

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

APPELLANTS' MEMORANDUM OF FACT AND LAW

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PART I - OVERVIEW

1. This is an appeal by the defendants from the Judgement of The Honourable Justice Harrington dated March 4, 2011. In that Judgment Justice Harrington granted summary judgment in favour of the plaintiff, while simultaneously denying the defendants' motion for summary judgment.
2. The plaintiff commenced this action by Statement of Claim dated April 6, 2010. By this action, the plaintiff seeks: (a) a declaration that copyright subsists in the Aga Khan's literary work; (b) a declaration that the defendants have infringed the plaintiff's copyright and moral rights; (c) injunctive relief; and (d) damages. The infringing material is defined as the Golden Edition Book ("Golden Edition") accompanied by its mp3 bookmark.
3. The named plaintiff, His Highness Prince Karim Aga Khan (hereinafter the "Imam" or the "Aga Khan"), is the spiritual leader of the Shia Imami Ismaili Muslims. There are approximately 15 million Ismailis worldwide, located in over 25 countries. The Imam succeeded his grandfather, Sir Sultan Mahomed Shah Aga Khan, to become the 49th hereditary Imam on July 11, 1957.
4. In this action, it is asserted that the appellants have infringed the Aga Khan's copyright by distributing His works, known as "Farmans" which are oral Guidance made by Him as Imam (spiritual leader) when He blesses His Jamats (congregation, "Ismailis").
5. As Ismailis, the appellants are expected to guide their lives according to the Farmans made

by their Imam, who has said that He makes Farmans for the Ismailis, and He has also said that not abiding by His Farmans can have very serious consequences to the individual.

6. Although the appellants defended this action on the grounds that the litigation has been commenced and prosecuted by Shafik Sachedina ("Sachedina"), who was appointed as Head of the Imam's Secretariat in or about December 1996, their main defence is that on August 15, 1992, during His visit to Montreal, the Imam gave His personal consent and authorization (with blessings for the success of the "work") to publish and distribute His Farmans during a ceremony known as *Mehmani* (a religious ceremony when the Imam personally meets His followers), and, in any event, by virtue of having given an oath of allegiance to the Imam, thereby becoming His Spiritual Children, the appellants also have an implied consent and authorization to the Farmans (the Ismaili Constitution which governs all aspects of an Ismaili life also does not prohibit the activities complained of), and as a result, the activities complained of are not infringing the Aga Khan's copyrights. The appellants also relied on the legal concepts of Detrimental Reliance and Latches.
7. The appellant Nagib Tajdin ("Tajdin") has published about 10 books after the Imam gave His personal consent, authorization and encouragement on August 15, 1992, to "continue" publishing His Farmans. The last publication, "Golden Edition" (the publication subject of this action) contains all of the Farmans previously published by Tajdin with new ones added after the date of the previous publication. All of the work undertaken by Tajdin was on a voluntary basis out of love for the Imam and was undertaken without any motivation for making profits. He invested his time and money and sold the books at nominal prices without recovering his investments (all projects were deficit projects.)
8. The appellants note that no evidence has been filed denying the giving of consent, authorization or encouragement in 1992, or any evidence explaining away the words spoken by the Aga Khan on August 15, 1992, to either deny what was said or to explain what He might have meant when He said "continue doing what you are doing" while placing His hand on the Farman Book, which clearly indicated that it was Volume 1 of His Farmans between

1957 to 1991, nor is there any evidence to place limitations or conditions on the words spoken. Yet, inexplicably, the motions judge speculated about what the Aga Khan might have meant by the words spoken and also speculated about restrictions on the words spoken by the Aga Khan in coming to a decision that no consent was given by the Imam in 1992. The motions judge also held that he would require expert evidence to determine the issue, but then nonetheless granted judgment.

PART II - STATEMENT OF FACTS

9. The Aga Khan is the spiritual father or "Imam" of the appellants. Farmans are given orally by the Aga Khan *as Imam* to His followers (Ismailis) when He grants them an audience, and the Farmans immediately become binding upon all Ismailis across the world whether or not they were present to hear the Farman in person.

Appeal Book, Vol 1, Tab 11, p.132, paras. 3, 4; Tab 13, p. 195, paras 2, 4

10. One of the most important tradition of the Ismaili faith is that all Ismailis give their Oath of Allegiance to their Imam before they are accepted into the Ismaili faith, and in return, the Imam also reciprocates by giving His promise to protect and to guide them through the making of Farmans, in their worldly and spiritual lives. The appellants have given their Oath of Allegiance to the Imam and He in return promised to guide them through the making of Farmans. The appellants note that there is no evidence at all contradicting or challenging this issue and as such implied consent could be established by this evidence standing on its own.

Appeal Book, Vol 1, Tab 11, p. 132, paras. 3, 4; Tab 13, p. 195, paras. 2, 4

11. One of the essential obligations of Ismailis is to abide by the Farmans, which are generally delivered by the Aga Khan orally, or occasionally, He might send a brief written message to the Jamats or individual Ismailis, which is known as Talika. A Farman remains valid until and unless superceded by a new Farman.

**Appeal Book, Vol 1, Tab 11, p. 132, para. 5, 6; Tab 13, p. 195, para. 3, 4;
Tab 14, p. 209, para. 14**

12. As Imam of the Ismailis, the Aga Khan has absolute authority in interpreting the faith for the Ismailis to practice according to the Time and Age, and accordingly, it is incumbent upon

Ismailis to follow closely every word of every Farman delivered by their Imam, and non obedience of Farmans with respect to religious matters have serious consequences to an Ismaili. The Aga Khan has said in this regard:

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

Appeal Book, Vol 1, Tab 13, p. 200, para. 21

13. The Imam Himself has often acknowledged that the Farmans are made for the Jamats (His followers). On November 29, 1964, the Imam said:

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

On March 4, 1981, the Imam said:

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

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.

Appeal Book, Vol 1, Tab 13, p.199, para. 19

14. Despite the above, Farmans have not been available for personal study through any official channel in at least three decades (previously there were printed and distributed to the Jamats). Cross examinations of Sachedina have established that over 80% of Ismailis have no access to Farmans. Evidence by Tajdin, confirmed on cross-examination, has established that many other Ismailis maintain personal collections, and publish Farmans and circulate them amongst themselves, or to their friends and other Ismailis in accordance with a longstanding Ismaili tradition.

Appeal Book, Vol 1, Tab 11, p. 133, para. 7, 8,11; Tab 15, p. 215, para. 18-22; p. 222, para. 57;

Appeal Book, Vol III, Tab 33, p. 668, Q. 633-637; Tab 34, p. 893, Q. 606-614, Exhibits E, F;

15. In searching for Farmans, the appellant Alnaz Jiwa ("Jiwa") came across co-appellant Nagib Tajdin (hereinafter "Tajdin") who provided Jiwa with Farmans, copies of which he could not obtain from any institutional body. The first books were obtained by Jiwa in 1993 for his personal use. Shortly thereafter, Jiwa obtained more Farman books to distribute to friends and family members and has been distributing the Farman books as they were periodically published by Tajdin since 1993. Tajdin asked Jiwa to put the monies received from the sale of the books to be delivered to the Jamat Khana for the benefit of the Aga Khan.

Appeal Book, Vol 1, Tab 6, p. 71, para 40; Tab 13, p. 196, para. 6-10

16. Jiwa undertook the distribution of the Farman books to enable other Ismailis to become better acquainted with their faith and to enable them to abide by the Farmans, and distributed these Farman books at the same price he paid for them to his family and friends. Tajdin has also undertaken these publications as a volunteer of the Aga Khan - not only without the intention of making profits, but also by investing his own money knowingly that it will not be recovered, essentially knowingly entering into deficit projects by selling the books at cost, by giving many books away for free, by cashing his insurance monies, etc. Overall, Tajdin has lost a huge amount of money all in the name of voluntary spirit, to enable the Ismailis to have Farmans to enrich their spiritual lives due to love and affection for the Imam and the Ismailis.

