respondent freight forwarder Leman. In its Defence, Leman admitted that it had arranged for the shipment and that the cargo had been damaged. The Bill of Lading between the parties stipulated a list of enumerated instances that could release Leman from liability. Leman, however, failed to plead any of the enumerated defences. As a result, the admissions in Leman's defence were sufficient to grant summary judgment against the defendant.

Canusa, ibid.

63. Similarly, in the present case, both Defendants admit that the Plaintiff is the author of the copyrighted Literary Works contained in the Infringing Materials and that they require his consent to the reproduction, publication and sale of the Infringing Materials. Both Defendants also admit to the publication, distribution and sale of the Infringing Materials. The infringement defences pled by the Defendants, namely, that the Plaintiff consents to the reproduction and/or that this action is not authorized by the Plaintiff, are not supported by the evidence of either the Defendants or the Plaintiff.

Plaintiff's Revised Memorandum of Fact and Law amended November 15 2010
(Plaintiff's Revised Memorandum), *supra* at paras. 35-36, 17, 21, 39-43.

64. As submitted in detail below, the defence presented by the Defendants on the sole issue on this motion is "so doubtful" that it does "not deserve consideration by the trier of fact at a future trial". The defence of consent as presented is "clearly without foundation" as a matter of evidence or as a matter of law and cannot possibly succeed.

B. Copyright Law

(i) *Subsistence of Copyright in the Aga Khan's Literary Works*

65. The Certificate of Copyright Registration in the unpublished literary works titled “Farmans” issued to Prince Karim Aga Khan on June 23, 2010 is admissible as evidence in this proceeding without further proof.

Copyright Act, R.S.C. 1985, c. C-42 [“*Copyright Act*”], section 58(3).

66. Copyright in Canada subsists in any original literary work provided that the author was, at the date of the making of the work, a citizen or subject or, a person ordinarily resident in a “treaty country”.

5. (1) Conditions for subsistence of copyright - Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country; [*Emphasis added*]

...

Copyright Act, section 5(1); *Wing*, *supra* at paras. 21-25, 43-48; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at paras. 16, 25-36, 2004 SCC 13 [*Law Society*].

67. A country that becomes a Berne Convention country or a WTO Member after the date of making the literary work is nevertheless “deemed to have been a Berne Convention country or a WTO Member at the date of the making or publication of the work”.

Copyright Act, *supra*, section 5(1.01); *Wing*, *supra* at paras. 21-24, 43-48.

68. The Plaintiff submits that a valid copyright exists in the Literary Works in Canada. The Defendants do not dispute that the Farmans and Talikas are original literary works created by the Aga Khan. The Infringing Materials also acknowledge the Plaintiff to be the author.

Plaintiff’s Revised Memorandum, *supra*, at paras. 35-37.

69. The Aga Khan has been a U.K. citizen since birth and is a resident of France, for which he holds a diplomatic passport. Both Defendants admit that the Plaintiff is a U.K. citizen. The U.K. is a WTO Member and has been a Berne Convention country since December 5, 1887. As a result, the Plaintiff submits that copyright in the Literary Works subsists in Canada.

Fox, Harold G. and McKeown, John S., *Fox on Canadian Law of Copyright and Industrial Designs*, looseleaf 4th ed., (2009, Toronto: Thomas Reuters Canada Limited) [*“Fox”*] p. 30-28; Plaintiff’s Revised Memorandum, *supra*, at paras. 37-38.

70. To the extent the Defendants have put in issue the existence of copyright in the Literary Works, which is denied, the Plaintiff further claims the benefit of the presumption contained at section 34.1(1)(a) of the *Copyright Act* that copyright is presumed to subsist in the Literary Works, unless the contrary is proven.

Copyright Act, *supra*, section 34.1(1)(a); *Wing*, *supra* at paras. 25, 47; *NFL Enterprises*, *supra* at para. 7.

(ii) Ownership of Copyright

71. As the sole author of the Literary Works the Plaintiff is the “first owner of the copyright therein”.

Copyright Act, *supra*, section 13(1).

72. In any event, the Plaintiff submits that the Aga Khan’s ownership of the Literary Works is not disputed in this proceeding. The Defendants each admit that the Aga Khan is the author of the Literary Works. In fact, the Defendants appear to rely on the authenticity of their reproduction of the Aga Khan’s Literary Works to sell the Infringing Materials.

Wing, *supra* at para. 52; *Entral*, *supra* at paras. 40-41; Plaintiff’s Revised Memorandum, *supra* at paras. 35-36.

73. To the extent the Defendants have put in issue the Plaintiff’s title to copyright in the Literary Works, which is denied, the Plaintiff further claims the benefit of the presumptions contained at sections 34.1(1)(b) and 34.1(2) of the *Copyright Act* that the Plaintiff is presumed to be the owner of copyright in the Literary Works, unless the contrary is proven.

Copyright Act, supra, sections 34.1(1)(b), 34.1(2); *Wing, supra* at paras. 25, 47; *NFL Enterprises, supra* at para. 7.

(iii) *Infringement of the Plaintiff's Literary Works*

74. As the owner of copyright in the Literary Works, the Aga Khan has the exclusive right to produce or reproduce the work, including the right to authorize the production or reproduction of his Literary Works:

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right ...

...

to authorize any such acts.

Copyright Act, supra, section 3(1).

75. The Defendants have infringed the Aga Khan's copyright by reproducing the protected Literary Works, in substantial part, without the Aga Khan's consent and in manner that is contrary to section 27(1) of the *Copyright Act*:

27. (1) Infringement generally - 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, supra, sections 3(1) and 27(1); *Wing, supra* at paras. 55-61.

76. The Plaintiff is not required to establish that the Defendants had knowledge of the Plaintiff's copyright as a prerequisite for proving copyright infringement:

Section 3 and s. 17(1) [s. 27(1)], however, admit of no prerequisite of knowledge of the existence of the violated copyright or that the action in question amounts to infringement. Infringement is the single act of doing something which ‘only the owner of the copyright has the right to do’.”

Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357 at 375.

77. The Defendants each admit to reproducing, publishing, distributing and selling the Infringing Materials containing the Aga Khan's Literary Works.

Plaintiff's Revised Memorandum, *supra*, paras. 39-41; *Wing*, *supra* at paras. 60, 68.

78. The fact that the Defendants purport not to have profited from the reproduction, publication, distribution and sale of the Infringing Materials is irrelevant. Proof of commercial gain is not necessary for establishing copyright infringement.

Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs de la Rotiserie St-Hubert de Drummondville (1986), 17 C.P.R. (3d) 461 at 471 (Que. Sup. Ct.); *Tajdin Defence*, paras. 30-38; *Jiwa Defence*, paras. 38, 40-42.

79. Since the Defendants in the case at bar admit to the publication, distribution and sale of the Infringing Materials containing the Plaintiff's Literary Works, they have the evidentiary burden on this motion to establish that at least one of their defences to copyright infringement presents a genuine issue for trial, namely that the Aga Khan consents to the use of his Literary Works by the Defendants. The Plaintiff submits below that this defence is without foundation.

C. The Aga Khan does not consent to the Defendants' use of his Literary Works

80. According to the Supreme Court of Canada, "[t]he 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".

Bishop v. Stevens, [1990] 2 S.C.R. 467 at 485-487.

(i) No consent provided during Mehmani meeting

81. Both Defendants allege that the Plaintiff expressly consented to the publication and distribution of the Infringing Materials during a meeting with an individual (not the Defendants) as part of a religious ceremony (Mehmani) that took place in Montreal in 1992, as follows:

"The first Farman book that was published by this defendant was presented before its distribution and circulation to the Imam during Mehmani in Montreal on August 15, 1992. As indicated in the cover page, the book presented to Him was Volume 1, containing Farmans that the Imam delivered to the Western countries. The Imam responded by placing His hand on the Farman Book presented to Him, and after giving his Blessings, the Imam gave the guidance to continue the work (the publication of His Farmans) with Blessing for the success of the work undertaken, and stated that other work could be undertaken together with the Imam..."

“Jiwa states that the Aga Khan personally gave His consent and blessings to the publication of these Farman books on August 15, 1992, and also stated then to ‘continue’ the work.”

Tajdin Defence, para. 11; Jiwa Defence, paras. 5, 53.

82. According to this unidentified individual (since identified in the Defendants’ summary judgment motion materials as Mr. Karim Alibhay), the purported consent to publish, distribute and sell the Plaintiff’s Literary Works was specifically obtained, as follows:

“Tajdin had published a Farman book, titled, “Kalam-e Imam Zaman, Farmans to the Western World, Volume 1”, containing Farmans of the Imam made to the Western countries, and he informed me that it had just been printed and that he wished to seek the Imam’s blessings before starting to distribute the Farman book to the Jamats. [...]

After the Imam had blessed us and accepted our offerings, the Imam looked at the Book which I had placed on the plate containing fruits and nuts, as it is rather unusual for Ismailis to place anything other the (sic) fruits and nuts (which are wrapped in saran wrap). After a short while, the Imam placed His hand on the Farman Book, when I humbly asked the Imam for His blessings, and I said to Him in French: “Mowlana Hazar Imam, que pouvons nous faire pour l’Imamat?” (Mowlana Hazar Imam – our Lord, the present Imam – what else can we do to serve the Imamat?”

The expression on the Imam’s face changed completely and brightened, He came closer to us from His chair as if He wanted to embrace us, he then put His right hand on my shoulder and placed His left hand again on the Farman book (which was in red cover) responded to my supplication in French: “Continuez ce que vous faites” (continue what you are doing), and then ended by saying “et ensuite nous allons voir ce qu’on peut faire ensemble” (and then we will see what we can do together). All the time while we were with the Imam, after He saw the Farman book, His hand was placed on the Farman book, blessing the book. He then finished the ceremony by giving us blessings for Barakat (abundance) and success.

Landeta Affidavit, para. 11, Exhibit “T”.

83. Despite relying in part on the 1992 Mehmani as the basis for consent, Mr. Jiwa admitted on cross-examination that he was not involved in 1992 Mehmani or in the 1998 discussion with Mr. Sachedina and Mr. Tajdin.

Jiwa Cross, p. 4, Q.11 and pp. 55-56, Q. 296-297.

84. Mr. Tajdin made the following admissions on cross-examination in connection with the circumstances of the 1992 Mehmani:

- (a) he printed the first Farman book and had received several cartons of the first volume the day prior to the Mehmani on August 14, 1992. Tajdin did not have time to seek guidance in writing from His Highness before having the books printed;

Tajdin Cross, pp. 90-91, Q. 525-530.

- (b) Mr. Tajdin did not tell any of His Highness' advisors, or anyone at the leadership, that he planned to have the book presented to His Highness at the Mehmani;

Tajdin Cross, p. 91, Q. 532.

- (c) Mr. Tajdin himself did not present the book and Mr. Alibhay did not mention Mr. Tajdin's name during his personal Mehmani meeting with His Highness;

Tajdin Cross, pp. 92-93, Q. 539-540.

- (d) Mr. Alibhay presented the book on the plate of fruit and nuts, without telling anyone except for Mr. Tajdin;

Tajdin Cross, p. 93, Q. 544-545.

- (e) His Highness merely put his hand on the book; he did not open it, nor did he take the book away with him to examine it (Mr. Alibhay still has the copy of the book that was presented);

Tajdin Cross, pp. 93-94, Q. 546, Q. 547-549 and pp. 94-95, Q. 552-553.

- (f) After the Mehmani, Mr. Tajdin did not write to His Highness to confirm what he was doing with the book, nor did he send any copy of the book to His Highness.

Tajdin Cross, p. 95, Q. 554-559.

85. The Plaintiff submits that the above-described "consent" to use the Plaintiff's Literary Works, which is espoused by the Defendants as their primary defence to copyright infringement in this proceeding, cannot satisfy their onus to provide evidence of "clear" consent to operate as a proper defence to infringement.

