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

AMENDED MEMORANDUM OF FACT AND LAW
(of the defendant Nagib Tajdin /responding party)

I - NATURE OF THE MOTION

1. This is a motion for summary judgment brought by the plaintiff ("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 restraining 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 - FACTS

2. 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 will only set out additional facts and law to be relied on by him in this factum.

OVERVIEW:

3. The defendants have been distributing the plaintiff's works, known as "Farmans" which are oral Guidance made the Imam when He blesses His Jamats (congregation). The Jamats guide their life according to the Farmans made by their Imam, who has said that He makes Farmans for the Jamats, as not abiding by His Farmans has very serious consequences to the individual.

4. Defendants have accepted not to argue authorization by the Aga Khan for this Motion based on a suggestion by Prothonotary Tabib to narrow the issue. This was without prejudice to the fact that they have evidence to the contrary. However since Mr Gray has decided to misinterpret defendants collaboration in this regards, if this Court feels that this issue is of importance to the outcome of the Motion, this defendant is ready to argue this point forcefully.

5. The defendants state that the litigation has been commenced and prosecuted in a manner that has misrepresented the Aga Khan, 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.

6. In any case, whether the Aga Khan has or has not authorized the Lawsuit, He certainly has not been running it, He has not been cooperating in person with counsel to provide any evidence that can be tested. There is no Affidavit, nor Affidavit of documents, nor any testimony in person by the Aga Khan to back the Statement of Claim. He has not even provided the questioned documents nor signature samples to the Plaintiff's expert.

7. Plaintiff's Counsel has retracted from the Statement of Claim and is no longer asking for all remedies stated originally therein. He is also not pursuing that the false claims that co-

defendant Jiwa published and is part of this defendant's web site. Counsel can retract or cling to whatever he wishes. That does not change the fact that Counsel is basing his case on inadmissible evidence and false accusations that cannot lead to Summary Judgement.

8. On August 15, 1992, the Imam was presented with a clearly marked Volume 1 of Farmans, and He gave his consent (with a binding order to "continue" and blessings for the success of the work) to Tajdin to publish and distribute His works, the Farmans. The Plaintiff's witness has admitted that The Golden Edition is the continuation of this work, and that the Aga Khan has known that Tajdin is undertaking this work. However, the Aga Khan has NEVER communicated to the defendants that He has not consented to the continued publication of His Farmans. The only person who has repeatedly communicated with Tajdin is Mr Sachedina, whose words are not binding to Tajdin.

9. Not only is the Plaintiff's evidence fabricated and of questionable authenticity, it contains major theological flaws that go against basic tenets and ethics of the Ismaili Faith upheld by the Aga Khan, and it is not supported by any known authentic binding materials available to Ismailis, namely the Ismaili code of conduct, the Farmans, the Ismaili Constitution.

10. The court record reflects the fact that the Plaintiff did attend in Canada to be questioned on October 15, 2010. Thereafter, on November 2, 2010, the Court fashioned a procedure for the Plaintiff to introduce evidence relating to that discovery in a motion. No evidence whatsoever has been submitted by the Plaintiff to support the inadmissible evidence in His case, or the unsubstatiated claims that the Aga Khan did not consent in 1992, or that the Aga Khan initiated or instructed the terms in the statement of claim.

11. The lack of true and tested evidence from the Aga Khan to support this action is not

surprising and supports the Defendants. The Aga Khan does not need to give any public evidence or start a lawsuit in order to be obeyed by the Defendants who have pledged unconditional obedience. He has many other simple means of dealing with this in a definite and binding manner. On the other hand, if, as evidence shows, He has been misrepresented in this case, then there is no use in His giving contradictory evidence either: it would go against the conciliatory approach that He favours, and it would only further embarrass community leaders and undermine the Ismaili institutional structure.

