Court File No. T-514-10

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 RESPONDING
MEMORANDUM OF FACT AND LAW
(of the defendant Alnaz Jiwa /responding party)

I - NATURE OF THE MOTION

1. This is a motion for summary judgment brought by the plaintiff (hereinafter the "Aga Khan", "Imam" or "Mawlana Hazar Imam") for a declaration that the plaintiff has a Copyright in His works; for a declaration that the defendants have infringed the Copyright; for an injunction refraining the defendants from infringing the Copyrights of the plaintiff; for an order delivering the infringing materials to the Institute of Ismaili Studies; for an order for a reference for the determination of damages, and any such damages to be payable to the AKDN Foundation; costs fixed in the amount of $30,000.00; and pre-judgment and post-judgment interest.

II - OVERVIEW

2. In responding to the Motion filed on behalf of the Aga Khan, this defendant will rely on the Memorandum of Fact and Law served and filed by him in support of his Motion for Summary Judgment to be heard at the same time as the plaintiff's motion, and as such to avoid repetition will only set out additional facts and law in this memorandum.

3. Mr. Gray seeks a judgment to refrain the defendants from disseminating (distributing) the Aga Khan's Farmans (guidance given to his followers) an activity which has always been encouraged by Him as the Imam, and the previous Imams. There are many individuals across the world disseminating the Imam's Farmans in various forms - by email, by small photocopied booklets, by books, etc. to the knowledge of the institutional leaders.

Cross of Tajdin, Exh, D-2 & 3
Cross of Sachedina, Qs, 862-884

4. The defendants state that the Imam is not behind this litigation because He had given His consent, authorization and encouragement to the co-defendant Nagib Tajdin ("Tajdin") through Karim Alibhay ("Alibhay") during His visit to Canada in 1992, and the litigation has been commenced and prosecuted by Shafik Sachedina ("Sachedina"), and documents submitted before and after April 6, 2010, when this litigation was filed, have been found by an handwriting and document examiner as not signed or written by the Aga Khan.

5. The defendants admit that the Aga Khan has Copyright over the Farmans, but state that they are not only undertaking to do what He had personally approved and encouraged in 1992, but also what is expected of all Ismailis (followers of the Imam) - to disseminate Farmans between and to Ismailis, and that this tradition has been ongoing for centuries. The defendants also concede that the consent by the Aga Khan or the implied consent is restricted in that it can only be distributed to Ismailis.

III - POINTS IN ISSUE AND ARGUMENT

6. a. Whether there is a genuine issue for trial with respect to the claim filed by the plaintiff.

   b. Whether the Aga Khan gave His consent and authorization on August 15, 1992, in Montreal to the publication and distribution of His Farmans.

   c. Whether there is implied consent and authorization to distribute the Aga Khan's Farmans to His spiritual children.

   d. Whether there is any admissible evidence proffered by the plaintiff in seeking to obtain summary judgment on his claim.

7. Mr. Gray's essential argument is that the Aga Khan at paragraph 6 of his memorandum, that "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.", and sets out the evidence to support that argument. This defendant will respond to the arguments hereinafter. However, this defendant will not repeat the facts and arguments set out in his Memorandum served and filed in support of his Motion.

8. In responding to arguments set out in paragraph 2 of his memorandum (Tab 1), that the defendants are continuing with their allegations "even after the attendance of the Plaintiff for discovery on October 15, 2010 as reflected in the court record.", this defendant states that Mr. Gray confirmed with Prothonotary Tabib as reflected in the Direction of the Court dated November 2, 2010, that he would continue with the Motions for Summary Judgment and not

bring a Motion for Judgment. With respect to the discovery, the court directed as follows:

> "To the extent any party were to attempt to raise, at the hearing of the motion for summary judgment, anything of what occurred at the attendance on discovery, they would be precluded from doing so unless admissible evidence of those facts were put before the court. The motions fo summary judgement are now fully briefed. No further evidence may be filed for use at the hearing of the motions without leave of the court, to be sought by way of motion."

9. The attendance at discovery is not evidence that the Aga Khan is the real plaintiff, that has authorized the action. The Aga Khan, although a person, is an "institution". He functions as a government in his own right, a King without a Kingdom, and his "kingdom" runs as a government runs.

> **Cross of Tajdin, Exh 13 (Constitution of 1998, replacing 1986 version)**
> **Cross of Sachedina, Exh A, 1948 Constitution;**
> **Cross of Sachedina, Exh B (Rules and Regulations under the Constitution)**

10. As noted in this defendant's other Memorandum, the Aga Khan's community has been organized and functions pursuant to a written Constitution and all officers' "Oath of Office" is to "defend and protect the Constitution." A review of the Constitution shows that the Aga Khan as an institution has established many different Boards, or bodies with specified duties and responsibilities.

