

**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 defendant Alnaz Jiwa /moving party)

**I - NATURE OF THE MOTION**

1. This is a motion for summary judgment dismissing the plaintiff's action.

**II - FACTS**

2. The plaintiff is the spiritual father (hereinafter the "Aga Khan", "Imam" or "Mawlana Hazar Imam") of this defendant, who is a follower of the Aga Khan. Farmans are given orally by the Aga Khan *as Imam of the Ismailis* to His followers (Ismailis) when He grants them an audience, and they immediately become binding upon all Ismailis across the world whether or not such a follower was present to hear the Farman in person.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 4, para 3*

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

3. In this action the plaintiff alleges that this defendant has infringed the plaintiff's copyright and moral rights relating to the publication under the name of *Golden Edition of Kalame Imam-e-zaman* (hereinafter the "Golden Edition") which contains the plaintiff's Guidance

(hereinafter “Farmans”) given by the Imam to the Ismailis (who are followers of the plaintiff).

*Statement of Claim dated April 6, 2010, Moving Party’s Record, Tab 6*

4. The Aga Khan is the present Imam of the Ismailis and is the bearer of the Noor, a word that means “The Light”, and the Noor has been handed down in direct descent from Prophet Mohamed (may peace be upon Him).

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

5. One of the most important tradition of the Ismaili faith is that all Ismailis give their oaths of allegiance to their Imam before they are accepted into the Ismaili faith, and in return, the Imam also reciprocates by giving His promise to protect and guide the Ismailis. This defendant has given his oath of allegiance to the Aga Khan, and states that he has an immense love and respect for the Aga Khan, and will never disobey or in any way of form displease Him.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party’s Record, Tab 4, paras 3 and 4*

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

6. One of the essential obligations of Ismailis is to abide by the Farmans, which are generally delivered by the Aga Khan orally when He visits His Jamats (congregation). Occasionally, the Aga Khan might send a brief written message to the Jamats or individual Ismailis, which is known as Talika.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party’s Record, Tab 4, para 5*

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

*Affidavit of Karim Alibhay sworn April 28, 2010  
Moving Party's Record, Tab 3, para 14*

7. A Farman remains valid until and unless superceded by a new Farman, and becomes binding immediately on all Ismailis wherever they may be living, unless the Imam restricts a Farman for a particular Jamat or a particular segment of the Jamat, and when the Imam restricts a Farman, He indicates such a restriction when making that Farman.

*Affidavit of Nagib Tajdin sworn May 7, 2010  
Moving Party's Record, Tab 4, para 5*

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

8. As Imam of the Ismailis, the Aga Khan has absolute authority in interpreting the faith for the Ismailis to practice according to the Time and Age, and such guidance is given by the Imam through his Farmans. Accordingly, it is incumbent upon Ismailis to follow closely every word of every Farman delivered by their Imam, and non obedience of Farmans with respect to religious matters have serious consequences to an Ismaili. The Aga Khan has said in this regard:

The Imam's word on matters of faith is taken as an absolute rule. ... The Community always follows very closely the personal way of thinking of the Imam. ... An Ismaili who did not obey My word in matters of faith, would not be excommunicated, he would still be a Muslim. He simply would no longer be a member of the Jamath [His followers].

*Sunday Times, December 12, 1965*

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

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

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

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

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

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

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

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

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

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

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

Farman books as they were periodically published by Tajdin since 1993.

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

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

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

14. Jiwa states that in distributing Farman books obtained from Tajdin to his families, friends, and other Ismailis, Jiwa has not violated either the Ismaili Constitution or any Farmans of the Aga Khan, and these are two primary sources that all Ismailis are obliged to abide by.

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

15. The Ismailis have been governed by a Constitution which all Ismailis are obliged to abide with “in letter and spirit”. The first Constitution was ordained in 1900 by the Aga Khan’s grandfather, Sir Sultan Mahomed Shah Aga Khan (“Sultan Mahomed Shah”), who was the 48<sup>th</sup> Imam of the Ismailis, and each country was given its own Constitution.

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

16. In 1986 the Aga Khan ordained one Constitution which became applicable to all worldwide Ismailis after undertaking a three and one-half year review of all of the various Constitutions

then applicable to His Jamats worldwide, with Rules and Regulations adapted for each country, which radically changed the organization of the institutions governing the Jamats, as well as the religious aspects of the Jamats and personal law relating to the Ismailis.

