

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

NAGIB TAJDIN and ALNAZ JIWA

Applicants

- and -

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

**RESPONSE OF THE RESPONDENT,
HIS HIGHNESS PRINCE KARIM AGA KHAN**
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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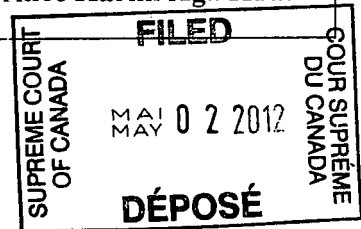


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RESPONDENT'S MEMORANDUM OF ARGUMENT
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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The respondent, His Highness Prince Karim Aga Khan (alternatively “His Highness” or the “Respondent”), is the spiritual leader of approximately 15 million Shia Imami Ismaili Muslims worldwide. The applicants, Nagib Tajdin (“Tajdin”) and Alnaz Jiwa (“Jiwa”) (collectively, the “Applicants”), have admitted to publishing and/or selling a book and mp3 audio bookmark entitled *Farmans 1957-2009 – Golden Edition Kalam-E Imam-E Zaman* (the “Infringing Materials”) which reproduces His Highness’ religious addresses (called “Farmans”) and brief written messages (called “Talikas”). His Highness commenced an action to stop the Applicants from infringing his copyright in these works. The Applicants defended the action on the basis that they believed they had the express consent of His Highness to publish the Infringing Materials based on an exchange that took place at a religious ceremony (known as a “Mehmani”) in 1992, or alternatively, on the basis of implied consent based on their reading of

the Ismaili Constitution and their oath of allegiance to His Highness which they say entitles them “as of right” to the guidance issued by him.

2. With the close of pleadings, both parties filed motions for summary judgment on the basis that the issue of consent was amenable to summary determination. As the Court of Appeal correctly concluded, the Applicants, by their motions, had taken the position that all the necessary facts were before the Court to determine the question of consent.¹

3. By Judgment of the Federal Court dated March 4, 2011 and Reasons given on January 7, 2011² (collectively the “Judgment”), the Applicants were found to have infringed the Respondent’s copyright. The Respondent’s motion for summary judgment was accordingly granted and the Applicants’ motions for summary judgment were dismissed. The Judgment was upheld in an unanimous decision of the Federal Court of Appeal dated January 16, 2012 (the “Appeal Decision”). The Applicants did not appeal the dismissal of their motions for summary judgment.

4. The Applicants now seek leave to appeal to the Supreme Court of Canada. The Applicants assert that there are issues of public importance raised by the decisions below. However, the Respondent asserts that the issues raised on this application are unique to this case, and, more strikingly, none are germane or necessary to the Courts’ decisions below.

5. The Applicants state that this application raises “the issue of which party bears the onus of proof in establishing consent under s. 27 of the *Copyright Act*”.³ However, the Federal Court of Appeal held that, “in the very particular circumstances of this case, the inference of the absence of consent is the only possible conclusion”; and that “this is so whoever bears the ultimate burden of proving the absence of consent”.⁴

¹ *Nagib Tajdin v. His Highness Prince Karim Aga Khan / Alnaz Jiwa v. His Highness Prince Karim Aga Khan*, 2012 FCA 12 (the “FCA Judgment”) at para. 16, Notice of Application Record for Leave of the Applicants dated March 15, 2012 (“Applicants’ Record”), Vol. 1, Tab 3, p. 45.

² *His Highness Prince Karim Aga Khan v. Nagib Tajdin, Alnaz Jiwa et al.*, 2011 FC 14 (“FC Judgment”); Applicants’ Record, Vol. 1, Tab 2.

³ Notice of Application for Leave of the Applicants dated March 15, 2012 (“Notice of Application”) at para. 1(a); Applicants’ Record, Vol. 1, Tab 1, p. 2.

⁴ FCA Judgment, *supra* at para. 22; Applicants’ Record, Vol. 1, Tab 3, p. 48.

6. The Applicants contend that the decisions of the courts below raise “the issue of the applicable standard of review on appeal from a decision allowing a motion for summary judgment”.⁵ However, writing for the Federal Court of Appeal Madam Justice Gauthier held that, “[i]n my view, nothing in this case turns on the standard of review. My conclusion would be the same on either standard”.⁶

7. The Applicants suggest that the appeal would raise “the issue of whether a court hearing a motion for summary judgment can go beyond the record to determine the issues on a motion for summary judgment”.⁷ However, the Federal Court of Appeal’s decision with respect to express consent was based precisely on the record presented by the Applicants, a set of uncontested facts put forward by the Applicants themselves, and which the Court considered to “constitute a proper factual matrix enabling the judge or this Court to determine whether or not these events are capable of constituting consent within the meaning of section 27 of the *Copyright Act*”.⁸ With respect to the issue of implied consent, again the Federal Court of Appeal accepted the evidence of the Applicants and noted that here also there was no genuine issue for trial.⁹