> **Cross of Sachedina, Exh B (Rules and Regulations under the Constitution), second last page.**

11. The Aga Khan has sternly stated as follows:

> "Secondly, in the new Constitution, I would like the new officers to remember that however much time we take to write out the Constitution to prepare it for My Jamats of East Africa, unless the officers and the Jamats themselves live by the Constitution, then there is no point in having one whatsoever."

The Constitution is the governing law that governs the activities of the Ismailis worldwide, and all are expected to govern themselves in accordance with the provisions of the Constitution.

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

12. Under the Constitution various bodies have been established such as Leader's International Forum; Councils; Apex Institutions and the Aga Khan Development Netwrok; Central Institutions; Tariqah and Religious Education Boards ("ITREB"); Grants and Review Boards; Mukhis and Kamadias; International Conciliation Board; etc.

13. The Aga Khan has given "real autonomy" to these institutional bodies. In an interview given by the Aga Khan reproduced in *Paris Match,* December 15, 1994, the Aga Khan stated:

> PM: Your Highness, what pride do you get from your work?
> AK: I am proud of two things. The first is the creation, in a variety of countries, or institutions of the community which posses real autonomy, which do not depend on the intervention, nor the thinking, nor the support of the Imam.

Statement of Defence, Moving Party's Record, Tab 7, pg. 14, para. 64

14. Accordingly, these institutional leaders have "real autonomy" and can operate under the head institution: Aga Khan. These leaders can and do perform duties on the behalf of the Aga Khan, and the defendant's allegations, supported by expert reports indicating that the Aga Khan's signature has been forged, that the Aga Khan is not the real plaintiff brings forth an obligation on the responding party to refute the allegations and evidence by way of admissible evidence. The responding party has failed to adduce credible and admissible

evidence to refute the defendants' evidence on point.

15. In responding to arguments set out in paragraph 53, 96 and 108 of the memorandum (Tab 1), Mr. Gray submits that "the Plaintiff showed up as ordered for his examination for discovery..." this defendant states that had the Aga Khan been the real Plaintiff, then Mr. Gray would have brought a motion as Directed on November 2, 2010, to prove the fact he wishes this court to infer from facts that are not in the nature of evidence filed in these motions. Mr. Gray also had an option to bring a Motion for Judgment, but as noted by Prothonotary Tabib in her Direction dated November 2, 2010, Mr. Gray refused to do so.

16. In *Cooper v. R.*, Justice Wyman W. Webb J. of the Tax Court stated with respect to adverse inference: In the *Law of Evidence in Canada,* third edition, by Justice Lederman, Justice Bryant and Justice Fuerst of the Superior Court of Justice for Ontario, it is stated at p. 377 that:

> "§6.449 In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it."
>
> ***Cooper v. R.*, 2010 CarswellNat 2499, at para. 20**
> **Defendants' Book of Authorities, Tab 14**

17. Despite allegations of fraud and allegations that the Aga Khan is not the real plaintiff, and

despite filing of expert evidence to support the allegations that the Aga Khan had not authored the three letters in question, the responding party has not placed any admissible evidence to refute the allegations or evidence filed by the defendants.

18. Associate Justice K. Sharlow of the Federal Court of Appeal in the case of *Candrug Health Solutions Inc.*, allowed the appeal and reversed the motion's judge's order after reviewing thirteen affidavits and finding that many affidavits did not contain admissible evidence and/or evidence capable of supporting the evidence required to support the issue in question, and said that:

> I conclude that the record on this appeal contains no evidence that is capable of establishing that, as of May 20, 2003, the trade-marks in issue in this case were clearly descriptive or deceptively misdescriptive of the character or quality of the services provided by the online pharmacy business controlled by Mr. Thorkelson. It is not clear from the judge's reasons whether and to what extent he relied on any of this evidence, but I must conclude with respect that any such reliance would have been misplaced.
>
> What remains to support the judge's decision is his own impression of the meaning of the words "Canada" and "drugs" when used in association with an online pharmacy business, and the inferences he drew, without any evidence, about what consumers would or would not understand.
>
> ***Candrug Health Solutions Inc. v. Thorkelson,* 2008 CarswellNat 663, 2008 FCA 100 at para. 14 and 15 Defendants' Book of Authorities, Tab 15**

19. Mr. Gray's seeks this court to make a finding that by attending for discoveries, the Aga Khan authorized the action. The Court record shows that Mr. Gray appealed the Direction ordering discoveries and a second Direction had to be ordered before he agreed to produce the Aga Khan. This defendant submits that there is no admissible evidence to support a finding that

by attending for discoveries, the Aga Khan authorized the action. This defendant submits that this court should take a "hard look" at the evidence filed and *rely only on admissible evidence filed* to determine if there are facts which would support the finding Mr. Gray seeks this court to find.

20. United States Supreme Court Judge Clarence Thomas during his 1991 confirmation proceedings, said that he could not prove a negative. Similarly, this defendant cannot prove a negative and the obligation rested with Mr. Gray to prove and counter the evidence submitted by the defendants.

