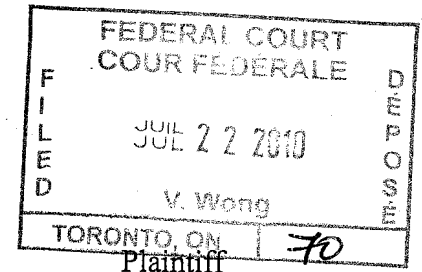


FEDERAL COURT

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

- 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

PLAINTIFF'S WRITTEN REPRESENTATIONS*(Plaintiff's motion in writing for case management and leave to file supplementary evidence)***PART I – OVERVIEW**

1. This motion in writing arises in the context of an action for infringement of copyright and moral rights relating to the unauthorized reproduction of a book and mp3 audio bookmark entitled *Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman* (the "Infringing Materials"). The Infringing Materials reproduce in substantial part a series of original religious addresses and messages (*viz.* Farmans and Talikas), of which the Plaintiff is the sole and original author.
2. By this motion, the Plaintiff seeks: (i) an order for case management; and (ii) leave to file supplementary evidence, namely, a Certified Copy of the Copyright Registration dated June 23, 2010 for the Plaintiff's unpublished literary works, Farmans.

PART II – FACTS

1. **Litigation History**

3. The Plaintiff commenced this action by Statement of Claim dated April 6, 2010. By this action, the Plaintiff seeks: (1) a declaration that copyright subsists in his literary works; (2) a declaration that the Defendants have infringed the Plaintiff's copyright and moral rights; (3) injunctive relief; and (4) damages, *inter alia*.

Statement of Claim, Affidavit of Christian Landeta, sworn July 22, 2010
("Landeta Affidavit"), para. 2, Exhibit "A".

4. On April 29, 2010, the Defendants, Alnaz Jiwa and Nagib Tajdin, each separately served and filed a Statement of Defence. Both parties are separately self-represented. On May 25, 2010, the Plaintiff served and filed his Replies to the Statements of Defence.

Landeta Affidavit, paras. 3-6, Exhibits "B"- "E".

5. On June 21, 2010, the Defendants each served and filed separate motions for summary judgment to dismiss this action. The Defendants' motions were returnable on July 12, 2010.

Landeta Affidavit, paras. 7-8, Exhibits "F"- "G".

6. On June 28, 2010, the Plaintiff also served and filed its own motion for summary judgment for: (i) a declaratory judgment that copyright subsists in the Plaintiff's Literary Works and that the Plaintiff is the owner thereof; (ii) a declaratory judgment that the Defendants have infringed the Plaintiff's copyright; (iii) a permanent injunction; (iv) an order for delivery up; (v) damages and costs, *inter alia*. The Plaintiff's motion was returnable on July 19, 2010.

Landeta Affidavit, para. 9, Exhibit "H".

7. On June 28, 2010, the Plaintiff proposed a schedule for cross-examinations in July and requested that the Defendants adjourn their motions (returnable July 12, 2010) for one week until July 19, 2010 so that all motions could be heard together. The Defendants refused to adjourn their respective motions for even one week until July 19, 2010.

Landeta Affidavit, paras. 10-11, Exhibits "I"- "J".

8. As a result, the Plaintiff wrote to the Court to request an immediate case teleconference to determine a schedule for the hearing of the motions.

Landeta Affidavit, para. 11, Exhibit "J".

9. By Direction of the Honourable Madam Justice Heneghan dated July 6, 2010, both motions for summary judgment were adjourned *sine die* to permit the scheduling of cross-examinations and a special sitting.

Landeta Affidavit, para. 12, Exhibit "K".

10. Cross-examinations have been scheduled for some of the affidavits for the second week of August.

Landeta Affidavit, para. 13, Exhibit "L".

11. The Plaintiff has been advised by the Court administrator that October 4, 2010 is the earliest date currently available for a one-day special sitting for the hearing of the summary judgment motions.

Landeta Affidavit, para. 16, Exhibit "O".

