

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the “**Act**”);

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
October 19, 2015	
CT-2015-009	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	includes doc's #'s 39 to 43

**STARGROVE ENTERTAINMENT INC.**

Applicant

. and .

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
UNIVERSAL MUSIC CANADA INC.,  
SONY/ATV MUSIC PUBLISHING CANADA CO.,  
SONY MUSIC ENTERTAINMENT CANADA INC.,  
ABKCO MUSIC & RECORDS, INC.,  
CASABLANCA MEDIA PUBLISHING, and  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**MOTION RECORD OF THE MOVING PARTY,  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

**(Motion to Exclude the Affidavit of Mario Bouchard)**

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October 19, 2015

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**TAB 1**  
**Notice of Motion**

CT-2015-009

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the Competition Act, R.S.C. 1985, c. C-34, (the “**Act**”);

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act ;

**AND IN THE MATTER OF** an Application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76 and 77 of the Act;

**AND IN THE MATTER OF** an Application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**B E T W E E N:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> October 19, 2015 CT-2015-009 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 39

**STARGROVE ENTERTAINMENT INC.**

Applicant

- and -

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
 UNIVERSAL MUSIC CANADA INC.,  
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 SONY MUSIC ENTERTAINMENT CANADA INC., ABKCO MUSIC & RECORDS, INC.,  
 CASABLANCA MEDIA PUBLISHING, and  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**NOTICE OF MOTION OF  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

**(Motion to Exclude the Affidavit of Mario Bouchard)**

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**TAKE NOTICE THAT** Canadian Musical Reproduction Rights Agency Ltd. (“**CMRRA**”) will make a motion to the Competition Tribunal (“**Tribunal**”), in accordance with the Tribunal’s Direction of October 9, 2015, for the following relief:

- (a) An order declaring that the affidavit of Mario Bouchard, sworn on August 27, 2015 (the “**Bouchard Affidavit**”), is inadmissible;

- (b) Further, or in the alternative, an order excluding the Bouchard Affidavit;
- (c) An order granting CMRRA its costs of this motion on a solicitor-client basis or, in the alternative, costs to be fixed at the highest end of Column V of Tariff B of the *Federal Courts Rules*, S.O.R./98-106; and
- (d) Such further and other relief as CMRRA may request and the Tribunal deem just.

### **GROUNDINGS FOR THE MOTION**

- (a) The Bouchard Affidavit is inadmissible, as it relies upon information that:
  - (i) is subject to settlement privilege; and
  - (ii) was provided to Mr. Bouchard solely in his capacity as a representative of the Copyright Board of Canada in relation to settlement discussions in another litigation proceeding and therefore risks compromising the integrity of the processes of the Copyright Board of Canada if admitted;
- (b) In the alternative, the Bouchard Affidavit fails the test for the admissibility of expert evidence for the following reasons:
  - (i) The Bouchard Affidavit is not necessary. It is essentially a legal opinion regarding the interpretation of the *Copyright Act* and its application to the facts of this application, along with the interpretation of certain contracts. Expert opinion evidence on domestic law is not admissible before the Tribunal;
  - (ii) Mr. Bouchard lacks the industry knowledge and experience required of an expert; and

- (iii) The admission of the Bouchard Affidavit would cause prejudice to the Respondents, including by breaching settlement privilege, while offering no probative value.
- (c) Such further and other grounds as counsel may advise and the Tribunal may accept.

**AND TAKE NOTICE THAT**

CMRRA will rely on the following materials:

- (a) The affidavit of Caroline Rioux, sworn on October 19, 2015;
- (b) CMRRA's Memorandum of Fact and Law;
- (c) The Bouchard Affidavit and the report and appendices appended thereto; and
- (d) Excerpt of the affidavit of David A. Basskin, sworn January 14, 2009 (as appended to the Bouchard Affidavit); and
- (e) Such further and other evidence as counsel may advise and the Tribunal may accept.



**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at Toronto this 19th day of October, 2015

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**BETWEEN:**

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. and .

