Federal Court  Cour fédérale

Date: 20110107

Docket: T-514-10

Citation: 2011 FC 14

Ottawa, Ontario, January 7, 2011

PRESENT: The Honourable Mr. Justice Harrington

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

REASONS FOR JUDGMENT

HARRINGTON J.

[1] The only issue in these cross-motions for summary judgment is whether the Aga Khan gave the defendants his consent to publish his literary works known as Farmans and Talikas. I find that

consent was never given to publish any Farman or Talika, much less those in respect of which he now seeks injunctive relief; judgment in favour of plaintiff.

[2] His Highness Prince Karim Aga Khan is the spiritual leader, or Imam, of the Shia Imani Ismaili Muslims. There are approximately 15 million Ismailis worldwide, living in more than 25 countries, including Canada. They began to immigrate here in 1972 after those of Asian origin were expelled from Uganda during the reign of terror of Idi Amin.

[3] The Aga Khan succeeded his grandfather, Sir Sultan Mahomed Shah Aga Khan, to become the 49th hereditary Imam in 1957. He is well-known and respected worldwide, in Muslim and non-Muslim circles alike, for his philanthropic, diplomatic and religious works. He is a citizen of the United Kingdom and a resident of France, which has bestowed upon him a diplomatic passport.

[4] As Imam of the Shia Imani Ismaili Muslims, the Aga Khan gives advice and guidance to his flock ("Jamat") on both religious and temporal matters. Two means of address frequently used are "Farmans" and "Talikas". A Farman is an address given before an audience. It is recorded and preserved in audio and often in video form. A Talika is a brief written religious message.

[5] These Farmans and Talikas (hereinafter "Farmans") are literary works within the meaning of the *Copyright Act*. The Aga Khan has taken action to assert his right of ownership and for a permanent injunction and other relief to stop the defendants from infringing his rights by printing and disseminating a book of Farmans entitled *Farmans 1957-2009 – Golden Edition Kalam-E-Iman-E-Zaman* (which means "Words of the Imam of the Time"). This book is accompanied by an

MP3 audio bookmark, preloaded with 14 audio extracts of readings of Farmans by the Aga Khan himself.

[6] The Aga Khan is a qualified author within the meaning of the *Copyright Act*. The defendants Najid Tajdin and Alnaz Jiwa admit his ownership and admit that if it were not for his consent they would be infringing his copyright.

[7] Consent is the only issue in the cross-motions for summary judgment before me. In their statements of defence the defendants also allege that the Aga Khan did not instruct counsel to institute this action. However they have wisely abandoned that point, at least for the purposes of summary judgment.

PRINCIPLES OF SUMMARY JUDGMENT

[8] Summary judgment is but one of several means at the Court's disposal to control its own process and to carefully husband a non-renewable resource: courtroom time. The principles are set out at Rules 213 and following of the *Federal Courts Rules*. Given the cross-motions, both parties are obliged to set out specific facts showing that there is no genuine issue for trial. In addition, if the only genuine issue is the amount of damages to which the moving party is entitled, the Court may order a trial of that issue, or grant summary judgment with a reference.

[9] There are great many cases on point. One, which is nearly always cited, is the decision of Madam Justice Tremblay-Lamer in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853, [1996] F.C.J. No. 481 (QL). The test set out there is whether the case is so doubtful it

deserves no further consideration. If there are relevant disputed questions of fact where credibility is in issue, the matter should be allowed to continue. Although there are credibility issues in the motions as pleaded before me, they are not, in my opinion, germane.

[10] In *Premakumarum v. Canada*, 2006 FCA 213, [2007] 2 F.C.R. 191, the Federal Court of Appeal asked whether the case is so doubtful that it "does not deserve consideration by the trier of fact at a future trial." The issue is not whether the plaintiff, or defendants, as the case may be, cannot possibly succeed, but rather whether the case of one party or the other is clearly without foundation.

[11] I am satisfied that the tests have been met and that it is in the interest of justice and judicial economy to dispose of this action by way of summary judgment. I declare that the Aga Khan has never given the defendants permission to publish any Farman, much less the *Golden Edition* collection.