12. Both Defendants have said that they are unavailable to attend a hearing on October 4, 2010 and are unwilling to suggest an alternative date until conclusion of the cross-examinations.

Landeta Affidavit, paras. 14-15, 17-18, Exhibits "M"- "N", "P"- "Q".

13. The Defendant, Mr. Tajdin, is currently residing in Kenya. The Defendant, Mr. Jiwa, is a lawyer with a practice in Stouffville, Ontario. As previously mentioned, the Defendants are self-represented in the present proceeding.

Landeta Affidavit, paras. 3-4, 8, Exhibits "B"- "C", "G".

2. **Certificate of Registration of Copyright**

14. On or about June 29, 2010, the Plaintiff obtained a Certificate of Registration of Copyright dated June 23, 2010 for his unpublished literary works, entitled Farmans.

Landeta Affidavit, para. 19, Exhibit "R".

15. On July 7, 2010, the Plaintiff provided the Defendants with a copy of the Certificate of Registration and advised that the Plaintiff would be seeking leave to rely on the Registration in the summary judgment motions.

Landeta Affidavit, para. 19, Exhibit "R".

16. The Plaintiff requested a certified copy of the Certificate of Registration and received this certified copy on July 15, 2010.

Landeta Affidavit, para. 20.

PART III – SUBMISSIONS

1. **Request for Special Management**

17. The Court may at any time order a proceeding to continue as a specially managed proceeding.

Federal Courts Rules, SOR/98-106, Rule 384.

18. Case management is appropriate where "preliminaries" may take more than the usual time allowed for under the *Federal Courts Rules*.

Ecology Action Centre Society v. Canada (Attorney General), [2001] F.C.J. No. 1588 (F.C.T.D.) at para. 3.

19. This Court has previously designated a copyright infringement action as a specially managed proceeding.

4093879 Canada Ltd. (c.o.b. Nygard International Partnership) v. Wal-Mart Canada Corp., 2003 FC 1000.

20. The Plaintiff submits that the present case should be specially managed for the following reasons:

- (a) Since both parties have brought summary judgment motions, this action is no longer proceeding according to the timelines provided in Part IV of the *Federal Courts Rules* and will require court-ordered scheduling;
- (b) The parties require assistance with scheduling the delivery of supplementary materials, and additional cross-examinations, if any, with respect to the summary judgment motions;
- (c) The parties require assistance with scheduling a special sitting hearing date for the summary judgment motions;
- (d) Senior counsel for the Plaintiff is involved in an eight-week trial in Federal Court File No. T-1661-07 commencing September 20, 2010, a factor that significantly impacts scheduling;
- (e) One of the Defendants, Mr. Tajdin, currently resides in Nairobi, Kenya, a factor that significantly impacts scheduling; and
- (f) The Defendants are self-represented litigants.

Landeta Affidavit, *supra*.

- 21. The Plaintiff further submits that due to the Defendants' ongoing infringement in selling the Infringing Materials, the Plaintiff desires to have this case proceed as quickly as possible.
- 22. The Plaintiff has been advised by the court administrator that October 4, 2010 is the earliest available date for the hearing of the summary judgment motions. In view of the limited availability of special sitting days in the fall of 2010, senior counsel for the Plaintiff has made arrangements to be absent from his other trial in order to be available on this date.

Landeta Affidavit, para. 16, Exhibit "O".

23. The Defendants have advised, however, that they are not available on this date. The Defendants insist on waiting until cross-examinations are completed before agreeing to scheduling.

Landeta Affidavit, paras. 14-15, 17-18, Exhibits "M"- "N", "P"- "Q".

24. The Defendants purport to rely on the Direction of Madam Justice Heneghan dated July 6, 2010, as stating that a hearing date cannot be requested until after cross-examinations are completed. The Plaintiff's submit that Madam Justice Heneghan made no such direction. The Direction addresses the adjournment of the summary judgment motions and scheduling for cross-examinations. At the conclusion of the Direction, Hengehan J. "suggests" that a special sitting be requested at the conclusion of cross-examinations so the summary judgment motions can be heard together.