- (a) First, by the Defendants' own admissions, this purported "consent" was in relation to a book of Farmans published in 1992 that is not even the subject of the present proceeding. The Infringing Materials were not released for publication until December 2009;

- (b) Second, by the Defendants' own admissions, the Plaintiff did not open the book presented or review any of its content. There is no evidence that the Plaintiff even knew of, or comprehended, the subject-matter of the book that was presented to him;
- (c) Third, by the Defendants' own admissions, any words spoken by the Plaintiff to the individual were communicated in the context of a religious ceremony. The alleged words spoken do not "clearly" communicate the Plaintiff's consent to any publication, distribution and sale of the Infringing Materials by the Defendants. At no time does the individual even mention the Defendants' names, nor does he make any explanation as to the contents of the book or request to publish, distribute and sell the book. There is no discussion of any consideration between the parties of any kind;
- (d) Fourth, the Defendants' evidence is that the word "ensemble" was used by His Highness. If this is so, it does not imply any ability to act alone, but requires that any work be undertaken "together" with His Highness or other appropriate Ismaili institutions;
- (e) Fifth, any alleged consent given was not given to the Defendants but to a third party. The Defendants do not submit that this third party is personally known to the Plaintiff, nor do they submit that there were ever any prior, or subsequent meetings, between the third party and the Plaintiff;
- (f) Sixth, there were approximately 500 to 700 Ismailis from various congregations awaiting an audience with His Highness during Mehmani that same day. To afford each Ismaili the opportunity to meet His Highness, individual audiences with the Imam were for a duration of only a few seconds; and

Bhaloo Affidavit, para. 8.

- (g) Seventh, in his letter dated January 4, 2010 to the Plaintiff, the Defendant Mr. Tajdin, in his own words, seeks consent from the Plaintiff for the publication of the Infringing Materials, as follows:

"I the undersigned, Nagib Tajdin Nasser Kanji, submit as follows:
It is with utmost respect and submission to the House, of Imam-e-Zaman that I attach a copy of the book titled Golden Edition, a compilation of many of the Khudawind's Farmans made from 1957-2009.

This book is a collective effort from several Murids who have worked on its compilation for many years with love and devotion and with Khudawind's blessings with the aim of preserving, in one compilation, 50 years of Farmans to be submitted as Nazrena for Khudawind's Golden Jubilee – unfortunately so late. A summary of the Farman project is given on the next page.

With Khudawind's authorization, we also seek to give Umedwari of copies of this Golden Edition for each Jamatkhana in the world.

We are in need of direction, wisdom and guidance as to this project and also for other future long term projects, such as the compilation, translation and publication of the Farmans of Mowlana Aga Ali Shah and Mowlana Aga Hassanaili Shah, from various manuscripts, a project to be completed for the next Diamond Jubilee, Inshallah.

I therefore beg for an audience at Khudawind's convenience for further guidance in this matter." [Emphasis added].

This letter is inconsistent with the Defendants' contention that they already had the Plaintiff's "consent" to publish, distribute and sell the Infringing Materials based on the third party's August 1992 encounter with the Plaintiff at Mehmani.

Sachedina Affidavit, Exhibit "F".

- (h) Eight, the Affirmation sworn by the Plaintiff, and provided to the Defendants on May 14, 2010, further advises "I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the Statement of Claim". The signature on this Affirmation has been attested to by two persons who have sworn and filed affidavits with this Court and are available to be cross-examined.

Gleason Affidavit, Exhibit "A"; Colman Affidavit, para. 3; Landeta Affidavit, paras. 7-8, Exhibit "F".

(ii) *No other implied consent*

86. The Defendants also purport to have obtained "implied consent" to publish, distribute and sell the Infringing Materials on the following bases: (i) they purport to have received no complaints about their activities since they started distributing His Highness' Farmans in 1992; (ii) the new Ismaili Constitution does not vest any institution with powers to compile or publish Farmans, but is silent on the issue; and (iii) since Ismailis are entitled to have access to Farmans, any copying and distribution of Farmans is permitted.

Jiwa Defence, paras. 23-28, 43, 48, 51, 52, 55, 63; Tajdin Defence, paras. 13, 16-20, 29, 42; Jiwa Cross, pp. 4-9, Q. 10-36.

87. These allegations are unsupportable in the face of the complaints made by: (i) Mr. Sachedina on behalf of His Highness; (ii) the letters by His Highness and his brother; (iii) the public announcements to the whole Ismaili community (which both Mr. Jiwa and Mr. Tajdin admit were made but which Mr. Jiwa says are simply ignored); (iv) the Defendants' own actions in continuing to seek consent and authorization from His Highness; and (v) the Defendants' own statements that they had sought to obtain copies of Farmans and were told that the Aga Khan did not authorize publication of Farmans.

Plaintiff's Revised Memorandum, *supra* at paras. 15-30, 42; Jiwa Cross, pp. 50-51, Q. 261-264.

88. Contrary to the Defendants' statements, the Plaintiff has submitted evidence that there were complaints concerning the Defendants' past unauthorized distribution of Farmans.

Sachedina Affidavit, paras. 15-16; Bhaloo Affidavit, paras. 4-7; Jiwa Defence, para. 33.

89. The new constitution expressly provides that any Ismaili who, without permission, prints or publishes or circulates any material purporting to be in the name of the Imam is liable to disciplinary action. Mr. Jiwa admits he has not sought such permission.

Tajdin Cross, Exhibit 13 (Article 14); Jiwa Cross, p. 14, Q. 57.

90. The law is also clear that silence to a request for authorization cannot constitute an authorization to reproduce a protected work. The Plaintiff therefore submits that, even if true, which is denied, a lack of prior complaints concerning prior Farman publications cannot constitute consent.

Breen v. Hancock House Publishers Ltd. (1985), 6 C.P.R. (3d) 433 at 437 (F.C.T.D.); *Warner Brothers-Seven Arts Inc. v. CESM-TM Ltd.* (1971), 65 C.P.R. 215 at 232 (Ex. Ct.).

91. There is an authorized policy governing the distribution of Farmans to the community. Providing the community with access to Farmans cannot be equated to an implied consent to the publication, distribution and sale of the Plaintiff's Literary Works. Further by Jiwa's own admission since 1977, he has sought to obtain copies of Farmans and was told that the Aga Khan did not authorize the publication of the Farmans.

Sachedina Affidavit, paras. 9-13, Exhibits "B"- "C"; Jiwa Defence, para. 33.

92. Finally, in any event, to the extent there has been any lack of clarity concerning authorization to use the Plaintiff's copyright, which is denied, the Plaintiff has repeatedly communicated to the Defendants that he does not authorize or consent to the Defendants' publication, distribution or sale of the Infringing Materials. The Plaintiff's lack of authorization has been communicated by: (i) the Plaintiff directly to the Defendant Mr. Tajdin; (ii) by the Head of the Department of Jamati Institutions at the Plaintiff's Secretariat, Mr. Sachedina, directly to Mr. Tajdin; (iii) by the

Plaintiff's brother, Prince Amyn, directly to the Defendant Mr. Tajdin; (iv) by announcement to all the Jamat, as authorized directly by the Plaintiff; and (v) by Affirmation signed by the Plaintiff and provided to the Defendants on May 14, 2010.

Sachedina Affidavit, paras. 14-40, Exhibits "D"- "L"; Gleason Affidavit, paras. 2-7, Exhibit "A"; Colman Affidavit, para. 3.

93. The Plaintiff swore an Affirmation in this proceeding whereby he confirmed that: (i) he is the Plaintiff in Court File No. T-514-10; (ii) he reviewed and approved the contents of the Statement of Claim filed with the Court; and (iii) he retained the firm of Ogilvy Renault LLP to act on his behalf. This Affirmation was signed in the presence of independent counsel and a notary public, each having no previous involvement with the Plaintiff or this proceeding. The Plaintiff submits that this Affirmation satisfies the requirements of Rule 15.02. There can be no question that this proceeding has been authorized by the Plaintiff.¹

Gleason Affidavit, paras. 1-7, Exhibit "A"; Colman Affidavit, para. 1.

94. This Affirmation was provided during the course of the action in answer to the Defendants' assertion that the action is not authorized by the Plaintiff (which allegation is not being pursued on this motion) and in accordance with the specific procedure for confirming a lawyer's authority to commence a lawsuit on behalf of a client addressed at Rule 15.02 of Ontario's *Rules of Civil Procedure*.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 15.02; *Federal Courts Rules*, *supra*, Rule 4 (the "gap" rule); *Parson's Road Property Owners Assn. v. Vadium Corp.* (1998), 18 C.P.C. (4th) 94 at para. 7 (Ont. Ct. Gen. Div.); *Suellothan Bauchemie (Canada) Ltd. v. Raanani Estate* (2003), 33 C.P.C. (5th) 312 at paras. 15, 19 (Ont. Sup. Ct.).

95. To the extent that there is any remaining issue or concern that the Plaintiff somehow consented to the publication, distribution and sale of any Farman at any time, which is strictly denied, the law provides that consent without consideration can be revoked (even the Defendants

¹ The Defendants' expert evidence suggesting that the Affirmation was not signed by the Plaintiff should not be admitted, or alternatively, given no weight, in the face of the Defendants refusal to provide the Plaintiff and its expert with the original set of documents examined by their expert in coming to this conclusion, and also by reason of the Defendants refusal to cross-examine Mr. Gleason and Ms. Coleman.

acknowledge this point). The Defendants do not assert that there has ever been consideration in exchange for the use of His Highness' Farmans. Since the launch of the Infringing Materials, the Plaintiff has clearly communicated through a variety of different channels (including the filing of this law suit) that he does not consent to the Defendants' use of his Literary Works.

Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum (1983), 76 C.P.R. (2d) 276 at paras. 18-21 (B.C.C.A.); Tajdin Cross, pp. 25-26, Q. 135-139 and Jiwa Cross, pp. 57-58, Q. 308-309.

96. The Plaintiff showed up as ordered for his examination for discovery in this action in part in answer to the assertion that he had not authorized this action. It follows that if the Plaintiff did authorize this action, that he does not consent to the publication of the Infringing Works.
97. For all of the above reasons, the evidence is clear that the Plaintiff does not, and has not ever, consented to the Defendants' use of his Literary Works. The Defendants' defences to infringement are without foundation. There is no genuine issue for trial that the Plaintiff consented (or does now consent) to the publication, distribution or sale of the Infringing Materials.
98. It is clear that the Defendants' defences are so doubtful that they do not deserve consideration by a trier of fact at a future trial. The Plaintiff requests that this motion for summary judgment be granted forthwith.

D. Remedies

99. In making an order disposing of an action by summary judgment, the Court "may make any order necessary for the disposition of the action".

Federal Courts Rules, *supra*, Rule 216(7); *NFL Enterprises, supra* at para. 9.
100. Upon establishing that copyright has been infringed, the copyright owner is entitled to "all remedies" under the *Copyright Act*:

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Copyright Act, supra, section 34(1).

101. The Plaintiff submits that having established that there is no genuine issue for trial, in addition to the declaratory relief sought, the Plaintiff is also entitled to the following statutory remedies, namely: a permanent injunction, delivery up and damages.

(i) Injunction

102. The Federal Court has the jurisdiction to grant a permanent injunction that requires the Defendants to cease reproducing, publishing, distributing and selling the Infringing Materials:

“...where infringement of copyright has been established, the owner of the copyright is *prima facie* entitled to an injunction restraining further infringement.”

Copyright Act, supra, section 34(1); *Canada v. James Lorimer and Co.* (1984), 77 C.P.R. (2d) 262 at 268 (F.C.A) [*Lorimer*]; See also *NFL Enterprises, supra* at para. 9; *Wing, supra* at paras. 69-71; *Entral, supra*, at para. 41; *Film City, supra* at para. 25.

(ii) Delivery Up

103. The Federal Court has the jurisdiction to order the Defendants to deliver up all copies of the Infringing Materials in their possession or control:

It follows that, where the infringing work is found to include any substantial part of a work in which copyright subsists, the copyright owner is to be deemed owner of all copies of the infringing work and all production plates and is *prima facie* entitled to the assistance of the Court in gaining possession of them...The fact that the copyright owner has suffered no damages as a result of the infringement is not a basis for refusing an injunction.

Copyright Act, supra, section 34(1); *Lorimer, supra* at 268; See also *NFL Enterprises, supra* at para. 9; *Wing, supra* at paras. 75-76.

(iii) Damages

104. The Federal Court has the jurisdiction to order the Defendants to pay damages in an amount to be determined on the facts of the case. On summary judgment, the Court may make an order directing a trial or reference to determine the amount of damages owing.

Copyright Act, supra, section 34(1); Federal Courts Rules, *supra*, Rule 216(7)(a).

105. A claim for damages is not incompatible with a claim for a permanent injunction and delivery up. The Plaintiff is entitled to be compensated for the unauthorized use of his copyright, as well as to have such unauthorized use halted.