8. The Applicants assert that the decisions below raise “the issue of whether a court hearing a motion for summary judgment can draw an adverse inference from the failure of a party to file transcripts of discoveries of his opponent in responding to a motion for summary judgment”.¹⁰ However, the Federal Court of Appeal held that “[how the judge dealt with the examination for discovery]...is not central to the determination of whether there is a genuine issue for trial”.¹¹

9. The Applicants contend that this appeal raises the issue of “whether an injunction can issue prohibiting distribution of books that have been published before consent is revoked”.¹²

⁵ Notice of Application, *supra* at para. 1(b); Applicants’ Record, Vol. 1, Tab 1, p. 2.

⁶ FCA Judgment, *supra* at para. 8; Applicants’ Record, Vol. 1, Tab 3, p. 43.

⁷ Notice of Application, *supra* at para. 1(c); Applicants’ Record, Vol. 1, Tab 1, p. 2.

⁸ FCA Judgment, *supra* at para. 14; Applicants’ Record, Vol. 1, Tab 3, pp. 44-45.

⁹ FCA Judgment, *supra* at para. 19; Applicants’ Record, Vol. 1, Tab 3, p. 47.

¹⁰ Notice of Application, *supra* at para. 1(d); Applicants’ Record, Vol. 1, Tab 1, p. 2.

¹¹ FCA Judgment, *supra* at para. 22; Applicants’ Record, Vol. 1, Tab 3, p. 48.

¹² Notice of Application, *supra* at para. 1(f); Applicants’ Record, Vol. 1, Tab 1, p. 3.

However, the Federal Court of Appeal recognized that “if the record does not disclose any fact capable of constituting consent, there is no need to determine if the alleged consent was later revoked”.¹³

10. The Applicants contend that the appeal would address whether the new summary judgment rules narrowed the powers of a motions judge to grant judgment after finding that there existed a genuine issue regarding trial.¹⁴ Not only was this issue not raised in the courts below, but the Federal Court of Appeal found no genuine issue with respect to consent, thus removing any need for the court to make any findings of fact.¹⁵

11. Contrary to the Applicants’ assertions, this case involves what the Federal Court recognized to be a unique set of facts, facts which the Respondent did not contest for the purposes of the parties’ motions for summary judgment and which the motions judge and the Federal Court of Appeal simply found “...are not capable of constituting consent within the meaning of section 27 of the *Copyright Act*”.¹⁶

12. There are no issues of public or national importance raised in the application for leave to appeal. Even assuming the issues identified by the Applicants could be considered to have wider implications than to simply resolve the dispute between the parties to this action, this case does not present a sufficient record for a proper determination of these issues by this Court: the factual foundation is not developed in the material in the court below; and the issues now raised, by the Applicants are not germane to the Courts’ decisions below.

13. The Court of Appeal decision is plainly right and none of the issues raised by the Applicants were or would be dispositive of the appeal.

14. This application for leave to appeal should be dismissed with costs.

¹³ FCA Judgment, *supra* at para. 13; Applicants’ Record, Vol. 1, Tab 3, p. 44.

¹⁴ Notice of Application, *supra* at para. 1(g); Applicants’ Record, Vol. 1, Tab 1, p. 3.

¹⁵ FCA Judgment, *supra* at paras. 17, 19 and 20; Applicants’ Record, Vol. 1, Tab 3, pp. 45-46 and 47-48.

¹⁶ FCA Judgment, *supra* at para. 20; Applicants’ Record, Vol. 1, Tab 3, p. 48. FC Judgment, *supra* at para. 41; Applicants’ Record, Vol. 1, Tab 2, p. 19.

B. Facts

(1) The Action and Cross Summary Judgment Motions

15. Upon learning of the Infringing Materials, His Highness wrote two personal letters to Tajdin asking him to stop.¹⁷ Tajdin continued, even after an announcement was read out in all Ismaili Jamatkhana (prayer halls) globally advising that the Infringing Materials were unauthorized and should not be supported.¹⁸ His Highness then issued instructions to file a Statement of Claim with the Federal Court in Canada.

16. The Applicants each served and filed a Statement of Defence in which they admit that copyright exists in the Farmans and Talikas, that this copyright is owned by His Highness and that, if it were not for his consent, they would be infringing his copyright.¹⁹

17. The Applicants defended the action on the bases that: (i) their actions cannot constitute an infringement of copyright since His Highness provided consent at a specific ceremony in 1992 and, implied consent to the publication, distribution and sale of the Infringing Materials; and (ii) His Highness did not authorize the commencement of the action.²⁰

18. In response to the Applicants' suggestion that the action was not authorized, and in accordance with the gap rule of the *Federal Courts Rules* and Rule 15.02 of the *Ontario Rules of*

¹⁷ Affidavit of Shafik Sachedina, sworn June 25, 2010 ("Sachedina Affidavit"), at paras. 26-35, Exhibits G and J; Respondent's Record dated April 30, 2012 ("Respondent's Record"); Tab 7, p. 80-82, Tab 7G, pp. 89-90, Tab 7J, pp. 92-93.

