

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120116

**Dockets: A-59-11
A-60-11**

Citation: 2012 FCA 12

**CORAM: NADON J.A.
SHARLOW J.A.
GAUTHIER J.A.**

BETWEEN:

NAGIB TAJDIN and ALNAZ JIWA

Appellant

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

Heard at Toronto, Ontario, on November 14, 2011.

Judgment delivered at Ottawa, Ontario, on January 16, 2012.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**NADON J.A.
SHARLOW J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellants Nagib Tajdin and Alnaz Jiwa ask this Court to reverse the judgment of the Federal Court (2011 FC 14) granting the summary judgment motion of the respondent, His Highness Prince Karim Aga Khan (the Aga Khan). The judgment declares that Mr. Tajdin and Mr. Jiwa infringed the Aga Khan's copyright in his literary works, particularly *Farmans* and *Talikas*, and grants among other things a permanent injunction precluding the publication of a book entitled *Farmans 1957-2009 – Golden Edition Kalam-E Iman-E-Zaman (Golden Edition)* as well as

accompanying MP3 audio bookmarks (preloaded with fourteen audio extracts of readings of *Farmans* by the Aga Khan).

[2] Mr. Tajdin and Mr. Jiwa also published copyrighted literary works of the Aga Khan at least between 1992 and 1998. Such publications and any other actions relating to such publications are not the subject of the infringement action filed by the Aga Khan.

[3] It is worth noting that although these appeals challenge only the decision of the judge with respect to the Aga Khan's motion, the judge had to decide cross-motions for summary judgment which were heard together. In fact, Mr. Tajdin and Mr. Jiwa were the first to file such a motion on the basis that it was clear that there was no genuine issue with respect to infringement given that their actions were done with the consent of the copyright owner, the Aga Khan. Mr. Tajdin and Mr. Jiwa described the issues raised in both motions as identical except for the fact that in the Aga Khan's motion the judge also had to determine the admissibility of the "hearsay statements" in the affidavits filed in support of the said motion.

[4] Importantly, Mr. Tajdin and Mr. Jiwa admit that the *Golden Edition* includes literary works covered by copyrights owned by the Aga Khan.

[5] It is in that context that, in his reasons, the judge mentions that the only possible genuine issue in the cross-motions for summary judgment before him was whether the Aga Khan gave his consent or, in other words, whether Mr. Tajdin and Mr. Jiwa performed the act admitted to without

the consent of the owner of the copyrighted literary work. This is not really disputed by the parties even if, in their Notice of Appeal and their Memorandum, Mr. Tajdin and Mr. Jiwa state that the judge should have given more attention to their defence of laches/detrimental reliance.

[6] In their Memorandum, Mr. Tajdin and Mr. Jiwa raise 19 issues or errors which, in their view, justify granting the appeals. Among other things they submit: i) that the judge erred in law, by failing to properly apply the test to determine whether there was a genuine issue for trial, proceeding as though he were the trial judge, ii) that he admitted and relied on inadmissible hearsay evidence, iii) that he erred in law by drawing inferences without the necessary facts or on the basis of contested facts, iv) that he erred when he concluded that the Aga Khan never consented to the publication of the *Farmans*, v) that he erred in holding that the onus to prove consent was on Mr. Tajdin and Mr. Jiwa, vi) that the judge had no jurisdiction to order costs (\$30,000.00) to be payable to the Aga Khan as opposed to the Aga Khan Development Network (AKDN), a charitable foundation which was what was sought by the Aga Khan.

[7] With respect to some issues, the parties disagree as to the standard of review applicable. For Mr. Tajdin and Mr. Jiwa, this Court should apply the correctness standard to all the issues, including whether or not the judge was correct to find that there was no genuine issue for trial. They rely, in that respect, on the standard applied in Ontario (*Canadian Imperial Bank of Commerce v F-1 Holdings & Investments Inc* (2007), 162 ACWS (3d) 554 (OSJ Div Ct) and *B(F) v G(S)*, 2001 CarswellOnt 1413, 199 DLR (4th) 554 (Ont SCJ) [see also *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764], rather than the palpable and overriding error standard applied by the

Federal Court of Appeal (*ITV Technologies v WIC Television Ltd*, 2001 FCA 11, para 6; *Quadco Equipment Inc v Timberjack Inc*, 2003 FCA 93, para 4; *Begg v Canada (Minister of Agriculture)*, 2005 FCA 362, para 13; and *Eli Lilly and Co v Apotex Inc*, 2005 FCA 361, paras 39 and 44).

[8] In my view, nothing in this case turns on the standard of review. My conclusion would be the same on either standard.

[9] In his reasons, the judge correctly describes the test applicable on summary judgment motions. He relies on seminal cases cited by both parties. He concludes at paragraph 11 that he is 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. He further notes that “although there are credibility issues in the motions as pleaded before me, they are not, in my opinion, germane.”