Appeal Book, Vol 1, Tab 11, p. 139, paras. 36, 37; Tab 13, p. 196, paras. 7-9

17. Jiwa states that in distributing Farman books obtained from Tajdin to his families, friends, and other Ismailis, Jiwa (as well as Tajdin) in loose format (pages) or in book formats over the years, he has not violated either the Ismaili Constitution or any Farmans of the Imam, the two primary sources that all Ismailis are obliged to abide by. Farmans made after ordaining of the New Ismaili Constitution can supercede the Ismaili Constitution in the case of any inconsistency between the provisions of the Constitution and the Farman.

**Appeal Book, Vol 1, Tab 13, p. 196, paras. 11-18
Vol III, Tab 33M, p. 721, Article 2.6**

18. The first Farman book was published by Tajdin in August 1992 when the Imam visited

Canada to grant an audience to the Canadian Ismailis. The Imam agreed to personally grant an audience to approximately 20% of Canadian Ismaili families, and they were to be chosen alphabetically, and as such Tajdin was unable to personally meet the Imam. Accordingly, he asked a very good friend of his, Karim Alibhay ("Alibhay") to present the Farman book to the Imam and to seek His Guidance.

**Appeal Book, Vol 1, Tab 11, p.134, paras. 13-16;
Tab 14, p. 208, paras. 6-9; Tab 15, p. 213, para. 11**

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

Appeal Book, Vol 1, Tab 14, p. 208A, paras. 9-10

20. Alibhay gave evidence that after posing a question to the Imam, the Imam placed His right hand on his shoulder, His left hand on the book of Farmans and responded in French: "Continuez ce que vous faites (continue what you are doing), réussissez ce que vous faites (succeed in what you are doing), et ensuite nous allons voir ce qu'on peut faire ensemble (and then we will see what we can do together)". Since then Tajdin has been publishing Farmans (openly to the knowledge of the Imam and the Institutional leaders) for distribution on a non-profit basis to the followers of the Imam.

Appeal Book, Vol 1, Tab 14, p. 209, para. 6-12

21. Most important, the presenting of the Farman Book to the Imam has been recorded on video and despite asking for same, has not been produced to the appellants or to the court, and its existence has *not been denied*. This would have been the best evidence concerning the presentation of the Farman book to the Imam and his response. An adverse inference could and should have been drawn due to the failure to produce this best evidence that goes to the heart of the issues raised in defence. As noted above, there is no evidence tendered at all to dispute Alibhay's evidence and he was not cross-examined.

**Appeal Book, Vol 1, Tab 13, p. 201, para. 25, 26; Tab 14, p. 209, para. 15, 16;
Tab 15, p. 214, para. 14-18**

22. Based on the Imam's direction and encouragement to "continue" the work, with blessings for success, Tajdin has been publishing and openly distributing Farmans as from August of 1992 to his

family, friends, and other Ismailis on a non-profit basis since the year 1993. The last book (Golden Edition) was published in December 2009.

Appeal Book, Vol 1, Tab 7, p. 89, para. 30-35; Tab 11, p. 132, para. 18-21, 36; Tab 13, p. 195, paras. 6-9; Tab 15, p. 214, paras. 12,13,36, 52, 54;

23. The appellants state that they cannot be said to be infringing the Copyright of the Imam when they acted on the Imam's personal authorization and encouragement to "continue the work" which has not been revoked by Him. The two letters and the Affirmation purported to have been signed by the Aga Khan is the only evidence which could be said to have revoked the 1992 consent. The appellants' expert has made a finding that these documents are not signed by the Aga Khan.

**Appeal Book, Vol 1, Tab 12B, 12E, p.169, 189; Vol II, Tab 26J, p. 443
Tab 18B,18C,18D, p.308, 322, 333**

24. However, even if the documents were authentic, they were signed in the year 2010, well after the Golden Edition was published and distributed, which raises the issues of whether it is an infringement to publishing of the books before the consent is revoked, and whether once published an injunction can issue prohibiting the books published during the consent period.

PART III - STATEMENT OF ISSUES

25. The appellants raise the following issues for determination:
- (a) Whether the motions judge erred in law when, contrary to Rule 216(1), he failed to consider whether there was a genuine issue for trial but instead proceeded as though he were the trial judge;
 - (b) Whether the motions judge erred in law in admitting and relying on hearsay evidence (the two letters and the Affirmation purportedly signed by the Aga Khan) to ground his judgement;
 - (c) Whether the motions judge erred in law in relying on the evidence of the respondent's expert after finding that the experts' evidence was contradictory;
 - (d) Whether the motions judge erred in finding that the experts' evidence was contradictory;

- (e) Whether the motions judge erred in law by drawing inferences without the necessary facts on the record, and/or on drawing inferences on contested facts;
- (f) Whether the motions judge erred in rejecting the unchallenged evidence of Alibhay who was not cross-examined, and in relying on the evidence of Sachedina when his evidence not only was contradicted by Tajdin but also by Mohamed Tajdin's ("Mohamed") evidence (who was not cross-examined);
- (g) Whether the motions judge erred in speculating what the Aga Khan might have meant when he said, "Continuing doing what you are doing" when there was no evidence at all on this issue to either contest the evidence of Alibhay, or to explain away the words spoken;
- (h) Whether the motions judge misapprehended evidence of the words spoken "continue the work" by the Aga Khan in 1992 when he concluded that the Aga Khan never gave consent to the publication of the Farmans, despite jurisprudence on the issue (that consent can be implied from relationship, conduct, including indifference);
- (i) Whether the motions judge erred in granting a judgement after acknowledging that he had no expert evidence on the issue of religious gestures relating to the issue of the personal consent and authorization given by the Aga Khan on August 15, 1992;
- (j) Whether the motions judge erred in making a determination on the issue of authorization and consent and implied consent without a factual underpinning on the complex issues;
- (k) Even if the consent and authorization given by the Aga Khan on August 15, 1992, to "continue the work" was revoked after the date of the publication of the Golden Edition, whether the appellants could be found to have infringed on the Aga Khan's Copyright, and whether an injunction could issue restraining the further distribution of the Golden Edition without being liable for the damages suffered by the appellants for same?
- (l) Whether a party responding to a motion for summary judgment is required to file *all evidence* as if they were conducting a trial and in failing to do so, the party risks having an adverse inference drawn against them, and judgment granted?

- (m) Whether the motions judge erred in speculating what the impact of the discoveries were when there was no evidence on the record, and erred in stating that the attendance was proof positive that the consent, if given, was revoked;
- (n) Whether the motions Judge erred in interpreting the Ismaili Constitution and its impact on the issue of implied consent in the issue of Copyright infringement;
- (o) Whether the motions Judge erred in holding that the onus is on the appellants to prove consent contrary to the holding made by the Federal Court of Appeal in *Positive Attitude Safety System Inc. v. Albion Sands Energy Inc.*, 2005 CarswellNat 3575 (Tab 13), which held that the plaintiff had the onus of proof of no consent;
- (p) Whether the entered order goes beyond what is sought for in the Statement of Claim (infringing materials is defined as the Golden Edition), but the Judgment granted is much broader in that regard;
- (q) Whether the motions judge erred in his assessment and his finding on the issue of Latches;
- (r) Whether the issue of Detrimental Reliance applies, given the fact that appellants had changed their position after the Aga Khan had said in 1992 to “continue doing what you are doing”?
- (s) Whether the motions judge had jurisdiction and /or whether he erred on the issue of Ordering Costs be payable to the plaintiff when the Notice of Motion did not seek that relief.