THE FACTS

[12] The named defendants are Ismailis who claim to profess absolute loyalty to the Aga Khan. Notwithstanding that they say they have his consent three times over to publish the *Golden Edition*, in their devotion to him all he has to do is say the word and they will cease and desist. However they have placed so many conditions on this word that this lawsuit was taken in frustration. Thus we are now in the realm of civil law, not religion. They simply cannot, or will not, accept that their Imam does not want them to publish his Farmans. That task has been left to others.

[13] Mr. Tajdin is a businessman formerly of Montreal who now lives in Kenya. Mr. Jiwa practices law in the Greater Toronto Area. In, or before, 1992, Mr. Tajdin began collecting, publishing and disseminating His Highness' Farmans to Ismaili communities. More recently he has been assisted by Mr. Jiwa.

[14] In December 2009, Mr. Tajdin published the *Golden Edition*. Within weeks, Shafik Sachedina, of London, Head of the Department of Jamati (Ismaili Institutions) since 1996, Head of the Department of Public Affairs, a member of the Aga Khan Development Network and Governor of the Institute of Ismaili Studies, came to learn of the publication. As he was aware that the Aga Khan had never consented to the publication of Farmans, except through authorized Ismaili institutions, he instructed Mr. Tajdin to cease publication. Mr. Tajdin responded by stating that he would only do so on His Highness' personal word.

[15] A number of events took place over the next few months, leading to the filing of the Aga Khan's statement of claim in early April 2010.

[16] There was an institutional decrying of Mr. Tajdin's publication. This only proves, according to Messrs Tajdin and Jiwa, that usurpers are against them. They have the Aga Khan's consent and only he can take that consent away.

[17] Mr. Tajdin wrote to the Aga Khan, and received a reply. The Aga Khan's counsel claims that Mr. Tajdin's letter is proof positive he was aware that he did not have the Aga Khan's consent to publish the *Golden Edition*. Mr. Tajdin's position is that he was not seeking consent to publish

but rather a blessing and consent to deliver free of charge the *Golden Edition* to Ismaili communities worldwide. It is not necessary to rule on this point.

[18] Be that as it may, the reply bore the signature of the Aga Khan. In it he states he has viewed with concern the unauthorized private initiative of some who print, publish or circulate the text of Farmans attributed to him. He said: “This is a serious and absolutely unacceptable breach of the Imam’s right and responsibility, established over many centuries, to safeguard the integrity of his communications to the Jamat.” He established a process for the publication and circulation of Farmans and stated that he expected Mr. Tajdin “and the other murids who are working with you, immediately to take all the necessary measures to recall and to withdraw from circulation your recent publication and the accompanying MP3 device and cease their printing and distribution.”

[19] According to Messrs Tajdin and Jiwa this letter is a forgery. There is conflicting expert evidence on file.

[20] On 18 February 2010, another letter purportedly signed by the Aga Khan was sent to Mr. Tajdin. His Highness took umbrage with Mr. Tajdin’s assertion that his earlier letter had been forged by his secretary and stated he would write no further. He added that “I want you to know that this is the last one I will send you on this matter. If it cannot solved in the relationship of a Murid to his Imam I will have no other choice than to use all the measures available to me to enforce my rights, and to exercise effective control of my communication with my Jamat.” This letter too, according to Messrs Tajdin and Jiwa, is a forgery.

THE LEGAL PROCEEDINGS

[21] Following the issuance of the statement of claim in April 2010, separate statements of defence were filed by Messrs Tajdin and Jiwa, each of whom are self-represented. They say the Aga Khan personally gave his consent and blessings to the publication of present and future Farmans in Montreal in August 1992, and that his consent has never been revoked. Quite apart from this express consent, he gave his implied consent to the defendants, and to others, twice over. One implied consent is based on a reading of changes to the Ismaili Constitution. While it once was that publication of Farmans was controlled, that is no longer the case, and so it is open to the defendants to do what they are doing. The other implied consent is through speeches and interviews the Aga Khan has given over the years in which he has bemoaned the fact that circulation of his Farmans has been spotty.

[22] They say that if the Aga Khan is not pleased with what they are doing, all he has to do is amend the Constitution, or simply issue a Farman, as a new Farman has the effect of overriding the Constitution. However, it is not up to the defendants to dictate to the Aga Khan. He tried the religious route, without success.