Landeta Affidavit, para. 12, Exhibit "K".

25. In view of the limited availability of special sittings, the Plaintiff submits that the most just and expeditious determination of this proceeding will be obtained by applying for a hearing date for the summary judgment motions as quickly as possible. Having agreed to a schedule for the completion of cross-examinations, there is no reason why a hearing date cannot be scheduled now.

Federal Courts Rules, Rule 3.

26. The Defendants were initially so intent on having this matter move forward quickly that they would not agree to adjourn their summary judgment motions by a single week. The Plaintiff, submits, however, that since learning that they would not have the opportunity to cross-examine the Plaintiff, His Highness the Aga Khan, the Defendants have demonstrated little interest in moving this matter forward. The Plaintiff is highly concerned that this case will not move forward in an expeditious manner without guided intervention from the Court.
27. For all of the above reasons, the Plaintiff respectfully requests an Order designating this action as a specially managed proceeding.

2. **Request to file supplementary evidence**

28. On a motion, a party shall submit all evidence it intends to rely on that does not appear on the Court file.

Federal Courts Rules, Rule 363.

29. Rules 80 to 86 govern affidavits generally. Rule 84(2) states that a party who has cross-examined the deponent of an affidavit filed in a motion may not subsequently file an affidavit in that motion without obtaining leave of the Court or the consent of the parties.

Federal Courts Rules, Rules 80-86.

30. The *Federal Courts Rules* do not directly address the present circumstance, where the Plaintiff seeks leave to submit supplementary evidence in advance of cross-examinations.

Federal Courts Rules, Rule 84(2).

31. Rule 3 requires the *Federal Courts Rules* to be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits".

Federal Courts Rules, Rule 3.

32. The Plaintiff therefore submits that the test for determining whether supplementary evidence can be filed in advance of cross-examinations, can be no more onerous than the test for filing supplementary evidence after cross-examinations. This test is as follows: (i) was the information in the affidavit available before the cross-examination; (ii) are the facts established by the supplementary affidavit relevant to the case; and (iii) might the filing of the supplementary affidavit cause "serious prejudice" to the other parties. The overriding principle is that "justice be done".

Coté v. Canada, [1996], F.C.J. No. 1670 at para. 9.

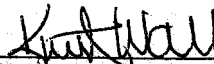
33. The Plaintiff is seeking to include the Certificate of Registration as evidence on the summary judgment motions. The Certificate of Registration was not obtained by the Plaintiff until after the Plaintiff's motion for summary judgment was already served and filed.

34. The Certificate of Registration is relevant to the present proceeding whereby the Defendants are alleged to be infringing the Plaintiff's Literary Works, which are the subject of the Certificate of Registration.
35. Since the Plaintiff is seeking to include the Certificate of Registration into evidence in advance of cross-examinations, there can be no "serious prejudice" to the parties. In fact, the Plaintiff provided the Defendants with a copy of the Certificate of Registration on July 7, 2010 and advised them that the Plaintiff intended to enter the Certificate of Registration into evidence and rely on it during the summary judgment motions.
36. For all of the above reasons, the Plaintiff respectfully requests an Order granting leave to file the Certificate of Registration as evidence in the summary judgment motions. A full evidentiary record will best ensure that justice is done between the parties.

PART IV – ORDER SOUGHT

37. The Plaintiff respectfully requests the following relief:
- (a) An Order pursuant to Rule 383 of the *Federal Courts Rules* designating this action as a specially managed proceeding;
 - (b) A case management conference to discuss scheduling matters for this motion and to schedule October 4, 2010, or the first available date thereafter, as the hearing date for the summary judgment motions;
 - (c) An Order granting the Plaintiff leave to serve and file the Certificate of Registration of Copyright dated June 23, 2010 for his unpublished literary works entitled *Farmans*; and
 - (d) Such further or other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July, 2010.