¹⁸ Sachedina Affidavit, *supra* at paras. 22 and 39, Exhibits E and L; Respondent's Record, Tab 7, pp. 80 and 83, Tab 7E, p. 87, Tab 7L, pp. 99-101.

¹⁹ FC Judgment, *supra* at para. 6; Applicants' Record, Vol. 1, Tab 2, p. 9. Statement of Defence of Nagib Tajdin dated April 25, 2010 ("Tajdin Defence"), at para. 10 (see also paras. 11, 12, 13, 14, 22, 27, 29, 30-35, 36, 44, and 46); Applicants' Record, Vol. 1, Tab 11, pp. 132 and also pp. 133-139. Statement of Defence of Alnaz Jiwa dated April 28, 2010 ("Jiwa Defence"), at paras. 1, 5, 48 and 51; Applicants' Record, Vol. I, Tab 12, p. 147 and also pp. 151-158.

²⁰ Tajdin Defence, *supra* at paras. 4-5, 10-12, 14 and 20; Applicants' Record, Vol. 1, Tab 11, pp. 131, 132-33, 134. Jiwa Defence, *supra* at paras. 5-6, 51-52, 58; Applicants' Record, Vol. 1, Tab 12, pp. 147-148, 157-158, 159.

Civil Procedure, His Highness executed an Affirmation dated May 12, 2010²¹, which states as follows:

AFFIRMATION

I, Prince Karim Aga Khan, do solemnly affirm pursuant to sections 14 and 15 of the Canada Evidence Act as follows:

1. I am the Plaintiff in Court File No T-514-10 filed in the Federal Court of Canada. I have personally reviewed and approved the contents of the Statement of Claim filed with the Court in this case.
2. I have retained the firm of Ogilvy Renault LLP to act as my solicitors on my behalf and have authorized the action for copyright infringement against the named defendants.
3. I do not consent and have never consented to the publication and copying of the works in dispute and that are set out in the Statement of Claim.
4. I have informed one of the defendants Nagib Tajdin in two letters which I have written to him of my instructions to stop the unauthorized publication and to deliver up the undistributed books. In the second letter I purposely added a handwritten note in order to show that the letter came from me personally.
5. I authorized the Ismaili Leaders International Forum (LIF) to inform my Community about this matter and I know that this communication reached both Mr. Jiwa and Mr. Tajdin.

Aga Khan.

Now appeared before me on this 12th day of May, 2010, Prince Karim Aga Khan, a person who did identify himself to me by means of *a passport (République Française)* and who did sign and solemnly affirm the above.

Jennifer A. Colman

Notary Public in and for the Commonwealth of Massachusetts [Please put name and official title and seal]

(2) The Parties' Motions for Summary Judgment

19. After the close of pleadings, each of the parties moved for summary judgment. The Notices of Motion of both Applicants sought summary judgment on the issue of consent:

"Tajdin cannot be liable for copyright infringement for distributing the Aga Khan's Farmans on the ground of consent given by the Aga Khan on August 15, 1992, and on the grounds of implied consent."²²

"Jiwa cannot be liable for distributing the Aga Khan's Farmans on the grounds of consent given by the Aga Khan to Tajdin on August 15, 1992,

²¹ Affidavit of Daniel J. Gleason, sworn June 1, 2010, at para. 5 and Exhibit A; Respondent's Record, Tab 4A, p. 64. *Federal Courts Rules*, SOR/98-106, Rule 4; Respondent's Record, Tab 2, p. 24. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 15.02; Respondent's Record, Tab 2, pp. 25-26.

²² Notice of Motion of the Defendant Nagib Tajdin dated June 16, 2010 ("Tajdin Notice of Motion"), at para. 8; Respondent's Record, Tab 5, p. 68.

for the distribution of the Farman books, and on the grounds of implied consent.”²³

20. Moreover, both of the Applicants’ Notices of Motion assert that,

“This defendant submits that there is no genuine issue of fact and/or law requiring trial of the matter, and as such the action [sic] be dismissed without costs.”²⁴

21. For the purpose of both parties’ cross summary judgment motions: (i) no facts were in dispute relating to the question of express consent; and (ii) the Applicants did not pursue the allegation that the action was not authorized by His Highness.²⁵

(3) The Applicants’ Defence of Consent

22. The sole defence raised by the Applicants on the motions for summary judgment was that of consent:

(a) Express Consent

23. The Applicants’ defence of consent is based on the circumstances of a religious ceremony (“Mehmani”) that took place in 1992 in Montreal, a ceremony that neither of the Applicants themselves took part in. The purported consent was provided to a third party, Karim Alibhay whose complete account of the 1992 Mehmani is as follows:

“Tajdin had published a Farman book, titled, “Kalam-e Imam Zaman, Farmans to the Western World, Volume 1”, containing Farmans of the Imam made to the Western countries, and he informed me that it had just been printed and that he wished to seek the Imam’s blessings before starting to distribute the Farman book to the Jamats. [...]