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Respondents

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**MOTION RECORD OF THE MOVING PARTY,  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.  
(Motion to Exclude the Affidavit of Mario Bouchard)**

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**TAB 2**

**Affidavit of Caroline Rioux Sworn October 19, 2015**

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the "**Act**");

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Respondents

**AFFIDAVIT OF CAROLINE RIOUX  
 (SWORN OCTOBER 19, 2015)**

I, Caroline Rioux, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the president of Canadian Musical Reproduction Rights Agency Ltd. ("**CMRRA**"), a respondent in this proceeding. As such, I have knowledge of the matters set out in this affidavit. To the extent that my knowledge is based on information and belief, I have identified the source of that information and I believe it to be true. The statements made in this affidavit are made without the intention of waiving any applicable privilege.

2. I am swearing this affidavit in support of a motion made by CMRRA to exclude the affidavit sworn by Mario Bouchard, and the purported “expert” report attached to that affidavit (the “**Bouchard Report**”), as evidence in this proceeding.

**I. Overview**

3. My concerns relate to Mr. Bouchard’s statement, at paragraph 3 of the Bouchard Report, that his “knowledge of the operation of the Canadian mechanical licensing market and of [CMRRA] ... was further increased as a result of [his] involvement, on behalf of the [Copyright Board], in discussions between CMRRA-SODRAC Inc. (“**CSI**”), major record labels and the Board following the settlement reached in the pending list class action.”

4. I have been directly involved at various times in the discussions to which Mr. Bouchard refers, which I will refer to below as the “**Section 77 Discussions**”. I have also instructed Veronica Syrtash, CMRRA’s Vice President of Legal and Business Affairs, as well as our outside counsel, in relation to the issues that have been discussed, and have received reports as the discussions have progressed.

5. As I explain in more detail below, CMRRA has participated in the Section 77 Discussions with the expectation that any information it provided to Mr. Bouchard was to be used only for the purpose of helping the parties to those discussions fashion a workable system for the issuance of mechanical licences pursuant to section 77 of the *Copyright Act*. CMRRA has understood that both the Copyright Board and Mr. Bouchard, as its designated representative, are impartial in the Section 77 Discussions. As such, we have not hesitated to provide him, often at his request, with information about mechanical licensing generally and about aspects of our own mechanical licensing processes specifically. I believe that at least some of that information was not, and is not, publicly available, and that Mr. Bouchard understood that when he received it.

6. I was therefore shocked to learn that Mr. Bouchard had purported to provide expert evidence in support of the applicant in this proceeding, and especially that his evidence relied in part on knowledge gained solely through his participation on the Section 77 Discussions. Had I believed that there was any risk that information provided to Mr. Bouchard, as the designated representative of the Copyright Board, would later be used against CMRRA in this or any other proceeding, CMRRA would not have agreed to participate in a process facilitated by him, nor would we have shared information with him. Further, had Mr. Bouchard sought our consent to use information obtained as a result of his participation in the Section 77 Discussions, CMRRA would have refused.

## II. Background

### A. CMRRA and CSI

7. CMRRA is a music licensing agency that represents, in Canada, the owners of copyright in musical works for the purpose of administering the right to reproduce those works in various media and for various purposes.

8. CMRRA negotiates and issues licences for the reproduction of musical works by record labels – including the “mechanical licences” that are at issue in this proceeding – and by other commercial users. It also collects and administers levies and royalties payable under tariffs certified by the Copyright Board for a variety of other types of reproduction, including the copying of recorded music for private use<sup>1</sup> and the reproduction of musical works by online music services and their customers<sup>2</sup> and by terrestrial<sup>3</sup> and satellite<sup>4</sup> radio stations in the course of their broadcast operations.

9. In 2002, CMRRA and Société du Droit de Reproduction de Auteurs, Compositeurs, et Éditeurs au Canada (SODRAC) Inc. (“**SODRAC**”), another Canadian music licensing agency based in Montreal, formed CSI-SODRAC Inc. (“**CSI**”) in order to provide certain types of users with access to our combined repertoire of music for licensing purposes. CSI now administers tariffs for commercial radio stations and online music services, as well as a number of private licence agreements with users of different types.

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<sup>1</sup> Tariff of Levies to be Collected by the Canadian Private Copying Collective in 2015 on the Sale, In Canada, of Blank Audio Recording Media, Supplement to the Canada Gazette, Part I, December 31, 2014, available online: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2014/20141213-1.pdf>

<sup>2</sup> Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Online Music Services in 2008, 2009 and 2010, Supplement to the Canada Gazette, Part I, October 6, 2012, available online: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/Tarif-CMRRA-SODRAC.pdf>

<sup>3</sup> Statement of Royalties to be Collected by SOCAN, Re: Sound, CSI, AVLA/SOPROQ in Artist/ in Respect of Commercial Radio Stations (CSI 2008-2012), Supplement to the Canada Gazette, Part I, July 10, 2010, available online: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2010/20100710.pdf>, and erratum: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2010/20100121-erratum.pdf>, interim as of November 7, 2012.