12. The plaintiff at paragraph 85 of his factum enumerates 7 points from which he argues that no consent was given, or can be inferred.

a. In response to paragraph 85 (a) and (b) of the Plaintiff's factum, the defendants state that the consent given was to “continue” the work. The book presented to the Imam clearly indicated on it that it contained His Farmans, and that it was Volume I. Accordingly, whether the Imam opened the book or not is not relevant nor determinative of the issue. The argument made by the plaintiff that the Golden Edition was not released for publication until 2009 and could not have been the subject of consent is erroneous. Consent was to“continue” the work, and the Kalam-e Imam-e Zaman Golden Edition as well as the nine other Farman books published by Tajdin in the last 18 years are the continuation of the work. Mr Sachedina has admitted this. In Fact, the Announcement of January 16th referred to this book simply as Kalam-e Imam-e Zaman, which is the same name as the book that was presented in 1992.

Cross-examination of Ssachedina pp. 12-13: #44-#46, pp.107-109: #453& #459

.b. In response to paragraph 85(c) of the plaintiff’s factum, the works subject of this action are “religious” works, and as such the argument made in that paragraph cannot

support that the consent, given in religious context, is misplaced. In fact, the religious context makes the Imam's words binding on the defendant as per his oath of allegiance to the Imam. Furthermore, the fact that no names were mentioned does not mitigate the consent issue, consent was given, and if the Imam wanted to inquire whom the consent was given, He could have asked for the information.

c. In response to paragraph 85(d), the word “ensemble” was used in future tense, the context was “then“ we will see what can be done together. Therefore, the future work under the context is not related to the Farman books, but to something to be identified. In fact, Sachedina and Aziz Bhaloo (“Bhaloo”) did meet the defendant Tajdin, acknowledged the 1992 Mehmani events, and they discussed what work could be undertaken together in the spirit of the last sentence. That does not, though, take away or undermine the consent.

d. In response to paragraph 85(e), the consent given by the Imam was not given to a third party. Karim Alibhay had worked with Tajdin on compiling the Farmans. An undertaking of this magnitude cannot be undertaken by a sole or singular person. The consent was not given to a person *per se*, but to the “work”, in that the words spoken were, “continue this work”, and *you (plural)* continue this work. If the Imam wanted to restrict the consent to a particular person, he could have done so at any time.

e. In response to paragraph 85(f), the granting of *Mehmani* is personal. Bhaloo’s evidence is a self-serving evidence, and contrived. The numbers therin are exaggerated, and Tajdin calculated that there were at most 100-150 Mehmanis presented on that day. The *Mehmani* has been recorded on Video, and only the institutions have a copy of the ceremony. If Sachedina and/or Bhaloo discloses the Video, the actual event can be determined, whether the Imam generally spends a few seconds or not is not

determinative. The issue is whether the Imam communicated His consent to the distribution of His works, and it does not matter if He did it in a few seconds or an hour. The evidence is clear that He gave His consent. Other than self-serving contrived evidence, there is no credible evidence put into evidence to dispute that the consent was given. An adverse inference should be taken for the failure to provide Video recording of the *Mehmani*. The Imam does in a short time, Guide and Bless His spiritual children.

Cross-Examination of Sachedina pp.45-47: #195 - #199

Affidavit of Nagib Tajdin sworn July 13, 2010,
Tajdin's Responding Record Tab 6, Paragraph 14-17

Affidavit of Alnaz Jiwa sworn July 16,
Tajdin's Responding Record Tab 7, Paragraph 27-28

f. In response to paragraph 85(g), the letter written by Tajdin to the Imam does not "revoke" the previous consent given by the Imam. Tajdin wrote to the Imam a report, and is seeking permission to offer as a donation a copy to each Jamatakhana across the world. The seeking of "direction, wisdom, and guidance" is with respect to this project and future projects, but the supplication made by Tajdin to his Imam is a routine prayer all Ismailis make when they approach their Imam. Tajdin's letter of January 4th was also written in the spirit of determining what work could be undertaken next if the Imam would accept that the Farman project had ended. However, the argument made in the plaintiff's factum misinterprets the plain and simple words: the seeking of direction is not same as seeking consent.