[23] In addition to the two letters purportedly signed by the Aga Khan in the months leading up to the institution of this action, in response to the defence that the action was instituted by usurpers without his knowledge and consent, while in Boston the Aga Khan signed an affirmation in which it is specifically stated that he personally reviewed and approved the contents of the statement of claim, had retained the firm of Ogilvy Renault LLP to act as solicitors in the action for copyright infringement, has never consented to the publication and copying of the works in dispute and had

personally signed the two letters to Mr. Tajdin instructing him to stop the unauthorized publication and to deliver up the undistributed books. He also authorized the Ismaili Leaders International Forum to inform his community about the matter.

[24] The jurat is signed by a notary public in and for the Commonwealth of Massachusetts who stated that the person before her identified himself by means of a French passport. Both the notary public and a lawyer who was present signed affidavits. However Messrs Tajdin and Jiwa have declined to cross-examine them on the basis that they were hoodwinked by a usurper. This affirmation was in response to the allegation that Messrs Ogilvy Renault had not been authorized by the Aga Khan to institute the action. There is no specific Federal Court rule on point. Since the action was filed in Toronto, plaintiff's solicitors relied upon the gap rule and Rule 15.02 of the *Ontario Rules of Civil Procedure* which provide that a defendant may request that the lawyer named in the originating process deliver a notice declaring whether he or she is authorized. Until challenged, our court takes a solicitor at his or her word as section 11(3) of the *Federal Courts Act* specifically provides that a person authorized to practice as a barrister or solicitor is an officer of the Federal Court.

[25] The action is under case management, with Prothonotary Tabib assigned to act as Case Manager. Among other things, she scheduled an examination for discovery of the Aga Khan at his convenience when next in Canada. She limited the examination to fifteen minutes, more than enough time to deal with the points in issue. It must have come as quite a surprise to the defendants when the real Aga Khan presented himself for an examination for discovery in Toronto on

15 October 2010! More to be said on that examination. However, his appearance should have put the forgery issue to rest.

THE *COPYRIGHT ACT*

[26] The Aga Khan's copyright is not in issue. Canada, the United Kingdom and France are all parties to the *Berne Convention*. As a citizen of the United Kingdom and a resident of France, the Aga Khan is an author qualified to seek the protection of Canada's *Copyright Act*. It is admitted that the *Golden Edition* was published here. Although copyright was only registered in June 2010, the date of registration is not relevant in the present case.

[27] The reproduction by the defendants of the Farmans is *prima face* an infringement as per section 3 of the Act. Section 27 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 has the right to do.

[28] As aforesaid, thus the only issue is whether or not the Aga Khan has consented. Although section 13(4) of the Act provides that an assignment or grant must be in writing, mere permission may be given orally, or even implied by the conduct of the author.

BURDEN OF PROOF

[29] The burden of proof is important in motions for summary judgment in that the parties are required to put their best foot forward. They cannot save the best for trial. If there are no relevant issues of credibility, and if no novel issues of law are being raised (*Law Society of Upper Canada v.*

Ernst & Young (2003), 65 O.R. (3d) 577, 227 D.L.R. (4d) 577)), it is in the interest of justice that the matter be dealt with summarily.

[30] The defendants take the position that the burden of proof is on the Aga Khan to establish that he did not give consent. In my opinion, they are very much mistaken. It is not up to the author to prove a negative, *i.e.* that he did not give consent. Consent is a matter of defence and so the burden must lie upon the defendants. This point is also important because the defendants say most of the plaintiff's evidence is hearsay.

[31] In *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at paragraph 35, Madam Justice McLachlin, as she then was, cited with approval the following passage from H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed. (Toronto: Carswell, 1967), at page 339:

> In order to constitute an infringement the acts complained of must be done "without the consent of the owner of the copyright". Such a consent may be presumed from the circumstances. The inference of consent must be clear before it will operate as a defence and most come from the person holding the particular right alleged to be infringed.