<sup>4</sup> Statement of Royalties to be Collected by SOCAN, NRCC and CSI in Respect of Multi-Channel Subscription Radio Services (CSI 2006-2009), available online: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2009/20090411-m-b.pdf> and erratum: <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2009/20090516-m-b.pdf>. Note that the period of 2012-2017 is subject to a negotiated agreement.



**B. The Pending List Class Action**

10. In 2008, CMRRA became aware that a statement of claim had been issued by the estate of the late Chesney Henry (Chet) Baker, a well-known jazz musician, under the Ontario *Class Proceedings Act, 1992*, alleging that CMRRA, SODRAC, and what were then considered the four major record labels – Sony BMG Music (Canada) Inc. (now Sony Music Entertainment Canada Inc.), EMI Music Canada Inc., Universal Music Canada Inc., and Warner Music Canada Co. – had failed to pay royalties to the plaintiff and other songwriters for certain reproductions of their musical works on CDs and other physical products. A copy of the statement of claim, as served on CMRRA on October 6, 2008, is attached as **Exhibit “A”** to this affidavit.

11. Because the proposed class action concerned recordings that appeared on the defendant record labels’ “pending lists” – i.e., lists of recordings that had been commercially released but for which mechanical licences had not yet been obtained – the litigation became known to some as the **“Pending List Class Action”**. I will use that term to describe the litigation in this affidavit as well.

12. Although CMRRA was surprised to be named as a defendant, it ultimately agreed to assist the plaintiffs in the pursuit of the Pending List Class Action. SODRAC did the same.

13. After extensive negotiations, the parties to the Pending List Class Action eventually agreed to settle the matter on the basis set out in a settlement approval order issued by Justice Strathy on May 30, 2011, an excerpt of which is attached as **Exhibit “B”** to this affidavit (the **“Settlement Approval Order”**), including the form of order and CSI Term Sheet (defined below).

14. Among the materials attached as Exhibit “A” to the Settlement Approval Order is a document that is officially entitled “Key Terms of Settlement” but most often referred to by the parties (and in the order itself) as the **“CSI Term Sheet”**. Among other things, the CSI Term Sheet established the parameters of a new mechanical licensing system that applies to new products released in Canada on or after January 1, 2013. That system, which is set out in Section 6 of the CSI Term Sheet (beginning at page 23) consists of four steps, concluding with the submission of licence requests to the Board in relation to any musical works that remain unlicensed after a specified period of time. It is that final step in the system that is relevant to the current motion.

### C. The Section 77 Discussions

15. Under section 77 of the *Copyright Act*, the Copyright Board is empowered to issue a licence (a “**Section 77 Licence**”) to use a published work or other specified subject matter in circumstances where the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located. A copy of section 77 of the *Act* is attached as **Exhibit “C”** to this affidavit.

16. During the course of the Pending List Class Action, it became apparent to CMRRA that section 77 might present a useful way to prevent sound recordings from remaining unlicensed in circumstances where other reasonable attempts to license them had proven unsuccessful. It occurred to us that, as part of a settlement to the litigation, the defendant record labels might consider appointing CSI as their agent for the purpose of applying to the Copyright Board for Section 77 Licences. However, it was also apparent to CMRRA that it would be impractical, and prohibitively expensive, to pursue Section 77 Licences on behalf of the defendant record labels on a case-by-case basis. Instead, CMRRA and SODRAC decided to approach the Copyright Board to propose a more streamlined licensing solution.

17. To that end, David A. Basskin, who was then president and CEO of CMRRA, wrote to Mr. Bouchard, who was then General Counsel to the Copyright Board, on November 12, 2009, to propose an initial meeting to discuss the issuance of Section 77 Licences for this purpose and in this way. Mr. Bouchard agreed to meet in Ottawa on November 20, 2009. A copy of the e-mail correspondence between Mr. Basskin and Mr. Bouchard is attached as **Exhibit “D”** to this affidavit.