13. In response to paragraph 85(h), the Affirmation is relied on by the plaintiff.

a) However, the plaintiff's counsel has chosen not to file the Affirmation as evidence, thus precluding the defendants from cross-examining the plaintiff.

b) Furthermore, the Affirmation is *not signed* by the Imam. The factum states that two persons have sworn and filed affidavits attesting to the fact that the Aga Khan signed the Affirmation. The affiants have not provided a copy of the passport, or any other photo identification or any credible evidence to make a clear determination as to who appeared before them, although the defendants had alleged in their Statement of Defence that the Imam had not authorized this litigation.

c) The Affiants also cannot interpret the Affirmation, so defendants cannot ask them for any clarifications on its meaning and implication on the case, especially in the context of the 1992 consent

d) Point #3 of the Affirmation especially is out of place. It says "3. I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the statement of Claim. " This obviously does not mean that He has never consented to any publication of Farmans in general, as there are official Farman publications from 40 years ago, and another approval of a Farman publication was announced in the January 16th, 2010 announcement. If this means that He has not consented specifically to the Golden Edition KIZ Book only, then that is true and does not advance the Plaintiff's case because Defendants are acting on a consent given by the Aga Khan in 1992 for the KIZ Farman publication project where he said to "Continue" and to "Succeed" in the Project, after which Tajdin published many books under the KIZ heading and continued openly distributing the KIZ books well into the 2000's.

e) The Affirmation was delivered with an email threat from opposing counsel to 'widely circulate it', and the threat was subsequently carried out. The Affirmation's purpose was more vexatious than legal.

14. Sachedina has sent two other letters purporting to have been signed by the Aga Khan, and one letter is said to have inserted a handwritten sentence (ending in a coma) to highlight that the Imam Himself wrote and signed the letter. As it stands, both letters are highly suspicious in timing, in content, in format, and in authenticity. These letters have been attached as exhibits to Sachedina's affidavit thus precluding the defendants from cross-examining the Plaintiff on these. These letters were not mentioned in the statement of claim on April 6th, but they were quoted in the April 15 announcement that created an uproar in the Ismaili community against the defendants and their families. Their purpose was more vexatious than legal.

15. An expert has opined that the Imam has not signed the Affirmation as well as the first letter, and he also opined that the handwriting on the second letter has not been penned by the Aga Khan on that letter.

16. Plaintiff's attempt to merely discredit the expertise brought by the defendants without submitting any evidence to counter the expertise suggests that the Aga Khan is not involved in providing any evidence in this case. Furthermore:

a) Mr Ospreay is a leading expert in forensic handwriting analysis, and member of societies that often rival those that Mr Lindblom belong to. The Plaintiff's effors to discredit Ospreay merely show the weakness of the Plaintiff's case.

b) Defendants are not third parties, they collected sample signatures from known authentic correspondences of the Aga Khan. In fact, they and their family have received over the years directly from the Aga Khan letters which are authentic and contain authentic signatures, as acknowledged by opposing counsel.

Cross Examination of Tajdin p.13: #66

c) Ospreay reports that, based on signature samples of the Aga Khan dating from 1985 to 2009, the variation in the known signatures of the Aga Khan is narrow. Conversely, there is no undisputed known sample signature presented in the plaintiff's case that shows that the Aga Khan's signature has suddenly changed.

d) None of the experts consulted by the defendants declined to write an affidavit and none gave a different conclusion than that of forgery. Mr Ospreay was chosen for convenience because he is located in Toronto and because the Affirmation was only lent by Gray in Toronto for 10 days, precluding the defendants from sending the Affirmation to the 2 other Forensic experts out of province and out of country.

e) The Plaintiff offers no evidence that the Aga Khan has been injured to the point of mangling his signature permanently. In fact, Sachedina admits during cross-examinations that the Imam's shoulder was restored and that he is very active, and in good shape, and is often seen texting on his phone even after the shoulder accident and well before the date of the signatures on the questioned documents.

Cross-examination of Sachedina #586 - #599, #834 - #839

f) It is not reasonable to expect the Defendants to provide originals of the Plaintiff's signature. The Aga Khan is alive and well, and the plaintiff should put his best foot forward by providing authentic signature samples and obtaining definitive conclusions of whether the Aga Khan's signature has changed, whether the signature on the other 2 copies of the Affirmation are indeed His, whether the signature on the 2 letters are His, whether His recent signatures on international treaties signed in front of live audiences also match the Affirmation signature.