Brisson v. Unibroue inc. [2000] J.Q. No. 3993 at paras. 30-31 (C.S.) per Mayrand J; *Wing, supra* at paras. 69-76, 80-83; *NFL Enterprises, supra* at para. 9.

106. The Plaintiff submits that all of the aforementioned relief is appropriate in the circumstances of this case. Despite repeated, and personal, requests by the Plaintiff for the Defendants to cease all infringing activities, the Defendants have refused to do so. Rather, the Defendants have continued to knowingly infringe His Highness's copyright.
107. The Defendants have ignored irrefutable evidence that the Plaintiff does not consent to the publication, distribution and sale of the Infringing Materials. This evidence is in the form of a personal and independently sworn Affirmation that was provided to the Defendants in a good faith effort to settle this litigation.
108. In the face of this evidence, the Defendants have nevertheless refused to abide by their own personal undertakings to cease infringing the Plaintiff's copyright. Despite having conducted an examination for discovery of the Plaintiff, the Defendants have continued to demand a personal and private audience with the Plaintiff as a precondition to ceasing their infringing activities. The Plaintiff submits that not only do these demands have no basis or justification in law, they are particularly unreasonable in view of the circumstances of the Defendants' persistent and continued infringement of the Plaintiff's Literary Works and the allegations that all of the Plaintiff's advisers and his solicitors (and by implication the Plaintiff himself) have condoned forgery.
109. The Defendants' purported defences in the present proceeding are without merit; there is no genuine issue for trial. The Defendants continue and unreasonably refuse to cease the infringing activities. In view of the Defendants' flagrant and continued disregard for the Plaintiff's copyright, all remedies requested are appropriate and should be granted forthwith.

IV. ORDER SOUGHT

110. The Plaintiff respectfully requests that this motion for summary judgment be granted on the terms set out at paragraph 1 of the Statement of Claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of June, 2010.

AND REVISED this 22nd day of November, 2010


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V. LIST OF AUTHORITIES

	<u>Case Law</u>
1.	<i>Bishop v. Stevens</i> , [1990] 2 S.C.R. 467
2.	<i>Breen v. Hancock House Publishers Ltd.</i> (1985), 6 C.P.R. (3d) 433 (F.C.T.D.)
3.	<i>Brisson v. Unibroue inc.</i> [2000] J.Q. No. 3993 (C.S.)
4.	<i>Canada v. James Lorimer and Co.</i> (1984), 77 C.P.R. (2d) 262 (F.C.A.)
5.	<i>Canusa Systems Ltd. v. Canmar Ambassador (The)</i> , [1998], 146 F.T.R. 314 (F.C.T.D.)
6.	<i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , [2004] 1 S.C.R. 339, 2004 SCC 13
7.	<i>Compo Co. v. Blue Crest Music Inc.</i> , [1980] 1 S.C.R. 357
8.	<i>Entral Group International Inc. v. McCue Enterprises</i> , 2010 FC 606
9.	<i>Federated Co-Operatives Ltd. v. Canada</i> , [1999], 165 F.T.R. 135, aff'd 2001 FCA 23, 200 F.T.R. 106, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 183
10.	<i>Film City Entertainment Ltd. v. Golden Formosa Entertainment Ltd.</i> , 2006 FC 1149
11.	<i>F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.</i> (1999), 1 C.P.R. (4th) 88 (F.C.T.D.)
12.	<i>Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum</i> (1983), 76 C.P.R. (2d) 276 (B.C.C.A.)
13.	<i>Koslowski v. Courier</i> , 2009 FC 883
14.	<i>NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)</i> (1998), 85 C.P.R. (3d) 328 (F.C.A.)
15.	<i>Parson's Road Property Owners Assn. v. Vadium Corp.</i> (1998), 18 C.P.C. (4th) 94 (Ont. Ct. Gen. Div.)
16.	<i>Premakumaran v. Canada</i> (2006), 270 D.L.R. (4th) 440, 2006 FCA 213 (F.C.A.)
17.	<i>Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs de la Rotiserie St-Hubert de Drummondville</i> (1986), 17 C.P.R. (3d) 461 (Que. Sup. Ct.)
18.	<i>Suellothan Bauchemie (Canada) Ltd. v. Raanani Estate</i> (2003), 33 C.P.C. (5th) 312 (Ont. Sup. Ct.).
19.	<i>Warner Brothers-Seven Arts Inc. v. CESM-TM Ltd.</i> (1971), 65 C.P.R. 215 (Ex. Ct.)
20.	<i>White v. Canada</i> , [1998] 152 F.T.R. 39, aff'd [1999] F.C.J. no. 2024 (F.C.A.)

	<u>Case Law</u>
21.	<i>Wing v. Van Velthuisen</i> (2000), 9 C.P.R. (4th) 449 (F.C.T.D.)
	<u>Statutes and Regulations</u>
22.	<i>Copyright Act</i> , R.S.C. 1985, c. C-4, ss. 3(1), 5(1), 5(1.01), 13(1), 27(1), 34, 34.1
23.	<i>Federal Courts Act</i> , R.S.C. 1985, c. F-7, s. 11(3)
24.	<i>Federal Courts Rules</i> , SOR/98-106, Rules 4, 213-219, 400, 401
25.	<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, Rule 15.02
	<u>Secondary Sources</u>
26.	Fox, Harold G. and McKeown, John S., <i>Fox on Canadian Law of Copyright and Industrial Designs</i> , looseleaf 4th ed., (2009, Toronto: Thomas Reuters Canada Limited), p. 30-28
	<u>Additional Authority</u>
27.	<i>Browne v. Dunn</i> (1893), 6 R. 67 (H.L.)

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

**REVISED MEMORANDUM OF
FACT AND LAW OF THE PLAINTIFF**
(Plaintiff's Rule 213 Motion
for Summary Judgment)

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TAB 2

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

**REVISED PLAINTIFF'S RESPONDING
MEMORANDUM OF FACT AND LAW
(Defendants' Motions for Summary Judgment)**

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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
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

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I. FACTS

A. Overview

1. The Defendants' motions for summary judgment¹ seek to dismiss the Plaintiff's action for copyright infringement in relation to the Defendants' unauthorized reproduction of a book and mp3 audio bookmark entitled Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman (the “**Infringing Materials**”). The Infringing Materials reproduce, in substantial part, a series of original religious addresses and messages (*viz.* Farmans and Talikas), of which the Plaintiff is the sole and original author (the “**Literary Works**”).
2. Both Defendants admit facts which establish that the Plaintiff's Literary Works are entitled to copyright and are owned by the Plaintiff. The Defendants admit that the Plaintiff is the author of the Literary Works contained in the Infringing Materials. The Defendants admit that they publish, distribute and/or sell the Infringing Materials.
3. The Defendants submit, however, that they have provided sufficient evidence for this Court to conclude that the Plaintiff consented to the publication, distribution and sale of the Infringing Materials, and as such, the Plaintiff's action should be dismissed.
4. The Plaintiff's evidence on this motion (which is the same evidence the Plaintiff has filed on his own motion for summary judgment) demonstrates that the present action for copyright infringement does not need to go to trial. This is because the defences presented by the Defendants do not present a supportable defence. The Plaintiff's own motion for summary judgment dated June 28, 2010, should be granted and the Defendants' motions dismissed.
5. Even if all evidence and statements of the Defendants are accepted to be true, their own evidence fails to meet the standard of “clear” consent required by Canadian law to operate as a proper defence to copyright infringement. The purported “consent” upon which the Defendants rely to publish, distribute and sell the Infringing Materials, relates to circumstances surrounding an

¹ Although the Defendants, Mr. Tajdin and Mr. Jiwa, each served and filed separate motion records for summary judgment dated June 18, 2010, the Defendants rely on identical evidence in support of their motions. As a result, the Plaintiff will address both motion records in a single Responding Memorandum of Fact and Law.

earlier book, which the Defendant, Mr. Tajdin, agreed to stop selling, at the request of the Plaintiff, some 10 years before the release of the Infringing Materials.

6. The Plaintiff has repeatedly communicated to the Defendants that he does not, and has not ever consented to the unauthorized publication, distribution and sale of his Literary Works. Rather than abide by His Highness' clear instructions, the Defendants unreasonably insist, despite having being presented with irrefutable evidence to the contrary (including the attendance of the Plaintiff on October 15, 2010 at an examination for discovery ordered by the Court), that these complaints are forgeries and that they do have the consent of the Plaintiff.
7. The court record reflects the fact that the Plaintiff did attend in Canada to be questioned on October 15, 2010. Thereafter, the Court fashioned a procedure for the Defendants to introduce evidence relating to that discovery in this motion. According to the Prothonotary's September 24, 2010 Order, the Defendants have finished their discovery of the Plaintiff in this case, and no further evidence whatsoever has been submitted by them to contradict the Affirmation or support the allegations in their pleadings.
8. The Plaintiff, in its motion for summary judgment, has demonstrated that there is no viable defence. The Plaintiff's motion for summary judgment should be granted and the Defendants' motions for summary judgment should be dismissed.

B. The Plaintiff's Literary Works

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

Affidavit of Shafik Sachedina, sworn June 25, 2010, ["Sachedina Affidavit"] at para. 4, Exhibit "A".

10. As Imam of the Ismaili community, the Plaintiff (or sometimes "His Highness") is constantly engaged in significant diplomatic, religious and charitable commitments in all parts of the world. His Highness' duties include diplomatic initiatives to promote international development, world peace, and education to further the cause of understanding of the religion of Islam, its art and culture, in the non-Islamic world.

Sachedina Affidavit, paras. 5-8.

11. His Highness has been, and continues to be, engaged in setting up universities and other institutions of higher learning in the Islamic world. He also contributes to founding museums and institutes to study Islamic culture in the non-Islamic world. Further, His Highness is frequently asked to mediate or advise on international conflicts.

Sachedina Affidavit, paras. 7-8.

12. As the religious leader of the Shia Imami Ismaili Muslims, His Highness has concern for the spiritual well being of the community and gives advice and guidance to the community on religious matters. A “Farman” is an address by His Highness as Imam to his community. A “Talika” is a brief, written religious message conveyed by His Highness to his community. His Highness’ Farmans and Talikas are collectively referred to herein as the “Literary Works”.

Sachedina Affidavit, paras. 4-6 and para. 9.

13. His Highness has approved a policy whereby he authorizes the dissemination of his Literary Works to the Jamat (Ismaili community) through the Ismaili Tariqah and Religious Education Boards (ITREB). No other individual or institution is authorized to disseminate, publish, distribute or otherwise sell the Plaintiff’s Literary Works.

Sachedina Affidavit, at paras. 10-13.

14. A Certificate of Copyright Registration in the unpublished literary works titled “Farmans” issued to Prince Karim Aga Khan on June 23, 2010 and has been filed with the Court.

Certificate of Copyright Registration dated June 23, 2010; Revised Combined Motion Record of the Plaintiff, Tab 8.

C. The Plaintiff did not, and does not, consent to the Defendants’ use of his Literary Works

i) No consent to use of other Farmans

15. In and around the mid-1990’s, the Plaintiff first learned that the Defendant, Mr. Tajdin, had published some books purporting to contain His Highness’ Farmans. His Highness advised the Head of the Department of Jamati Institutions at his Secretariat, Mr. Shafik Sachedina, that he did not authorize the publication of his Farmans by the Defendant and further instructed Mr. Sachedina to contact Mr. Tajdin to resolve this issue on his behalf.

Sachedina Affidavit, para. 14.

16. In October 1998, Mr. Sachedina and Aziz Bhaloo, then President of the Ismaili Council for Canada, met with Mr. Tajdin in Montreal to discuss Mr. Tajdin's unauthorized publication and distribution of Farman books.

Affidavit of Azim M. Bhaloo, sworn June 23, 2010 ["Bhaloo Affidavit"], paras. 3-4; Sachedina Affidavit, paras. 15-16.

17. Mr. Sachedina impressed upon Mr. Tajdin that no Farmans should be published without His Highness' approval. Before the end of the meeting, Mr. Tajdin stated that he would no longer publish and distribute the Farman books. To Mr. Sachedina's knowledge the matter had been resolved. Mr. Sachedina and Mr. Bhaloo's evidence is consistent with the Defendant, Mr. Tajdin's own statement in a letter he later addressed to the Plaintiff on January 4, 2010 whereby: (i) Mr. Tajdin includes a summary of his Farman projects showing that no Farman books were in fact released after 1998 until the Infringing Materials in 2009; and (ii) Mr. Tajdin requests His Highness' "authorization" and "guidance" with respect to the distribution of the Infringing Materials. On cross-examination, Mr. Tajdin admitted that the January 4, 2010 letter contains an accurate description of his printed Farman projects and that this letter was the first time that he wrote to His Highness about them.