[32] The defendants rely on the decision of the Federal Court of Appeal in *Positive Attitude Safety Systems Inc. v. Albian Sands Energy Inc.*, 2005 FCA 332, [2006] 2 F.C.R. 50, where Mr. Justice Pelletier stated at paragraphs 38 and 39:

> It is to be noted once again that the motion judge was dealing with a motion for partial summary judgment with respect to very precise questions. The question of copyright infringement "at large" was not before him. Consequently, in embarking upon this enquiry, the motion judge was already outside the scope of the motion before him.

> However, even if one assumes that the motion judge was right to consider the question, the difficulty is that copyright is defined in terms of the absence of the consent of the owner of the copyright:
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> | | |
> |---|---|
> | 27. (1) 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. | 27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir. |
> | [Emphasis added.] | [Non souligné dans l'original.] |
>
> Consequently, proof of copyright infringement requires proof of lack of consent. It is therefore illogical to conclude that there has been infringement, subject to the effect of a purported license. It may be that a party has done something which, by the terms of the *Copyright Act*, R.S.C. 1985, c. C-42, only the owner of the copyright may do. But, before that conduct can be defined as infringement, the judge must find that the owner of the copyright did not consent to that conduct.

[33] The defendants' reliance on that case is misplaced. On a motion for summary judgment, the judge in first instance found that there was an infringement, subject to whether or not a licence had been granted. As Mr. Justice Pelletier added at paragraph 40:

> As a result, the motion judge was not in a position to conclude, as he did, that the appellants infringed the respondents' copyright subject to the effect of a purported license. Until the issue of consent was dealt with, there could be no finding of infringement.

[34] The case stands for the proposition that one cannot bifurcate infringement from consent. *Bishop v. Stevens*, above, was not cited and it cannot be thought for a moment that the Federal Court of Appeal was purporting to depart from the teachings of the Supreme Court on the overall burden of proof.

A MATTER OF CONSENT

A. The Express Consent

[35] According to Mr. Tajdin, and all those who would assist him, past, present and future, the Aga Khan expressly gave them consent to publish past and future Farmans at a ceremony in Montreal in 1992.

[36] In July 1992, Mr. Tajdin learned that the Aga Khan would be coming to Montreal the following month. He had just caused to be printed a book entitled *Kalam-E Imam-E-Zaman-Farmans to the Western World, Volume I*. He sought guidance from the Imam before distributing it. Only about 20 percent of those in attendance were given the opportunity to attend personally before the Aga Khan. Mr. Tajdin was not selected, but his friend Karim Alibhai was. Thus he gave a copy of the book to Mr. Alibhai and asked him to present it to the Aga Khan and to seek guidance.

[37] The presentation of a member of the faithful to the Aga Khan is part of a Mehmani Ceremony. Normally a plate of fruit and nuts is presented to the Imam as a token of one's offerings. According to Mr. Alibhai, who was not cross-examined on his affidavit, he, his wife and their young son presented a plate of fruits and nuts, with the book on top, to the Aga Khan who blessed them by placing his right hand on his shoulder, his wife's shoulder and then his son's.

[38] After accepting the offerings, the Aga Khan looked at the book and placed his hand on it.

[39] The following exchange took place in French:

M. Alibhay: « Mowlana Hazar Imam, que pouvons nous faire pour l'Imamat? »	Mr. Alibhay: "Mowlana Hazar (our Lord the present) Imam, what else can we do to serve the Imamat?"
Aga Khan: « Continuez ce que vous faites, réussissez ce que vous faites et ensuite nous allons voir ce qu'on peut faire ensemble. »	Aga Khan: "Continue what you are doing, succeed in what you are doing and then we will see what we can do together."

[40] The Aga Khan did not open the book which has been kept ever since by Mr. Alibhai as a souvenir of that occasion.

[41] I am simply unable to construe this exchange as constituting consent on the Aga Khan's part that Mr. Tajdin, and those who may work with him from time to time, publish any Farman. The most favourable reading I can give to the defendants is that the Aga Khan may possibly have suggested future discussions, but on the balance of probabilities I find that not to be so. Messrs Tajdin and Jiwa are reading into the exchange things that simply are not there.