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

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

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

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

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

19. The importance of the Constitution to the Ismailia Jamats was explained by the Aga Khan shortly after He had ordained the Constitution of 1986, in Gilgit, Pakistan, on November 21, 1987, as follows:

The Imam and leaders of the Jamat have worked for three and a half years on the new Constitution of the Jamat. The Constitution starts on the premise that every Murid, wherever he lives and wherever the Imam is, has a bond with the Imam-of-the-Time. And therefore the Constitution links every Murid to the Imam-of-the-Time. In the same way, the rules and regulations have been designed to take into account national law in various countries, old traditions and habits, new needs.

But basically, the new Constitution provides that every Murid has the same relationship to the Imam-of-the-Time in the administration of Jamati matters and that is, I think, a very important step. [Emphasis added] ...

The Constitution has not been designed as an instrument of uncaring direction. On the contrary, it is an instrument seeking to respond to the needs of the Jamat in a manner which will serve the purpose and the interests of the Jamat. The Constitution has been designed, therefore, to serve. And it is in that spirit that I would wish the leadership of the Jamat to conceive of this document. It is a document aimed at serving the Jamat.

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

20. All aspects of an Ismaili's life concerning religious matters, personal law (an Ismaili can obtain a divorce from his own institution if the local law permits the exercise of such powers), etc. are governed by the Constitution. The powers and authorities of various institutional bodies are all governed by the Constitution. The Constitution also provides for taking disciplinary action (with rights of appeal) against any Ismaili, and provides for various forms of penalties, including a provision for an Ismaili to be excommunicated from the community.

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

21. The Aga Khan reminded the Jamats and the leaders of various institutional bodies that "unless the officers and the Jamats themselves live by the Constitution, then there is no point in having one whatsoever."

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

22. The Constitutions of various separate countries ordained in and after 1948 contained express Articles for the publication of Farmans (Jiwa has no knowledge if the Constitution in force prior to 1948 dealt with the powers for publishing Farmans). The previous Constitutions, prior to the new one ordained in 1986, contained the following articles:

**“HOLY FARMAN AND THE CONSTITUTION**

7. The Ismailia Association shall record, compile and certify Holy Farman.
8. The Ismailia Association in consultation with the Supreme Council shall be responsible for publication of Holy Farman.
9. Copies of Holy Farman shall be forwarded by the Ismailia Association to the Supreme Council.
- 10 Any Holy Farman certified by the President of the Supreme Council shall be conclusive evidence thereof.

Articles 7 to 12 above reproduced from the *Constitution of the Shia Imami Ismailis in Europe, Canada, and the United States of America* (incorporating recent amendments), July 1976, published by His Highness the Aga Khan Shia Imami Ismailia Supreme Council for Europe, Canada, and the United States of America.

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

23. The Ismailia Association referred to in paragraph 22 above, was renamed *Tariqah and Religious Education Boards* (“ITREB”) when the New Constitution was ordained in 1986. Notably, unlike all previous Constitutions, the New Constitution did not vest the responsibility of recording, compiling, certifying and publishing Farmans to ITREB, the institution vested with powers over religious matters, or to any other institution. Furthermore,



the Aga Khan did not reserve this power for Himself.

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

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

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

25. There has never been any “complaint” to Jiwa by anyone prior to the announcement made at Jamatkhana in Europe, Canada, Africa, and United States of America, on January 16, 2010, by Leaders International Forum [institutional leaders other than the Aga Khan] concerning the distribution of the Farman books, even though Jiwa has openly been distributing these Farman books since 1993. Notably, the announcement made to the congregation did not indicate that the Aga Khan prohibited the activity of making His Farmans available by the defendants.

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

26. The January 16, 2010, announcement made by institutional leaders regarding the publication of the Golden Edition. The announcement further stated that this activity (of distributing the Golden Edition) “constitutes a breach of the Ismailia Constitution...”. As set out above, the Aga Khan has not made any Farmans respecting the printing of the Farmans, and the Constitution does not prohibit such activity. On the contrary, if the announcement was correct

in that relevant institutions have been “entrusted” with responsibility, then such relevant bodies have failed to comply with the mandate to publish Farmans, as they have not published or distributed Farmans in the past about thirty or so years. Notably, the announcement did not state that the Imam had indicated or made a Farman that such publications by private initiatives are prohibited.