21. Mr. Gray is misapprehending the issue of the defendant's agreeing that they would not argue (for the purpose of these motions only) the issue of whether the Aga Khan authorized the action. Mr. Gray phrases it as follows: "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." He then deceitfully states that, "it was in support of this, now apparently abandoned argument, that certain carefully worded and flawed opinion about forgery have been proffered by the Defendants", while the allegations of fraud were made well before the litigation commenced.

Affidavit of Tajdin, sworn June 16, 2010
Moving Party's Record, Tab 5, paras 5, 7, 8, 9, & 10

22. Mr. Gray has misapprehended evidence in that the allegation of the authorization is not, in the defendant's opinion, essential for argument at the motions for summary judgment and

that the defendants have maintained all along during their evidence in chief and on cross-examinations (also of the expert) that the Aga Khan's signature is forged. Litigants routinely rely on certain arguments that they believe are central to the issues, whether it be at an appeal, a motion, or any types of hearing, but agreeing not to make arguments for a certain hearing is not the same as abandoning the argument for the action, or is not the same as an admission of same for the action.

23. The defendants believe that the issues of consent and implied consent are sufficient for a determination of the issues based on the record that is before this court, particularly as all evidence proffered, namely the affidavits of Sachedina and Aziz Bhaloo ("Bhaloo") are inadmissible on the grounds of hearsay evidence and being in the nature of self serving evidence.

24. The court in *Ayangma* states as follows on the issue of self serving affidavits:

> "I am also of the view that certain allegations are made in the plaintiff's affidavit that can only be described as self-serving. The Supreme Court of Canada in *Guarantee Co.,* supra, at p. 437, held that such allegations are insufficient to create a triable issue in the absence of detailed facts and supporting evidence. The plaintiff, in his affidavit, expresses opinions supported by other documents in his motion record. These documents do not provide facts known to the plaintiff but hearsay offered in support of his opinions."
>
> ***Ayangma v. R.*, 2002 CarswellNat 1525, 2002 FCT 707, 221 F.T.R. 81, at para.41, 43, 49 Defendants' Book of Authorities, Tab 16**

25. A review of the affidavits of Sachedina and Bhaloo indicates that it is devoid of any detailed facts and have not produced any supporting evidence such as emails, memos, and

correspondence, etc., and their cross-examinations and the affidavit of Mohamed Tajdin (who was not cross-examined) responding to their affidavits clearly indicates that their evidence is contrived and unsupported by any admissible evidence to refute the defendants' evidence and are self-serving affidavits without any detailed facts or supporting evidence, and as per Supreme Court's decision in *Guarantee Co.*, is not sufficient to create a triable issue in absence of detailed facts and supporting evidence.

26. In response to arguments set out in paragraph 13 of the memorandum (Tab 1), it is noted that, "His Highness has approved an ITREB policy .. no other individual or institution is authorized to disseminate, publish, distribute or otherwise sell the Plaintiff's Literary Works." There is no evidence to support this assertion. The policy referred to is dated May 7, 2010, and does not in any way mention that the policy is from the Aga Khan. On the contrary, Sachedina during his cross-examination stated that this was produced because the Aga Khan wanted to see what ITREB's policy was in respect to the publication of Farmans, indeed evidence is to the contrary of the assertion this court is asked to accept. Contrary to the submissions made by Mr. Gray, Sachedina states that he obtained this documents because "the Imam wanted to see what the process was (Q 306).

Affidavit of Sachedina, sworn June 25, 2010
Plaintiff's Motion Record, Tab 3(B)
Cross of Sachedina, pg. 74, Qs 306-310

27. The other citations given to support the above assertion are the evidence of Sachedina and the Constitution. Sachedina's evidence on this point is clearly hearsay and inadmissible.

The reference to the Constitution (in paragraphs 13, 89, 91 and 92) as evidence and argument supporting the above assertion is not accurate interpretation of the sections in question. There are two sections in the Constitution that is referred to by Mr. Gray, Article 8.4(d) and 14 .1(c).

28. Article 14 pertains to disciplinary action and sets out five sub-articles a to f detailing the kind of activities an individual could be subject to disciplinary action. The assertion made at above that this Article provides evidence that no one other that ITREB can print Farmans is not supported by this sub-article. At paragraph 89, the argument is set out as follows:

(para. 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." [Emphasis added.]

29. Article 14.1(c) reads as follows:

> 14.1 Any Ismaili shall be liable to disciplinary action who:
>
> (c) "without the permission in writing of the National Council obtained through the Regional Council within whose jurisdiction he resides, prints or publishes or circulates any material or makes any statement or convenes a meeting or assembly purporting to be on behalf of or relating to Mawlana Hazar Imam, the Ismaili Tariqah, the Jamat, or any Council or any other institution."