[42] Since the book placed before the Aga Khan was identified as volume 1, during the hearing I asked Mr. Tajdin how the Aga Khan would know that the book contained all his Western Farmans from 1957 to 1981. The reply was by the thickness of the book. However, we know nothing of the quality or thickness of the paper, or the size of the print. The parties did not exhibit the book as it is not intended for the uninitiated. Thus it is arguable, but not probable, that the Aga Khan was only interested in the completion of Farmans up to 1991. Reverting back to *Fox* there is nothing "clear" about this.

[43] Since Mr. Alibhay did not identify Mr. Tajdin's role, and said nothing about the fact that many copies were in stock, it could also be easily construed that this was Mr. Alibhay's personal collection, not for distribution.

[44] The defendants argue that it is difficult for a non-Ismaili to fully appreciate the relationship between the Imam and a murid. While I have no doubt that Messrs Tajdin and Jiwa are very knowledgeable in their faith, leaving aside the Aga Khan himself (on which more will be said) there are other Ismailis lined up against them, Ismailis who have held prominent positions. Apart from Mr. Sachedina, the plaintiff relies upon the affidavit of Aziz Bahloo who among other things was Vice-President of the Ismaili Council for Canada from 1987 and 1993 and President of the Council from 1993 to 1999. He was present at a meeting between Messrs Sachedina and Tajdin in 1998 in which it was said that the Aga Khan did not approve or authorize the publication or dissemination of Farman books by Mr. Tajdin. No new book was published until the *Golden Edition*.

[45] As mentioned earlier we are in the realm of civil law, not religion. No expert evidence has been filed as to the significance of ceremonial gestures. Given the ordinary meaning of the words used in the exchange between His Highness the Aga Khan and Mr. Alibhay, I simply cannot find that the Aga Khan gave his consent to Mr. Tajdin's endeavours.

[46] Furthermore, if I am wrong on that point and if consent were given at all, it could only be for that particular volume of Farmans, and not for future Farmans. In *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81, [1985] 1 W.W.R. 112, which also

stands for the proposition that the burden is upon the defendants to establish consent, McLachlin J., as she then was, dealt with the defendants' claim they had the right to use promotional material, based upon consent given during a dinner conversation. She said at paragraph 18 that "[t]hus if the defendants are to succeed on this defence, they must establish not only that Mr. Barker gave his consent to the use of materials then in existence, but to the use of all materials which the plaintiff might in the future develop." She found they had not. In this case, I am unable to accept the defendants' tortuous, convoluted reasoning.

B. First Implied Consent

[47] Prior to 1986 when the Aga Khan ordained one Worldwide Constitution of the Shia Imami Ismaili Muslims, there were various regional constitutions. For instance, the 1948 Constitution of the Ismailia Association for the Continent of Africa specifically stated:

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

According to Messrs Tajdin and Jiwa, were this Constitution still in place and applicable to Canada, they would be prohibited from doing what they are doing.

[48] In the 1986 Worldwide Constitution, with 1998 amendments of no import, a number of central and national institutions were created, which enjoy considerable autonomy.

[49] Articles 8.1 and 8.4 (d) provide:

> 8.1 There shall be a Tariqah and Religious Education Board for each of the territories specified in Part I of the Fourth

> Schedule to be known as "The Shia Imami Ismaili Tariqah and Religious Education Board" for the territory for which it is formed for the provision of religious education at all levels of the Jamat, for the training of religion teachers and waezeen, for research and publication, and for the performance of such functions in relation to the Ismaili Tariqah as Mawlana Hazar Imam may deem necessary.
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> 8.4 Each Tariqah and Religious Education Board shall under the direction and guidance of Mawlana Hazar Imam:
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> […]
>
> (d) undertake the publication of books and materials on relevant aspects of Islam and the Ismaili Tariqah;
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> […]
>
> (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.
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> [My Emphasis.]

[50] According the glossary appended to the Constitution, "Tariqah" is a transliterated Arabic word meaning "[p]ersuasion, path, way in Faith." If I have fully grasped the nuances of the defendants' submissions, since Farmans are not necessarily religious, but may be temporal in nature, it follows that the institutions which complain about the publication by them of the Farmans were never authorized to publish Farmans in the first place.

[51] On the face of it, there is nothing in the Constitution which deprives these boards from publishing Farmans. They were specifically directed to encourage constructive interaction between the religious and secular dimensions of education.