18. That meeting, which was also attended by our outside counsel, Casey Chisick of Cassels Brock & Blackwell LLP, marked the beginning of the Section 77 Discussions, which have continued sporadically ever since.

19. Following that initial meeting, CMRRA and SODRAC prepared a draft Memorandum of Understanding (“**MOU**”), setting out the parameters of the proposed licensing system, and provided it to Mr. Bouchard for review. After several rounds of revisions, Mr. Bouchard indicated that he was generally satisfied with the proposed document and suggested that CMRRA and SODRAC provide it to the Copyright Board for consideration. We did so by letter dated December 21, 2009 to Gilles McDougall, who was then the Acting Secretary General of the Board. A copy of that letter, without the proposed MOU, is attached as **Exhibit “E”** to this affidavit.

20. Over the months that followed, Mr. Chisick engaged in extensive discussions with the Copyright Board regarding the form and content of the proposed MOU. Mr. Bouchard was involved in those discussions, as were Mr. McDougall and Claude Majeau, the Vice-Chair and CEO of the Board. Once the Board was generally satisfied with the document, it directed Mr. Chisick to circulate the draft to the defendant record labels for comment. Mr. Chisick did so on March 30, 2010.

21. Although the Settlement Approval Order was issued on May 30, 2011, the MOU had not been finalized by that date. The parties and the Copyright Board understood that the MOU would be dealt with as a post-settlement matter, but that it was integral to the operation of the settlement. It was generally understood that it would be impractical for a potentially large number of Section 77 Licences to be applied for and issued in a timely way without a streamlined process for doing so. It was also understood that the future licensing system set out in the Settlement Approval Order depended on putting that final piece in place in due course.

22. For those reasons, CMRRA has considered all of the discussions and negotiations comprising the Section 77 Discussions, both before and after the issuance of the Settlement Approval Order, to be part of the settlement process: they are integral to achieving a final, lasting, and effective settlement of the Pending List Class Action. I believe that the other parties to the Section 77 Discussions, including the Board and Mr. Bouchard, share that understanding.

23. Since the Settlement Approval Order was issued, the Section 77 Discussions have continued sporadically. At first, the parties were asked to submit written comments to the Copyright Board on the draft MOU, and did so through their litigation counsel. Since then, Mr. Bouchard has exchanged written correspondence, participated in telephone conferences, and attended in-person meetings, with representatives of CMRRA and SODRAC to discuss a variety of outstanding issues. Some of those issues have related to the language of the MOU, and of standard terms and conditions of the Section 77 Licences to be issued by the Board, while others have concerned the mechanics and logistics of the licensing process itself. I do not know whether Mr. Bouchard has engaged in similar individual consultations with the defendant record labels or any other interested party.

24. The Section 77 Discussions are not yet complete, and I believe that Mr. Bouchard is still actively involved in them. In fact, he was corresponding actively with CMRRA's counsel on outstanding issues as recently as July 2015.

**D. Mr. Bouchard's Role in the Section 77 Discussions**

25. I have been involved in the Section 77 Discussions in a number of different capacities at various times. Not only have I reviewed various drafts of the MOU to ensure that they were consistent with CMRRA's operational needs, I have also been primarily responsible for instructing Mr. Chisick and Ms. Syrtash in relation to the Section 77 Discussions since at least the beginning of 2013, even before my appointment as president of CMRRA, having been delegated that responsibility by Mr. Basskin.

26. Although Mr. McDougall and Mr. Majeau have communicated directly with Mr. Chisick and counsel to the defendant record labels at various times, Mr. Bouchard has always been CMRRA's primary contact in relation to the Section 77 Discussions. He has corresponded extensively not only with Mr. Chisick but also with Ms. Syrtash, as CMRRA's senior in-house counsel, and has met with them in person on multiple occasions.

27. When Mr. Bouchard first became involved in the Section 77 Discussions, I understood that, as General Counsel, he was functioning as an employee of the Copyright Board. After his retirement from the civil service in August 2013, I understood that he was intending to work as a lawyer in private practice and that his continued involvement in the Section 77 Discussions was as independent counsel to the Board. Consequently, I have always assumed that any information disclosed to Mr. Bouchard would be used only to facilitate the Section 77 Discussions and protect the interests of the Board.