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Court File No. 514-10

FEDERAL COURT

BETWEEN:

HIS HIGHNESS PRINCE KARIM AGA KHAN

Plaintiff

- and -

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

Defendants

**PLAINTIFF'S
WRITTEN REPRESENTATIONS**

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Indexed as:
**Ecology Action Centre Society v. Canada (Attorney
General)**

Between
The Ecology Action Centre Society, applicant, and
The Attorney General of Canada, respondent

[2001] F.C.J. No. 1588

[2001] A.C.F. no 1588

2001 FCT 1164

2001 CFPI 1164

109 A.C.W.S. (3d) 388

Court No. T-1179-01

Federal Court of Canada - Trial Division
Toronto, Ontario

Giles, Associate Senior Prothonotary

October 25, 2001.

(10 paras.)

Administrative law -- Judicial review -- Material required to be produced on review -- Practice -- Time for service of supporting materials.

Motion by the applicant, Ecology Action Centre Society, for an order that the case be specially managed, and an order extending the time for the Society to serve and file its affidavits and documentary exhibits. The proceedings involved an application for judicial review of a decision of a federal tribunal. The Society also requested an order that the Crown produce certain documents and other materials in its possession in relation to the proceedings before the tribunal.

HELD: Motion allowed in part. As it appeared the proceedings would involve more than the usual number of interlocutory motions, special case management was appropriate. The time to file affidavits of witnesses was extended to 14 days after the date of this order. The Crown was ordered to produce all documents and other materials that were before the tribunal when it was considering and making its decision. The Crown was not required to produce documents and materials not considered or before the tribunal.

Statutes, Regulations and Rules Cited:

Case Name:
4093879 Canada Ltd. (c.o.b. Nygard International Partnership) v. Wal-Mart Canada Corp.

Between
4093879 Canada Ltd. and 4093887 Canada Ltd., a partnership carrying on business under the name and style of "Nygard International Partnership", plaintiff,
and
Wal-Mart Canada Corp. and Wal-Mart Stores, Inc., defendants

[2003] F.C.J. No. 1264

[2003] A.C.F. no 1264

2003 FC 1000

2003 CF 1000

125 A.C.W.S. (3d) 215

Docket T-1429-03

Federal Court
Ottawa, Ontario

Teitelbaum J.

Heard: In writing.
Judgment: August 26, 2003.

(6 paras.)

Practice -- Actions, conduct of -- Case management.

Motion by Nygard International for an order that its copyright infringement action be a specially managed proceeding. The defendant Wal-Mart consented to the order. Nygard argued that business relations between the parties, and future business planning, would benefit from a quick resolution of the issues. Further, it argued that due to the potential need for resolution of discovery issues, the case would benefit from the assignment of a case management judge.

HELD: Motion allowed.

0154

**** Translation ****

Indexed as:
Coté v. Canada

Between
Clément Coté, applicant, and
Her Majesty the Queen, respondent, and
Commissioner of Official Languages, intervenor

[1996] F.C.J. No. 1670

[1996] A.C.F. no 1670

124 F.T.R. 251

69 A.C.W.S. (3d) 1013

Court File No. T-1051-92

Federal Court of Canada - Trial Division
Ottawa, Ontario

Dubé J.

Heard: December 12, 1996
Judgment: December 13, 1996

(4 pp.)

Practice -- Evidence -- Affidavits -- Supplementary affidavits -- Affidavits, use of -- Interlocutory applications and motions -- Reply affidavit.

Motion by the respondent for an order dismissing the applicant's reply affidavit, which was served and filed with the court in response to the respondent's reply affidavits. The respondent submitted that the Federal Court Rules did not specifically provide for the filing of reply affidavits by applicants.

HELD: Motion allowed. The Federal Court Rules did not provide for the automatic filing of a reply affidavit by the applicant in an originating motion. However, the overriding consideration was to ensure that justice was done. Thus, the court would grant leave to file a supplementary affidavit provided that the party concerned sought leave to do so and satisfied the tests for granting such leave.