After the Imam had blessed us and accepted our offerings, the Imam looked at the Book which I had placed on the plate containing fruits and nuts, as it is rather unusual for Ismailis to place anything other the (sic) fruits and nuts (which are wrapped in saran wrap). After a short while, the Imam placed His hand on the Farman Book, when I humbly asked

²³ Notice of Motion of the Defendant Alnaz Jiwa dated June 18, 2010 (“Jiwa Notice of Motion”), at para. 8; Respondent’s Record, Tab 6, p. 72.

²⁴ Tajdin Notice of Motion, *supra* at para. 12; Respondent’s Record, Tab 5, pp. 68-69. Jiwa Notice of Motion, *supra* at para. 12; Respondent’s Record, Tab 6, p. 72.

²⁵ FC Judgment, *supra* at para. 7; Applicants’ Record, Vol. 1, Tab 2, p. 9.

the Imam for His blessings, and I said to Him in French: ‘Mowlana Hazar Imam, que pouvons nous faire pour l’Imamat?’ (Mowlana Hazar Imam – our Lord, the present Imam – what else can we do to serve the Imamat?)

The expression on the Imam’s face changed completely and brightened, He came closer to us from His chair as if He wanted to embrace us, he then put His right hand on my shoulder and placed His left hand again on the Farman book (which was in red cover) responded to my supplication in French: ‘Continuez ce que vous faites’ (continue what you are doing), ‘réussissez ce que vous faites’ (succeed in what you are doing), and then ended by saying ‘et ensuite nous allons voir ce qu’on peut faire ensemble’ (and then we will see what we can do together). All the time while we were with the Imam, after He saw the Farman book, His hand was placed on the Farman book, blessing the book. He then finished the ceremony by giving us blessings for Barakat (abundance) and success.”²⁶

24. Mr. Tajdin made the following admissions on cross-examination in connection with the circumstances of the 1992 Mehmani:

- (a) He printed the first Farman book and had received several cartons of the first volume the day prior to the Mehmani on August 14, 1992. Tajdin did not have time to seek guidance in writing from His Highness before having the books printed;²⁷
- (b) Mr. Tajdin did not tell any of His Highness’ advisors, or anyone at the leadership, that he planned to have the book presented to His Highness at the Mehmani;²⁸
- (c) Mr. Tajdin himself did not present the book and Mr. Alibhay did not mention Mr. Tajdin’s name during his personal Mehmani meeting with His Highness;²⁹
- (d) Mr. Alibhay presented the book on the plate of fruit and nuts, without telling anyone except for Mr. Tajdin;³⁰
- (e) His Highness merely put his hand on the book; he did not open it, nor did he take the book away with him to examine it (Mr. Alibhay still has the copy of the book that was presented);³¹

²⁶ Affidavit of Karim Alibhay, sworn April 28, 2010 at paras. 9, 11-12; Applicants’ Record, Vol. 1, Tab 13, pp. 167-168.

²⁷ Transcript of the Cross-examination of Nagib Tajdin on his Affidavits sworn May 7, 2010, June 16, 2010 and July 13, 2010 held on August 9, 2010 (“Tajdin Cross”), pp. 90-91, Q. 525-530; Respondent’s Record, Tab 8, pp. 112-113.

²⁸ Tajdin Cross, *supra* at p. 91, Q. 532; Respondent’s Record, Tab 8, p. 113.

²⁹ Tajdin Cross, *supra* at pp. 92-93, Q. 539-540; Respondent’s Record, Tab 8, pp. 114-115.

³⁰ Tajdin Cross, *supra* at p. 93, Q. 544-545; Respondent’s Record, Tab 8, p. 115.

- (f) After the Mehmani, Mr. Tajdin did not write to His Highness to confirm what he was doing with the book, nor did he send any copy of the book to His Highness.³²

25. The Applicants assert that His Highness continues to consent to their publication and distribution of Farmans and Talikas, even in the face of the commencement and prosecution of this action, including His Highness' attendance at an examination for discovery on October 15, 2010.³³

(b) Implied Consent

26. The Applicants also rely on an "implied consent" to publish, distribute and sell the Infringing Materials on the following bases: (i) they claim that the new Ismaili Constitution does not vest any institution with powers to compile or publish Farmans, but is silent on the issue; and (ii) since Ismailis are entitled to have access to Farmans, any copying and distribution of Farmans is permitted.³⁴

27. Thus the defence to infringement was limited to the assertion of a specific consent given on a specific day in respect of a specific event, and the assertion of implied consent was based on the "silence" of both the Ismaili Constitution and His Highness.³⁵

(4) Expert Evidence

28. The expert evidence filed on the parties' motions for summary judgment was directed to the authenticity of the signatures on His Highness' letters to Tajdin and the Affirmation attesting to His Highness' authorization of the action. None of this evidence was germane to the issue of

³¹ Tajdin Cross, *supra* at pp. 93-94, Q. 546, Q. 547-549 and pp. 94-95, Q. 552-553; Respondent's Record, Tab 8, pp. 115-117.