Bhaloo Affidavit, para. 7; Sachedina Affidavit, paras. 15-16 and Exhibit "F". Transcript of the cross-examination of Nagib Tajdin on his affidavits sworn May 7, 2010, June 16, 2010 and July 13, 2010 ["Tajdin Cross"], pp. 12-13, Q. 56-59 and p. 13, Q. 60-65, 68.

18. At no time did Mr. Sachedina, either on his own behalf or on the behalf of the Aga Khan, ever consent to the publication of any Farmans by the Defendants and Mr. Tajdin has conceded that Mr. Sachedina has no power to consent to the publication of Farmans in any event.

Bhaloo Affidavit, para. 7; Sachedina Affidavit, para. 17; Tajdin Cross, pp. 95-96, Q. 560.

ii) No consent to Infringing Materials

19. At the end of December 2009, Mr. Sachedina learned that the Defendants were now publishing and distributing another book of unauthorized Farmans entitled "Farmans 1957-2009 – Golden Edition Kalam-E Imam-E-Zaman" and accompanying mp3 audio bookmark (the "**Infringing Materials**"). The translation of this title is "The Words of the Imam of the Time." Mr. Sachedina promptly contacted Mr. Tajdin to request that the Infringing Materials be withdrawn from circulation with an apology to His Highness. Mr. Tajdin responded that he would abide by

this request if he received instructions directly from His Highness. Mr. Sachedina suggested that Mr. Tajdin write to His Highness and advised His Highness of the circumstances accordingly.

Sachedina Affidavit, paras. 18-19 and 20.

20. Mr. Tajdin did not stop the distribution of the Infringing Materials. Accordingly, on January 16, 2010, the Plaintiff authorized an announcement to be read out globally in all Ismaili Jamatkhans advising that the Infringing Materials were unauthorized and should not be supported. Mr. Tajdin admitted that the announcement had been made, however, he insisted that it was authorized by Mr. Sachedina and not by His Highness, despite acknowledging that Mr. Sachedina does not actually have the authority to send such an announcement. Mr. Jiwa also acknowledged that the announcement was made and that the leaders cautioned against buying the book as it was unauthorized.

Sachedina Affidavit, para. 22, Exhibit "E"; Tajdin Cross, p. 57, Q.332, pp. 57-58, Q. 333-339 and p. 59, Q. 341-343; Transcript of the cross-examination of Alnaz Jiwa on his affidavits sworn June 16, 2010 and July 16, 2010 ["Jiwa Cross"], pp. 49-50, Q. 257-259.

21. By letter dated January 4, 2010, and received by His Highness on January 20, 2010, Mr. Tajdin sought further "guidance" by letter for the first time from the Imam with respect to the publication of the Infringing Materials and requested an audience with the Plaintiff. Mr. Tajdin's letter enclosed a copy of the Infringing Materials.

Sachedina Affidavit, paras. 23-24; Supplementary Tajdin Affidavit, paras. 1-2; Tajdin Defence, para. 37 and Tajdin Cross, p. 13, Q 60-65 and 68.

22. In response to this letter, and at the request of His Highness, Mr. Sachedina contacted Mr. Tajdin again to advise of His Highness' instructions that he immediately withdraw the Infringing Materials. Mr. Tajdin again advised that he would only comply if he received instructions directly from His Highness. As a result, the Plaintiff decided to contact Mr. Tajdin directly by letter dated January 24, 2010 whereby he stated:

"I, therefore, expect you, and the other murids who are working with you, immediately to take all the necessary measures to recall and to withdraw from circulation your recent publication and the accompanying mp3 device, and cease their printing and distribution. Also, I would like you to deliver all remaining stocks of these materials to the Institute of Ismaili Studies at 210, Euston Road, London NW1 2DA."

Sachedina Affidavit, paras. 25-26, Exhibit "G".

23. On the Plaintiff's instructions, Mr. Sachedina contacted Mr. Tajdin again to ascertain his reaction to the letter dated January 24, 2010. Mr. Tajdin confirmed to Mr. Sachedina that he would follow His Highness' instructions to withdraw the Infringing Materials. Mr. Sachedina offered to assist with any costs in withdrawing the Infringing Materials.

Sachedina Affidavit, para. 27.

24. Shortly after this conversation, however, Mr. Tajdin again reiterated his request that he had to meet with the Plaintiff in person in order to comply with his request to cease the infringement. Again, it was communicated to Mr. Tajdin that this was not possible due to the Plaintiff's extreme workload, but that Mr. Tajdin was welcome to communicate with the Plaintiff by letter.

Sachedina Affidavit, paras. 28-31, Exhibits "H"-"T".

25. The distribution of the Infringing Materials continued, and on the instructions of His Highness, Mr. Sachedina spoke with Mr. Tajdin again. At this time, Mr. Tajdin stated that he believed the letter from His Highness dated January 24, 2010 to be a forgery. This time, Mr. Tajdin demanded a meeting with His Highness.

Sachedina Affidavit, paras. 32-34.

26. After Mr. Sachedina reported this conversation to the Plaintiff, the Plaintiff wrote a second letter to Mr. Tajdin dated February 18, 2010 to confirm that he was the signatory of the letter dated January 24, 2010 and again requesting Mr. Tajdin to comply with his earlier instructions to cease infringing the Literary Works. Mr. Tajdin alleged that this second letter was also a forgery, despite seeking and receiving direct assurances from His Highness' brother, Prince Ameen, to the contrary.

Sachedina Affidavit, paras. 35-36, Exhibits "J"-"K";

27. Mr. Tajdin has since refused to produce to counsel for the Plaintiff or the Plaintiff's expert, the original copy of either the January 24, 2010 letter or the February 18, 2010 letter, for the stated reason that if he did, they would "self-destruct".

Tajdin Cross, pp. 18-21, Q. 98-114 and pp. 40-41, Q. 233-235.

iii) No consent - authorization to commence action in Canada

28. Given the history of unacceptable behaviour in the face of letters directly from His Highness and his brother, as well as the allegations of forgery showing an absence of good faith by Mr. Tajdin, His Highness did not believe it was appropriate to respond to these demands by granting an audience to Mr. Tajdin. He decided that Mr. Tajdin's allegations had overstepped acceptable comment and issued instructions to file a Statement of Claim with the Federal Court in Canada.

Sachedina Affidavit, para. 37.

29. In light of this grave and unprecedented step, His Highness authorized that a second announcement be made to Ismaili communities, but only in four affected countries (Canada, Kenya, the U.K. and the U.S.A.), advising of the sequence of events leading to filing the Statement of Claim. Mr. Sachedina was also authorized to give a briefing on this matter to the Ismaili Community's senior global leadership. Mr. Tajdin acknowledged on cross-examination that the announcement in respect of the Golden Edition was made, but again claimed that it was authorized by Mr. Sachedina despite the fact that he has no authority to do so without consulting His Highness.

Sachedina Affidavit, paras. 38-39, Exhibit "L"; Tajdin Cross, p. 57, Q. 332, pp. 60-62, Q. 353-362 and p. 59, Q. 341-343.

D. Litigation History

30. The Plaintiff commenced this action by Statement of Claim dated April 6, 2010.² By this action, the Plaintiff seeks: (i) a declaration that copyright subsists in his Literary Works; (ii) a declaration that the Defendants have infringed the Plaintiff's copyright in his Literary Works; (iii) injunctive relief; (iv) delivery up; and (v) damages, *inter alia*.

Affidavit of Christian Landeta, sworn June 28, 2010 ("Landeta Affidavit"), para. 2, Exhibit "A".

31. On April 29, 2010, the Defendants, Alnaz Jiwa and Nagib Tajdin, each served and filed a Statement of Defence.

Landeta Affidavit, paras. 3-4, Exhibits "B"- "C".

² On cross-examination, Mr. Tajdin admitted that if the Statement of Claim is authorized by His Highness, Mr. Tajdin will accept that he does not have consent to publish the book (Tajdin Cross, p. 77, Q. 439-441).

32. On May 25, 2010, the Plaintiff served and filed: (i) a Reply to the Statement of Defence of Mr. Jiwa; and (ii) a Reply to the Statement of Defence of Mr. Tajdin.

Landeta Affidavit, paras. 5-6, Exhibits “D”-“E”.

33. On June 21, 2010, the Defendants each served and filed a motion for summary judgment to dismiss this action on the basis that the Plaintiff provided consent, express and/or implied to the publication, distribution and sale of the Infringing Materials. In the Defendants’ motions for summary judgment and on cross-examination, neither Defendant has contested that copyright subsists in the Plaintiff’s Literary Works. Both Defendants acknowledge that the Plaintiff is the author of the Literary Works.

Landeta Affidavit, paras. 9-10, Exhibits “G”-“H”; Memorandum of Fact and Law of the Defendant Mr. Tajdin, dated June 18, 2010 at paras. 42-43; Memorandum of Fact and Law of the Defendant Mr. Jiwa, dated June 18, 2010 at paras. 30-32.

34. On June 28, 2010, the Plaintiff filed a motion for summary judgment seeking judgment against the Defendants recognizing copyright in the Plaintiff’s Literary Works and seeking judgment on the terms set out at paragraph 1 of the Statement of Claim.

E. The Defendants’ Admissions

i) Plaintiff is the Author of Infringing Materials

35. Both Defendants admit the allegation contained at paragraph 4 of the Statement of Claim: “A ‘Farman’ is an address by the Aga Khan as Imam to his community. A ‘Talika’ is a brief, written religious message conveyed to his community by the Aga Khan”. As a result, both Defendants admit that the Plaintiff is the author of the Infringing Materials.

Statement of Defence of Mr. Jiwa, dated April 28, 2010 in Landeta Affidavit, para. 4, Exhibit “C” [“Jiwa Defence”] para. 1, see also paras. 9, 48, 71; Statement of Defence of Mr. Tajdin, dated April 25, 2010 in Landeta Affidavit, para. 3, Exhibit “B” [“Tajdin Defence”], para. 1, see also paras. 3(a) and 3(j).

See also: Affidavit of Nagib Tajdin, sworn May 7, 2010 [“Tajdin Affidavit”], paras. 5-9; Affidavit of Alnaz Jiwa, sworn June 16, 2019 [“Jiwa Affidavit”], paras. 3-6, 22, 23, 25, 26.

36. Further, the Defendants have published and/or distributed and sold a work in which they have asserted that the Aga Khan is the author. The title of the Infringing Materials, “Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman” means “Words of the Imam of the Time”

thereby attributing authorship to His Highness. Both Defendants state that they have faithfully reproduced the Plaintiff's Literary Works.

Jiwa Defence, paras. 1, 42, 55, 62, 63; Tajdin Defence, paras. 22, 27, 28; Sachedina Affidavit, para. 18, Exhibit "D".

See also: Tajdin Affidavit, paras. 10, 12, 21.

ii) Infringing Materials are Works in which Copyright may subsist

37. Both Defendants admit the allegation at paragraph 7 of the Statement of Claim: "The Plaintiff, the Aga Khan, is a citizen of the United Kingdom and a resident of France". As a result, both Defendants admit that the Plaintiff is a qualified author for the purpose of the *Copyright Act*, R.S.C. 1985, c. C-42 ("*Copyright Act*").

Jiwa Defence, para. 1, Tajdin Defence, para. 1.

38. Mr. Jiwa further admits the allegation contained at paragraph 14 of the Statement of Claim: "The Aga Khan has been since birth a citizen of the United Kingdom. As a result, copyright exists in Canada and all Berne Convention countries worldwide in works authored by the Aga Khan". Mr. Jiwa accordingly admits that copyright exists in the Infringing Materials.

Jiwa Defence, para. 1.

ii) Defendants admit prima facie Infringement

39. Mr. Jiwa has admitted the following (a) paragraph 19 of the Statement of Claim: "The Aga Khan has not assigned or licensed the Literary Works or Readings to the Defendants"; (b) paragraph 26 of the Statement of Claim: "The Book and MP3 are composed of the following materials: (i) reproductions of a substantial part of the Plaintiff's Literary Works described above; and (ii) reproductions of a substantial part of the Readings described above"; and the Farmans contained on the audio bookmark / MP3 are "in the Aga Khan's voice".

Jiwa Defence, paras. 1 and 42.