PART IV - LAW AND ARGUMENT

Standard of Review

26. In determining what the standard of review is from an appeal from a judge's decision, the Ontario Superior Court of Justice (Divisional Court) referred to the decision in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] S.C.J. No. 31 (S.C.C.) (cited to Q.L.), and summarized the law as follows:

“The standard of review on a motion for summary judgment does not require an analysis of whether a palpable and overriding error has been made by the judge hearing the motion. It is strictly one of correctness.”

***Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc.*, 2007 CarswellOnt 8012, at paras 5-8; Appellants’ Brief of Authorities, Tab 3**

27. Justice Himel in *B. (F.) v. G. (S.)* (2001), 199 D.L.R. (4th) 554 (Ont. S.C.J.), explains why the appropriate standard of review of a summary judgment should be one of correctness as follows:

“In a motion for summary judgment, the judge hearing the motion is not finding facts but, rather, is determining whether or not there is a genuine issue for trial. ... On an appeal of an order of summary judgment, the appellate court must determine whether the judge applied the appropriate test and whether there was any error in its application. ... The standard of appellate review is, therefore, a standard of correctness, not a standard of deference applied to findings of fact in a trial.

***B. (F.) v. G. (S.)*, 2001 CarswellOnt 1413, (O.S.C.J), at para. 10
Appellants’ Brief of Authorities, Tab 4**

28. Accordingly, the appellants submit that the appropriate standard of review for reviewing the decision of a motion judge’s hearing motions for summary judgment is a standard of correctness, in so far as he is assessing whether there is a genuine issue for trial, and when he is exercising his discretion in determining the issue of granting judgment pursuant to Rule 216(3), then the standard is whether the judge gave sufficient weight to all relevant considerations.

***MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, [2004] 3 F.C.R. 3 (F.C.A.) at para 28
Appellants’ Brief of Authorities, Tab 6**

Role of the Motions Judge / Appropriateness of Summary Motion

29. The motions judge started his reasons for decision by stating that the “*only* issue in these cross-motions for summary judgment is whether the Aga Khan gave the appellants his consent to publish his literary works known as Farmans and Talikas.” [Emphasis added]. However, as noted in paragraph 6 above, the appellants are not only relying on the issue of consent as articulated by the motions judge.

Appeal Book, Vol 1, Tab 3, p..23, para. 1

30. The motions judge erred in focusing on the merits of the action as opposed to the more limited question of “genuine issue” which is the cornerstone of a motion for summary judgment. Having made that error, the motions judge then proceeded to analyze the evidence as a trial judge as opposed to a motions judge. The motions judge erred in failing to determine properly the import of the following issues:

- a. issue of the oath of allegiance given by the appellants to their Imam and in exchange the promise by the Imam to guide His flock which would mean that an individual who is the Imam's follower is entitled as of right to the Guidance issued by his spiritual guide and to distribute them to his families and fellow Ismailis;

**Appeal Book, Vol 1, Tab 11, p.132, paras. 3, 4; Tab 13, p. 195, para. 2
Tab 33M, p. 706, Articles D-F**

- b. issue of whether the Ismaili Constitution is a complete code of conduct and whether the Ismaili Constitution supercedes the provisions of *Copyright Act* in that it could be considered as an implied consent, consent by conduct and/or relationship;

Appeal Book, Vol 1, Tab 13, p. 196, para. 11-23

- c. issue of the Farmans made by the Imam wherein He urges His followers to abide by every word of His, that He makes Farmans for His followers, and many other such Guidance which could be deemed to be implied consent;

Appeal Book, Vol 1, Tab 13, p. 199, paras. 18 -22

- d. issue of the continuous publication of Farmans from 1992 with the knowledge of the Imam and his institutional leaders thus precluding the granting of an injunction on the legal consent of "Latches", and or "Detrimental Reliance"; and

**Appeal Book, Vol 1, Tab 13, p. 196, para. 6,10; Tab 15, p. 216, paras. 26, 36
Vol II, Tab 26, p. 395, para. 14; Vol III, Tab 34, p. 750, Q. 468-470**

- e. if this litigation or the letters purportedly written by the Aga Khan is deemed to revoke the consent given by Him in 1992, then can it retroactively prohibit the publication of the Golden Edition which was published within the period the consent was effective.

31. The motions judge identified (at para. 60) numerous questions that remained unanswered, and in light of such fundamental questions remaining in doubt, the motions judge erred in granting summary judgment. In the case of *Garford Pty Ltd.*, Justice James Russell sternly drew the distinction between hearing a motion for summary and trials at para. 9 as follows:

"A motion for summary judgment is not intended, and **should not be treated, as a**

substitute for a trial. In determining whether a trial is unnecessary and would serve no purpose, the motions judge must guard against assuming the role of a trial judge and deciding the issues" and at paragraph 10, he states that, "... [summary judgment] should not be granted where, on the whole of the evidence, the judge **cannot find the necessary facts** or it would be unjust to do so. If there are serious factual or legal issues that must be resolved, the case is not appropriate for summary judgment." [Emphasis added]

***Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.*, 2010 FC 996
Appellants' Brief of Authorities, Tab 5, paras. 6-9**

32. The motions judge's decision relying on inadmissible hearsay evidence (paras. 18, 20, 23, 30, 44), drawing an adverse inference (paras. 58-65), preferring one version of evidence when faced with contradictory evidence (para. 19), drawing inferences from contested evidence (para. 44), without explaining why the contradictory evidence between Bhaloo and Sachedina against Tajdin and Mohamed (who was not even cross-examined) did not raise a serious credibility issue when the evidence they contradicted on was on material issues, ignoring evidence that was not challenged and in speculating (without any underlying evidence) on what might have been meant when the Imam said, "continue doing what you are doing" (paras. 39-46), drawing an adverse inference (paras. 25, 59, 60, 63 67) because evidence was not led on all of the issues are all indications of the motions judge misapprehending his role as a trial judge as opposed to being a motions judge.

Appeal Book, Vol 1, Tab 3

33. Rule 216(3) permits a judge on a motion for summary judgment, after finding that a "genuine issue" exists, to conduct a trial on the affidavit evidence with a view to determining the issues in the action. However, this is not always possible, particularly where there are conflicts in the evidence, where the case turns on the drawing of inferences or where serious issues of credibility are raised (*MacNeil Estate*), and a motions judge can only make findings of fact or law provided the relevant evidence is available on the record and does not involve a "serious" question of fact or law which turns on the drawing of inferences (para. 33 of *MacNeil Estate*). A respondent to a motion for summary judgment does not have the onus as they would if they were plaintiffs at trial, and do not have the burden of proving all of the facts of their case.

**Rule 216(3), Appellant's Brief of Authorities, Tab 2
MacNeil Estate, supra, at paras 25, 36, 37, 38; Appellants' Authorities, Tab 6**

***Petrillo v. Allmax Nutrition Inc.*, 2006 CarswellNat 3328, 300 F.T.R. 262.
paras. 40, 41, 42, 45, 49; Appellant's Authorities, Tab 26**

34. The Federal Court of Appeal in the case of *Pyrrha* held that when significant consequences flow from a summary judgment decision on an issue [under *Copyright Act*] which had not previously been litigated in Canada and that difficult issue should not be decided in a summary way without have more evidence at trial on the issues.