17. The Plaintiff's expert Lindblom does not provide any contradicting evidence, only unsubstantiated hypothesis.

a) In presenting hypothesis about the reasons for a change in a person's signature, he conceded that the signatures in the January 24 letter and in the one copy of the May Affirmation that has been publicized, is different from previous known signatures of the Aga Khan.

b) He only tries to question the credentials of established Expert, Mr Ospreay. It advances no evidence for its baseless hypothesis that the Aga Khan's signature may have deteriorated because He is aging or Ill.

c) It offers no analysis of contemporary signatures to counter its baseless claim that signatures given to Mr Ospreay are not representative of the Aga Khan's current signature.

d) In fact, Lindblom says that he asked Mr Gray for original documents and was not provided with any originals nor with any known signature samples of the Aga Khan.

Cross-Examination of Lindblom pp.40-44: #216-233

e) And although he claims expertise in analyzing photocopied material, he claimed in this case to not be able to give an opinion because he only had photocopied material with unknown copying history.

Cross-Examination of Lindblom p.22:#117-119

f) However, both the January and February letter had been scanned and sent by the Plaintiff by email to Tajdin, so the Plaintiff could have provided that first-generation scanned copy to Lindblom.

g) Sachedina said that the Plaintiff provided him a copy of all correspondence, so Sachedina also could have also provided copies with a known scanning or copying

history.

h) The Plaintiff is also said to have retained two other signed copies of the Affirmation that have never been shown to the experts nor to the defendants. Those originals could have been provided to Lindblom and to the Defendants.

i) The fact that Gray was not able to provide any contemporary signature samples of the Aga Khan to Lindblom even though Lindblom asked for some shows once again that the Aga Khan is not willing to give evidence in this case.

j) The report offers no conclusion as to the authenticity of the questioned documents. It is unreasonable to make such costly and time-consuming efforts to hire an expert and conduct cross-examinations to merely discredit another expert's opinion. Why gamble the whole case on having the defendants' expertise struck by the Judge?

k) If the Plaintiff intends to rely heavily on the affirmation, then he should have put his best foot forward and obtained an affirmative opinion on its authenticity, and brought an authentic Affidavit from the Aga Khan Himself.

18. The Plaintiff's Memoranda of fact and Law contain Misrepresentation of the evidence.

a) Paragraph 13 is wrong: There is no evidence that His Highness has approved any dissemination policy (admitted by Sachedina in cross-examination). It is not in the Ismaili Constitution, or in any Farman, and there is no official document from the Imam.. The ITREB's role is also misrepresented as Farman Publication is no longer included in in the Ismaili Constitution since 1986.

Sachedina's Cross-examination p.74: #306-#309

Affidavit of Alnaz Jiwa sworn June 16,
Tajdin's Responding Record Tab 5, Paragraph 12-18

b) Paragraph 17 is wrong: Tajdin's January 4 letter, sent long before the lawsuit was initiated, does not ask for permission to distribute the material, it asks for permission to submit a gift to the Aga Khan for all His Jamatkhanas. In fact, Tajdin has written therein already that the Golden Edition was made with the Blessing of the Imam which confirms his stand that there was already consent.

c) Paragraph 34 is wrong: Tajdin did not say "If the Statement of claim is authorized.." he said "If the Aga Khan tells me, I will accept"

Cross-Examination of N. Tajdin pp.78-80: #439 - #454

d) Paragraph #51 is wrong: Tajdin's answer was not in the context of the Affirmation.. In reading the transcript in context it is clear that at this point, Mr Gray was not asking about the affirmation, but he was asking, despite the questions of authenticity, about providing to Tajdin yet another hypothetical document signed by the Aga Khan.

Cross-Examination of N. Tajdin pp.68-70: # 398-#404

e) Paragraph #108 is wrong: Defendants have not asked for any meeting with the Aga Khan since the Discovery, and have not shown any doubt about understanding the Aga Khan's actual intentions.

19. Note the date on the copyright registration: June 23, 2010, months after this litigation was started. So by printing Farmans, this defendant has definetely not breached a 'registered' copyright. And Just as the copyright is registered for 'Farmans' in general, the Defendants maintain that their consent to print was also to continue printing "Farmans" in general, not just an earlier book, and not the "Golden Edition" in particular.