³² Tajdin Cross, *supra* p. 95, Q. 554-559; Respondent's Record, Tab 8, p. 117.

³³ This despite the fact that the Applicant Mr. Jiwa, admits in his Statement of Defence that since 1977, he has been told by the "...Ismaili Association and the Ismaili Council, as well as from other sources, including religious lecturers and teachers...that the Aga Khan did not authorize the publication of the Farmans made by Him, and as such they could not give copies of Farmans to Jiwa." Jiwa Defence, *supra* at para. 33; Applicants' Record, Vol. 1, Tab 12, p. 154.

³⁴ Jiwa Defence, *supra* at paras. 23-28, 43, 48, 51, 52, 55, 63; Applicants' Record, Vol. 1, Tab 12, pp. 151-153, 156, 157, 158, 160. Tajdin Defence, *supra* at paras. 13, 16-20, 29, 42; Applicants' Record, Vol. 1, Tab 11, pp. 133-34, 136, 139.

³⁵ Tajdin Defence, *supra* at paras. 10-11, 14 and 20; Applicants' Record, Vol. 1, Tab 11, pp. 132-34. Jiwa Defence, *supra* at paras. 5 and 51-52; Applicants' Record, Vol. 1, Tab 12, pp. 147-48, 157-58.

consent, either express or implied. As the Federal Court of Appeal properly recognized, if the Applicants never had consent, then it would not be necessary to show that any consent was revoked. In arriving at his decision on the parties' motions, the Motions Judge did not find it necessary to consider or assess the expert evidence tendered by the parties in relation to the allegations of forgery.

29. While it is not therefore necessary to review the expert evidence in detail, nevertheless it should be noted that there were serious flaws in the evidence of forgery tendered by the Applicants and in the conclusion of their expert Graham Ospreay, whose evidence was challenged by the Respondent's expert, Mr. Lindblom.

30. The Respondent's expert, Brian Lindblom, was denied the opportunity to examine the original set of documents which were analyzed by Mr. Ospreay. Mr. Tajdin has steadfastly refused to provide the original January 24, 2010 or February 18, 2010 letters from His Highness for inspection since he was certain that they would "self-destruct" once turned over to the Respondent's solicitors. He has also refused to provide the originals of the comparator signatures.³⁶

31. It was Mr. Lindblom's opinion that, based on his preliminary review of Mr. Ospreay's findings, he had serious concerns about the validity and accuracy of Mr. Ospreay's report with respect to the authenticity of the January 24, 2010 letter and the Affirmation.³⁷

(5) Discovery

32. Prior to the hearing of the parties' summary judgment motions, the Applicants sought and were granted the right to examine His Highness for discovery. That examination took place on October 15, 2011. Despite having conducted discovery of His Highness, the Applicants did not seek to introduce the transcript of that discovery on their motions for summary judgment.³⁸

³⁶ Affidavit of Brian Lindblom, sworn August 10, 2010 ("Lindblom Report"), at paras. 2, 7, 17 and 18; Respondent's Record, Tab 9, pp. 126-127, 130. Tajdin Cross, *supra*, pp. 18-21, Q. 97-114, and pp. 38-41, Q. 216-239; Respondent's Record, Tab 8, pp. 102-105 and 107-110.

³⁷ Lindblom Report, *supra* at para. 18; Respondent's Record, Tab 9, p. 130.

³⁸ FC Judgment, *supra* at paras. 58 and 64; Applicants' Record, Vol. 1, Tab 2, pp. 25 and 64.

(6) Collateral Evidence

33. As previously stated, there was considerable collateral material filed by the Applicants who tried to prove that the numerous letters they had received from the Respondent were forgeries and that announcements made in the Ismaili prayer halls did not represent the Respondent's true wishes or that an affidavit sworn by the Respondent and witnessed by a lawyer in Boston was by an impostor. The Respondent filed material to show that the letters had really come from him and that he really was the Plaintiff. In the end the Applicants admitted, for the purposes of the summary judgment motion, that His Highness was the Plaintiff and that His Highness, the admitted real Respondent, showed up for discovery. At the summary judgment motion the Judge at the Trial Level commented on this collateral evidence, but concluded that credibility issues were not germane to the issue of whether there was a genuine issue for trial. The Court of Appeal agreed with this.³⁹

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

34. The Respondent agrees that the question raised by this request for leave to appeal is whether there is a question of national or public importance and whether therefore leave to appeal should be granted.