***Pyrrha Design Inc. v. 623735 Saskatchewan Ltd.*, 2004 Carswellnat 4660, 2004 FCA 423, at para 13; Appellants' Brief of Authorities, Tab 27**

Admissibility of Evidence

35. The respondent's evidence consists of five affidavits: by Sachedina; by Aziz Bhaloo ("Bhaloo"); by Jennifer Colman ("Colman"); by Daniel Gleason ("Gleason"); and by Brian Lindblom ("Lindblom") an expert witness. All of the evidence filed primarily consists of hearsay and/or double hearsay evidence, or documents attached to Exhibits to their affidavits, which documents are in the nature of hearsay. Such evidence can only be admitted if the grounds of necessity and reliability (*Merck Frosst Canada Inc.*) are satisfied. The motions judge erred in law in admitting (and in relying) on the impugned evidence, and also founding his judgment almost entirely on the impugned evidence, evidence which was materially contradicted by the appellants' evidence, some of which was not even cross-examined.

Appeal Book, Vol II, Tabs 26, 27, 28, 29, 30, p. 392-489

36. Sachedina's affidavit and Bhaloo's affidavit were entirely based on hearsay or double hearsay evidence, and Sachedina attached two letters purportedly written by the Aga Khan as exhibits to his affidavit. Gleason and Colman attached an Affirmation purportedly signed by the Aga Khan as an exhibit to their affidavit, all without tendering any evidence of necessity and reliability to make these attachments admissible.

**Appeal Book, Vol II, Tab 26 & 27; Tab 28A; Tab 29A.
Vol I, Tab 18B, 18C, 18D, pp. 308, 322, 333**

37. Sachedina confirmed on cross-examinations that the Aga Khan did not instruct them or ask them to file evidence on his behalf or at all, and that they did not consult with the Aga Khan nor did they review the contents of their affidavits with the Aga Khan, essentially confirming

the appellants' evidence that they are the instructing minds in this litigation.

Appeal Book, Vol III, Tab 34, p. 750, Q. 25,26,28-33; Tab 35, p.1040, Q. 6

38. Associate Justice K. Sharlow of the Federal Court of Appeal in the case of *Candrug Health Solutions Inc.*, allowed the appeal and reversed the motion's judge's order after reviewing thirteen affidavits and finding that many affidavits did not contain admissible evidence and/or evidence capable of supporting the evidence required to support the issue in question, and said that: "It is not clear from the judge's reasons whether and to what extent he relied on any of this evidence, but I must conclude with respect that any such reliance would have been misplaced."

***Candrug Health Solutions Inc. v. Thorkelson*, 2008 CarswellNat 663, 2008 FCA 100, at para. 14; Appellants' Brief of Authorities, Tab 8**

39. Additionally, the court in *Merck & Co.* stated:

"In my opinion the evidence in question is clearly hearsay and is precluded from admission unless it be admissible by some exception to the hearsay rule. That rule, as defined by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, (1992, Butterworths, Toronto) p. 156, may be stated as follows:

"Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein."

***Merck & Co. v. Apotex Inc.* 1998 CarswellNat 560, 79 C.P.R. (3d) 501, 146 F.T.R. 148, at para. 7; Appellants' Brief of Authorities, Tab 9**

40. A comprehensive analysis on the issue of hearsay is set out in *Rees*.
***Rees v. Royal Canadian Mounted Police*, 2005 CarswellNfld 83, 2005 NLCA 15 at paras 71-73; Appellants' Brief of Authorities, Tab 10.**
41. The Court in the case of *T.E.A.M.* sternly reminded the importance of requiring parties to bring forth "best evidence" as follows:

"The court should afford little or no weight to hearsay evidence ... Reliance on hearsay evidence should be particularly discouraged in the context of a summary judgment motion. Parties are urged to put their best evidence before the court in a direct fashion when they seek a summary judgment in their favour: *Podkriznik v. Schwede*, [1990] M.J. No. 179, 64 Man. R. (2d) 199 (Man. C.A.)." [Emphasis added]

***T.E.A.M. v. Manitoba Telecom Services Inc.*, 2005 CarswellMan 446, 206 Man. R. (2d) 39, para. 10; Appellants' Brief of Authorities, Tab 11**

42. Justice Gibson in the case of *American Cyanamid Co.* said as follows:

“I conclude that it would be quite inappropriate to allow the defendant to rely on this motion for summary judgment on evidence, whether or not it is “other evidence”, that it would not be entitled to rely on at trial.

***American Cyanamid Co. v. Bio Agri Mix Ltd.*, 1997 CarswellNat 636, 73 C.P.R. (3d) 277, 127 F.T.R. 274, at para 10; Appellants’ Brief of Authorities, Tab 7, *Voltige Inc. v. Cirque X Inc.*, 2006 FC 686, 2006 CarswellNat 2808, paras. 13, 14 Appellants’ Brief of Authorities, Tab 29**

43. Justice Pelletier, in *Canadian Memorial Services*, held that “One cannot create a credibility issue by tendering inadmissible evidence” and said that the case raised a credibility issue making the disposition inappropriate by summary proceedings.

***Canadian Memorial Services v. Personal Funeral Services Ltd.*, 182 F.T.R. 28, 2000 CarswellNat 149, paras 11, 12; Appellants’ Brief of Authorities, Tab 30**

Conflicting Evidence

44. Jurisprudence has consistently held that assessment of credibility should be decided at a trial where the witnesses are cross-examined before a trial judge who must observe the witnesses give *viva voce* evidence before deciding the question of credibility, which witness’ testimony be accepted or rejected.

45. The motions judge held (at para. 19) that the “experts’ reports are contradictory”, but then accepted the respondent’s expert’s opinion (or non-opinion) and rejecting the appellants’ expert’s finding to ground his decision. The issue of contradictory expert’s findings was an issue in a motion for summary judgment before Justice Hugessen, who referred to a decision of the Federal Court of Appeal as follows:

“Clearly the two experts conflict. Both were cross-examined at some length. Neither resiled from his opinion. That seems to me is the classic circumstance in which the Court ought not to grant summary judgment and I would cite *Trojan Technologies Inc. v. Suntec Environmental Inc.* (2004), 31 C.P.R. (4th) 241 (F.C.A.) as a sufficient authority for that proposition.”

***Rivard Instruments Inc. v. Ideal Instruments Inc.*, 2007 CarswellNat 2695, 2007 FC 870, at para 9; Appellants’ Brief of Authorities, Tab 12**

46. However, the evidence does not support the finding made by the motions judge that the experts' reports were contradictory. The appellants' expert conclusively made a finding that the Aga Khan did *not* sign the two letters and the Affirmation. The respondent's expert did not contradict this finding at all. In his report, the respondent's expert stated that he could not make a determination of the question that the Aga Khan had signed the questioned documents because the quality of the documents *given to him was of poor quality*. On cross-examination he admitted that he asked respondent's counsel, Mr. Gray, "repeatedly" for original documents which were alleged not to have been signed by the Aga Khan and some contemporary signatures of the Aga Khan for his review to determine if the appellants' expert's findings could be impeached. Although the respondent's counsel purportedly said that he had three original copies of the Affirmation, he did not give even one of the three original copies for examination by his own expert, nor give contemporary sample signatures of the Aga Khan to his expert for review.

**Appeal Book, Vol 1, Tab 18B,18C,18D, pp. 308, 322, 333
Vol IV, Tab 37, p. 1220, Q. 228-231**

47. The respondent's expert admitted on cross-examination that he was not retained to make a determination of whether the documents in question were signed by the Aga Khan but that he was retained to critique the appellants' expert. He also admitted that he had in the past made positive determination on the authenticity of a questioned signature on a facsimile copy, and also admitted that he had undertaken a study which had found that 183 experts out of 186 got their assessment of the authenticity of signatures correct from reviewing photocopies.