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

27. On December 13, 2003, the Aga Khan said that knowledge had sometimes been buried on purpose and that the guidance that was given by the Imams of the Time should be reconstituted “to inform ourselves”. Farmans made by the Imams were always made available in writing to the Jamats, except in the recent years, and it is not the Aga Khan who desires his Farmans to remain hidden or that the congregation should not have copies of same.

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party’s Record, Tab 2, para 20 and Exh. “D”*

28. In a visit to Montreal, Canada, on August 15, 1992 in 1992, the Aga Khan was presented with the first book published by Tajdin during a personal attendance before the Aga Khan. The book clearly indicated on the cover page that it contained the Aga Khan’s Farmans made to the Western World between 1957 to 1991, and that it was a Volume 1.

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

29. The book was presented to the Aga Khan by Tajdin’s dear friend, Karim Alibhay (“Alibhay”), who gave evidence that the Aga Khan placed His right hand on his shoulder and His left hand on the book of Farmans and responded in French and said: “Continuez ce que vous faites (continue what you are

doing), réussissez ce que vous faites (succeed in what you are doing), et ensuite nous allons voir ce qu'on peut faire ensemble (and then we will see what we can do together)". Since then Tajdin has been publishing Farmans for distribution on a non-profit basis to the followers of the Aga Khan.

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

30. Most important, the presenting of the Farman Book to the Aga Khan has been recorded and despite asking for same, has not been produced by Sachedina or Bhaloo and neither has denied its existence nor explained as to why it has not been produced. This would have been the best independent evidence concerning the presentation of the Farman book to the Aga Khan.

*Affidavit of Alnaz Jiwa sworn June 16, 2010  
Moving Party's Record, Tab 2, para 25*

31. Based on the Aga Khan's direction and encouragement to "continue" the work, with blessings for success, Tajdin has been publishing and distributing the Farmans of the Aga Khan as from August of 1992, and Jiwa has obtained the Farman books from Tajdin and has been distributing them primarily to his family and friends, or other Ismailis only, since the year 1993.

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

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

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

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

### III - POINTS IN ISSUE

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

### IV- SUBMISSIONS

36. Rule 214 provides that “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, and Rule 215 provides that “a response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.”
37. Rule 216 (1) provides that where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim, the Court shall grant summary judgment accordingly.
38. In *Rachalex Holdings Inc. v. W & M Wire & Metal Products Ltd.*, 2007 FC 502, 157 A.C.W.S. (3d) 629 (F.C.), the court set out the test for summary judgment at para. 8 (citing

the decision in *Spenco Medical Corp. v. EMU Polishes Inc.*, 2004 FC 963 (F.C.) at paras. 6-8):

...The Court is not to grant summary judgment where it is shown that there is a genuine issue for trial. However, Rule 216(3) specifically permits this Court to grant summary judgment even where there is a genuine issue for trial so long as the Court "is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law"

*Koslowski v. Courier*, 2009 CarswellNat 2902, 2009 FC 883, at para. 15.  
Defendants' Book of Authorities, Tab 3

39. In *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853 (Fed. T.D.), Madam Justice Tremblay-Lamer set out the general principles applicable to a motion for summary judgment at paragraph 8:

the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al.*, [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (T.D.));

this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court;

in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge ... The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved.

*Koslowski v. Courier*, supra at para. 16

40. Rule 216(3) permits a judge on a motion for summary judgment, after finding that a "genuine issue" exists, to conduct a trial on the affidavit evidence with a view to determining the issues in the action. However, this is not always possible, particularly where there are conflicts in

the evidence, where the case turns on the drawing of inferences or where serious issues of credibility are raised;

*Koslowski v. Courier*, supra at para. 17(3)

41. In the recent judgment released by the Federal Court of Appeal on January 20, 2010, in the case of *Sterling Lumber Co. v. Harrison*, stated that:

“the principle that parties to a motion for summary judgment must put their best foot forward precludes the respondents from saying that other evidence may be adduced at trial that contradicts Mr. Harrison's statement against interest and under oath that he had sold the mats in question before 2003.” [Emphasis added]

*Sterling Lumber Co. v. Harrison*, 2010 CarswellNat 69, 2010 FCA 21 at para. 8  
Defendants' Book of Authorities, Tab 3

42. In *Cselko Associates Inc. v. Zellers Inc.*, the court held that:

“. . . Rule 20 should not be eviscerated by the practice of deferring actions for trial *at the mere suggestion that future evidence may be made available*. (emphasis original).