40. Mr. Tajdin states that the Farmans contained in the Infringing Materials "are transcribed verbatim without any changes" from the words of the Imam.

Tajdin Defence, at paras. 22, 27, 28.

See also: Tajdin Affidavit, paras. 10, 12.

41. Both Defendants admit to publishing, distributing and/or selling the Infringing Materials;

Jiwa Defence, at paras. 37-41, 52, 53, 55, 57, 59, 60, 61, 63, 71; Tajdin Defence, at paras. 10, 11, 12, 13, 14, 15, 22, 27, 29, 30-35, 36, 44, 46; Tajdin Cross, pp. 100-106; and Jiwa Cross, p. 31-32, Q. 147-154, p. 33, Q. 161, p. 34, Q. 166-168 and pp. 39-41, Q. 192-203.

See also: Tajdin Affidavit, paras. 12, 13, 19, 20, 21, 22, 28, 29, 34, 36, 37; Supplementary Tajdin Affidavit, paras. 2, 17, 26; Jiwa Affidavit, paras. 6-10, 24-27, 31-33, 37.

42. Mr. Jiwa admits that since 1977, he has been told by the “Ismailia Association and the Ismaili Council, as well as from other sources, including religious lecturers and teachers...that the Aga Khan did not authorize the publication of the Farmans made by Him, and as such they could not give copies of Farmans to Jiwa”.

Jiwa Defence, para. 33.

See also: Tajdin Affidavit, para. 8; Jiwa Affidavit, para. 5.

43. Both Defendants admit the allegation contained at paragraph 24 of the Statement of Claim: “The Book indicates that it was printed in Canada. The Book does not identify the publisher of the book”. As a result, both Defendants admit that the Infringing Materials are published in Canada.

Jiwa Defence, para. 1, Tajdin Defence, para. 1; Tajdin Cross, p. 100, Q. 590-591 and pp. 105-106, Q. 630-631.

iv) Defendants’ Undertakings to Cease Infringing

44. Both Defendants undertook in their respective pleadings to cease publishing and distributing “His Farmans” upon satisfaction that this is the action so desired by the Plaintiff;

Jiwa Defence, paras. 3-4 and 77; Tajdin Defence, paras. 26, 54, 55, 59, 66.

See also : Tajdin Affidavit, paras. 4, 14; Supplementary Tajdin Affidavit, para. 26; Jiwa Affidavit, paras. 2, 26.

F. Action is authorized by the Plaintiff

45. As stated above, the present action was commenced by Statement of Claim issued on April 6, 2010. His Highness, Prince Karim Aga Khan, is the sole plaintiff to this action.

Landeta Affidavit, para. 2, Exhibit “A”.

46. On April 28, 2010, both Defendants served Statements of Defence containing allegations that the Statement of Claim was initiated by advisors to the Aga Khan or an “Usurper Plaintiff”, without the authorization of His Highness.

Jiwa Defence, paras. 6, 58; Tajdin Defence, paras. 4, 5, 56-64; Supplementary Tajdin Affidavit, para. 24; Jiwa Affidavit, paras. 23, 26.

47. Both Statements of Defence also contained undertakings from each of the Defendants to cease publishing and distributing the Infringing Materials at the request of His Highness.

Jiwa Defence, paras. 3-4 and 77; Tajdin Defence, paras. 26, 54, 55, 59, 66.

48. Mr. Tajdin agreed on cross-examination that the January 24, 2010 letter states that His Highness does not consent to Mr. Tajdin publishing his Farmans, and if the letter is genuine, he has no consent to publish the Golden Edition. Indeed, he stated that if the letter is genuine, that ends the lawsuit.

Tajdin Cross, pp. 22-25, Q. 124-134, p. 26, Q. 140.

i) The Plaintiff's Affirmation

49. On May 12, 2010, at the request of counsel for the Plaintiff, Mr. Daniel Gleason, a lawyer at the Boston law firm of Nutter McClennen & Fish LLP, met with His Highness at the Mandarin Oriental Hotel in Boston, Massachusetts for approximately 20 minutes. The purpose of this meeting was for Mr. Gleason to present an Affirmation to the Plaintiff, to assure himself that His Highness understood its contents, and to obtain the Plaintiff's signature thereon. Mr. Gleason was accompanied to this meeting by Ms. Jennifer Colman, a Certified Notary Public for the Commonwealth of Massachusetts.

Affidavit of Daniel J. Gleason, sworn June 1, 2010 [“Gleason Affidavit”], paras. 1-2;
Affidavit of Jennifer A. Colman, sworn June 1, 2010 [“Colman Affidavit”], paras. 1-2.

50. Mr. Gleason and Ms. Colman were greeted at the Mandarin Oriental by the Aga Khan's personal assistant, Sherbanoo Moledina, and were escorted to His Highness' suite, where they were introduced and engaged in a brief social conversation with His Highness. His Highness then presented his French Diplomatic passport for examination by both Mr. Gleason and Ms. Colman.

Gleason Affidavit, para. 3; Colman Affidavit, para. 3.

51. Mr. Gleason and Ms. Colman next presented three copies of the Affirmation to His Highness who assured them, after he had read it, that he understood its contents and was prepared to sign.

Gleason Affidavit, para. 4; Colman Affidavit, para. 3.

52. At that point, Mr. Gleason and Ms. Colman watched His Highness sign each of the three copies of the Affirmation. Ms. Colman then affixed her notary seal on each signed document, thereby confirming his signature to be genuine. The executed Affirmation dated May 12, 2010, states as follows:

Gleason Affidavit, para. 5; Colman Affidavit, para. 3.

AFFIRMATION

I, Prince Karim Aga Khan, do solemnly affirm pursuant to sections 14 and 15 of the Canada Evidence Act as follows:

1. I am the Plaintiff in Court File No T-514-10 filed in the Federal Court of Canada. I have personally reviewed and approved the contents of the Statement of Claim filed with the Court in this case.
2. I have retained the firm of Ogilvy Renault LLP to act as my solicitors on my behalf and have authorized the action for copyright infringement against the named defendants.
3. I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the Statement of Claim.
4. I have informed one of the defendants Nagib Tajdin in two letters which I have written to him of my instructions to stop the unauthorized publication and to deliver up the undistributed books. In the second letter I purposively added a handwritten note in order to show that the letter came from me personally.
5. I authorized the Ismaili Leaders International Forum (LIF) to inform my Community about this matter and I know that this communication reached both Mr. Jiwa and Mr. Tajdin.

Aga Khan.

Now appeared before me on this 12th day of May, 2010, Prince Karim Aga Khan, a person who did identify himself to me by means of *a passport (Republique and Française)* who did sign and solemnly affirm the above.

Jennifer A. Colman

Notary Public in and for the Commonwealth of Massachusetts [Please put name and official title and seal]

53. Other than His Highness' personal assistant, who did not participate in the meeting itself, no one else was present when Mr. Gleason and Ms. Colman obtained the Plaintiff's signature on the Affirmation.

Gleason Affidavit, para. 6; Colman Affidavit, para. 3.

54. At no time during this meeting did the Plaintiff have any difficulty understanding the purpose of the Affirmation or demonstrate any hesitation in freely affixing his signature to it.

Gleason Affidavit, para. 7; Colman Affidavit, para. 3.

55. The Defendants have received a copy (and Mr. Jiwa has received the original) of the Affirmation sworn by the Plaintiff. Mr. Tajdin admits that if the Affirmation was signed by His Highness, it clearly expresses his wish that Mr. Tajdin cease publishing the Farmans. However, Mr. Tajdin refuses to believe that it was in fact signed by His Highness. Indeed he stated that even if 10 million people confirm that it is His Highness' writing, he will not accept it. Mr. Jiwa is of the view that Mr. Gleason is either mistaken, lying or the victim of identity fraud.

Landeta Affidavit, paras. 7 and 8, Exhibit "F"; Tajdin Cross, p. 68, Q. 396 and p. 70, Q. 402-404; Jiwa Cross, pp. 22-24, Q. 106-116.

56. Mr. Tajdin and Mr. Jiwa have both declined to cross-examine Mr. Gleason or Ms. Coleman on their affidavits, despite the Plaintiff's offer to have them do so. Insofar as the Defendants question the credibility or accuracy of the affidavit of Mr. Gleason and Ms. Coleman, they should have cross-examined them. Their assertions of forgery and identity fraud represent a collateral attack on their credibility and without cross-examination, contradict the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).
57. Further, since that time, the Plaintiff submitted for examination for discovery in accordance with the September 24, 2010 Order of the Case Management Prothonotary. The Defendants also conducted a discovery of the Plaintiff on October 15, 2010. No evidence from that discovery has been put before this Court. In the absence of any evidence from that discovery having been put before this Court, an inference should be drawn that there is no further evidence on the issue of the validity of the Affirmation that would assist in determining the issues to be resolved on this motion.

II. ISSUES

58. There is one main issue on this motion for summary judgment:
- (i) Is there a genuine issue for trial that the Defendants are infringing the Plaintiff's copyright in his Literary Works because the Plaintiff does not consent to the Defendants' publication, distribution and sale of the Infringing Materials?

59. The Defendants submit that there is no genuine issue for trial because the Plaintiff provided consent to the publication, distribution and sale of his Literary Works during a 1992 religious ceremony. The Defendants further submit that all subsequent announcements and correspondence by, and on behalf of, the Plaintiff stating that he does not consent, can be disregarded by the Defendants as they are either forgeries or unauthorized statements that do not emanate from the Plaintiff himself.
60. The Plaintiff, however, submits that there is no valid defence to this action based on the Defendants' own evidence and admissions, as well as the Plaintiff's evidence that His Highness has never consented to the publication, distribution and sale of his Literary Works by the Defendants. The Plaintiff submits that not only should this action not be dismissed, but that summary judgment should be ordered against the Defendants for failing to establish any defence to copyright infringement capable of succeeding at trial. The Plaintiff's request for summary judgment is the subject of a Notice of Motion dated June 28, 2010.

III. SUBMISSIONS

A. Law on Summary Judgment

61. A party may bring a motion for summary judgment on all issues raised in the pleadings at any time after the defendant has filed a defence, but before a trial date has been scheduled.

Federal Courts Rules, SOR/98-106, as am. [*Federal Courts Rules*], Rule 213.

62. A court should not grant a motion for summary judgment unless it is satisfied that there is "no genuine issue for trial". The test for granting summary judgment is whether the responding party's case "is so doubtful that it does not deserve consideration by the trier of fact at a future trial".

Premakumaran v. Canada (2006), 270 D.L.R. (4th) 440 at para. 8, 2006 FCA 213 (F.C.A.) [*Premakumaran*]; *Federated Co-Operatives Ltd. v. Canada*, [1999], 165 F.T.R. 135 at para. 7, aff'd 2001 FCA 23, 200 F.T.R. 106, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 183; *Entral Group International Inc. v. McCue Enterprises*, 2010 FC 606 at para. 39 [*Entral*].

63. The moving party on a motion for summary judgment bears the ultimate burden of establishing that there is no genuine issue for trial:

Federal Courts Rules, supra, Rule 214; *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.* (1999), 1 C.P.R. (4th) 88 at para. 12 (F.C.T.D.); *NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)* (1998), 85 C.P.R. (3d) 328 at paras. 4-5 (F.C.A.) [*NFL Enterprises*].

64. As a result, the responding party “may not rest on the mere allegations of denials of its pleadings”, but must provide evidence establishing a genuine issue for trial.

White v. Canada, [1998] 152 F.T.R. 39 at para. 25, aff'd [1999] F.C.J. No. 2024 (F.C.A.); *Kosłowski v. Courier*, 2009 FC 883 at para. 13; *Film City Entertainment Ltd. v. Golden Formosa Entertainment Ltd.*, 2006 FC 1149 at para. 17 [*Film City*].

65. As submitted in detail below, the Plaintiff's action for copyright infringement is well-founded. The law and evidence submitted by the Plaintiff on this motion clearly demonstrate that this action presents a case for summary judgment in favour of the Plaintiff. The Defendants, on the other hand, have no evidence to support their defence that the Plaintiff consented or consents to the reproduction of the Infringing Materials and their motions should be dismissed accordingly.

B. Copyright Law

i) Subsistence of Copyright in the Aga Khan's Literary Works

66. The Certificate of Copyright Registration in the unpublished literary works titled “Farmans” issued to Prince Karim Aga Khan on June 23, 2010 is admissible as evidence in this proceeding without further proof.