Appeal Book, Vol IV, Tab 37, p. 1220, Q. 100-103, 216-233; Tab 37E

48. Notably though, the respondent's expert *did not* contradict the findings made by the appellants' expert, yet the motions judge inexplicably dismissed entirely the appellants' expert's uncontradicted evidence that the two letters and the Affirmation were not signed by the Aga Khan.
49. Similarly, Justice Harrington also erred in preferring the evidence of Sachedina and Bhaloo when their evidence was materially contradicted by Tajdin's and Mohamed's evidence (who

was not cross-examined). Sachedina's evidence was that since late 90s (after his appointment in late 1996 and early 1997 at the Imam's secretariat), the Imam frequently informed him (a classic hearsay statement) that he was concerned about Tajdin publishing Farman books. However, his evidence was self-serving and he could not give any details of the information, when, where, how, etc., the alleged statements were made by the Aga Khan. Sachedina also declared in his affidavit that he traveled with Bhaloo to Montreal in 1998 inform Tajdin of the Imam's position. Justice Harrington relied on this evidence (para. 44) to found his decision despite the fact that Mohamed and Tajdin materially contradicted their evidence that Sachedina and Bhaloo did not come to visit Tajdin as deposed by them but that both of them attended a National fund raising as Guests of Honour (photos enclosed) for the Focus Humanitarian Group. at the invitation of Mohamed who organized the fund raising event.

Appeal Book, Vol 1, Tab 15, paras. 12-17, 24-39; Tab 17, p. 282, paras. 13-14

50. Mohamed also testified that the meeting with Sachedina and Bhaloo (both of whom were invited as guests) was organized at the request of Tajdin. Both gave evidence that Sachedina did not convey any message concerning the ceasing the distribution of the Farman books, and instead had brought a special message from the Aga Khan to Tajdin family with special Blessings for their services to the community. Mohamed was not cross-examined on his affidavit (he has served the Imam and his institutions for three continuous decades in various voluntary capacity, and currently he (an engineer) and his wife (a physician) are serving the Imam in senior positions in a voluntary capacity (without any pay or remuneration) for several years at the Aga Khan Hospital in Kenya as their gift to the Imam for his Golden Jubilee.)

Appeal Book, Vol 1, Tab 17, p. 282, paras. 5-9, 19,22

Appeal Book, Vol 1, Tab 15, p. 212, paras. 35-38

51. Sachedina's evidence is further eroded in light of the fact that Bhaloo was the Vice President of the National Council for Canada from 1987 to 1993 and was the organizer for the Aga Khan's visit to Montreal in 1992 when the first Farman book was presented to the Aga Khan and he would have the video of that event but has not produced it. He was also then appointed as President from 1993 to 1999 during which time Tajdin printed most of the Farman books. As the most senior leader of Canada, he agreed that he frequently met the Aga Khan during the

relevant period, and yet the Aga Khan never told him that he wanted Tajdin to cease the work complained off. It is not a coincident that the complaints alleged to be from the Aga Khan commenced after Sachedina came on board, and who is responsible for the forged letters to be sent to Tajdin after Tajdin responded to him that he would abide by the Aga Khan's instructions.

Appeal Book, Vol I, Tab 16, p. 242, paras.25, 30-31; Tab 15, p. 218, paras. 35, 36; Vol II, Tab 27, paras. 2-4

52. Justice Harrington made findings of fact despite the seriously contested evidence that goes to the heart of the dispute contrary to *MacNeil Estate* and *Garford* mentioned above. (Sachedina was contradicted by Tajdin and by Mohamed, who was not even cross-examined. The motions judge did not even explain why he relied on Sachedina's evidence to ground his judgment (although hearsay) and more importantly, why he rejected the evidence of Tajdin (who did not resile on cross-examination) and Mohamed (who was not cross-examined)). It is submitted that the Ismaili Constitution, the Ismaili traditions and the Aga Khan's Farmans all are contradictory to Sachedina's evidence in addition to being contradicted by Tajdin and Mohamed's evidence.

Onus to Prove Consent

53. The Motions Judge erred in holding (at para. 46) "I am unable to accept the defendants' tortuous, convoluted reasoning" on the issue of onus of proof. In doing so, he rejected the appellants' reliance on a Federal Court of Appeal ruling on point in *Positive Attitude Safety System Inc.* held as follows:

"However, even if one assumes that the motion judge was right to consider the question, the difficulty is that copyright is defined in terms of the absence of the consent of the owner of the copyright."

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

***Positive Attitude Safety System Inc. v. Albion Sands Energy Inc.*, 2005 CarswellNat**

3575, 2005 FCA 332, paras 39, 40; Appellants' Brief of Authorities, Tab 13

54. The above case has approvingly cited in the *Canadian Law of Copyright & Industrial Design*, 4th Edition (Carswell), at page 21-7:

"In order to show infringement the plaintiff must provide proof of lack of consent". Justice Russel W. Zinn of this Court in the recent case of *Atomic Energy of Canada Ltd. v. Areva NP Canada Ltd.*, 2009 FC 980, also held that a plaintiff must prove, on a balance of probabilities "that there has been a copying from that work without its consent."

***Canadian Law of Copyright & Industrial Design*, 4th Edition (Carswell), p. 21-7
Appellants' Brief of Authorities, Tab 14**

55. The motions judge erred in law in not applying the law on onus with respect to the proof of consent. There is no evidence led on this point at all to prove lack of consent, particularly a important point in light of Alibhay's evidence of presenting the book to the Aga Khan in 1992.

Express Consent, Authorization and Instruction

56. The motions judge held that the Aga Khan did not consent to the publication of any Farmans, and also speculated as to what the Imam might have meant when he said the words, "continue doing what you are doing" or that He might have wanted only Alibhay to publish, or just that first book to be published. The motions judge also opined that he would need expert evidence to be able to understand the "gestures" during the ceremony of *Mehmani* when Alibhay presented the Farman book to the Imam in Montreal on August 15, 1992, to help understand the words spoken by the Aga Khan at that time. In *Robertson*, the Court held that "a freelancer who knows the uses to be made of a work and expresses no limitations can arguably be said to impliedly licence the publisher to make use of the work within those contemplated uses."

**Appeal Book, Vol 1, Tab 3. p. 35, paras. 41, 45, 46; Tab 14, p. 208, paras. 11, 12
Robertson v. Thomson Corp. 2001 CarswellOnt 3467, 15 C.P.R.(4th) 147
Appellants' Brief of Authorities, Tab 23, para. 158**

57. Alibhay gave evidence (he was not cross-examined) that Tajdin gave him a copy of the first Farman book to present to the Imam (as people were chosen by their last name to present their offerings to the Imam and Tajdin was not chosen as part of the group of people who could

present themselves personally before the Imam). On August 15, 1992, Alibhay presented the first Farman prominently titled, "Farmans to the Western World, 1957-1991, Volume 1," to the Imam. The Imam first blessed Alibhay and his family and thereafter, the Imam looked at the Farman book when Alibhay asked the Imam what else could they do to serve the Imam. The Imam after placing His hand on the Farman book said: "continue doing what you are doing" in response to the question. The Imam then said, "Succeed in what you do".

Appeal Book, Vol 1, Tab 14, p. 208a, paras. 8-12

58. It is after this event that Tajdin commenced distributing the first Farman book and published (continuously) about 9 more books between 1992 and 2009, when the last book (Golden Edition) was published by him.