*Cselko Associates Inc. v. Zellers Inc.*, 1992 CarswellOnt 754, at para. 16  
Defendants' Book of Authorities, Tab 4

43. Based on the above case law, Jiwa submits that this court is obligated to take a “hard look” at evidence and to determine if it can find the facts necessary to decide the questions of fact and law. However, in order to find the facts necessary to determine whether there are genuine issues of fact that would require a trial, this court must take a “hard look” to identify admissible evidence to find facts to support granting a judgment sought by the defendants while disregarding facts that are either not admissible or are of no evidentiary value to assist the court. This court cannot look beyond the motion record and transcripts to find the facts

necessary to determine if judgement be granted.

44. Jiwa states that this court is obligated to look for facts found on the record for evidence. Although “the onus remains on the moving party to show that there is no genuine issue for trial, but the responding party must present its best case or risk losing: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), where Osborne, J.A. stated: “a respondent on a motion for summary judgment must lead trump or risk losing”; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff’d [1997] O.J. No. 3754 (C.A.). [Emphasis added]

*Suway v. Women's College Hospital*, 2008 CarswellOnt 1195, 165 A.C.W.S. (3d) 67 at para. 21 Defendants’ Book of Authorities, Tab 5

45. Section 27. (1) of the *Copyright Act* provides that it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

*Copyright Act*, R.S.C.. 1985, c. C-42.

46. The above section concerning the issue of consent has been clarified by the Federal Court of Appeal as follows:

“However, even if one assumes that the motion judge was right to consider the question, the difficulty is that copyright is defined in terms of the absence of the consent of the owner of the copyright.” [Emphasis added]

“Consequently, proof of copyright infringement requires proof of lack of consent. It

is therefore illogical to conclude that there has been infringement, subject to the effect of a purported license. It may be that a party has done something which, by the terms of the *Copyright Act*, R.S.C. 1985, c. C-42, only the owner of the copyright may do. But, before that conduct can be defined as infringement, the judge must find that the owner of the copyright did not consent to that conduct.” [Emphasis added]

*Positive Attitude Safety System Inc. v. Albian Sands Energy Inc.*, 2005 CarswellNat 3575, 2005 FCA 332 at para. 39 Defendants’ Book of Authorities, Tab 6

47. Jiwa, accordingly, submits that the unrefuted and unchallenged evidence of Alibhay that of the Aga Khan’s response when presented with the first book published by Tajdin was an encouragement to “continue” the work, and since then about 10 books have been published by Tajdin and distributed only to Ismailis, the followers of the Aga Khan.

48. The court in *Cselko* held that “a licence to use may be implied by the conduct of the parties and need not be in writing.” *Howard Drabble Ltd. v. Hycolith Manufacturing Company* (1928), 44 T.L.R. 264 (Ch.Div.). See also *Fox Copyright* (2nd edition) 298 ff.

*Cselko Associates Inc.*, supra at para. 19

49. Under the Copyright Act, consent can be orally given, and can also be implied from the circumstances. The learned author of *Fox’s Canadian Law of Copyright and Industrial Design*, states that “Such permission for mere doing of an Act that would otherwise be an infringement of copyright may be given orally or by implication, and passes no interest.” Referring to the case of *Muskett v. Hill* (1839) 5 Bing NC 649, 9 LJCP 201, 132 ER 1267, the court said that “A mere oral licence in the form of permission to do a thing “passes no interest,



but only makes an action lawful which without it would be unlawful.” The court further stated that “Such a licence, amounting to a mere dispensation, may in certain circumstances provide an equitable defence to an action of infringement.” [Emphasis added]

*Netupsky v. Dominion Bridge Co.* 1969 CarswellBC 76, 58 C.P.R. 7, 5 D.L.R. (3d) 195, at para. 98, Defendants’ Book of Authorities, Tab 7

50. In *Robertson v. Thomson Corp.*, the court held that a freelancer who knows the uses to be made of a work and expresses no limitations can arguably be said to impliedly licence the publisher to make use of the work within those contemplated uses.