Copyright Act, R.S.C. 1985, c. C-42 [“*Copyright Act*”], section 58(3).

67. Copyright in Canada subsists in any original literary work provided that the author was, at the date of the making of the work, a citizen or subject or, a person ordinarily resident in a “treaty country”.

5. (1) Conditions for subsistence of copyright - Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country; [*Emphasis added*]

...

Copyright Act, section 5(1); *Wing, supra* at paras. 21-25, 43-48; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at paras. 16, 25-36, 2004 SCC 13 [Law Society].

68. A country that becomes a Berne Convention country or a WTO Member after the date of making the literary work is nevertheless “deemed to have been a Berne Convention country or a WTO Member at the date of the making or publication of the work”.

Copyright Act, supra, section 5(1.01); *Wing, supra* at paras. 21-24, 43-48.

69. The Plaintiff submits that a valid copyright exists in the Literary Works in Canada. The Defendants do not dispute that the Farmans and Talikas are original literary works created by the Aga Khan. The Infringing Materials also acknowledge the Plaintiff to be the author.

Plaintiff’s Responding Memorandum dated July 2, 2010 [“Plaintiff’s Responding Memorandum”], *supra*, at paras. 36-37.

70. The Aga Khan has been a U.K. citizen since birth and is a resident of France, for which he holds a diplomatic passport. Both Defendants admit that the Plaintiff is a U.K. citizen. The U.K. is a WTO Member and has been a Berne Convention country since December 5, 1887. As a result, the Plaintiff submits that copyright in the Literary Works subsists in Canada.

Fox, Harold G. and McKeown, John S., *Fox on Canadian Law of Copyright and Industrial Designs*, looseleaf 4th ed., (2009, Toronto: Thomas Reuters Canada Limited) [“Fox”] p. 30-28; Plaintiff’s Responding Memorandum, *supra*, at paras. 38-39.

71. To the extent the Defendants have put in issue the existence of copyright in the Literary Works, which is denied, the Plaintiff further claims the benefit of the presumption contained at section 34.1(1)(a) of the *Copyright Act* that copyright is presumed to subsist in the Literary Works, unless the contrary is proven.

Copyright Act, supra, section 34.1(1)(a); *Wing, supra* at paras. 25, 47; *NFL Enterprises, supra* at para. 7.

ii) Ownership of Copyright

72. As the sole author of the Literary Works the Plaintiff is the “first owner of the copyright therein”.

Copyright Act, supra, section 13(1).

73. In any event, the Plaintiff submits that the Aga Khan’s ownership of the Literary Works is not disputed in this proceeding. The Defendants each admit that the Aga Khan is the author of the

Literary Works. In fact, the Defendants appear to rely on the authenticity of their reproduction of the Aga Khan's Literary Works to sell the Infringing Materials.

Wing, supra at para. 52; *Entral, supra* at paras. 40-41; Plaintiff's Responding Memorandum, *supra* at paras. 37, 41-43.

74. To the extent the Defendants have put in issue the Plaintiff's title to copyright in the Literary Works, which is denied, the Plaintiff further claims the benefit of the presumptions contained at section 34.1(1)(b) of the *Copyright Act* that the Plaintiff is presumed to be the owner of copyright in the Literary Works, unless the contrary is proven.

Copyright Act, supra, sections 34.1(1)(b); *Wing, supra* at paras. 25, 47; *NFL Enterprises, supra* at para. 7.

ii) *Infringement of the Plaintiff's Literary Works*

75. As the owner of copyright in the Literary Works, the Aga Khan has the exclusive right to produce or reproduce the work, including the right to authorize the production or reproduction of his Literary Works:

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right ...

...

to authorize any such acts.

Copyright Act, supra, section 3(1).

76. The Defendants have infringed the Aga Khan's copyright by reproducing the protected Literary Works, in substantial part, without the Aga Khan's consent and in manner that is contrary to section 27(1) of the *Copyright Act*:

27. (1) Infringement generally - 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, supra, sections 3(1) and 27(1); *Wing, supra* at paras. 55-61.

77. The Plaintiff is not required to establish that the Defendants had knowledge of the Plaintiff's copyright as a prerequisite for proving copyright infringement:

Section 3 and s. 17(1) [s. 27(1)], however, admit of no prerequisite of knowledge of the existence of the violated copyright or that the action in question amounts to infringement. Infringement is the single act of doing something which ‘only the owner of the copyright has the right to do’.”

Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357 at 375.

78. The Defendants each admit to reproducing, publishing, distributing and selling the Infringing Materials containing the Aga Khan’s Literary Works.

Plaintiff’s Responding Memorandum, *supra*, para. 44; *Wing*, *supra* at paras. 60, 68.

79. The fact that the Defendants purport not to have profited from the reproduction, publication, distribution and sale of the Infringing Materials is irrelevant. Proof of commercial gain is not necessary for establishing copyright infringement.

Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs de la Rotiserie St-Hubert de Drummondville (1986), 17 C.P.R. (3d) 461 at 471 (Que. Sup. Ct.); Tajdin Defence, paras. 30-38; Jiwa Defence, paras. 38, 40-42.

See also, Tajdin Affidavit, para. 36; Jiwa Affidavit, para. 9.

80. Since the Defendants in the case at bar admit to the publication, distribution and/or sale of the Infringing Materials containing the Plaintiff’s Literary Works, they have the overall burden on this motion to establish that the Aga Khan consents to the use of his Literary Works by the Defendants. The Plaintiff submits below that the Defendants’ defence to infringement based on consent has no foundation. As a result, the Defendants motion for summary judgment should be denied and the Plaintiff’s motion for summary judgment granted.

C. The Aga Khan does not consent to the Defendants’ use of his Literary Works

81. According to the Supreme Court of Canada, “[t]he 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”.

Bishop v. Stevens, [1990] 2 S.C.R. 467 at 485-487.

i) No consent provided during Mehmani meeting

82. Both Defendants allege that the Plaintiff expressly consented to the publication and distribution of the Infringing Materials during a meeting between the Plaintiff and Mr. Karim Alibhay during a religious ceremony (Mehmani) that took place in Montreal in 1992, as follows:

“The first Farman book that was published by this defendant was presented before its distribution and circulation to the Imam during Mehmani in Montreal on August 15, 1992. As indicated in the cover page, the book presented to Him was Volume 1, containing Farmans that the Imam delivered to the Western countries. The Imam responded by placing His hand on the Farman Book presented to Him, and after giving his Blessings, the Imam gave the guidance to continue the work (the publication of His Farmans) with Blessing for the success of the work undertaken, and stated that other work could be undertaken together with the Imam...”

“Jiwa states that the Aga Khan personally gave His consent and blessings to the publication of these Farman books on August 15, 1992, and also stated then to ‘continue’ the work.”

Tajdin Defence, para. 11; Jiwa Defence, paras. 5, 53.

See also, Tajdin Affidavit, paras. 15-18, 35; Jiwa Affidavit, paras. 24-26

83. According to Mr. Alibhay, the purported consent to publish, distribute and sell the Plaintiff's Literary Works was specifically obtained, as follows:

“Tajdin had published a Farman book, titled, “Kalam-e Imam Zaman, Farmans to the Western World, Volume 1”, containing Farmans of the Imam made to the Western countries, and he informed me that it had just been printed and that he wished to seek the Imam's blessings before starting to distribute the Farman book to the Jamats. [...]

After the Imam had blessed us and accepted our offerings, the Imam looked at the Book which I had placed on the plate containing fruits and nuts, as it is rather unusual for Ismailis to place anything other the (sic) fruits and nuts (which are wrapped in saran wrap). After a short while, the Imam placed His hand on the Farman Book, when I humbly asked the Imam for His blessings, and I said to Him in French: “Mowlana Hazar Imam, que pouvons nous faire pour l'Imamat?” (Mowlana Hazar Imam – our Lord, the present Imam – what else can we do to serve the Imamat?”

The expression on the Imam's face changed completely and brightened, He came closer to us from His chair as if He wanted to embrace us, he then put His right hand on my shoulder and placed His left hand again on the Farman book (which was in red cover) responded to my supplication in French: “Continuez ce que vous faites” (continue what you are doing), and then ended by saying “et ensuite nous allons voir ce qu'on peut faire ensemble” (and then we will see what we can do together). All the time while we were with the Imam, after He saw the Farman book, His hand was placed on the Farman book, blessing the book. He then finished the ceremony by giving us blessings for Barakat (abundance) and success.

Affidavit of Karim Alibhay, sworn April 28, 2010, paras. 9, 11-12.

84. Despite relying in part on the 1992 Mehmani as the basis for consent, Mr. Jiwa admitted on cross-examination that he was not involved in 1992 Mehmani or in the 1998 discussion with Mr. Sachedina and Mr. Tajdin.

Jiwa Cross, p. 4, Q.11 and pp. 55-56, Q. 296-297.

85. Mr. Tajdin made the following admissions on cross-examination in connection with the circumstances of the 1992 Mehmani:

- (a) he printed the first Farman book and had received several cartons of the first volume the day prior to the Mehmani on August 14, 1992. Tajdin did not have time to seek guidance in writing from His Highness before having the books printed;

Tajdin Cross, pp. 90-91, Q. 525-530.

- (b) Mr. Tajdin did not tell any of His Highness' advisors, or anyone at the leadership, that he planned to have the book presented to His Highness at the Mehmani;

Tajdin Cross, p. 91, Q. 532.

- (c) Mr. Tajdin himself did not present the book and Mr. Alibhay did not mention Mr. Tajdin's name during his personal Mehmani meeting with His Highness;

Tajdin Cross, pp. 92-93, Q. 539-540.

- (d) Mr. Alibhay presented the book on the plate of fruit and nuts, without telling anyone except for Mr. Tajdin;

Tajdin Cross, p. 93, Q. 544-545.

- (e) His Highness merely put his hand on the book; he did not open it, nor did he take the book away with him to examine it (Mr. Alibhay still has the copy of the book that was presented);

Tajdin Cross, pp. 93-94, Q. 546, Q. 547-549 and pp. 94-95, Q. 552-553.

- (f) After the Mehmani, Mr. Tajdin did not write to His Highness to confirm what he was doing with the book, nor did he send any copy of the book to His Highness.

Tajdin Cross, p. 95, Q. 554-559.

86. The Plaintiff submits that the above-described "consent" to use the Plaintiff's Literary Works, which is espoused by the Defendants as their primary defence to copyright infringement in this proceeding, cannot satisfy their onus to provide evidence of "clear" consent to operate as a proper defence to infringement.

- (a) First, by the Defendants' own admissions, this purported "consent" was in relation to a book of Farmans published in 1992 that is not even the subject of the present proceeding. The Infringing Materials were not released for publication until December 2009;
- (b) Second, by the Defendants' own admissions, the Plaintiff did not open the book presented or review any of its content. There is no evidence that the Plaintiff even knew of, or comprehended, the subject-matter of the book that was presented to him;
- (c) Third, by the Defendants' own admissions, any words spoken by the Plaintiff to the individual were communicated in the context of a religious ceremony. The alleged words spoken do not "clearly" communicate the Plaintiff's consent to any publication, distribution and sale of the Infringing Materials by the Defendants. At no time does the individual even mention the Defendants' names, nor does he make any explanation as to the contents of the book or request to publish, distribute and sell the book. There is no discussion of any consideration between the parties of any kind;
- (d) Fourth, the Defendants' evidence is that the word "ensemble" was used by His Highness. If this is so, it does not imply any ability to act alone, but requires that any work be undertaken "together" with His Highness or other appropriate Ismaili institutions;
- (e) Fifth, any alleged consent given was not given to the Defendants but to a third party. The Defendants do not submit that this third party is personally known to the Plaintiff, nor do they submit that there were ever any prior, or subsequent meetings, between the third party and the Plaintiff;
- (f) Sixth, there were approximately 500 to 700 Ismailis from various congregations awaiting an audience with His Highness during Mehmani that same day. To afford each Ismaili the opportunity to meet His Highness, individual audiences with the Imam were for a duration of only a few seconds;

Bhaloo Affidavit, para. 8.

- (g) Seventh, in his letter dated January 4, 2010 to the Plaintiff, the Defendant Mr. Tajdin, in his own words, seeks consent from the Plaintiff for the publication of the Infringing Materials, as follows:

"I the undersigned, Nagib Tajdin Nasser Kanji, submit as follows:

It is with utmost respect and submission to the House, of Imam-e-Zaman that I attach a copy of the book titled Golden Edition, a compilation of many of the Khudawind's Farmans made from 1957-2009.