Cross of Tajdin, Exh 13 (Constitution of 1998, replacing 1986 version)

30. This is an article that deals with disciplinary actions and the interpretation asserted by Mr. Gray is as if the word "purporting" is excluded. Furthermore, if that is the meaning that anytime anyone speaks about our community, say to his or her children, or neighbours to say what and who we are, he or she would be breaching this article of the Constitution, a clearly unacceptable situation. This article extends to those who *purport* to do the items enumerated, and cannot support the proposition submitted by Mr. Gray, and any person who does contravene this article is subject to .disciplinary action.

31. Article 8.4 reads as follows:

> 8.4 Each Tariqah and Religious Education Board shall under the direction and guidance of Mawlana Hazar Imam:
>
> (a) implement a comprehensive programme and curriculum of religious education at all levels within the Shia Imami Ismaili Tariqah of Islam;
>
> (h) implement programmes for the training and upgrading of waezeen and religion teachers;
>
> (c) engage in or support research in the relevant aspects of Islam and the Ismaili Tariqah;
>
> (d) undertake the publication of books and materials on relevant aspects of Islam and the Ismàili Tariqah;
>
> (e) be a point of reference and consultation for Mukhis and Kamadias in matters of religious rites and practices of the Ismaili Tariqah;
>
> (f) make submissions to bring about uniformity in religious rites and practices of Ismailis, when so directed by Mawlana Hazar Imam;
>
> (g) work in close collaboration with other Tariqah and Religious Education Boards in different regions of the world; and
>
> (h) work in close collaboration with the Institute of Ismaili Studies to facilitate empathy and convergence or other harmonious relationships in their respective programmes, the development of human resources and education material and encourage constructive interaction between the religious and secular dimensions of education.
>
> **Cross of Tajdin, Exh 13 (Constitution of 1998, replacing 1986 version)**

32. Sub-article (d) is referred to as supporting the argument made (in paragraphs 13, 89, 91 and 92) by Mr. Gray to support that this "no other individual or institution is authorized to disseminate, publish, distribute or otherwise sell the Plaintiff's Literary Works."

33. The word Farman is defined in the Constitution as: "Any pronouncement, direction, order or ruling made or given by Mawlana Hazar Imam." Mr. Gray's seems to ground his assertion on the words "publication of books and materials on relevant aspects of Islam and the Ismàili Tariqah" as providing foundation that only ITREB and no one else can publish Farmans, an assertion not supported by evidence he is relying as a foundation for his inference.

Cross of Tajdin, Exh 13 (Constitution of 1998, replacing 1986 version)

34. All of the Constitutions of various separate countries ordained in and after 1948 (until the new one ordained in 1986) contained express Articles for the publication of Farmans. Jiwa does do not know if the Constitutions in force before 1948 dealt with the powers for publishing Farmans, as he has not been able to review any copies of the older Constitutions.

The *Constitution of the Shia Imami Ismailis in Europe, Canada, and the United States of America* (1976) 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 10 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.

Cross of Sachedina, Exh "A", 1948 Constitution

35. The 1948 Constitution referred to above at page 7 clearly makes a distinction between Firmans (as it was spelt then) and religious materials as follows:

> "It shall be the duty of the Association to record, collect and collate Firmans of Mawlana Hazar Imam throughout the continent of Africa and to be incharge of all religious literature, books, publications, and school books."

Of importance is that although Sachedina consistently states that the Imam's authority is required to publish His Farmans, and that Statement of Claim alleges that it is long standing policy for the Imam to edit His Farmans, the above noted clause contradicts that assertion as there is no requirement for any editing to be undertaken (since as noted above, every "word" is important) and that no prior authority is required before publishing Farmans. This defendant states that this can also be taken as conduct implying that Ismailis have a right to their Imam's Farmans as of right, and it is equal to any Ismaili having implied consent and/or permission to Farmans and to disseminate them to his family and friends, so long as they are Ismailis.

36. Although the Aga Khan spent three and one-half years reviewing all previous Constitutions before finalizing the 1986 Constitution before finalizing the new Constitution, the above article which defined and gave jurisdiction and mandate over Farmans *was removed* when He ordained the new Constitution in 1986. Jiwa states that the Aga Khan did that because the

Association (as it was called then) despite the express provisions *failed and/or ignored* to publish Farmans, thus leaving the field open for others, such as Tajdin and numerous other individuals, to disseminate His Farmans, which is a necessity if the followers are to guide themselves and their families in accordance with their Imam's guidance.

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

37. At paragraph 42, Mr. Gray refers to this defendant's evidence that he was told by the Association that the Aga Khan did not authorize the publication of Farmans. Their statements which were being made by the institutional leaders were untrue as the Constitution in force clearly did not require any authorization by the Aga Khan to publish Farmans. They simply failed to or refused to abide by the Constitution ion force. The Imam, accordingly, revoked the Article giving the Institutions *exclusive* authority to publish His Farmans, and this one fact supports the defendants' evidence that the Aga Khan has not authorized this action.