20. The Imam's brother, Prince Amyn Mohamed ("Prince Amyn") is said to have sent a letter to Tajdin. Tajdin wrote to him by courier, in French, without asking for a reply, sharing his suspicions, and including only his postal address and phone number. A reply allegedly from Prince Amyn (with no signature at all) came by email (Tajdin had not provided his email address), from the email address of a secretary (which cannot be reassuring), in English (Prince Amyn's first language is French as is Tajdin's, but Sachedina only speaks English), Tajdin's name was misspelled as Naguib which is how only Sachedina spells it (Tajdin searched for "Naguib" in thousands of emails in his outlook).

Cross-Examination of Sachedina pp.213-214: #919 - #922
Affidavit of Nagib Tajdin, sworn July 13, 2010,
Tajdin's Responding Record Tab 6, Paragraph 72

21. Cross-examinations have shown many discrepancies in the launching of this case.

a) Mr Jiwa was never contacted by anyone or warned before being served with this action. Jiwa has been falsely accused of publishing Farmans and running a website: this already undermines the credibility of this action. Jiwa was included only because of a misunderstanding by Sachedina who confused the difference between a website and a mailing list, and who confused Tajdin's public website (ismaili.net) with Jiwa's unrelated private Mailing list (ilm-net). H.H. the Aga Khan is Harvard-Educated, and knows the difference between a mailing list and a website.

Cross-Examination of Sachedina pp.156-158: #654 - #661

b) This action was also filed on the initiative of only a couple of people who had planned this course of action since January. Sachedina offered no evidence that instructions to start the claim came from His Highness. When asked when His highness

decided to issue the statement of Claim, Sachedina first said it was discussed with only him and Mr Manji in the timeframe of the second letter, February, then End of March, then it was found that the action was considered since Sachedina wrote the January Announcement before the Aga Khan got Tajdin's letter

Cross-examination of Sachedina pp.120-121: #515-#519, #23-#27, #771

c) In the absence of an affidavit from the Aga Khan, the main affiants in this action, Sachedina and Bhaloo, purporting to convey the Aga Khan's wishes, discussed amongst themselves, but did not review their affidavits with the Aga Khan Himself. They were also not chosen by the Aga Khan to be witnesses. There is no evidence that He allowed them to speak on His behalf.

Cross-examination of Sachedina pp. 9-10: #25-#27, pp. 10-11: *#28-#33,* pp.192-193: *#830-#833*

d) When the Lawsuit was launched, and another announcement was made on April 15 on behalf of the Leaders' International Forum (LIF). During Mr Tajdin's Cross-Examination, Mr Gray tried to establish that this would be written in a consultative process with all the institutional bodies. During His Witness Sachedina's Cross-Examination, the witness contradicts the above. He says that the announcement was actually finalized and then sent out to everyone on the very evening that it was read out. the chairman of the LIF had no involvement, and never spoke to the Aga Khan about this matter, and the LIF was not consulted (contrary to what has been implied through the pleadings and through the announcements). It is Mr Sachedina who informed the LIF about this action. He claims that the announcement was not written with any institutions, but drafted by the Aga Khan and read out over the phone by the Aga Khan to Mr Sachedina while Mr Sachedina was driving. Not only is this claim odd, but it also contradicts Ismaili tradition, as any letter actually drafted by the Aga Khan and read out

in Jamatkhanas is never treated as an "announcement" from Leaders, it is treated as a Talika and accompanied by over a dozen religious ceremonies including the most sacred ceremony of Holy Water.

Cross-examination of N. Tajdin pp.62-64: #364 - #375
Cross-examination of Sachedina pp.169-174: #716 -#745

e) It is unbelievable that the Aga Khan would prefer to start a long legal process instead of giving instructions in person to Tajdin by a 2 minute personal phone call or a short 5 minute meeting.

f) Great pains are taken to keep the Farmans in the Ismaili community. The Farman books have not been entered as evidence by either party. ITREB is an Ismaili constitutional body manned 100% by Ismailis who have taken an oath of office, whereas the IIS is an outreach institution manned by non-Ismailis which is not mandated with the distribution of Farman books. It is therefore questionable in the ismaili context that the Imam would ask that an order be made to return books to the IIS and not to ITREB.