Appeal Book, Vol 1, Tab 11, p. 134, paras. 13, 19 -29

59. It is noteworthy that no evidence at all was led on behalf of the Aga Khan denying speaking the words as described by Alibhay, nor seeking either to explain away what He meant, or to try to restrict what he said as speculated by the motions judge. The sole evidence on this issue is the evidence of Alibhay. Yes, inexplicably, the motions judge speculated what the Imam might have meant and came to a decision that the Aga Khan never consented to the publication of His works.

Appeal Book, Vol 1, Tab 14, page 208, para. 11-12

60. In the case of *Concept Developments Ltd.*, the Court explained the matter of authorization as follows:

"The issue of (c) the question of "authorization" is both legally and factually complex. It is best described in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at para 38:

"Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree

of indifference ... These are determinations best left to a trial judge to weigh in the context of all of the evidence.”

***Concept Developments Ltd. v. Webb*, 2010 CarswellNat 4906, 2010 FC 1315
Appellants’ Brief of Authorities, Tab 15, para. 11**

61. Justice Joyal in the case of *de Tervagne v. Beloeil* (Town), held (at Para. 45) that a factor to determine this issue is whether a reasonable person is led to conclude that consent has been given. He then said:

“... it is possible to establish that a person has sanctioned, approved or countenanced an actual infringing activity ... if it is shown that certain relationships existed between the alleged authorizer and the actual infringer, or that the alleged authorizer conducted himself in a certain manner.” [Emphasis added]. In the case of *BMG Canada*, the Court held that authorization can be inferred from less than direct acts including a sufficient degree of indifference.

***de Tervagne v. Beloeil* (Town), [1993] 3 F.C. 227, Tab 16, paras. 42, 44, 45, 49
BMG Canada Inc. v. John Doe, 2004 FC 488, Tab 11, para 24**

62. The Court in *Concept* also reminds the limits of summary procedures as follows:

“However, these summary procedures have their limits. Trials are the ways by which true disputes are resolved. People have a right to their day in court to deal with legitimate claims. Courts must be mindful that the effect of a summary judgment motion can deprive a party of that right.”

***Concept Developments Ltd. v. Webb*, *supra*, at para 15
Appellants’ Brief of Authorities, Tab 15**

63. The appellants’ state that the relationship between the parties, the Ismaili Constitution, the Oath of Allegiance, the various public Farmans encouraging the reading of the Farmans, the saying that He makes Farmans for the Jamats, the words spoken by the Aga Khan during the Mehmani are complex matters, and these types of “complex” issues are best left for a trial judge to determine. It has been held that a licence to use may be implied from the conduct of the parties and need not be in writing.

Appeal Book, Vol 1, Tab 15, p. 212 para. 17; Vol III, Tab 34, p. 750 Q. 195-197

64. It is submitted that the motions judge erred when he made findings of fact (at para 11) in his

reasons for decision: "I declare that the Aga Khan has never given the defendants permission to publish any Farman, much less the Golden Edition", in face of Alibhay's unchallenged and uncontradicted evidence, and the motions judge's admission that he might have needed expert evidence to determine the issues which were of religious nature. The conflicting and/or the missing evidence, as held by the motions judge, in respect of authorization and/or consent, the interpretation of the Ismaili Constitution, the interpretation of Farmans and the issue of relationship are all complex matters and presented genuine issues for trial. It is noteworthy that the Ismaili Constitution governs all aspects of an Ismaili's life, and publishing Farmans is no longer prohibited under the new 1986 Ismaili Constitution, and it raises an issue of whether the *Copyright Act* is superceded by the Ismaili Constitution.

65. The motions judge made findings in regard to the provisions and import of the Ismaili Constitution on the issues before him. In this regard, Snider J. held:

"there is a significant gap in the evidence required to determine the proper interpretation of the provisions (of the Regulations). That missing evidence relates to the intent and object of both the regulations at issue and the underlying statutory framework. It consists of further evidence from Merck, third party evidence and evidence from government officials, as described below." ... "the context of legislation is critical to understanding it. Expert evidence on statutory interpretation or, in particular, the evolution of the provisions in dispute in this action will be helpful to the judge. ... The Regulations were the subject of extensive consultation prior to their enactment in 1993 and their amendment in 1998. The understanding of the parties to this action may well be relevant in establishing the contextual framework. ... The conduct of all parties to this litigation may be relevant."

***Apotex Inc. v. Merck & Co.*, 2004 CarswellNat 584, 2004 FC 314, 248 F.T.R. 8
Appellants' Brief of Authorities, Tab 17, at paras. 28, 35, 36, 37**

66. After stating the above, Snider J. concluded that, "In my view, all of this evidence is relevant to the determination of the issues in this matter. Further, much of this evidence will be contested and, thus, is properly dealt with at trial. Apotex should not be precluded, through summary judgment, from leading this evidence." Accordingly, the motions judge erred in holding on the issue of interpreting the Ismaili Constitution contrary to jurisprudence.

***Apotex Inc. v. Merck & Co.*, supra, at para. 36
Appellants' Brief of Authorities, Tab 17**

67. In considering the issues relating to *Libel and Slander Act*, the Ontario Court of Appeal in *Romano v. D'Onofrio* stated that, "This was not a case where the law was settled and could be applied to admitted facts." The Court said: "Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings. The Court went on to hold that; "That type of interpretive analysis should only be done in the context of a full factual record, possibly including appropriate expert evidence"

***Romano v. D'Onofrio*, 2005 CarswellOnt 6725, (O.C.A.), paras. 7, 9
Appellants' Brief of Authorities, Tab 22**

68. In the case at bar, the issues are complicated and not previously litigated, and the interpretation of the Ismaili Constitution and the religious nature of the issues are the type for which interpretative analysis would require a trial and possibly expert evidence to properly understand and deal with the matter.
69. The motions judge also misapprehended evidence when he held that at para. 2: "They say that if the Aga Khan is not pleased with what they are doing, all he has to do is amend the Ismaili Constitution, or simply issue a Farman, as a new Farman has the effect of overriding the Ismaili Constitution. However, it is not up to the defendants to dictate to the Aga Khan. He tried the religious route, without success." By holding as he did, the Motions Judge failed to appreciate the arguments made by the defendants that none of the official pronouncements made by the Imam, including the Ismaili Constitution, Farmans or Talikas, indicate that the activities complained of are not desired by Him, and the only evidence that purports to be from the Aga Khan concerning these activities is forged. The defendants were not seeking to dictate to the Aga Khan, but are pointing to evidence that establishes that the Aga Khan's official pronouncements as set out in the Ismaili Constitution and all of his public Farmans support the defendants' activities, and that instead of prohibiting such activity, He actually encouraged them. The defendants' evidence is that they have abided by what was expected of them, that in abiding with their Constitution and Farmans (which provides implied consent, authorization based on relationship, etc.) they are not in breach of their Constitution or any Farmans.
70. According to the Federal Court of Appeal in the *MacNeil Estate*, parties responding to a

motion for summary judgment do not have the burden of proving all of the facts in their case; rather, they have only an evidentiary burden to put forward evidence showing that there is a genuine issue for trial.

Adequacy of Record (Adverse Inference)

71. The motions judge drew an adverse inference against the appellants for not filing transcripts of the discoveries. However, in a motion for summary judgment, drawing an adverse inference against a responding party is not available at law.