Statutes, Regulations and Rules Cited:

384. Order for special management —
The Court may at any time order that a
proceeding continue as a specially man-
aged proceeding.

SOR/2007-214, s. 3

384. Ordonnance de poursuivre à titre
d'instance à gestion spéciale — La
Cour peut, à tout moment, ordonner que
l'instance se poursuive à titre d'instance à
gestion spéciale.

DORS/2007-214, art. 3

3. General principle—These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

3. Principe général—Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

363. Evidence on motion — A party to a motion shall set out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file.

363. Preuve — Une partie présente sa preuve par affidavit, relatant tous les faits sur lesquels elle fonde sa requête qui ne figurent pas au dossier de la Cour.

DORS/2002-417, art. 21

0160

Affidavit Evidence and Examinations

Affidavits

80. (1) **Form of affidavits** — Affidavits shall be drawn in the first person, in Form 80A.

(2) **Affidavit by blind or illiterate person** — Where an affidavit is made by a deponent who is blind or illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read to the deponent and that the deponent appeared to understand it.

(2.1) **Affidavit by deponent who does not understand an official language** — Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall

(a) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and

(b) contain a jurat in Form 80C.

Preuve par affidavit et interrogatoires

Affidavits

80. (1) **Forme** — Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A.

(2) **Affidavit d'un handicapé visuel ou d'un analphabète** — Lorsqu'un affidavit est fait par un handicapé visuel ou un analphabète, la personne qui reçoit le serment certifie que l'affidavit a été lu au déclarant et que ce dernier semblait en comprendre la teneur.

(2.1) **Affidavit d'une personne ne comprenant pas une langue officielle** — Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :

a) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;

b) comporter la formule d'assermentation prévue à la formule 80C.

R. 80(3)

Federal Courts Rules

(3) Exhibits — Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

SOR/2002-417, s. 10

(3) Pièces à l'appui de l'affidavit — Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci est inscrite sur la pièce même ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.

DORS/2002-417, art. 10

81. (1) Content of affidavits — Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.

Proposed Amendment — 81(1)

81. (1) Content of affidavits — Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

81. (1) Contenu — Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

Modification proposée — 81(1)

81. (1) Contenu — Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête — autre qu'une requête en jugement sommaire ou en procès sommaire — auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

The above amendment was proposed in the Rules Amending the Federal Courts Rules (Summary Judgment and Summary Trial) which were pre-published in January 2009 but which had not been promulgated when this edition went to press.

(2) Affidavits on belief — Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a

(2) Poids de l'affidavit — Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne

R. 81

Federal Courts Rules

party to provide evidence of persons having personal knowledge of material facts.

pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

82. Use of solicitor's affidavit — Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

82. Utilisation de l'affidavit d'un avocat — Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

83. Cross-examination on affidavits —

A party to a motion or application may cross-examine the deponent of an affidavit served by an adverse party to the motion or application.

83. Droit au contre-interrogatoire —

Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par une partie adverse dans le cadre d'une requête ou d'une demande.

84. (1) When cross-examination may be made — A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

(2) Filing of affidavit after cross-examination — A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

84. (1) Contre-interrogatoire de l'auteur d'un affidavit — Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

(2) Dépôt d'un affidavit après le contre-interrogatoire — La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

85. Due diligence — A party who intends to cross-examine the deponent of an affidavit shall do so with due diligence.

85. Diligence raisonnable — Le contre-interrogatoire de l'auteur d'un affidavit est effectué avec diligence raisonnable.

86. Transcript of cross-examination on affidavit — Unless the Court orders otherwise, a party who conducts a cross-examination on an affidavit shall order and pay for a transcript thereof and send a copy to each other party.

86. Transcription d'un contre-interrogatoire — Sauf ordonnance contraire de la Cour, la partie qui effectue un contre-interrogatoire concernant un affidavit doit en demander la transcription, en payer les frais et en transmettre une copie aux autres parties.