[52] Furthermore, in the letter dated 24 January 2010, bearing the signature of the Aga Khan, it is specifically stated that responsibility for publication of Farmans has been entrusted to the Jamati Institutions that he appoints under the Ismaili Constitution "which I have ordained for my Jamat's social governance globally." (My emphasis.)

[53] The preamble of the 1998 amendment notes the Imam's full authority of governance of and in respect of all religious and Jamati matters of the Ismaili Muslims. The 1986 Constitution specifically provides:

> Historically and in accordance with Ismaili tradition, the Imam of the time is concerned with spiritual advancement as well as improvement of the quality of life of his murids. The *Imam's Ta'lim* lights the murids' path to spiritual enlightenment and vision. In temporal matters, the Imam guides the murids, and motivates them to develop their potential.

[54] Even if there were room for interpretation of the Constitution, assuming the letter dated 24 January 2010 was authored by or authorized by the Aga Khan, any and all doubt has been dispelled.

C. Second Implied Consent

[55] The second implied consent, not only given to Messrs Tajdin and Jiwa, but to all Ismailis, is based on various public statements apparently made by His Highness from time to time. According to Mr. Jiwa, the Aga Khan has said:

a. “I have given you Farmans which I urge you to follow, because these Farmans I make are made for My Jamats” (Karachi, November 1964);

b. “You have looked to the Imam-of -The-Age for advice and help in all matters and through your Imam’s immense love and affection for His spiritual children, His Noor has indicated to you where and in which direction you must turn, so as to obtain spiritual and worldly satisfaction.” (Karachi, December 1964)

c. “The Imam’s word on matters of faith is taken as an absolute rule. … The Community always follows very closely the personal way of thinking of the Imam. … An Ismaili who did not obey My word in matters of faith, would not be excommunicated, he would still be a Muslim. He simply would no longer be a member of the Jamath [His followers].” (*Sunday Times*, London, December 1965)

d. “I have a feeling I may have been speaking at a level which is difficult for some of you to comprehend. If this is the case, I simply ask you to listen to this Farman at your own time more peacefully, and try to understand what I have been saying to you.” (Nairobi, 1981);

e. “This is a complex Farman…think about it, discuss it with your children, discuss it with your grandchildren, if they are old enough to think in these terms, and prepare them to see the way ahead, wisely and properly…” (Bombay, 1992)

f. “My Jamat would know that during the past decades much time and effort has been taken to reconcile our knowledge of our own history. Knowledge which had been buried by time, which has sometime been buried on purpose by others, but which it is essential that we should reconstitute and use in order to inform ourselves as to the practices and beliefs and the ethics of the past within the Jamat, the guidance that

> was given by the Imams of the Time, and to inform ourselves so as better to project into the future a number of important decisions." (Dubai, 2003)

[56] I cannot for a moment accept that His Highness contemplated in these speeches or interviews that authority was given to one and all Ismailis to publish his Farmans. If, as the defendants suggest, the Shia Imami Ismaili Tariqah and Religious Education Boards (ITREBs) have fallen down on the job, that is a matter for the Aga Khan. He has not authorized Messrs Tajdin and Jiwa to step in their shoes.

LACHES

[57] Although the defendants are careful not to say that the Aga Khan has been inattentive to matters of concern to the Jamat, in a roundabout way they allege the same thing. They presuppose that the Aga Khan personally knew of their activities and by doing nothing about it, acquiesced. The evidence falls far short of laches. There is unbridled arrogance in this assertion. Why would one suppose the Aga Khan had personal knowledge of what a handful of his followers were doing? Furthermore, Mr. Tajdin only wrote to the Aga Khan in January 2010 to tell him exactly what he was doing. That letter elicited a very strong reaction, followed by this lawsuit. Again the burden is on the defendants, and they have failed to discharge it.

THE EXAMINATION FOR DISCOVERY

[58] If there were any doubt left, surely it would have been put to rest by the examination for discovery of the Aga Khan in Toronto, on 15 October 2010. Prothonotary Tabib had directed that

the discovery be limited to 15 minutes, which was more than enough time to dispel any doubt as to the matters in controversy.

[59] First of all, the defendants admit that the real Aga Khan showed up. That is proof positive that he authorized the current lawsuit and that if he had ever given his consent, which he had not, by instituting the lawsuit he withdrew it.