Appeal Book, Vol I, Tab 3, paras. 59-67

72. The motion records were filed, cross-examinations conducted, and the motions were essentially ready for argument by the time the discoveries took place. Prothonotary Tabib directed on November 2, 2010, with respect to the discovery, as follows:

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

73. Both parties had an option: either one could have brought a motion for filing further evidence. Neither did that, and were content to and argued the motions on the briefs filed. Yet the motions judge drew an adverse inference against the appellants for failing to file evidence. It is trite law that adverse inference cannot be drawn if both parties have access to that evidence - it is only available when that evidence is exclusively in one party's control. Furthermore, the motions judge inferred without any evidence on the issue of what the Aga Khan might have said at the discoveries. Had the Aga Khan said what is speculated by the motions judge, then respondents' counsel, Mr. Gray, would have without doubt sought to file evidence of same.

74. Respecting this issue, the Federal Court of Appeal in *MacNeil Estate* held:

“Nowhere in the Rules is a responding party required to bring forward sufficient evidence so that genuine issues for trial may be resolved on a motion for summary judgment.”

MacNeil Estate v. Canada (Department of Indian & Northern Affairs), Supra Appellant's Authorities, Tab 6, para. 37

75. In *Apotex*, it was alleged that Apotex had not put its "best foot" forward when it did not file certain evidence in response to a motion for summary judgment, and the moving party sought that an adverse inference should be drawn for Apotex' failure to file that evidence which was in its possession. Snider J. reviewed case law and held:

"In my view, Merck carries the obligation on Apotex in this motion too far. If Merck is correct, any responding party on a motion for summary judgment would be required to bring forward all the evidence necessary to allow the motions judge to resolve the issues in dispute. In respect of Rule 216(1), this ignores the first step-that the judge be satisfied that there is no genuine issue for trial. To my mind, the first obligation on a responding party is to put its "best foot" forward in convincing the motions judge that a genuine issue for trial exists. As discussed elsewhere in these reasons, that can be done by identifying "gaps" in the evidence before the motions judge that can only be addressed through evidence led at trial. [Emphasis added].

Apotex Inc. v. Merck & Co., supra, at Tab 17, paras. 27, 28

76. Furthermore, the Federal Court of Appeal in *MacNeil* said that, "I think that the Motions Judge erred by simply rejecting the appellant's arguments without apparently considering whether they raised a genuine issue for trial." In the case at bar, the motions judge also erred by not determining the issue of genuine issue.

MacNeil Estate, supra, at para 40; Appellants' Brief of Authorities, Tab 6

77. The Nova Scotia Court of Appeal in the case *Bank of Nova Scotia* said the following with respect to the obligation of a party responding to a motion for summary judgment:

"As I see it there is no explicit obligation either within the Rules or in case authorities that requires the defendant to raise every arguable issue for trial in response to the plaintiff's application for summary judgment or even most of the defendant's arguable issues for trial. To fend off an application he merely needs to raise one, notwithstanding some others may be known to him, or become apparent through the course of the litigation." [Emphasis added].

Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc., 2010 CarswellNS 654, 2010 NSCA 81, para 32; Appellants' Brief of Authorities, Tab 18

78. The motions judge's reasons indicate that he conducted a trial on affidavits by drawing an

adverse inference against the appellants. However, the legal requirement of putting the best foot forward does not “entail turning a summary judgment motion into the trial itself by requiring all the trial evidence. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge...” The jurisprudence on Rule 216 is clear that a motions judge should refrain from issuing summary judgment where the relevant evidence is unavailable on the record and involves a serious question of fact which turns on the drawing of inferences, and finished by saying that the trial judge would benefit from having more evidence on the intentions of going into contractual relations.

***AMR Technology Inc. v. Novopharm Ltd.*, 2008 CarswellNat 2986, 2008 FC 970, 70 C.P.R. (4th) 177, 169 A.C.W.S. (3d) 76, para 22, Tab 19**

***Society of Composers, Authors & Music Publishers of Canada v. Maple Leaf Sports & Entertainment*, 2010 CarswellNat 2101, FC 731, para 17 Tab 28**

79. The appellants submit that Justice Harrington erred in drawing an adverse inference against the appellants on the issue of the transcripts of discovery, on the grounds that a responding party need not call all evidence to defend the motion for summary judgment. Furthermore, it is trite law that it is not appropriate to draw an adverse inference where the witness in question was available to both parties as in this case, the witness is the party who could have given the necessary evidence. On the contrary, the motions judge ought to have drawn an adverse inference against the respondent for not filing His personal affidavit as would be expected in the circumstances in a Copyright case due to the fact that the evidence about lack of consent can only be given by the Copyright holder.
80. The motions judge misapprehended evidence when he held that, "However, it is not up to the defendants to dictate to the Aga Khan. He tried the religious route, without success. This is a finding of fact on inadmissible hearsay evidence, and evidence that is shown to be forged (forged signatures). By holding as he did, the motions judge failed to appreciate the arguments made by the appellants that none of the official pronouncements made by the Imam, including the Ismaili Constitution, Farmans or Talikas, indicate that the activities complained of are not desired by Him, and that these materially support the appellants' evidence instead of defeating their evidence.

Appeal Book, Vol 1, Tab 3, para. 22

81. The Motions Judge misapprehended evidence when he held at para. 12, "...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." The only condition placed by the Appellants is that the communication from the Aga Khan be authentic, and there is nothing else on evidence on this point. Justice Harrington has speculated on this matter without any evidence to support his findings.

Appeal Book, Vol 1, Tab 3, para. 12

Detrimental Reliance/Latches

82. Evidence has established that Tajdin has been publishing Farman books (as other individuals also do across the world) and published ten books as from 1992 to 2009, and that distribution of same was undertaken publically to the knowledge of the Aga Khan and His institutional leaders. Alibhay's evidence, which was not contradicted, was that the Aga Khan knew of the publication in 1992, when He encouraged the 'work', and Sachedina confirmed that the Aga Khan knew of the publications at least as of mid-nineties of the various publications by Tajdin.

Appeal Book, Vol 1, Tab 11, p. 132, para. 22

83. Accordingly, the legal concept of Latches and the law of Detrimental Reliance is relied upon by the appellants. Although the appellants' presented case law for consideration, the motions judge essentially ignored this line of defence and granted judgment against the appellants. The appellants submit that it is unjust to grant judgment against them without consideration of all of their defences and evidence filed by them based on *Garford*: [summary judgment] should not be granted where, on the whole of the evidence, the judge cannot find the necessary facts or it would be unjust to do so.
84. The Court in *Paul v. Vancouver International Airport Authority*, stated as follows: (i) Estoppel by Representation operates over a wide field of common law and equity. The basic principle is that a person who makes an unambiguous representation, by words, or conduct, or by silence, of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation.

***Paul v. Vancouver International Airport Authority*, 2000 CarswellBC 561, 2000 BCSC 341, 5 B.L.R. (3d) 135, at para. 74, Tab 20**

85. The Ontario Superior Court states as follows about laches and acquiescence:

“In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these conditions rests the doctrine of laches: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239, per Lord Selborne.”

***Egnatios v. Leon Estate*, 1990 CarswellOnt 502, paras. 63, 68, 70
Appellants' Brief of Authorities, Tab 21**

86. The appellants state that as from 1992 the Aga Khan knew of the publications, and encouraged it, His institutional leaders also knew of the publications and the appellants have changed their position by publishing books at enormous expenses and it is unjust to suddenly hold the appellants liable for infringement.