Cross-examination of Sachedina pp.48-49: *#208 - #214*

22. Cross-examinations have shown many discrepancies in the circumstances surrounding the two Questioned Letters of January and February:

a) Witness Sachedina's Affidavit Says that the January 24th letter is a swift reply to a January 4th letter to the Aga Khan from Mr Tajdin received at Aiglemont (Aga Khan's Residence) on January 20th. However, In his testimony, he says that he does not know when the Aga Khan received the letter. It was shown that a DHL receipt shows the Letter actually reached Aiglemont on January 8th. But Sachedina wrote to Nagib on January 10th saying that his letter had not reached Aiglemont.

Cross-examination of Sachedina's p.190-191: #820 - #826

b) Witness Sachedina first said that he had nothing to do with the January 24th letter, but then admitted that Ms Parkes must have gotten Tajdin's address from Sachedina as Tajdin never gave his address to Parkes.

Cross-examination of Sachedina pp.218-219: #943-#947

c) In response to the January 24th Letter, Mr Tajdin had told Mr Sachedina that he needed some clarifications and that he was willing to fly to Paris to Meet the Aga Khan at His convenience. Suspiciously, Mr Sachedina never conveyed the message to the Aga Khan.

Cross-Examination of Sachedina p.136: #570 - #573.

d) The February 18th letter repeated sentences that Mr Sachedina spoke angrily on the phone on the previous day to Tajdin

e) The witness Sachedina contradicted himself on the drafting of the Letter of February 18th. He Admits he saw the draft before it was signed. At First, he said that H.H. the Aga Khan showed him a draft in person, and later he said that H.H. the Aga Khan wrote the letter during one of his travels.

Cross-Examination of Sachedina pp.118-119: #505 - #509, p.166: #697 - #702

23. It was found during cross-examinations that Mr Sachedina misrepresents the Imam's words for his convenience.

a) When Mr Gray asked Mr Tajdin if he has ever criticized the Leaders, Tajdin gave a recent example of a Farman made by the Imam in 2008 in a Large gathering in London where the Imam himself criticized leaders by saying that they do not always convey His messages to the Jamat. Sachedina justified the fact that this sentence was edited out of the 'official' Farman by saying that the Imam was interrupted. It was then shown that there was no interruption and that the tape of the Farman contained a 2-second gap between the

end of the Imam's sentence and the applause of the Jamat.

Cross-Examination of N. Tajdin p.37: #213-#215
Cross-Examination of Sachedina p.99: #426, pp.196-201: #850 - #861

b) In the same way, Sachedina's Affidavit represents his own views. In the same way, Sachedina's phonecalls to Tajdin starting January 1st were made without consulting the Imam, so again they represent his own views. In the same way, Sachedina and Bhaloo's affidavits were written without consulting the Aga Khan, so again they represent their own views.

Affidavit of Sachedina, sworn June 25, 2010, Paragraph 21
Cross-examination of Sachedina pp.10-11: #32 - #33

c) Paragraph 33 and 34 of Sachedina's affidavit are also distortions. Sachedina did not plead with Tajdin. He threatened to ruin Tajdin's reputation because he had found out about the forgery. By reverence for the Imam and His institutions, Tajdin only wanted the matter resolved by the Imam, he tried to contain the information, and did not publicize the forgery until many months later, after the Statement of Claim became public through a mass e-mail campaign.

Affidavit of Sachedina, sworn June 25, 2010, Paragraph 33-34
Cross-examination of Sachedina pp.167-168: #704-#709
Cross-examination of N. Tajdin pp.33-35: #187-#202
Supplementary Affidavit of Nagib Tajdin sworn June 16, 2010,
Tajdin's Responding Record Tab 3, Paragraph 9-10

24.d) Only the Aga Khan can tell what His true intentions are. He has not said that He did not consent to Farman Publication in 1992. He has not said that He needs to Edit Farmans. He has not said that He has signed any of the questioned letters. And most importantly, he has not given Evidence in this Case. Evidence that would easily end the case. Bhaloo and Sachedina’s evidence that they went to meet Tajdin in 1998 to tell him that the Imam

has asked that he stop distributing Farmans, and that Tajdin did stop distributing Farmans is also false. They would have had no authority to revoke the Imam's consent. They met Tajdinto discuss what other projects they could work togther for, 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. The Affidavit of Mohamed Tajdin who hosted Sachedina and Bhaloo and who arranged and attended this meeting is uncontested.