[10] I agree with both statements.

[11] It is evident from a simple reading of the decision that the judge made a number of superfluous findings using language more appropriate to a trial judge. It is also clear that many of these findings were prompted by the parties’ arguments. It appears that he may have been trying too hard to put an end to this dispute where the line between their religious debate and the copyright infringement is far from clear, at least in Mr. Tajdin and Mr. Jiwa’s argument. This, however, does not mean that his conclusion that the Plaintiff had met the test and that there was no genuine issue for trial is incorrect.

[12] Be that as it may, it was not disputed at the hearing before this Court that the determination of whether there was a genuine issue in this case turns on the following:

- a. whether the events that took place at the 1992 Mehmani ceremony are capable of constituting consent, be it express or implied, to the publication of the *Farmans* and *Talikas* included in the *Golden Edition*;
- b. whether since the adoption of a new constitution in 1986, which did not include any specific reference to the publication, reproduction or distribution of the *Farmans* and *Talikas*, each member of the Jamat was implicitly authorized to publish, reproduce, distribute or sell to other Ismaili the copyrighted literary works included in the *Golden Edition* on the basis of their special relationship with the Aga Khan.

[13] Mr. Tajdin and Mr. Jiwa allege that the Aga Khan's signature on certain documents is forged, and that improper use has been made of the Aga Khan's brother's e-mail. These allegations relate to what can only be described as an alleged conspiracy by persons in the Secretariat of the Aga Khan to stop Mr. Tajdin and Mr. Jiwa's activities out of spite and jealousy. The allegations need not be discussed or considered to determine whether a genuine issue for trial exists, for if the record does not disclose any fact capable of constituting consent, there is no need to determine if the alleged consent was later revoked.

[14] As noted by Mr. Tajdin and Mr. Jiwa, the events that took place at the 1992 Mehmani ceremony are not in dispute. The affidavit of Karim Alibhay described them in sufficient detail to

constitute a proper factual matrix enabling the judge or this Court to determine whether or not these events are capable of constituting consent within the meaning of section 27 of the *Copyright Act*, RSC 1985, c C-42.

[15] It is not disputed that consent, in this statutory provision, can be either express or implied. “Such a consent may be presumed from the circumstances. The inference of consent must be clear before it will operate [...] and must come from the person holding the particular right alleged to be infringed” (H. G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed (Toronto: Carswell, 1967) at 339, cited with approval by Chief Justice McLachlin in *Bishop v Stevens*, [1990] 2 SCR 467 at paragraph 35).

[16] As already mentioned, Mr. Tajdin and Mr. Jiwa took the position before the judge that he had all the necessary facts to determine this question and to draw, if necessary, a clear inference of consent. They obviously cannot, now in appeal, take a different position.

[17] The relevant facts may be summarized as follows:

- (a) The book presented on a plate to the Aga Khan on top of the Alibhay family’s offering of fruits and nuts at the 1992 Mehmani ceremony had just been printed by Mr. Tajdin a few days before the said ceremony;
- (b) The title on the cover of the book clearly refers to *Farmans* and Volume I, however, there is no indication as to who printed it or who prepared this compilation;

- (c) No notice had been given to the Aga Khan, or any of the ceremony organizers, of Mr. Tajdin and Mr. Jiwa's intention to seek the Aga Khan's consent to the reproduction, distribution, and sale of the copyrighted literary work included in this book;
- (d) There is no evidence that the Aga Khan, or anybody else in the organization at the time, knew or ought to have known that Mr. Alibhay was acting on behalf of Mr. Tajdin and Mr. Jiwa;
- (e) There is no evidence that the Aga Khan knew or ought to have known that this book was not simply a compilation printed for the personal use of the Alibhay family, of which three members were presented to the Aga Khan (explaining the use of the word "we" – "nous" in French).

The brief verbal exchange that took place between Mr. Alibhay and the Aga Khan, which is reproduced in its entirety at paragraph 39 of the judge's reasons, is not, in my opinion, capable of constituting consent within the meaning of section 27 of the *Copyright Act*.

[18] The fact that, in light of his undisclosed intentions and his knowledge of his "*Farman*s project", Mr. Tajdin may have had a genuine subjective belief that through this exchange consent was given for the publication and sale of the copyrighted works of the Aga Khan, past and future, so long as the sales and distribution were made only to Ismailis, is not particularly relevant. The test to be applied here is an objective one, and the focus is on whether the owner of the copyright can be presumed to have consented to the otherwise infringing actions.

[19] Turning now to the second set of facts put forth by Mr. Tajdin and Mr. Jiwa, I have considered all of the arguments with respect to the new constitution, the oath sworn to the Aga Khan by the Jamat, as well as those relating to various statements of the Aga Khan referred to in the material submitted by Mr. Tajdin and Mr. Jiwa. That material indicates that:

- (a) the Aga Khan expects his Jamat to read, discuss, and reflect on his *Farmans* and *Talikas* which may sometimes be quite difficult to comprehend;
- (b) Knowledge of the Ismaili history, particularly with respect to the practices, beliefs, and ethics of the past, has been buried and is not sufficiently known;
- (c) The availability and level of circulation of his teachings, and those of previous Imams, may not be satisfactory, or at least optimal.