*Robertson v. Thomson Corp.* 2001 CarswellOnt 3467, 15 C.P.R.(4th) 147 at para. 158 Defendants’ Book of Authorities, Tab 8

51. In response to paragraph 84 of the Revised Responding Factum, Jiwa states that on the basis of the Aga Khan’s consent, encouragement and blessings given to “continue”, any books published as a result of that consent is not an infringing material, so whether or not Jiwa was involved in the 1992 *Mehmani* ceremony is of no consequence.

52. Justice Binnie of the Supreme Court of Canada stated in the case of *Galerie d'art du Petit Champlain Inc.* that that “once an authorized copy of a work is sold to a member of the public, it is usually the purchaser, not the seller, who has the right to decide what will happen to the copy.”

*Galerie d'art du Petit Champlain Inc. c. Théberge*, 2002 CarswellQue 306, 2002 SCC 34 at para. Defendants’ Book of Authorities, Tab 9

53. Therefore, if this court holds that the Aga Khan consented to the continuation of the work of

publishing his Farmans, then Jiwa obtaining the works and making use of it does not contravene the Copyright Act whether or not he was part of the group when the first book was presented to the Aga Khan.

54. In response to paragraph 85 a to f, of the Revised Responding Factum, setting out six enumerated points concerning the application of the consent given by the Aga Khan in 1992, Jiwa responds as follows (using his subsections a to f):
- a. f: as set out above, the law respecting consent decisively provides that consent of the owner does not have to be in writing;
  - b. d: there is no requirement under Copyright Act, and no case law has been cited by Mr. Gray to support his argument that any consent or permission is required of anyone other than the actual owner of the works, and as such this argument does not have any basis in law to vitiate the consent given by the Owner. On the contrary, this argument establishes that it is the Aga Khan's officers who are agitated as opposed to the Aga Khan in Tajdin bypassing them in obtaining direct consent from the Aga Khan and will do anything, including forging the Aga Khan's signatures to stop the activities complained of;
  - c. the argument that Tajdin did not personally present the book to the Aga Khan does not vitiate consent given by the Aga Khan to Alibhay.

The court in *Robertson*, referring to *Cselko Associates Inc.*, states that the “A freelancer who knows the uses to be made of a work and expresses no limitations can arguably be said to impliedly licence the publisher to make use of the work within those contemplated uses.

*Robertson v. Thomson Corp.*, supra at para. 158

The Aga Khan could have, when he urged Alibhay to “continue” the work to place the limitations being urged by Mr. Gray in his submissions, but this argument does not vitiate the consent given to Alibhay.

- e. Mr. Gray’s characterization of the evidence is misleading when he states that, “His Highness merely put his hand on the book; he did not open the book nor take it away with him to examine it.”.

The Aga Khan is a Harvard educated person, and could read clearly on the book that it contained his Farmans to the Western World, between 1957 [year of his enthronement] to 1991 [the year before the trip to Canada in 1992], with a Volume 1 printed on it. In addition to placing His hand on the book, the Aga Khan spoke to Alibhay to “continue” work, and blessed for the “success” of the work. The Aga Khan has followers in Africa and Asia which were the Volumes II and III published in due course.

There is no evidence given by Mr. Gray in his responding motion record nor his moving motion record to oppose or contradict Alibhay’s evidence and he has not been

cross-examined by Mr. Gray, and as such his evidence remains unrefuted and unchallenged.

Furthermore, the event was recorded and despite being asked and questioned by the defendants, this evidence has not been disclosed or provided to refute Alibhay's evidence and Jiwa submits that an adverse inference can be made on this ground as the two affiants who provided their affidavits in support of these motions have access to the video recording and no explanation has been given as to why it was not produced.

55. Jiwa submits that the unrefuted and unchallenged evidence of Alibhay is determinative of this action and provides clear evidence that the Aga Khan had no concerns about His Farmans to be distributed to his followers.
  