PART III – STATEMENT OF ARGUMENT**A. Response to the Grounds Upon Which Leave to Appeal Has Been Sought**

35. Because this case turns on the interpretation of uncontested but “very particular”, if not unique, facts there is no issue of national or public importance requiring the attention of this Court:

³⁹ FCA Judgment, *supra* at paras. 9-10; Applicants' Record, Vol. 1, Tab 3, p. 43. Sachedina Affidavit, *supra*, para. 22 and 39, Exhibit “E” and “L”; Respondent's Record, Tab 7E and 7L, pp. 87 and 99-101. Sachedina Affidavit, *supra* at paras. 26 and 35, Exhibit “G” and “J”; Respondent's Record, Tab 7G and 7J, pp. 89-90 and 92-93. Sachedina Affidavit, *supra* at para. 36, Exhibit “K”; Respondent's Record, Tab 7K, pp. 95-97.

(1) **The Standard of Review**

36. The Court of Appeal recognized that the result in this case would be the same whatever the standard of review was. It therefore did not consider the standard of review at great length. As a consequence any discussion of the standard of review in this case is purely academic and does not present the Supreme Court with any record on which that standard could or should be reviewed.

37. The ultimate question on a motion for summary judgment is whether there is a genuine issue necessitating a trial for its determination. The Motions Judge recognized the principles of summary judgment in his Reasons for Judgment when he wrote, “[s]ummary judgment is but one of several means at the Court’s disposal to control its own process and to carefully husband a non-renewable resource: courtroom time”.⁴⁰

38. There is no issue of national or public importance in the lower courts’ determination. On the facts of this case, there is no genuine issue requiring a trial.

(2) **Role of the Motions Judge/Appropriateness of Summary Motion**

39. The Applicants assert that this appeal offers an opportunity to clarify the proper role of a Motions Judge on a motion for summary judgment. They specifically raise questions relating to: the weighing of evidence; the drawing of adverse inferences; and the use of discovery transcripts.

40. This case does not present any of these questions as relevant issues. Contrary to the Applicants’ complaints, the Motions Judge was alive to the limits of his role in determining contested facts on a motion for summary judgment: he chose not to attempt to resolve the allegations of forgery, or the expert evidence tendered on the issue. Likewise, the Federal Court of Appeal also concluded that they could decide the matter on the uncontested facts and that the contested facts were not germane.⁴¹

⁴⁰ FC Judgment, *supra* at para. 8; Applicants’ Record, Vol. 1, Tab 2, p. 9.

⁴¹ FC Judgment, *supra* at para. 17; Applicants’ Record, Vol. 1, Tab 2, p. 11. FCA Judgment, *supra* at paras. 11, 13, 16, 22; Applicants’ Record, Vol. 1, Tab 3, pp. 43-45, 48.

41. The Federal Court of Appeal did not consider the unproduced discovery to be central to the determination of whether there was a genuine issue for trial. Since the Federal Court of Appeal was satisfied that there were no facts capable of constituting consent, the Court did not need to accept or refer to the affidavits filed in support of His Highness' motion. They held, "[i]n the very particular circumstances of this case, the inference of the absence of consent is the only possible conclusion".⁴²

42. In determining that the defence of express consent did not merit a trial, the Federal Court of Appeal and the Motions Judge considered only the evidence of Karim Alibhay, evidence which was not challenged by the Respondent. The Motions Judge neither rejected this evidence, nor did he prefer the evidence of any other affiant to it. Rather, the motions Judge simply found that the exchange relied upon by the Applicants could not operate at law as a defence to infringement, a finding which was clearly open to him and which the Federal Court of Appeal upheld on appeal.⁴³

43. In determining the issue of implied consent, the Motions Judge and the Federal Court of Appeal also considered that the text of the Ismaili Constitution and the reported public statement by His Highness did not provide support for an argument that the Respondent had consented to any reproduction or publication.⁴⁴

(3) Conflicting Evidence

44. Simply put, there was no conflicting evidence which the Federal Court or the Federal Court of Appeal considered in making their decisions. They could and did make the necessary determination that there was no genuine issue for trial without regard to the contested evidence.

45. There was some conflict in the evidence, but neither the Motions Judge nor the Court of Appeal relied on it or preferred one expert over another. The Motions Judge did not make any finding as to the authenticity of the documents alleged to have been forged. The Court of Appeal

⁴² FC Judgment, *supra* at paras. 58-64; Applicants' Record, Vol. 1, Tab 2, pp. 25-27. FCA Judgment, *supra* at para. 22; Applicants' Record, Vol. 1, Tab 3, p. 48.