25. Additionally, both Sachedina and Bhaloo have tried to mislead the Court by hiding the real purpose of their visit to Montreal in 1998 and by keeping silent on the presence of Mr Mohamed Tajdin, the Convenor for the Focus Humanitarian Fundraising campaign, at the informal meeting with the defendant. Bhaloo's recollection is also incorrect as his affidavit says that Tajdin presented the Mehmani when he should have known that that was not the case. Bhaloo's numbers are also incorrect as he writes that there were 500 to 700 ismailis waiting for individual audiences when there were in fact only 100 to 150 mehmanis presented that day. Furthermore, if The Imam was concerned of Tajdin's activities in the 1990's while Bhaloo was president of the National Council and Tajdin was living in his jusrisdiction, the Imam never mentioned this to Bhaloo during his various meetings with him.

. *See Cross-Examination of Bhaloo pp. 33-34: #171 - #176*

Affidavit of Nagib Tajdin sworn July 13, 2010,
Tajdin's Responding Record Tab 6, Paragraph 14-17

26. 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 Farmans, by the Ismaili Constitution, or by Ismaili traditions going back to about 1,400 years.

27. An announcement was made in April by the Leaders International Forum ("LIF"), which is said to have been authorized by the Imam, indicating that the Imam had no alternative but to bring ths action as the defendants refused to follow His letters (now found to have been forged), and unsigned email purported to be from Prince Amyn (shown to be forged as well). However, the Imam does have simple 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 is to simply say so in one of His numerous Farmans around the world.

28. All the activities undertaken by Sachedina, convinces the defendants that the Aga Khan has not prohibited the dissemination of His Farmans, that He gave His consent, and implied consent, and has not revoked it.

II - POINTS IN ISSUE

29. 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.

e. Whether these motions should be tried as a summary trial on the issue of whether the plaintiff gave His consent on August 15, 1992.

IV- SUBMISSIONS

30. The ruthless way in which the defendants have been treated is completely against every authentic communication that the Aga Khan has ever made on conflict resolution. The Aga Khan has repeatedly urged his followers to avoid litigation, to seek solutions of compromise, to use the Ismaili Arbitration process (which is legally binding). He has urged that no matter the conflict, there should never be one party that is marginalized because such "destruction is NOT Islam". In contradiction to these ethics, and without relying on any admissible evidence, the two announcemens in Jamatkhana and the mass-email circulation of the Statement of Claim have totally marginalized the defendants in the Ismaili community, just as Sachedina had threateded on the Phone in February. If Judgement is granted without any admissible evidence, it would go against the ethics that the Imam has worked for decades to establish in His community.

Statement of Defence of Tajdin, Paragraph 61

31. 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.

32. 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, *Defendant's Book of Authorities, Tab 7*, at para. 98

33. The consent to publish and distribute *"may be presumed from the circumstances"*, so long as the inference of consent must be clear before it will operate as a defence and must come from the person holding the particular right alleged to be infringed. [emphasis added]

> *Netupsky v. Dominion Bridge Co.*
> *Defendant's Book of Authorities, Tab 7*, at para. 99.

34. As stated 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."

35. Furthermore, the Imam, in His actions during the 1992 mehmani ceremony clearly accepted, discussed and blessed the "Kalam-e Imam-e Zaman Farmans to the Western World Volume 1". Consent to this publication was implied then and there . Details of the significance of Mehmani have been set out in this defendant's other factum and will not be repeated here..

36. And on top of that, Imam's words, reported in Karim Alibhay's undisputed affidavit, are

not only a clear consent, but also a binding Farman in the form of an order to "continue" and to "succeed". The obedience and respect due to the Imam and to the Mehmani ceremony does not allow Tajdin to return to the Imam for confirmation, he must obey and continue the work until it can be deemed a success.