38. This defendant therefore submits that the assertion made by Mr. Gray in paragraphs 13, 89, 91 and 92 are not supported by evidence and be disregarded.

39. In response to arguments set out in paragraphs 15 to 20, 22, 25 to 30 of the memorandum (Tab 1), this defendant states that all of these paragraphs are inadmissible on the grounds of hearsay evidence. The defendants have given evidence that Sachedina is the person behind the forged signatures and most of the evidence given in these paragraphs originate with Sachedina, saying that he was told, or he was informed by the Aga Khan. This defendant states that

evidence submitted and relied upon in these paragraphs are what the Supreme Court in Guarantee referred to above as "self serving" evidence and be disregarded on this ground as well.

40. The court in *Merck Frosst* stated the following in regards to hearsay:

> "It should not be forgotten that whenever hearsay is admitted into evidence the other side is, in effect, deprived of its right to cross-examine. That is why the newly created exception requires that it be demonstrated that the hearsay evidence is reliable and necessary."
>
> "The rule that evidence is to be provided by affidavits is not a mere question of technicality; it ensures that no one is hurt by allegations which one does not have a chance to challenge."
>
> *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, 1995 CarswellNat 1003, 60 C.P.R. (3d) 93, 91 F.T.R. 260 at para. 15 and 16.
> Defendants' Book of Authorities, Tab 17

41. The court in *Merck & Co.* stated:

> "In my opinion the evidence in question is clearly hearsay and is precluded from admission unless it be admissible by some exception to the hearsay rule. That rule, as defined by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, (1992, Butterworths, Toronto) p. 156, may be stated as follows:
>
> > Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

***Merck & Co. v. Apotex Inc*. 1998 CarswellNat 560, 79 C.P.R. (3d) 501, 146 F.T.R. 148 at para. 7** **Defendants' Book of Authorities, Tab 18**

***Rees v. Royal Canadian Mounted Police*, 2005 CarswellNfld 83, 2005 NLCA 15 at paras. 71-73** **Defendants' Book of Authorities, Tab 21**

42. However, the Court in the case of *T.E.A.M.* sternly reminded the importance of requiring parties to bring forth "best evidence" as follows:

> "A party should not rely on hearsay evidence in respect of contentious matters unless it can concurrently demonstrate the necessity and reliability of doing so. The court should afford little or no weight to hearsay evidence that is justified by claims of expedience or by a transparent goal of avoiding crossexamination. Reliance on hearsay evidence should be particularly discouraged in the context of a summary judgment motion. Parties are urged to put their best evidence before the court in a direct fashion when they seek a summary judgment in their favour: *Podkriznik v. Schwede*,[1990] M.J. No. 179, 64 Man. R. (2d) 199 (Man. C.A.)." [Emphasis added]
>
> ***T.E.A.M. v. Manitoba Telecom Services Inc.*, 2005 CarswellMan 446, 206 Man. R. (2d) 39, at para. 10 Defendants' Book of Authorities, Tab 19**

43. Any evidence that is not admissible at trial is also not admissible in motions for summary judgment. Justice Gibson in the case of *American Cyanamid Co.* said as follows:

> "I conclude that it would be quite inappropriate to allow the Defendant to rely on this motion for summary judgment on evidence, whether or not it is "other evidence", that it would not be entitled to rely on at trial. Accordingly, paragraphs 37 to 40 of the first Johnson affidavit that reflect portions of the examination for discovery of Mr. Klothen will be disregarded in my decision."
>
> ***American Cyanamid Co. v. Bio Agri Mix Ltd.*, 1997 CarswellNat 636, 73 C.P.R. (3d) 277, 127 F.T.R. 274, at para. 10 Defendants' Book of Authorities, Tab 20**

44. However, hearsay evidence is admissible as set out by Nadon J. in the case of *Merck Frosst* as follows:

> In *Lecoupe v. Canadian Armed Forces*, 81 F.T.R. 91, I held that certain paragraphs of an affidavit were admissible, notwithstanding that the information which appeared therein constituted hearsay evidence. In my reasons, I stated, at page 93 of the report, the following:
>
> > In other words, in the aftermath of *Khan* and *Smith*, the exceptions to

> the hearsay rule have been merged into one broad exception which allows for the admission of proposed evidence that is reliable and necessary, with the appropriate weight to be give to such evidence to be determined by the trial judge.

***Merck Frosst*, supra, at para. 10**

45. Mr. Gray has not produced *any* evidence to satisfy the strict test of reliability and necessity in order to persuade this court in admitting hearsay evidence. Justice Nadon in *Merck Frosst* stated that,

> "In view of the evidence before me or rather the lack of evidence that the Applicants cannot obtain a proper affidavit from a representative of Novopharm, I must conclude that the necessity component of the hearsay exception has not been demonstrated. Consequently, the Applicants' motion for leave to file the Pauzé and Barrette affidavits is dismissed." (para. 18)

and as such this defendant submits that without the evidence of reliability and necessity all hearsay evidence to be disregarded.