[60] A few simple questions would have put the consent issue to rest:

a. What, if anything, does the Aga Khan remember of the presentation to him of the book of Farmans in Montreal in 1992?
b. Did he receive and read Mr. Tajdin's letter to him dated 4 January 2010?
c. Did he author, or approve, the letter dated 24 January 2010, bearing his signature in response thereto?
d. Likewise, did he author, or approve, the subsequent letter addressed to Mr. Tajdin dated 18 February 2010?
e. Did he appear before a notary public in Boston and sign a solemn affirmation denying that he had ever given the defendants consent, and affirming that he had authorized his lawyers to institute the current action?

[61] The defendants had previously complained that they were unable to cross-examine the Aga Khan on his solemn affirmation because it was not directly in the record. Rather, it was an exhibit to the affidavits of the Boston lawyer and notary public. However, when he attended the examination

for discovery they were facing a motion for summary judgment, and were obliged to put their best foot forward. They were then entitled to cross-examine.

[62] During argument before me, Mr. Jiwa stated that although he was present at the discovery, it was not his discovery. In other words, he has waived discovery. Although Mr. Tajdin apparently did pose some questions, there were many off the record discussions, allegedly at the instance of the Aga Khan's lawyer, and so the transcript is said to be useless.

[63] I consider the position of the defendants to be completely unacceptable. They cannot force a trial, and thus take up finite judicial resources, by refusing to conduct a meaningful examination for discovery. I also take note of the fact that under Rules 288 and following the Aga Khan is normally not permitted to make use of his own discovery.

[64] The transcript was not put before me. I can only infer that the proper questions were not asked because the defendants would not have liked the answers. In any event, the burden to establish consent was upon them, and they have failed to discharge it.

[65] A negative inference may be raised if a witness who logically should have been called was not. The inference is that the evidence would be harmful to that party's case. A recent example is the decision of Madam Justice Heneghan in *South Yukon Forest Corp. v. Canada*, 2010 FC 495, 365 F.T.R. 13, at paragraphs 812 and following. As she stated at paragraph 814 "[t]he law is well-settled that the failure of a party to call a witness with personal knowledge of facts that she alleges, will give rise to a negative inference on the part of the trier of fact, that the "absent evidence" would

be harmful to the party that failed to call the witness." Cases frequently cited are *Lévesque v. Comeau*, [1970] S.C.R. 1010, and *Abbott Estate v. Toronto Transportation Commission*, [1935] S.C.R. 671.

[66] At paragraph 816 of *South Yukon*, Madam Justice Heneghan quoted from the decision of the Federal Court of Appeal in *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (2000), 251 N.R. 358, where Mr. Justice Rothstein, as he then was, said:

> […] However, even if the presumption was applicable, the failure to call Ms. Iles to testify as to the creation date indicates as the most natural inference, that the appellants were afraid to call her and this fear is some evidence that if she were called, she would have exposed facts unfavourable to the appellants. In drawing an adverse inference, the learned trial judge relied on the following passage from Wigmore on Evidence which is relevant to the issue.
>
> > The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions: and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the parties fear of exposure. But the propriety of such an inference in general is not doubted.
>
> I think this is sufficient to displace any presumption. It was not necessary for the respondent to call evidence on the point.
>
> In addition to the reasons of the trial judge for drawing an adverse inference, which I think are sufficient on their own, it is noteworthy that the appellants refused to disclose their witnesses in advance of trial. As the creation date of September 1988 was pleaded by the appellants, and the respondent in its statement of defence put the appellants to the strict proof thereof, it was

> reasonable for the respondent to expect that the appellants would lead evidence on the point. In these circumstances, it is no answer for the appellants to say that the witness was equally available to the respondent. Nor is it an adequate excuse that the witness was outside the jurisdiction. See Lévesque v. Comeau et al.
>
> I can find no fault in the approach and the finding of the learned Trial Judge. She was entitled to draw an adverse inference in these circumstances and to conclude that the Harmonie work was created prior to June 8, 1988.