I cannot conclude that there is a genuine issue with respect to consent.

[20] Obviously, the Aga Khan encourages his followers to reflect on the guidance he provides to them. However, even taken together, the oath, the new constitution, and the above mentioned statements are not capable of constituting consent within the meaning of section 27 of the *Copyright Act*.

[21] Things might have been simpler if the solemn affirmation in the name of the Aga Khan had been filed on its own instead of being filed as an exhibit to the affidavits of two witnesses present when it was solemnly affirmed in Boston. However, here again, this is not a fatal flaw as suggested by Mr. Tajdin and Mr. Jiwa, particularly given the context in which this evidence was

filed and the fact that Mr. Tajdin and Mr. Jiwa are still doubting its genuineness, even after they actually met the Aga Khan at the examination for discovery in Toronto. The Respondent explained why an affidavit from the Aga Khan was not filed. Neither the judge nor this Court is bound to make an adverse inference against the Aga Khan as urged by Mr. Tajdin and Mr. Jiwa. I am satisfied that it was reasonably open to the judge not to do so here.

[22] Mr. Tajdin and Mr. Jiwa take issue with how the judge dealt with the examination for discovery. Again, this is a matter that is not central to the determination of whether there is a genuine issue for trial. I am satisfied that having concluded that there are no facts capable of constituting consent, one can only infer that the publication by Mr. Tajdin and Mr. Jiwa of the *Golden Edition* was done without the consent of the Aga Khan. To come to that conclusion, one need not accept, or even refer to, the affidavits filed in support of the Aga Khan's motion which are said to contain only hearsay statements. In fact, in the very particular circumstances of this case, the inference of the absence of consent is the only possible conclusion. This is so whoever bears the ultimate burden of proving the absence of consent.

[23] The record before this Court does not establish any defence based on laches, detrimental reliance or acquiescence. The judge found that Mr. Tajdin and Mr. Jiwa, who do not dispute that they had the burden of putting forth all the necessary facts supporting such defences, did not establish that the Aga Khan had the appropriate knowledge of their activities at the relevant time and the evidence falls far short in respect of such defences.

[24] It is not disputed that the Aga Khan only became aware of the late 2009 publication of the *Golden Edition* when Mr. Tajdin wrote to the Aga Khan on January 4, 2010. In fact, this was the first time that Mr. Tajdin and Mr. Jiwa directly informed the Aga Khan of their “*Farman* project” which started in 1992, even before the Mehmani ceremony took place, and their belief that the Aga Khan had blessed the said project in 1992.

[25] There is no evidence that the Aga Khan knew that Mr. Tajdin and Mr. Jiwa continued to distribute the books they published before 1998 after they claim to have agreed to publish their next book in collaboration with Mr. Sachedina and the Ismaili institutions in 1998. In his letter dated January 4, 2010, Mr. Tajdin expressly confirms that no new books were published between 1998 and 2009.

[26] Mr. Tajdin and Mr. Jiwa did not allege that the Aga Khan, the acknowledged owner of the copyrights in the *Farmans* included in the *Golden Edition*, knew that they believed that they were authorized by him to pursue their activities in 2009 because of the blessing he gave to the Alibhay family or because of the wording of the new constitution and their special relationship with the Aga Khan.

[27] Moreover, the parties did not discuss at all how the equitable doctrine of laches and acquiescence could in law apply to the Aga Khan’s statutory rights under the *Copyright Act*. It is

certainly not clear to me how the doctrine of laches could apply here in light of the three year statutory limitation provided for in the said statute, especially considering that in their Statements of Defence, Mr. Tajdin and Mr. Jiwa rely expressly on the said limitation. Nor is it clear how there is any room for the application of the doctrine of acquiescence in the context of section 27, where the legislator expressly deals with the issue of consent.

[28] That said, even assuming that these defences are available, I agree with the judge that there is an insufficient factual basis to conclude to the existence of a genuine issue here.

[29] There is little to say with respect to costs for the judge had doubts whether costs could be paid to a non-party. It was within the judge's discretion to grant such costs to the Aga Khan, leaving it to him to dispose of such costs as he sees fit. Mr. Tajdin and Mr. Jiwa have not shown any error in that respect.

[30] I would therefore dismiss the appeal with costs.

“Johanne Gauthier”

J.A.

“I agree
M. Nadon J.A.”

“I agree
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PRINCE KARIM AGA KHAN

**(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON
DATED MARCH 4, 2011, DOCKET NO. T-514-10)**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 14, 2011

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
SHARLOW J.A.

DATED: January 16, 2012

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