46. At paragraphs 21, 28, and 47 to 52, Mr. Gray submits his arguments by referring to the Affirmation purportedly signed by the Aga Khan and the two letters purportedly written by the Aga Khan and sent to Tajdin.

47. This defendant submits that all of this evidence is also hearsay and be disregarded in their entirety. The defendant filed evidence of their expert, Graham Opsreay, ("Opsreay") who was cross-examined by Mr. Gray. Mr. Gray complaints that Tajdin refused to produce the original documents for his expert to review and as such his expert could not provide opinion on the issue.

48. Mr. Gray's expert, Mr. Brian Lindblom ("Lindblom") provided his evidence but on cross examination he admitted that he was only retained to critique Opsreay's report and was not asked to prepare his own report on whether the Aga Khan had signed the questioned documents. He also admitted that he "repeatedly" asked Mr. Gray to provide him with the contemporary samples of the Aga Khan's signatures and also originals. Mr. Gray has not explained why could he not provide an original of the three original Affirmations that are in his possession. Despite his submission that an original has been given to Jiwa, one original was only given for a ten day period and all three copies are with Mr. Gray.

Cross-Examination of Lindblom pg. 19, Qs 100-103; pg.40, Qs 216-233

49. Lindblom also maintained in his evidence that he could not give opinions if he did not have originals, but on cross he admitted that he has given conclusive and other opinions based on copies as opposed to originals, and that he had conducted a survey of 72 experts in the field working in Canada, Britain, UK, USA, Australia and found that all but three "identified these and produced a list of suspect features that was almost the same as that produced" by him and his associate working from the originals.

Cross-Examination of Lindblom, Exh. "A".
Cross-Examination of Lindblom, Exh. pg. 380-383

50. Although initially Lindblom on cross-examination said that he was never rejected as an expert by a Judge, on impeaching him he admitted that a Judge had ruled that he was not suitable as an expert in that case. In one case a Judge had held that his opinion was "baffling".

Cross-Examination of Lindblom pg. 77, Qs 370-372; pg. 83, Qs 389-391

51. Lindblom also agreed (after being impeached) that he has previously given conclusive opinions without having originals and has done so also with a facsimile copy, and as such the evidence that he could not do a proper review is without foundation.

Cross-Examination of Lindblom pg. 81, Qs 382-386

52. However, whether or not the expert opinion are relied on makes not difference on the grounds that the two letters and the Affirmation are hearsay and should be disregarded.

53. The law with respect to the issue of affidavit evidence filed and to be relied upon by parties in support of their case, is succinctly set out in the Court of Appeal of Newfoundland and Labrador which referred to *Halsbury's Laws of England*, 4th edition, Volume 17 (London: Butterworths, 1980), at page 193. At paragraph 277, the editor writes:

> Any party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.

The editor cites a number of authorities. It is sufficient to refer only to *Allen v. Allen*, [1894] P. 248 (Eng. C.A.).

At page 253, Lopes L.J. wrote:

> ... It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination. ...

We accept that view as an accurate statement of the common law applicable in this

province today.

The consequence of denying a party its right to cross-examine any other party who gives evidence was considered by the English Court of Appeal in *Blaise v. Blaise*, [1969] 2 All E.R. 1032 (Eng. C.A.). At page 1036

Lord Justice Sachs wrote:

> ... As a matter of first impression it seemed to me — and I had no hesitation on this point — to lead to the conclusion that where a party is denied the important right to cross-examine a witness whose answers on cross-examination might affect the result, that constituted both a substantial wrong and a miscarriage of justice. ...

Lord Justice Fenton Atkinson expressed it slightly differently, but to the same effect, when, at page 1038, he wrote:

> ... In my judgment there was on the facts of this case a substantial wrong or miscarriage of justice because the husband was not allowed to develop his full case and evidence which might have led to a different decision was shut out. In other words, as it seems to me, he lost a chance of success which was fairly open to him.