This book is a collective effort from several Murids who have worked on its compilation for many years with love and devotion and with Khudawind's blessings with the aim of preserving, in one compilation, 50 years of Farmans to be submitted as Nazrena for Khudawind's Golden Jubilee – unfortunately so late. A summary of the Farman project is given on the next page.

With Khudawind's authorization, we also seek to give Umedwari of copies of this Golden Edition for each Jamatkhana in the world.

We are in need of direction, wisdom and guidance as to this project and also for other future long term projects, such as the compilation, translation and publication of the Farmans of Mowlana Aga Ali Shah and Mowlana Aga Hassanaili Shah, from various manuscripts, a project to be completed for the next Diamond Jubilee, Inshallah.

I therefore beg for an audience at Khudawind's convenience for further guidance in this matter." [Emphasis added].

This letter is inconsistent with the Defendants' contention that they already had the Plaintiff's "consent" to publish, distribute and sell the Infringing Materials based on the third party's August 1992 encounter with the Plaintiff at Mehmani; and

Sachedina Affidavit, Exhibit "F"; Supplementary Tajdin Affidavit, para. 3, Exhibit "A".

- (h) Eight, the Affirmation sworn by the Plaintiff, and provided to the Defendants on May 14, 2010, further advises "I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the Statement of Claim". The signature on this Affirmation has been attested to by two persons who have sworn and filed affidavits with this Court and are available to be cross-examined.

Gleason Affidavit, Exhibit "A"; Colman Affidavit, para. 3; Landeta Affidavit, paras. 7-8, Exhibit "F".

ii) No consent from Mr. Sachedina on behalf of His Highness

87. The Defendant, Mr. Tajdin, also purports to have obtained consent to publish His Highness' Farmans from Mr. Sachedina on January 2, 1999.

Tajdin Affidavit, para. 24.

88. The Plaintiff submits that this defence to infringement was not raised in any Statement of Defence, and as such, should not be considered by this Court. In any event, the law is clear that the consent must come from the owner of the copyright. Moreover, the purported consent was not even in relation to the Infringing Materials. Finally, the Defendants have no evidence to establish that Mr. Sachedina was authorized to consent to the publication, distribution and sale on His Highness' behalf. Mr. Sachedina himself has testified that no such consent was ever provided.

Sachedina Affidavit, para. 17.

Bishop, supra.

iii) No other implied consent

89. The Defendants also purport to have obtained "implied consent" to publish, distribute and sell the Infringing Materials on the following bases: (i) they purport to have received no complaints

about their activities since they started distributing His Highness' Farmans in 1992; (ii) the new Ismaili Constitution does not vest any institution with powers to compile or publish Farmans, but is silent on the issue; and (iii) since Ismailis are entitled to have access to Farmans, any copying and distribution of Farmans is permitted.

Jiwa Defence, paras. 23-28, 43, 48, 51, 52, 55, 63; Tajdin Defence, paras. 13, 16-20, 29, 42; Jiwa Cross, pp. 4-9, Q. 10-36.

See also, Tajdin Affidavit, paras. 22, 34; Jiwa Affidavit, paras. 10, 17-18, 27, 30, 32-33, 37-39.

90. These allegations are unsupportable in the face of the complaints made by: (i) Mr. Sachedina on behalf of His Highness; (ii) the letters by His Highness and his brother; (iii) the public announcements to the whole Ismaili community (which both Mr. Jiwa and Mr. Tajdin admit were made, but which Mr. Jiwa says are simply ignored) ; (iv) the Defendants' own actions in continuing to seek consent and authorization from His Highness; and (v) the Defendants' own statements that they had sought to obtain copies of Farmans and were told that the Aga Khan did not authorize publication of Farmans.

Plaintiff's Revised Responding Memorandum, *supra* at paras. 15-29, 51-58; Jiwa Cross, pp. 50-51, Q. 261-264.

91. Contrary to the Defendants' statements, the Plaintiff has submitted evidence that there were complaints concerning the Defendants' past unauthorized distribution of Farmans.

Sachedina Affidavit, paras. 15-16; Bhaloo Affidavit, paras. 4-7;

92. The new constitution expressly provides that any Ismaili who, without permission, prints or publishes or circulates any material purporting to be in the name of the Imam is liable to disciplinary action. Mr. Jiwa admits he has not sought such permission.

Tajdin Cross, Exhibit 13 (Article 14); Jiwa Cross, p. 14, Q. 57.

93. The law is also clear that silence to a request for authorization cannot constitute an authorization to reproduce a protected work. The Plaintiff therefore submits that, even if true, which is denied, a lack of prior complaints concerning prior Farman publications cannot constitute consent.

Breen v. Hancock House Publishers Ltd. (1985), 6 C.P.R. (3d) 433 at 437 (F.C.T.D.); *Warner Brothers-Seven Arts Inc. v. CESM-TM Ltd.* (1971), 65 C.P.R. 215 at 232 (Ex. Ct.).

94. There is an authorized policy governing the distribution of Farmans to the community. Providing the community with access to Farmans cannot be equated to an implied consent to the publication, distribution and sale of the Plaintiff's Literary Works. Further by Mr. Jiwa's own admission since 1977, he has sought to obtain copies of Farmans and was told that the Aga Khan did not authorize the publication of the Farmans. Mr. Tajdin also admits that local institutional leaders would not provide him with copies of Farmans.

Sachedina Affidavit, paras. 9-13, Exhibits "B"- "C"; Jiwa Defence, para. 33; Tajdin Affidavit, para. 8.

95. Finally, in any event, to the extent there has been any lack of clarity concerning authorization to use the Plaintiff's copyright, which is denied, the Plaintiff has repeatedly communicated to the Defendants that he does not authorize or consent to the Defendants' publication, distribution or sale of the Infringing Materials. The Plaintiff's lack of authorization has been communicated by: (i) the Plaintiff directly to the Defendant Mr. Tajdin; (ii) by the Head of the Department of Jamati Institutions at the Plaintiff's Secretariat, Mr. Sachedina, directly to Mr. Tajdin; (iii) by the Plaintiff's brother, Prince Aryn, directly to the Defendant Mr. Tajdin; (iv) by announcement to all the Jamat, as authorized directly by the Plaintiff; and (v) by Affirmation signed by the Plaintiff and provided to the Defendants on May 14, 2010.

Sachedina Affidavit, paras. 14-40, Exhibits "D"- "L"; Gleason Affidavit, paras. 2-7, Exhibit "A"; Colman Affidavit, para. 3.

96. To the extent that there is any remaining issue or concern that the Plaintiff somehow consented to the publication, distribution and sale of any Farman at any time, which is strictly denied, the law provides that consent without consideration can be revoked. The Defendants do not assert that there has ever been consideration in exchange for the use of His Highness' Farmans. Since the launch of the Infringing Materials, the Plaintiff has clearly communicated through a variety of different channels, that he does not consent to the Defendants' use of his Literary Works.

Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum (1983), 76 C.P.R. (2d) 276 at paras. 18-21 (B.C.C.A.).

iv) The Defendants' Allegations of Forgery and Unauthorized Complaints

97. The Defendants' contention that they have consent from the Plaintiff to publish the Infringing Materials appears to be based on two assumptions: (i) the Plaintiff consented to the Defendants' use of his Literary Works during a brief encounter with Mr. Alibhay during a 1992 religious

ceremony; and (ii) the Defendants have never been asked to cease publishing, distributing and selling the Infringing Materials since all subsequent correspondence from His Highness to Mr. Tajdin was forged, including the Plaintiff's Affirmation sworn before Mr. Gleason and Ms. Colman. In addition, the Defendants contend that all requests from Mr. Sachedina, all public announcements to the community, and even the commencement of this action, were not authorized by the Plaintiff.

Tajdin Affidavit, paras. 29-34; Supplementary Tajdin Affidavit, paras. 7-24; Jiwa Affidavit, paras. 24, 26.

98. The Defendants' allegations of forgery and lack of authorization concerning the Plaintiff's subsequent complaints over his infringing activities, are not relevant to the issues of infringement, and in any event, are without foundation.
99. According to the evidence of Mr. Tajdin, he had reason to believe that the January 24, 2010 letter from His Highness to Mr. Tajdin and the Affirmation signed by His Highness on May 12, 2010 were forged. Based on this belief, he sought the opinion of three handwriting experts and attached their respective reports to his affidavit, including: (i) report from Graziella Pettinati on January 24, 2010 letter ("Pettinati Report"); (ii) Report from Wendy Carlson on January 24, 2010 letter ("Carlson Report"); (iii) Report from Graham Ospreay on January 24, 2010 letter ("Ospreay Interim Report"); (iv) Report from Graham Ospreay on Affirmation ("Ospreay Affirmation Report").

Supplementary Tajdin Affidavit, paras. 5-8, 22-24, Exhibits "C", "D", "F", "G";

100. Only Mr. Ospreay subsequently swore an expert affidavit in compliance with the *Federal Courts Rules* ("Final Ospreay Report"), the Plaintiff assumes that the Defendants have chosen not to rely on the Pettinati and Carlson Reports.

Affidavit of Graham Ospreay sworn July 14, 2010 ["Final Ospreay Report"].

101. There are both procedural and substantive problems with this Court accepting the Defendants' expert evidence:

(a) Procedural Issues

102. The Pettinati and Carlson Reports have been submitted into evidence indirectly as exhibits to the Supplementary Tajdin Affidavit. As a result, these expert reports have not been tendered as

sworn expert affidavits in compliance with the *Federal Courts Rules*. The Plaintiff has been denied the opportunity to cross-examine these experts to test the conclusions in their reports.

Federal Courts Rules, supra, Rules 80(1), 83-84, 363.

103. The Plaintiff's expert, Brian Lindblom, has been denied the opportunity to examine the original set of documents which were analyzed by the Defendants' expert, Mr. Ospreay. This has left Mr. Lindblom "unable to assess some of the characteristics Mr. Ospreay identified, most particularly where they concern speed of writing and subtle connections and disconnections"; this is significant in light of Mr. Ospreay's opinion that the signature on the letter of January 24, 2010 shows hesitation in movement and his own admission that it is important to have originals in order to determine, *inter alia*, writing speed.

Affidavit of Brian Lindblom sworn August 10, 2010 [Lindblom Affidavit], para. 17;
Revised Combined Motion Record of the Plaintiff, Tab 8; Ospreay Cross, pp. 79-80, Q.
372-375 and pp. 80-81, Q. 377-380.

104. Mr. Tajdin has steadfastly refused to provide to the Plaintiff the original January 24, 2010 or February 18, 2010 letter from His Highness for inspection by the Plaintiff's lawyers or expert.

Tajdin Cross, pp. 18-21, Q. 98-114 and pp. 40-41, Q. 233-235; and Ospreay Cross, pp.
21-22, Q. 98-103 and pp. 22-23, Q. 104-109.

105. In the face of the Defendants' refusal to provide the Plaintiff and its expert with the original set of documents examined by their expert in coming to his conclusions, the Defendants' expert evidence should not be admitted, or alternatively, given no weight whatsoever.
106. Additionally, the Defendants persistence in the allegation that the Affirmation was not signed by the Plaintiff should not be admitted, or alternatively, given no weight, for the additional reason that the Defendants refusal to cross-examine Mr. Gleason and Ms. Coleman constitutes a violation of the rule in *Browne v. Dunn*.

(b) Issues of Substance

107. Furthermore, the expert evidence submitted in support of the Defendants' allegations of forgery are significantly flawed and should be granted no weight by this Court, for the reasons set out in the paragraphs which follow.

108. Even if the Plaintiff were afforded an opportunity to cross-examine the Defendants' experts, or examine the original documents they analyzed, none of the experts have submitted evidence that can be properly tested: all of the experts based their reports on "known" signatures provided to them by the Defendant, Mr. Tajdin. There is no evidence that any of the so-called "known" signatures are those of the Plaintiff. There is also no way of knowing whether any of the "known" signatures were tampered with or modified before being provided to the experts.

Harris v. Canada Customs & Revenue Agency, [2002] F.C. 484, 214 F.T.R. 1.

Ospreay Cross, pp. 24-25, Q. 110-116 and pp. 25-26, Q. 117-118..

109. Notably, the Defendants have not provided any handwriting analysis reports on His Highness' letter to Mr. Tajdin dated February 18, 2010, nor have they submitted any handwriting analysis reports comparing the Plaintiff's signatures on His Highness' letters to Mr. Tadjin dated January 24, 2010, February 18, 2010 and the Affirmation sworn May 12, 2010.