37. 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.

38. 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.

39. 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 and practiced by Ismailis who publish, republish and

translate Farmans in various languages in their personnal capacity on a regular basis.

40. As set out in the case *Netupsky v. Dominion Bridge Co.*, supra., the various Farmans, Articles of the Ismaili Constitution, and the promises exchanged between the spiritual father and His spiritual children provides implication of consent to the distribution of His Farmans, both for personal use and for the dissemination among the Ismailis.

41. The Imam gave consent to publish and distribute His Farmans, along with Blessings for the success of the undertaking, and as such the express consent given provides this defendant with the consent to distribute the Imam's Farman, and not just one initial book that was presented to the Imam, but Farmans delivered by the Imam to His Jamats, for distribution to His Jamats.

42. Tajdin 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.

43. If the activities of distributing the Aga Khan's Farmans are infringing the *Copyright Act,* then for example, whenever any Ismaili writes or emails a copy of a Farman to his or her child who is attending University away from home (an activity which is actually encouraged by the Imams) that Ismaili would then be guilty of infringing on the Aga Khan's copyright, and be contrary to the very essence of Ismailism, and contrary to the instructions given by the Imam himself in his own Farmans.

44. 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,*
> *Defendant's Book of Authorities, Tab 14, at para. 20*

45. None of the materials that are allegedly from the Aga Khan in support of the Plaintiff's motion for summary judgement are submitted as admissible evidence. The forged signatures noted in these materials indicates that these cannot be relied on to determine the Aga Khan's intentions, and as such this action must be dismissed on the grounds of lack of evidence.

46. 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.

47. 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, Defendant's Book of Authorities, Tab 17, para. 15-16.

48. 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, [1998] 3 F.C. 400, 3 F.C. 400, Defendant's Book of Authorities, Tab 18, at para. 7*

49. 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, 2005 MBQB 259, 23 C.P.C. (6th) 235, 52 C.C.P.B. 123, 206 Man. R. (2d) 39, 144 A.C.W.S. (3d) 20, Defendant's Book of Authorities, Tab 19, at para 10.*

50. 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.

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

52. 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, 2005 CarswellNfld 83, 2005 NLCA 15, Defendant's Book of Authorities, Tab 21, at paras. 57 to 60*

53. The court in *Suwary v. Women's College Hospital* reasoned

> 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, Defendant's Book of Authorities, Tab 5, para 34*

54. Mr. Gray is seeking an injunction 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.

55. Sachedina states that the plaintiff knew in the mid-nineties and frequently informed him about the infringing activities of Tajdin, yet this action was brought about 18 years after

the Kalam-e Imam-e-Zaman volume 1 was presented to the Imam and 15 years after He purportedly expressed frequent concern Sachedina. The issue raised by this litigation is not that *the* Golden Edition is the infringing book, it is the Farmans printed therein that is works infringed, and the Golden Edition contains all the Farmans previously distributed openly by Tajdin and a very few Farmans made during Golden Jubilee celebrations of the Imam. Accordingly, the activities complained of have been ongoing at least as of 1992 to date.

56. Jerome A.C.J. in rendering his decision in the case of *1013579 Ontario Inc. v. Bedessee Imports Ltd.* 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, *Defendant's Book of Authorities, Tab13*

57. Tajdin has provided undisputed evidence in Karim Alibhay's affidavit that he has consent to publish Farmans, not just the book in question; As a follower of the Aga Khan, this consent to "continue" is a binding order to him; Tajdin has maintained the integrity of Farmans by publishing them verbatim; Tajdin has shown that he has continuously distributed Farmans to ismailis for over 18 years with the knowledge of the Aga Khan. On the other hand, the Plaintiff's pleadings are unsubstantiated and based on inadmissible evidence.

58. Accordingly, this defendant submits that the motion of the plaintiff be dismissed, and the the defendant's motion dismissing the action be allowed, without costs.

IV - ORDER SOUGHT

59. This defendant asks that the plaintiff's motion be dismissed.

60. 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 24, 2010

Respectfully submitted,

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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

MEMORANDUM OF FACT AND LAW

of the defendant Nagib Tajdin

responding to the Plaintiff's Motion

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