***Rees v. Royal Canadian Mounted Police*, supra at paras. 57 to 60**
Defendants' Book of Authorities, Tab 21

54. The Supreme Court of Canada's decision of *R. v. Darrach,* the Supreme Court stated the following about the importance of cross-examination to test evidence:

> "Having produced his affidavit, the basic rules of evidence require the accused to submit to cross-examination because the right to cross-examine is essential to give any weight to an affidavit.
>
> The accused's refusal to submit to cross-examination on his sworn affidavit in effect reduces its weight to that of an unsworn statement. Yet, it has long been decided that an accused cannot make an unsworn statement because it would lead to many dangerous results, the most obvious of which are, the escape from cross-examination; the safe introduction of a concocted defence; the securing of all the benefits of sworn evidence in accused's favour without incurring the consequences of perjury by refraining from going into the witness box; and also depriving the jury of the benefit of appraising his credibility in general from his demeanour therein." [Emphasis

added]

***R. v. Darrach,* 2000 CarswellOnt 3321, 2000 SCC 46 ar para. 61 - 63**
Defendants' Book of Authorities, Tab 22

55. At paragraph 63, *Gonthier J.,* further noted that:

> As Cory J. put it more recently in *Osolin*, *supra*, cross-examination "is of essential importance in determining whether a witness is credible" (p. 663). ... Cross-examination is required to enable the trial judge to decide relevance by assessing the affiant's credibility and the use to which he intends to put the evidence. ... Without cross-examination, "the court can not attribute much, if any, weight to such evidence" because it is impossible to assess its probative value and prejudicial effect as the legislation requires. [Emphasis added]

***R. v. Darrach*, supra, at para. 63**

56. Justice Blanchard in the case of *Ayangma* said the following about the failure to cross-examine a witness on his affidavit:

> "The defendant has not had the opportunity to cross-examine on this evidence. It would therefore be prejudicial to the defence to allow such evidence as part of the proceeding without a proper opportunity for the defence to test its veracity."

***Ayangma v. R.*, supra 26**

57. The court in *Suwary* said,*"* 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

***Suwary v. Women's College Hospital*, 2008 CarswellOnt 1195, 165 A.C.W.S. (3d) 67 at para. 34 Defendants' Book of Authorities, Tab 5**

58. Jiwa submits that the submissions made by Mr. Gray respecting the letters and Affirmation purportedly signed by the Aga Khan be disregarded as the defendants have been denied the right to test the evidence as noted above by the Supreme Court of Canada, in addition to the

evidence given by the defendants that these documents have not been signed by the Aga Khan.

59. As noted in paragraph 16 above, due to the failure to file direct evidence to enable the evidence to be tested by the defendants, this court should make an adverse inference as set out in the case of *Cooper v. R.*

***Cooper v. R.*, supra at para. 20.**

60. At paragraphs 51 and 52, Mr. Gray faults the defendants for failing to cross-examine the affiants Daniel Gleason ("Gleason") and Jennifer Coleman ("Coleman") and submits that not doing so violates the rule in *Dunn v. Browne.* The obligation to provide and submit admissible evidence is on a party wishing to tender the evidence, and if that party wished the courts to rely on that evidence then the evidence should be tendered within the rules and procedures set out by jurisprudence. This defendant denies that the rule set out by *Dunn v. Browne* has been breached by him.

61. Mr. Gray is seeking an inunction for refraining us to continue to disseminate Farmans but as there is no credible and admissible evidence submitted by him to establish that the Aga Khan has revoked the consent and encouragement given by him in 1992, that part of the claim must also fail.

62. The Aga Khan's brother, Prince Amyn Mohamed ("Prince Amyn") who is said to have sent

a letter to Tajdin. Although Tajdin wrote to him in French, he purportedly responded in English. However, the letter is not signed by Prince Amyn, sent through someone else's email account, and contains an error. Tajdin's name is Nagib, and Prince Amyn's email, not sent from His email account, spells the name as Naguib. Only Sachedina spells Nagib's name as Naguib, which indicates that Sachedina is the one who penned the email, purporting to be from Prince Amyn. On cross-examination, Sachedina admitted that he addresses Tajdin's first name as Naguib, the only person who addresses Tajdin as Naguib.

***Cross of Sachedina, pg. 213, Qs* 919-922**

63. Accordingly, despite the dozen or so tabs of materials filed in this litigation by Bhaloo and Sachedina, not one credible document shows that the Imam has revoked the consent He gave on August 15, 1992. Sachedina's statements that the Imam has told Him "frequently" is a contrived statement and is not supported by the Ismaili Constitution, by Ismaili traditions going back to about 1,400 years, or by any Farman made by the Imam.

64. Bhaloo and Sachedina's evidence that they went to meet Tajdin to tell him that the Imam has asked that he stop distributing Farmans, and that Tajdin did stop distributing Farmans is also false, in that they went to discuss what other projects they could work together, in accordance with the Guidance given by the Imam on August 15, 1992. Tajdin was not informed by them to stop, and he did not stop, but continued distributing Farmans. On the contrary, Sachedina told Tajdin and his family that the Imam had asked him to convey the Imam's Blessings and appreciation for the services offered by them. Furthermore, neither of then had or have any

authority to revoke a consent or authorization that was given by the Aga Khan in 1992.