56. In response to paragraph 86 a to h, of the Revised Responding Factum, setting out eight enumerated points seeking to challenge the defendant's evidence concerning the consent submissions made by the defendants, Jiwa responds as follows (using his subsections a to h):
  - a. the Copyright Certificate filed by the plaintiff is filed not for any "books" but the Copyright is claimed for "Farmans". Sachedina in his cross-examinations agreed that the issue was not the form in which the Farmans were distributed but the real concern was the distribution of the Farmans in any form, be they bound in the book or

otherwise.

The Aga Khan's spoken words during the time of the Mehmani ceremony, "continue" the work, "succeed" in the work implies that he wished the work to be continuous, and as the first book clearly stated on it that it was VOLUME I clearly indicated that more volumes were to come and more volumes (10 books) were published and distributed from 1992 to date.

- b. c: Mr. Gray submits in b. that "there is no evidence that the Plaintiff even knew of, or comprehended, the subject-matter of the book that was presented to him", however, he seeks this court to make inferences as set out in sub paragraph b and c without filing *any evidence to support the finding of such an inference.*

Mr. Gray had an obligation of bringing forth evidence to provide support to the inference he wishes this court to infer.

The court in *Ruhl Estate*, referring to *Feoso Oil Ltd. v. Sarla*, states that:

"To this end, ... both sides are required to "put their best foot forward". The responding party cannot hold back in the hope that the motion will fall of its own weight because the evidence in support is insufficient.

*Ruhl Estate v. Mannesmann Kienzle GmbH*, 1997 CarswellNat 1840, 137 F.T.R. 81, at para. 13 Defendants' Book of Authorities, Tab 10

The court in *Suway* states that:

Rule 20 requires that a party put its best foot forward. It does not permit a party to put a toe in the water and then add more evidence if its case is found

wanting. ... It is well settled that a party may not "repair damage" to its case by introducing new evidence on a motion in order to patch up holes in the case created by the other party's evidence or counsel's submissions: *NRS London Realty Ltd. v. Glenn* (1989), 67 O.R. (2d) 704 (Ont. Dist. Ct.); *Grant v. Kerr*, [2001] O.J. No. 5162 (Ont. Master) (Master); *Choo v. Wong*, [2005] O.J. No. 5768

*Suway v. Women's College Hospital*, supra at para. 33 & 34

- d Mr. Gray argues, again that the word “ensemble” used by the Aga Khan implied the work to be undertaken with the Ismaili Institutions. However, there is no evidence, again, to provide a foundation for such an inference to be provided. This word used by the Aga Khan also supports the inference that Alibhay is to work with the group of persons, such as Tajdin, who was behind the publication as one person cannot bring about such a publication to completion. This inference is supported by evidence of Alibhay when he said to the Aga Khan, “what else can WE do...”, and the using of the word *we* clearly indicated to the Imam that more than one person is involved in the project.
- e As noted above, Mr. Gray has argues that the word “ensemble” connotes more than one person. If the Aga Khan was concerned about who is behind the publication, he could have asked and as noted above, in the case of *Robertson v. Thomson Corp.*, the court held that a freelancer who knows the uses to be made of a work and expresses no limitations can arguably be said to impliedly licence the publisher to make use of the work within those contemplated uses.

f Mr. Aziz Bhalloo was impeached during his cross-examination on this point where he admitted (Sachedina also admitted this point as well) that his statement that the meeting with the Aga Khan a few seconds was a general statement and that some had much more time, and that the purpose of such *Mehmanis* is to enable the followers to ask any questions, or to seek guidance from the Aga Khan. As noted above, there is no direct evidence to refute Alibhay's evidence and that the two officers who gave evidence suppressed the best evidence (video) of the ceremony, which would have conclusively and convincingly provide evidence of the consent.

Jiwa urges this court to make an adverse inference for the failure to bring forth the best independent evidence of the *Mehmani*.

g. Mr. Gray has misapprehended evidence in this regard. Tajdin gave evidence that he wrote that letter to the Aga Khan *after* Sahedina started telling him to withdraw all books. The letter is self explanatory, and the authorization that Tajdin is seeking is to *donate* one book each to the Jamatkhanas across the world, estimated to be about 5,000 worth \$250,000.00 plus postage for each book, which would be substantial. The Claim alleges that the defendants are seeking to profit from selling these books, while Tajdin is seeking to donate well over \$250,000.00 to the Aga Khan, and he has been publishing these books by cashing in his life insurance policies, and other assets.

h. Response to the issue of Affirmation will be presented later in its own section.