⁴³ FCA Judgment, *supra* at para. 14-17; Applicants' Record, Vol. 1, Tab 3, pp. 44-46.

⁴⁴ FC Judgment, *supra* at paras. 47-56; Applicants' Record, Vol. 1, Tab 2, pp. 21-25. FCA Judgment, *supra* at paras. 19-20; Applicants' Record, Vol. 1, Tab 3, p. 47.

did not do so either. In his Reasons for Judgment the Motions Judge makes reference to these signatures without deciding whether they are authentic.⁴⁵

(4) Onus to Prove Consent

46. The Court of Appeal quite properly considered that the facts from which consent or lack of consent were to be found were established by the parties cross motions for summary judgment. The Court considered that there was a "proper factual matrix" to enable the Motions Judge and the Court of Appeal to determine whether or not the alleged events were capable of constituting consent within the meaning of the *Copyright Act*.⁴⁶ On this basis the Court of Appeal did not find it necessary to address the issue of onus and did not do so.

47. The record in the courts below does not present an issue that is ripe for determination by this court or which would be relevant to the ultimate outcome of this case. As noted by the Court of Appeal, "[i]n fact, in the very particular circumstances of this case, the inference of the absence of consent is the only possible conclusion. This is so whoever bears the ultimate burden of proving the absence of consent."⁴⁷

48. Thus no issue of national or public importance is raised in a case where the onus of proof is of no consequence to the case and where the courts below proceeded on a set of facts presented by the Applicants that were not in dispute.

49. Since this is not a case which turned on onus in any way, the Court of Appeal correctly declined to address the issues. Without the benefit of the reasoning of the Court of Appeal on the issue, it is not a fit case to address onus in the abstract and where it is immaterial to the outcome.

50. In the end, the Applicants have relied on one specific event to try and establish express consent. For the purposes of the summary judgment motion, the Respondents accepted these facts as presented and the Motions Judge quite properly concluded that these facts did not

⁴⁵ FC Judgment, *supra* at para. 54; Applicants' Record, Vol. 1, Tab 2, p. 23.

⁴⁶ FCA Judgment, *supra* at para. 14; Applicants' Record, Vol. 1, Tab 3, pp. 44-45. *Copyright Act*, R.S.C. 1985, c. C-42, s. 27; Applicants' Record, Vol. 1, Tab 7, p. 118.

⁴⁷ FCA Judgment, *supra* at para. 22; Applicants' Record, Vol. 1, Tab 3, p. 48.

establish consent. In such circumstances, the question of onus does not arise or become determinative.

(5) **Express Consent, Authorization and Instruction**

(a) **Consent**

51. The Respondent submits that the alleged Mehmani "consent" to use the Respondent's Literary Works, which is espoused by the Applicants as their primary defence to copyright infringement in this proceeding, does not establish anything remotely resembling a "clear" consent so as to operate as a defence to infringement:

- (a) First, by the Applicants' own admissions, this purported "consent" was in relation to a book of Farmans published in 1992 that is not even the subject of the present proceeding. The Infringing Materials were not released for publication until December 2009;
- (b) Second, by the Applicants' own admissions, the Respondent did not open the book presented or review any of its content. There is no evidence that the Respondent even knew of, or comprehended, the subject-matter of the book that was presented to him;
- (c) Third, by the Applicants' own admissions, any words spoken by the Respondent to the individual were communicated in the context of a religious ceremony of extremely short duration. The alleged words spoken do not "clearly" communicate the Respondent's consent to any publication, distribution and sale of the Infringing Materials by the Applicants. At no time does the individual even mention the Applicants' names, nor does he make any explanation as to the contents of the book or request to publish, distribute and sell the book.
- (d) Fourth, the Applicants' evidence is that the word "ensemble" was used by His Highness. If this is so, it does not imply any ability to act alone, but requires that any work be undertaken "together" with His Highness or other appropriate Ismaili institutions; and
- (e) Fifth, any alleged consent given was not given to the Applicants but to a third party. The Applicants do not submit that this third party is personally known to the Respondent, nor do they submit that there were ever any prior, or subsequent meetings, between the third party and the Respondent.

52. It bears repeating that the issues of express and implied consent were raised by the Applicants on their motions for summary judgment on the basis that these issues were amenable to summary determination on the affidavit evidence presented.

53. It was the role of the Motions Judge to give meaning to the phrase upon which the Applicants based their defence of consent, indeed the Applicants called on the Motions Judge to do so in their own motions for summary judgment.⁴⁸

(b) Authorization and Instruction

54. The Applicants' assertion of authorization as a defence is misguided. Authorization is a liability which a person who is not the copyright owner can incur by virtue of such person's sanction, approval or countenance of another's infringement. In any event, the law of authorization is well-established and the current case raises no issue with respect to it at all and certainly not one of any national importance.