Cross of Tajdin, pg. 96, Qs 561-562

65. Of importance is that the Aga Khan if he wanted to stop the activities complained of, has very simply and effective ways to stop the distribution of His Farmans, *if he chooses to do so.* One way is to amend the Ismaili Constitution, which would be binding on all Ismailis. Another would be to make a Farman anywhere to tell the followers that he did not wish such activities to be undertaken by his followers and not only these defendants, but all others who engage in such activities would cease such activities.

Cross of Sachedina, pg. 99 Qs 426, 429-439

66. The Aga Khan has visited the Canadian congregation in 2005 and 2008 when he gave extensive Farmans to the Jamats and one sentence of his would have stopped the activities complained of. In 2008 when the Aga Khan visited the London congregation, he told then openly that he was not sure if his leaders were conveying his messages properly to the followers. Similarly, he can easily have these activities stopped if he wished. He also often sends a written direction or message to the congregation and could have sent a message in that fashion as well.

Cross of Sachedina, pg. 99, 426, pg. 196, Qs 850-861

67. Considering the various issues and the ability of the Aga Khan to have these activities stopped in the blink of an eye, and considering that he revoked the express authority he had

given to the institutions to publish his Farmans, there is just no credibility to Sachedina's insistence to stop these activities.

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

[8] I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

> 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried *(Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al.,* [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (T.D.));
>
> 2. there is no determinative test [...] but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie* [(1990), 75 O.R. (2d) 225 (Gen. Div.)]. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
>
> 3. each case should be interpreted in reference to its own contextual framework [...];
>
> 4. provincial practice rules (especially Rule 20 of the *Ontario Rules of Civil Procedure,* [R.R.O. 1990, Reg. 194]) can aid in interpretation [...];
>
> 5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court [...];
>
> 6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so [...];
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge [...] The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved.

***Koslowski v. Courrier*, 2009 CarswellNat 2902, 2009 FC 883, at para. 16 Defendants' Book of Authorities, Tab 1**
***Children's Aid Society of Hamilton v. N. (M.),* 2007 CarswellOnt 2453, [2007] W.D.F.L. 2759 at para. 28 - 31, Defendants' Book of Authorities, Tab 2**

69. 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.

70. Jerome A.C.J. in rendering his decision in the case of *1013579 Ontario Inc. v. Bedessee Imports Ltd.* (Tab 13) held that, "I am satisfied that the plaintiff's purchases over several years of the defendant's wares which bore the "Cow & Grill" mark, and the fifteen year delay in pursuing an action in trade-mark infringement constitute acquiescence of the defendant's use of trade-mark. There is no question of fact and law which need be referred to trial, and dismissed the action.

***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. Accordingly, Jiwa defendant submits that the motion of the plaintiff be dismissed, and that his motion dismissing the action be allowed, without costs. Jiwa serves his community and will not seek costs which would be paid from community resources - he give to his community and will not accept any costs.

72. However, the court in *Garford* said with respect to credibility issues with respect to motions for summary judgment as follows:

> "First, it is now well settled that issues of credibility ought not to be resolved on summary judgment motions; (*MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, [2004] 3 F.C.R. 3 (F.C.A.), paras. 32, 35 and *Trojan Technologies Inc. v. Suntec Environmental Inc.* (2004), 31 C.P.R. (4th) 241 (F.C.A.) para. 20). But, in my view, in order for there to be an issue of credibility justifying dismissing a summary judgment motion and sending a case to trial that issue must relate to some question relating to the merits as to which there is a conflict in the evidence produced on the motion itself. There is no such conflict here for the plaintiff has wholly failed to produce any evidence whatever to support the allegations of its claim against Sling Choker. The most it has done is to suggest certain activities which the latter has not been able to disprove positively but which equally have not been proven by plaintiff itself. The moving defendant having denied under oath the specific allegations against it, it is for plaintiff to produce some evidence in support of its claim."
>
> ***Garford Pty Ltd. v. Ground Control (Sudbury) Ltd.*, 2005 CarswellNat 1874, 2005 FC 946, 41 C.P.R. (4th) 92 at par. 5 Defendants' Book of Authorities, Tab 23**

73. Accordingly, Jiwa submits that there is no conflict in the evidence since there is no admissible evidence that can contradict or refute the evidence submitted by the defendants which in significant aspects gas remained unrefuted.

IV - ORDER SOUGHT

74. This defendant asks that the plaintiff's motion be dismissed, without costs..

75. In the alternative, this defendant asks that the matter be ordered to be summarily tried on the narrow issue of whether the Aga Khan gave His consent to distribute His Farmans on August 15, 1992, and whether consent, if held to have been given, extends to the Golden Edition.

Date: November 29, 2010

Respectfully submitted,

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

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

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

Court File No. T-514-10

FEDERAL COURT

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

and

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

Defendants

REVISED RESPONDING
MEMORANDUM OF FACT AND LAW
(of the defendant Alnaz Jiwa
responding to the Plaintiff's Rule 213 Motion
returnable December 7, 2010)

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

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