57. As per case law referred above, consent can be implied from the circumstances. The Aga Khan has stated that He makes Farmans for Ismailis, and expects Ismailis to abide by every word of His Farmans, adding that non compliance by an Ismaili equate to that Ismaili from losing the right to be a “member of the Jamath.”
58. All aspects of an Ismaili’s life concerning religious matters, personal law (an Ismaili can obtain a divorce from his own institution if the local law permits the exercise of such powers), etc. are governed by the Constitution. The powers and authorities of various institutional bodies are all governed by the Constitution. The Constitution also provides for taking disciplinary action (with rights of appeal) against any Ismaili, and provides for various forms of penalties, including a provision for an Ismaili to be excommunicated from the community.
59. The constitutional framework over a period at least from 1948 (and possibly earlier) to 1986 contained Articles which governed the recording, compiling and publication of Farmans. This evidences that the Constitution has jurisdiction over the publication of the Farmans, and that had the Aga Khan wished to prevent the publication and/or the distribution of His Farmans by other than the institutional bodies, He could have done so by adding an Article in the constitution as was previously achieved by Him in the previous Constitutions.
60. In addition to the above, the Aga Khan accepts Oaths of Allegiance from His followers, and in return He gives His pledge that He will Guide and Protect His followers, and inherent in the exchange of promises between a spiritual father and His children, is that His followers



have implied consent to have access to the Farmans, to discuss, study, and share His Farmans with their family members, friends and fellow Ismailis, an activity actually encouraged by the Imams.

61. Therefore, various Farmans, Articles of the Ismaili Constitution, and the promises exchanged between the spiritual father and His spiritual children provides implication of consent to having access to the Farmans, both for personal use and for the dissemination among the Ismailis.

62. Justice Joyal in the case of *de Tervagne*, held that:

“The third important principle to be found in the *Muzak* case is that it is possible to establish that a person has sanctioned, approved or countenanced an actual infringing activity (thereby rebutting the presumption that a person who authorizes an activity does so only so far as it is in accordance with the law), if it is shown that certain relationships existed between the alleged authorizer and the actual infringer, or that the alleged authorizer conducted himself in a certain manner.” [Emphasis added]

“Hitchcock attempted, at pages 34-43, to define the type of conduct or relationship from which it can be concluded that a person in fact authorized the infringement, within the meaning of the Act, by his or her conduct or relationship with the person who infringed the copyright.” [Emphasis added]

*de Tervagne v. Beloeil (Town)*, 1993 CarswellNat 222, [1993] 3 F.C. 227, at para 42 and 44 Defendants’ Book of Authorities, Tab 11

63. Justice Joyal also stated:

“... that the court may infer an authorization or permission from acts which fall short of being direct and positive; I go as far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorised

the performance or permitted the use of a place of entertainment for the performance complained of. “

*de Tervagne* supra at para. 47

64. Accordingly, Jiwa submits that not only the Aga Khan gave his direct and personal consent, authorization and encouragement to “continue” the work, but also the nature of the relationship between the Aga Khan and His followers said by Him as follows:

“The Imam’s word on matters of faith is taken as an absolute rule. ... The Community always follows very closely the personal way of thinking of the Imam. ... An Ismaili who did not obey My word in matters of faith, would not be excommunicated, he would still be a Muslim. He simply would no longer be a member of the Jamath [His followers].” [Emphasis added]

65. It is implicit in the above warning, as it may be reasonably be stated, that He expects His followers to pay attention to every word of His (My word) and as such it is implicit in that warning that He expects the followers to be in possession of His Farmans in order to pay attention to every word of His.

66. Although Jiwa does not believe that the Aga Khan is indifferent, however, to argue against Mr. Gray’s submissions that the consent was given without being able to open the book, etc., it becomes necessary to review the conduct as set out in the case of *BMG Canada Inc.*:

"Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993], 3 F.C. 227 (F.C.T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour,

encourage": see The New Shorter Oxford English Dictionary (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch.D.), at pp. 823-24.