55. Both the Trial Court and the Court of Appeal recognized that there was no issue of "authorization" raised on the motions with respect to the copyrighted works. Authorization is a legal concept which is distinct from consent and not applicable to the circumstances upon which the Applicants based their defence to infringement. The concept of authorization of infringement has been explained as follows:

"It is an infringement of copyright to authorize anyone to do that which is the sole right of the copyright owner. Therefore anyone who, without the owners' consent, sanctions, approves or countenances another to infringe copyright is himself or herself an infringer."⁴⁹

56. The case relied upon by the Applicants is a case in point: in *de Tervagne v. Boleil (Town)*, the issue before the court was who had authorized the performance of a copyrighted play in the wake of the bankruptcy of the producer of the play, thus entailing liability for copyright infringement, as between the town in which the play was performed; the owner of the cultural centre where the play was enacted; the director; or stage designer. The court determined that the producer alone had the requisite control over the play; the other defendants were not in such a position as would have enabled them to authorize the infringement.⁵⁰

⁴⁸ FC Judgment, *supra* at paras. 44-45; Applicants' Record, Vol. 1, Tab 2, p. 20.

⁴⁹ Roger T. Hughes, *Hughes on Copyright and Industrial Design*, 2nd ed. (Toronto: LexisNexis, 2011) at p. 500; Respondent's Record, Tab 3, p. 38.

⁵⁰ *de Tervagne v. Boleil (Town)*, [1993] 3 F.C. 227 (F.C.T.D.) ("*de Tervagne*") at para. 52; Applicants' Book of Authorities, Tab 7, p. 14

57. In any event authorization is a level of involvement considerably higher than consent. If there is no consent, there cannot be any authorization. Authorization requires consent and a level of sanction or approval which is applicable only to possible infringement liability by a person other than the alleged copier.

(6) Adequacy of the Record (Adverse Inference)

58. The Court of Appeal determined that the examination for discovery of the Respondent was not central to the determination of whether there was a genuine issue for trial. As such, any inference, adverse or otherwise is of no consequence.

59. Further the main inference drawn from the fact of the discovery was simply that the Respondent showed up, thus by his attendance alone putting to rest any suggestion that he had not authorized the infringement action.

60. In this case the Applicants filed their own motions for summary judgment on the very issues of consent that they now contest are not amenable to summary determination. By filing motions for summary judgment, the Applicants were inviting the Court to decide the issue of consent, both express and implied, without the need for a trial and it surely does not lie with them now to advance grounds of appeal arguing that the Motions Judge erred in accepting their invitation to determine these issues summarily on the very evidence they submitted.

61. A party responding to a motion for summary judgment is required to set out specific facts and adduce the evidence showing that there is a genuine issue for trial. The Applicants have failed to do that. The findings of the courts below are fact specific and do not present any novel principles of law, nor issue of national or public importance.

PART IV – SUBMISSIONS ON COSTS

62. The Respondent seeks costs on this leave application in any event of the cause.

PART V – ORDER SOUGHT

63. For the foregoing reasons, the Respondent requests an order dismissing this request for leave to appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 30th day of April, 2012

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PART VI – TABLE OF AUTHORITIES

AUTHORITY	Respondent's Memorandum of Argument Paragraph Nos.
Statutes and Regulations	
<i>Copyright Act</i> , R.S.C. 1985, c. C-42, s. 27 [Applicants' Record, Vol. 1, Tab 7, pp.118-120]	5, 7, 11, 46
<i>Federal Courts Rules</i> , SOR/98-106, Rule 4 [Respondent's Record, Tab 2, p. 22]	18
<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, Rule 15. 04 [Respondent's Record, Tab 2, p. 25]	18
Case Law and Secondary Sources	
<i>de Tervagne v. Boleil (Town)</i> , [1993] 3 F.C. 227 (F.C.T.D.) [Applicants' Book of Authorities, Tab 7]	56
<i>His Highness Prince Karim Aga Khan v. Nagib Tajdin, Alnaz Jiwa et al.</i> , 2011 FC 14 [Applicants' Record, Vol. 1, Tab 2, p. 7]	3, 6, 11, 18, 21, 32, 33, 37, 40, 43, 45, 48
<i>Nagib Tajdin v. His Highness Prince Karim Aga Khan / Alnaz Jiwa v. His Highness Prince Karim Aga Khan</i> , 2012 FCA 12 [Applicants' Record, Vol. 1, Tab 3, p. 39]	2, 5, 6, 7, 8, 9, 10, 11, 36, 40, 41, 43, 46, 47
Hughes, Roger T., <i>Hughes on Copyright and Industrial Design</i> , 2nd ed. (Toronto: LexisNexis, 2011) [Respondent's Record, Tab 3, p. 27]	55

PART VII – STATUTES AND REGULATIONS

STATUTES AND REGULATIONS
<i>Federal Courts Rules</i> , SOR/98-106, Rule 4
<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, Rule 15.02