[67] The only inference to draw is that neither Mr. Tajdin nor Mr. Jiwa wanted to pose the obvious questions to the Aga Khan because they would not have liked the answers. Had they asked the questions they should have asked, and received the answers they would have liked to have received, they would have been entitled to put the transcript before the Court on the cross-motions for summary judgment. The action would have been dismissed.

REMEDIES

[68] The motions for summary judgment of Messrs Tajdin and Jiwa are to be dismissed.

[69] In his motion for summary judgment, the plaintiff, His Highness Prince Karim Aga Khan, did not pursue some of the remedies sought in his Statement of Claim with respect to infringement of copyright relating to the unauthorized reproduction of the original Literary Works and Readings authored by him as found in the book entitled *Farmans 1957-2009 – Golden Edition Kalam-E-Iman-E-Zaman*. As aforesaid, this book is accompanied by an MP3 audio bookmark, preloaded with 14 audio extracts of recordings of Farmans personally read by the plaintiff which reproduce in substantial part a series of 189 Farmans and 77 Taliqahs and Messages authorized by him and delivered in various countries from 1957 to 2009.

[70] I declare copyright subsists in all plaintiff's Farmans and Talikas, whether or not contained in the *Golden Edition*; that he is the owner thereof and that the defendants have infringed copyright. For the purposes of the summary judgment motion, the plaintiff has chosen not to assert his moral rights.

[71] Likewise, I have no difficulty issuing a permanent injunction restraining the defendants, whether acting alone or in consort, from infringing copyright by publishing and distributing the *Golden Edition*.

[72] With respect to delivery up of all copies of the infringing material in the defendants' possession, care or control, the motion sought that they deliver the material to the Institute of Ismaili Studies in London, U.K. However given that the location of the infringing material is not known to the plaintiff, or to the Court, a more appropriate order is that while copies of the infringing material located in the United Kingdom be delivered up to the Institute in London, copies found elsewhere should be delivered to the appropriate ITREBs as identified in the Constitution.

[73] The plaintiff also sought an order for a reference for the determination of damages, with pre- and post-judgment interest, such damages to be payable to the Aga Khan Development Network (AKDN) Foundation or such other charitable organization as may be designated by him. In a motion for summary judgment one is entitled to ask for a reference on damages and I shall so order.

[74] Pre- and post-judgment interest are claimed in both the statement of claim and in the conclusions on the motion for summary judgment. However, the parties did not specifically address this issue in their written or oral submissions. As this cause of action did not arise in a single province, and as the claim is not for liquidated damages, sections 36 and 37 of the *Federal Courts Act*, which deal with pre-judgment and judgment interest are applicable. In the circumstances, I consider it appropriate that interest also be subject of the reference.

[75] The plaintiff asks for lump sum costs to be fixed to the amount of $30,000 also payable to the AKDN Foundation or such other charitable organization he may designate. The defendants, who did not seek costs in their own motions, asked for an opportunity to make representations on costs if, as and when they were found liable. I agreed.

[76] The requested orders that payment be made to charity, either directly or indirectly, shall be dealt with as part of the submissions with respect to costs and the reference.

[77] In accordance with Rule 394 of the *Federal Courts Rules*, I direct the plaintiff to prepare for endorsement a draft judgment to implement these conclusions, approved as to form and content by Messrs Tajdin and Jiwa, or if the parties cannot agree, to bring on a motion for judgment in accordance with Rule 369. In the meantime, an interlocutory injunction shall issue restraining the defendants, whether acting alone or by their directors, officers, servants, agents, workers or representatives, from infringing the plaintiff’s copyright in the literary works. More particularly, the defendants shall be restrained from ordering further copies of, publishing, reproducing, selling,

giving or promoting in any way the book entitled *Farmans 1957-2009 – Golden Edition Kalam-E Iman-E-Zaman* and accompanying pre-loaded MP3 audio bookmark.

"Sean Harrington"
Judge

Ottawa, Ontario
January 7, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-514-10
STYLE OF CAUSE:	HIS HIGHNESS PRINCE KARIM AGA KHAN v. 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
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 7, 2010
REASONS FOR JUDGMENT:	HARRINGTON J.
DATED:	JANUARY 7, 2011

APPEARANCES:

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Nagid Tajdin	FOR THE DEFENDANT NAGID TAJDIN (ON HIS OWN BEHALF)

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