Ospreay Cross, pp. 82-83, Q. 383-389.

The Evidence of Graham Ospreay

110. Evidence was provided by Mr. Graham Ospreay ("Ospreay"). Ospreay has not taken examinations to support his qualifications and is neither a member of the Canadian Society of Forensic Science (or any other forensic science organization in Canada for that matter). Ospreay belongs to an organization which sells its credentials on the internet for a fee.

Ospreay Cross, p. 21, Q. 96-97; Exhibit "F" to the Lindblom Affidavit and Lindblom Affidavit, para. 12.

111. Ospreay initially based his comparison of the signature on a copy of the January 24, 2010 letter and a copy of the Affirmation signed May 12, 2010 with 10 "known" signature specimens. Of those 10 specimens, only 2 (K1 and K7) were originals, with the earliest specimen being 14 years old (1996), and the most recent specimen being a portion of a "poor copy" of an undated letter which Ospreay was told by the Defendants was dated December 11, 2009.

Interim Report dated May 30, 2010, Exhibit 1 to the Ospreay Cross, pp. 1-2, and Ospreay Cross, pp. 11-12, Q. 48-51, pp. 13, Q. 59-63 and pp. 72-75, Q. 326-353.

112. The Ospreay Interim Report and Affirmation Report were updated by Ospreay who by then had been given access to the originals of the January 24, 2010 letter (by the Defendants) and May 12,

2010 Affirmation (by the Plaintiff). Additionally, he was provided with an 10 additional “known” signature specimens by the Defendants.

Ospreay Report 9B and 9C.

113. The expert evidence of Mr. Ospreay is significantly flawed in the following respects:

- (a) Ospreay Report 9B compares the signature on the January 24, 2010 letter to 20 “known” signatures specimens. The Ospreay Affirmation Report 9C uses the same comparator specimens. Of those 20 comparator specimens, the closest in time to the signature on the letter of January 24, 2010 was K1, described by Mr. Ospreay as “[a] portion of a letter (photocopy), bearing the known signature of Aga Khan, dated: December 11, 2009”. The next closest is K2, which is undated but purported to be dated 2007; there were no comparator documents between 2008 and 2006. Mr. Ospreay admitted on cross-examination that he asked the Defendant for more contemporaneous signature specimens, though he failed to state this in his report.

Ospreay Report 9B, p. 2; transcript of the cross-examination of Graham Ospreay on his affidavit sworn July 14, 2101 [“Ospreay Cross”], p. 76, Q. 354-359; and Ospreay Cross, pp. 57-58, Q. 250-255 and pp.68-69, Q. 310.

- (b) On cross-examination, Mr. Ospreay acknowledged the importance of having contemporaneous signature specimens. He explained as follows:

Q. What about the change over time...why do you need it contemporaneous? You agree with me that you do need contemporaneous specimens?

A. It’s best suited, yes.

Q. And why do you need those? Because there is a possibility of change over time?

A. There could be. It could also be the fact that...I have seen where an individual has a broken arm at the particular time the document is purportedly executed. So, yes, it’s always best suited to have like-type documents executed as close to or on the same time frame as the questioned signatures as possible.

Ospreay Cross, p. 68, Q. 308-309.

- (c) Importantly, Mr. Ospreay was not made aware of the fact that the Plaintiff had injured his shoulder of his writing arm in a skiing accident in December 2008. Despite giving a “broken arm” by way of an example of a relevant health consideration, upon being advised of the Plaintiff’s skiing accident, Mr. Ospreay would only admit that knowledge of the Plaintiff’s accident “could be relevant” though he did concede that if he had known, he would have included it in his report and he would have asked for documents signed before and after the accident. He agreed that it is “possible” that a shoulder injury could cause a signature to be written more slowly, and to be more hesitant.

Ospreay Cross, p. 69, Q. 312-314, p. 70, Q. 316-317, pp. 70-71, Q. 318-325 and pp. 81-82, Q. 381-382.

- (d) Of the 20 comparator “known” signature specimens, only one (K1), which is undated on its face, is purportedly dated after the Plaintiff’s December 2008 skiing accident. Ospreay further admitted that: K1 is a “poor copy” (having acknowledged the importance of having originals for various types of analyses) and that he was not given a complete document by the Defendants.

Ospreay Cross, pp. 72-75, Q. 326-353, pp. 79-80, Q. 372-375 and p. 376, p. 80.

- (e) Mr. Ospreay was not made aware by the Defendants of the fact that the Plaintiff was in his seventies. He would only concede that this was “possibly relevant” and that the relevance depended on the “health of an individual” despite acknowledging that he had previously published an article that stated that handwriting undergoes many natural changes over time.

Ospreay Cross, pp. 65-66, Q. 295-298 and p. 78-79, Q. 366-370.

- (f) Mr. Ospreay’s stated methodology was to note “fundamental” dissimilarities and he acknowledged that he failed to mention some similarities, despite acknowledging on cross-examination that it could be important to mention both similarities and dissimilarities;

Ospreay Cross, p. 63, Q. 281-282, pp. 49-50, Q. 215-218, p. 50-52, Q. 219-230, p. 52, Q. 231, and p. 52, Q. 233

Exhibit 9B to the Affidavit of Graham Ospreay sworn July 14, 2010 [“Ospreay Report 9B”].

114. For all of the above reasons, the Plaintiff submits that the Defendants’ evidence on the alleged forgeries is of no probative value.
115. This should be weighed against the Plaintiff’s direct evidence from the Head of the Department of Jamati Institutions at the Plaintiff’s Secretariat, Mr. Sachedina, that: (i) the Plaintiff authorized Mr. Sachedina to communicate to Mr. Tajdin on several occasions that he does not consent to the Defendants’ use of his Literary Works; (ii) the letters dated January 24 and February 18, as well as the public announcements to the community, were all authorized by the Plaintiff; and (iii) the present action was authorized by the Plaintiff.

Sachedina Affidavit, paras. 37-39, Exhibit “L”.

116. In addition, the Plaintiff’s own evidence, in the form an Affirmation sworn in the presence of independent counsel and a notary public, each having no previous involvement with the Plaintiff or this proceeding, clearly states that the Plaintiff: (i) authorized the present action against the Defendants; (ii) does not consent to the Defendants’ distribution of the Infringing Materials; (iii)

sent the letters dated January 24 and February 18, 2010 to Mr. Tajdin; and (iv) authorized the community announcements concerning the Infringing Materials.

Gleason Affidavit, paras. 1-7, Exhibit "A"; Colman Affidavit, para. 1.


Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 15.02; *Federal Courts Rules*, *supra*, Rule 4 (the "gap" rule); *Parson's Road Property Owners Assn. v. Vadium Corp.* (1998), 18 C.P.C. (4th) 94 at para. 7 (Ont. Ct. Gen. Div.); *Suellothan Bauchemie (Canada) Ltd. v. Raanani Estate* (2003), 33 C.P.C. (5th) 312 at paras. 15, 19 (Ont. Sup. Ct.); *Federal Courts Act*, R.S.C. 1985, c. F-7, section 11(3).

117. Finally, having had the opportunity to examine the Plaintiff for discovery on these issues, and in the absence of any evidence from that discovery being submitted for consideration on the Defendants' motions, the Court should draw the inference that there is no further evidence that could assist a court disposing of the issues on the Defendants' motions.
118. The evidence is clear that the Plaintiff does not, and has not ever, consented to the Defendants' use of his Literary Works. The Plaintiff's evidence presents a clear case for summary judgment that the Defendants are liable for copyright infringement. It follows that the Defendants' motions for summary judgment should be dismissed.

IV. ORDER SOUGHT

119. The Plaintiff respectfully requests that the Defendants' motions for summary judgment be dismissed with costs fixed in the amount of \$30,000.00 to be payable forthwith to the AKDN Foundation, or such other charitable organization as may be designated by the Plaintiff..
120. Such further and other relief as counsel may advise and to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2010.
AND REVISED this 22nd day of November, 2010


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V. LIST OF AUTHORITIES

	<u>Case Law</u>
1.	<i>Bishop v. Stevens</i> , [1990] 2 S.C.R. 467
2.	<i>Breen v. Hancock House Publishers Ltd.</i> (1985), 6 C.P.R. (3d) 433 (F.C.T.D.)
3.	<i>Brisson v. Unibroue inc.</i> [2000] J.Q. No. 3993 (C.S.)
4.	<i>Canada v. James Lorimer and Co.</i> (1984), 77 C.P.R. (2d) 262 (F.C.A)
5.	<i>Canusa Systems Ltd. v. Canmar Ambassador (The)</i> , [1998], 146 F.T.R. 314 (F.C.T.D.)
6.	<i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , [2004] 1 S.C.R. 339, 2004 SCC 13
7.	<i>Compo Co. v. Blue Crest Music Inc.</i> , [1980] 1 S.C.R. 357
8.	<i>Entral Group International Inc. v. McCue Enterprises</i> , 2010 FC 606
9.	<i>Federated Co-Operatives Ltd. v. Canada</i> , [1999], 165 F.T.R. 135, aff'd 2001 FCA 23, 200 F.T.R. 106, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 183
10.	<i>Film City Entertainment Ltd. v. Golden Formosa Entertainment Ltd.</i> , 2006 FC 1149
11.	<i>F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.</i> (1999), 1 C.P.R. (4th) 88 (F.C.T.D.)
12.	<i>Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum</i> (1983), 76 C.P.R. (2d) 276 (B.C.C.A.)
13.	<i>Koslowski v. Courrier</i> , 2009 FC 883
14.	<i>NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)</i> (1998), 85 C.P.R. (3d) 328 (F.C.A.)
15.	<i>Parson's Road Property Owners Assn. v. Vadium Corp.</i> (1998), 18 C.P.C. (4th) 94 (Ont. Ct. Gen. Div.)
16.	<i>Premakumaran v. Canada</i> (2006), 270 D.L.R. (4th) 440, 2006 FCA 213 (F.C.A.)

	<u>Case Law</u>
17.	<i>Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs de la Rotiserie St-Hubert de Drummondville</i> (1986), 17 C.P.R. (3d) 461 (Que. Sup. Ct.)
18.	<i>Suellothan Bauchemie (Canada) Ltd. v. Raanani Estate</i> (2003), 33 C.P.C. (5th) 312 (Ont. Sup. Ct.).
19.	<i>Warner Brothers-Seven Arts Inc. v. CESM-TM Ltd.</i> (1971), 65 C.P.R. 215 (Ex. Ct.)
20.	<i>White v. Canada</i> , [1998] 152 F.T.R. 39, aff'd [1999] F.C.J. no. 2024 (F.C.A.)
21.	<i>Wing v. Van Velthuizen</i> (2000), 9 C.P.R. (4th) 449 (F.C.T.D.)
22.	<i>Harris v. Canada Customs & Revenue Agency</i> , [2002] F.C. 484, 214 F.T.R. 1.
23.	<i>Crocs Canada Inc. v. Holey Soles Holdings Ltd.</i> , 2008 FC 188 and 2008 FC 384
	<u>Statutes and Regulations</u>
24.	<i>Copyright Act</i> , R.S.C. 1985, c. C-4, ss. 3(1), 5(1), 5(1.01), 13(1), 27(1), 34, 34.1
25.	<i>Federal Courts Act</i> , R.S.C. 1985, c. F-7, s. 11(3)
26.	<i>Federal Courts Rules</i> , SOR/98-106, Rules 4, 80(1) , 83-84 , 213-219, 363 , 400, 401
27.	<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, Rule 15.02
	<u>Secondary Sources</u>
28.	Fox, Harold G. and McKeown, John S., <i>Fox on Canadian Law of Copyright and Industrial Designs</i> , looseleaf 4th ed., (2009, Toronto: Thomas Reuters Canada Limited), p. 30-28
	<u>Additional Authority</u>
29.	<i>Browne v. Dunn</i> (1893), 6 R. 67 (H.L.)

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

**REVISED PLAINTIFF'S RESPONDING
MEMORANDUM OF
FACT AND LAW
(Defendants' Motions
for Summary Judgment)**

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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 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

**REVISED COMBINED
MEMORANDA OF FACT AND LAW
OF THE PLAINTIFF**

(Plaintiff's Rule 213 Motion for Summary
Judgment and Response to the Defendants'
Motions for Summary Judgment)

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