Appeal Book, Vol 1, Tab 11, p. 132, paras. 11, 22, 36

87. The Statement of Claim identifies the Golden Edition as the infringing material and sought an injunction restraining the distribution of the Golden Edition. The Injunction granted by the motions judge is much broader: “.. restraining the defendants... from infringing the plaintiff's copyright in the literary works...” which has been defined as Farmans and Talikas. The previous editions published by Tajdin cannot be restrained by an injunction due to the Limitations period (of three years) set out in the *Copyright Act*. The only evidence against this point is the evidence of Sachedina who said that Tajdin ceased (denied by Tajdin and Jiwa) distributing the books in 1998 and he just discovered after the publication of the Golden Edition. **Appeal Book, Vol 1, Tab 5, p. 55, paras. 1(a)(i) and 3**

88. However, his evidence is materially contracted by the appellants (documentary evidence has been given to prove that distribution of the books were ongoing and not ceased after 1998), and

by Mohamed. Accordingly, the evidence on this issue is contradictory and it is an error for the motions judge's judgment applying to the previous publications without considering the Limitations period pleaded by the appellants. The motions judge's judgment ought to be reversed on this ground as well.

Appeal Book, Vol I, Tab 11, p.135, paras. 19-23; Tab 16, 3-5

89. The Manitoba Court of Appeal held in the case of *Shell v. Barnsley*, where the issue was whether the plaintiff could found his claim in contract and negligence as well as on negligent-misrepresentation. The Court states that "Matters of law which have not been fully settled in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings", and then continued, "My view is strengthened by the fact that motion was premised on assumptions concerning the pleadings and the facts. ... My conclusion ... highlight the importance for counsel, and the judge, to address the appropriateness of proceeding by way of summary judgment where issues concern the developing areas of law."

***Shell v. Barnsley*, 2006 CarswellMan 394, 2006 MBCA 133, paras. 16, 17, 18
Appellants' Brief of Authorities, Tab 25**

90. On the issues of credibility the only thing the motions judge said is: "Although there are credibility issues in the motions as pleaded before me, they are not, in my opinion germane." With respect, it is trite law that justice must not only be done, but be seen to be done and it is a dereliction of duty for a judge to casually dismiss the credibility issues raised without explaining at all why certain witnesses' evidence was found to lack credibility or why he dismissed entirely the appellants' expert's unchallenged finding, or why he discarded evidence of Mohamed when he was not even cross-examined. The resolving of the credibility issue, even cursorily, evidences that serious credibility issues were raised but not adequately addressed by the motions judge.
91. It is submitted that Justice Harrington erred as follows: (a) in not ruling the impugned evidence as inadmissible; (b) in relying on the inadmissible hearsay evidence to ground his decision on; (c) in casually dismissing the credibility contest between the evidence of Sachedina and Bhaloo and Tajdin and Mohamed (who was not cross-examined and has served the Imam and his institutions for three decades in various capacity, and currently he, an engineer, and his

wife, a physician, are serving the Imam in senior positions in voluntary capacity, without any pay or remuneration, for several years at the Aga Khan Hospital in Kenya as their gift to the Imam for his Golden Jubilee); (d) in finding that the expert's evidence was contradictory; (e) in accepting the evidence of one expert and entirely rejecting the other evidence; (f) in dismissing the Latches argument on inadmissible evidence and contested evidence; (g) in misapprehending the importance and interpretation of the Ismaili Constitution; (h) in not dealing with the issue of Detrimental Reliance.

Costs


92. The Notice of Motion sought that costs of \$30,000.00 be made payable to the Aga Khan Development Network, or such other charitable institution as may be designated. Tajdin and his family are major donors to the AKDN and other community institutions. Based on the Notice of Motion, the appellants' consented without making any submissions against the costs award, but then at the time of settling the Order, the motions judge went beyond what was asked for in the Motion and made an Order that costs be payable to the respondent personally, without jurisdiction in doing so.

Appeal Book, Vol I, Tab 2, para. 9; Vol II, Tab 24, p. 372, para. 1(f)

PART V - ORDER SOUGHT

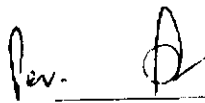
93. The appellants respectfully request that the appeal be allowed and the Judgment of Justice Harrington dated March 4, 2011, be set aside.

Date: June 13, 2011



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V - List of Authorities

1. *Copyright Act* (R.S.C., 1985, c. C-42), s. 27 and 41
2. *Federal Courts Rules* (SOR/98-106), 216
3. *Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc.*, 2007 CarswellOnt 8012
4. *B. (F.) v. G. (S.)*, 2001 CarswellOnt 1413, (O.S.C.J)
5. *Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.*, 2010 FC 996
6. *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, [2004] 3 F.C.R. 3 (F.C.A.)
7. *American Cyanamid Co. v. Bio Agri Mix Ltd.*, 1997 CarswellNat 636, 73 C.P.R. (3d) 277, 127 F.T.R. 274,
8. *Candrug Health Solutions Inc. v. Thorkelson*, 2008 CarswellNat 663, 2008 FCA 100
9. *Merck & Co. v. Apotex Inc.* 1998 CarswellNat 560, 79 C.P.R. (3d) 501, 146 F.T.R. 148
10. *Rees v. Royal Canadian Mounted Police*, 2005 CarswellNfld 83, 2005 NLCA 15
11. *T.E.A.M. v. Manitoba Telecom Services Inc.*, 2005 CarswellMan 446, 206 Man. R. (2d) 39
12. *Rivard Instruments Inc. v. Ideal Instruments Inc.*, 2007 CarswellNat 2695, 2007 FC 870
13. *Positive Attitude Safety System Inc. v. Albion Sands Energy Inc.*, 2005 CarswellNat 3575, 2005 FCA 332
14. *Canadian Law of Copyright & Industrial Design*, 4th Edition (Carswell)
15. *Concept Developments Ltd. v. Webb*, 2010 CarswellNat 4906, 2010 FC 1315
16. *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227
17. *Apotex Inc. v. Merck & Co.*, 2004 CarswellNat 584, 2004 FC 314, 248 F.T.R. 8
18. *Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc.*, 2010 CarswellNS 654, 2010 NSCA 81
19. *AMR Technology Inc. v. Novopharm Ltd.*, 2008 CarswellNat 2986, 2008 FC 970, 70 C.P.R. (4th) 177, 169 A.C.W.S. (3d) 76

20. *Paul v. Vancouver International Airport Authority*, 2000 CarswellBC 561, 2000 BCSC 341, 5 B.L.R. (3d) 135,
21. *Egnatios v. Leon Estate*, 1990 CarswellOnt 502
22. *Romano v. D'Onofrio*, 2005 CarswellOnt 6725, (O.C.A.)
23. *Robertson v. Thomson Corp.* 2001 CarswellOnt 3467, 15 C.P.R.(4th) 147
24. *BMG Canada Inc. v. John Doe*, 2004 CarswellNat 835, 2004 FC 488, at para. 24
25. *Shell v. Barnsley*, 2006 CarswellMan 394, 2006 MBCA 133, at para. 18.
26. *Petrillo v. Allmax Nutrition Inc.*, 2006 CarswellNat 3328, 300 F.T.R. 262
27. *Pyrrha Design Inc. v. 623735 Saskatchewan Ltd.*, 2004 Carswellnat 4660, 2004 FCA 423
28. *Society of Composers, Authors & Music Publishers of Canada v. Maple Leaf Sports & Entertainment*, 2010 CarswellNat 2101, FC 731
29. *Voltige Inc. v. Cirque X Inc.*, 2006 FC 686, 2006 CarswellNat 2808
30. *Canadian Memorial Services v. Personal Funeral Services Ltd.*, 182 F.T.R. 28, 2000 CarswellNat 149

FEDERAL COURT OF APPEAL

BETWEEN:

NAGIB TAJDIN AND ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

MEMORANDUM OF FACT AND LAW
(of the Appellants Nagib Tajdin and Alnaz Jiwa)

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