*BMG Canada Inc. v. John Doe*, 2004 CarswellNat 835, 2004 FC 488, at para. 24  
Defendants' Book of Authorities, Tab 12

67. As noted above, Jiwa has been distributing Farmans openly to the knowledge of institutional leaders at least since 1993, while Tajdin has been distributing a lot longer than that period, but in a book form as from 1992 to date.
68. Jiwa has not received any correspondence or any notice from the Aga Khan or any of His institutional leaders at any time until the announcement made in April of 2010. The announcements made earlier in January of 2010 did not indicate at all that the Aga Khan did not desire that His Farmans be distributed by anyone.
69. In response to Mr. Gray's arguments that no consideration has been given, and that the consent has been revoked, Jiwa responds that there is no credible admissible evidence to establish that the Aga Khan has revoked the consent, and that there is consideration given in the sense that all work is done on a volunteer basis, is done without any motivation of profit, and is done under the oath of allegiance given by a follower to his spiritual father, and by the reciprocal promise that he would guide his follower.
70. Furthermore, the court in *1013579 Ontario Inc.* said as follows:

“The key factors to consider when applying the doctrine of acquiescence and laches outlined in the *Institut national des appellations d'origine des vins & eaux-de-vie v. Andres Wines* (1987), 16 C.P.R. (3d) 385 (Ont. H.C.), are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

*1013579 Ontario Inc. v. Bedessee Imports Ltd.*, 1996 CarswellNat 901, 68 C.P.R. (3d) 486, at para. 7                      Defendants’ Book of Authorities, Tab 13

71. The court in *Robertson* held that:

”An English court has stated that the issue of acquiescence is determined in the copyright context by ascertaining "whether, in particular individual circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment." *Film Investors Overseas Services SA v. The Home Video Channel*, [1997] E.M.L.R. 347 at p.12 (Lexis).”

*Robertson v. Thomson Corp.*, supra at para. 170

72. Jiwa submits that although there is no credible, admissible evidence that the Aga Khan is seeking the cessation of the activities complained of, the length of time that has passed without any actions taken by the Aga Khan, such as making any Farmans to the congregation at large publically to have these activities stopped (many other individuals publish and distribute Farmans across the world), the Aga Khan could have informed His followers in publically not to purchase these books, he could have also amended the Constitution which governs the activities of the followers worldwide, his actions or non-actions have caused the activities to have been ongoing for about eighteen years, and as such *Robertson* and *1013579* cases would suggest that it would be unjust to hold the defendants as being infringing the Copyright Act.

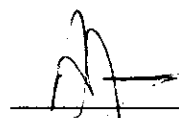
73. Jiwa denies that he has infringed the *Copyright Act* in any manner and form. The Farmans are made by the Aga Khan for His Jamats, with the intention for the Jamats to follow each word of His closely, and to abide by the guidance given by Him. The Imam encourages His followers to read or listen to His Farmans, and also encourages His followers to discuss Farmans, to write to each other about the Farmans, and as such the activity complained of is not an infringement of Copyright Act.

**V - ORDER SOUGHT**

74. This defendant submits that this action be dismissed without costs.

Date: November 29, 2010

**Respectfully submitted,**



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Alnaz Jiwa  
c/o 37 Sandiford Dr.  
Suite 205  
Stouffville, ON  
L4A 7X5

TO: OGILVY RENAULT LLP  
Suite 3800  
Royal Bank Plaza, South Tower  
200 Bay Street, P.O. Box 84  
Toronto, Ontario M5J 2Z4

Brian W. Gray  
Kristin E. Wall

Tel: (416) 216-4000  
Fax: (416) 216-3930

Solicitors for the Plaintiff

**FEDERAL COURT**

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BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

and

NAGIB TAJDIN, ALNAZ JIWA, JOHN DOE and DOE CO. and all  
others persons or entities unknown to the plaintiff who are reproducing,  
publishing, promoting and/or authorizing the reproduction and promotion  
of the Infringing Materials.

Defendants

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**REVISED MEMORANDUM OF FACT AND LAW**

by the defendant Alnaz Jiwa (Moving Party)

Rule 213 Motion returnable December 7, 2010

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Alnaz I. Jiwa  
37 Sandiford Drive  
Unit 205  
Stouffville, ON  
L4A 7X5

Tel: (905) 640-3831  
Fax: (905) 640-7533  
jiwalaw@yahoo.ca