28. I have always understood that the Copyright Board has its own interest in the outcome of the Section 77 Discussions, namely to ensure that any agreement reached with the parties meets both its statutory obligations and its administrative requirements. However, it has also been my impression that the Board is otherwise impartial as between the other parties to the Section 77 Discussions (i.e., CMRRA, SODRAC, and the defendant record labels) and that the information disclosed to it during the course of those discussions was to be used only for the purpose of negotiating and finalizing an appropriate MOU.

29. In fact, my understanding has always been that the Copyright Board's principal interest is in facilitating this final aspect of the settlement of the Pending List Class Action, and that Mr. Bouchard was charged with doing exactly that. In practice, Mr. Bouchard has often appeared to function as a facilitator or intermediary between CMRRA and SODRAC, on one hand, and the defendant record labels, on the other, contacting CMRRA to discuss whether and how various

outstanding deal points might be reconciled and resolved. As a result, CMRRA has felt that it was obliged to share with Mr. Bouchard details of its mechanical licensing processes and systems that would otherwise have been kept confidential.

30. Indeed, my impression throughout the Section 77 Discussions has been that Mr. Bouchard has limited knowledge of the actual mechanical licensing practices and processes in place at or between CMRRA and SODRAC, on one hand, and the record labels, on the other. I do not find that surprising; although I assume that Mr. Bouchard has heard testimony and/or reviewed documentary evidence about mechanical licensing in various Copyright Board proceedings, I do not believe he has any direct experience with the process.

31. As a result, it has been necessary for both CMRRA and SODRAC to provide Mr. Bouchard with a significant amount of information about mechanical licensing. This information has included not only formal documents such as our various forms of mechanical licensing agreement with major and independent record labels, but also anecdotal information about the mechanical licensing process, the contractual terms that are of primary importance to CMRRA (and why they are so important), specific challenges faced by CMRRA in the course of mechanical licensing, and other matters either that Mr. Bouchard has asked about or that have appeared relevant from time to time during the Section 77 Discussions.

32. Everything that CMRRA has disclosed to Mr. Bouchard has been disclosed on the understanding and belief that, as a representative of the Copyright Board in the Section 77 Discussions, he was acting as an impartial representative of an administrative tribunal and would use the information so provided solely for the purpose of helping to finalize the MOU. CMRRA has also understood that, since the Section 77 Discussions were taking place solely for the purpose of facilitating the court-approved settlement of the Pending List Class Action, any information disclosed to Mr. Bouchard, as a representative of the Board, was presumed to be confidential and would not be disclosed to any third party or used for any other purpose.

33. It never occurred to me, or to Mr. Basskin or Ms. Syrtash, that Mr. Bouchard might later use information provided to him in the context of the Section 77 Discussions against CMRRA in an unrelated proceeding. Had we known this, or even had reason to fear that this was a possibility, we would never disclosed any information to Mr. Bouchard or authorized our counsel to do so. In fact, we might well have asked the Board to appoint a different representative who could be trusted not to misuse the information that we were providing.

## **E. Implications for the Copyright Board Process**

34. As a collective society under the *Copyright Act*, CMRRA has had extensive dealings with the Copyright Board for many years. Until now, we have had no reason to question the impartiality or fairness of its processes or the use of information provided to its representatives.

35. In my view, it is important to the integrity of those processes that parties be able to rely on the Board's impartiality, and its commitment to the protection of confidential information, when interacting with its employees or representatives in any official capacity, whether as participants in a tariff proceeding or arbitration or, as in this case, in negotiations concerning the systematic exercise of other statutory powers of the Board. The perception of impartiality, if not also the reality, would be undermined if parties have reason to be concerned that those employees or representatives may later use information provided in the course of those interactions in ways that could harm the interests of those who provided it.

36. This is especially important in cases like the Section 77 Discussions, in which *only* the Copyright Board has the statutory authority to fulfill the function at issue, i.e., the issuance of mechanical licences where copyright owners cannot be located. Absent cooperation with the Board, it will be impossible for CMRRA and the other parties to the Pending List Class Action to comply with the Settlement Approval Order. Accordingly, we have no alternative but to deal with the Board, including by providing it with confidential information.. However, the effectiveness of those dealings may well be compromised if the parties are concerned about the misuse of information that they provide to the Board.

37. As matters now stand, the fact that Mr. Bouchard expressly cites his involvement in the Section 77 Discussions as a source of information relied upon in preparing the Bouchard Report is deeply troubling to CMRRA. While I have no reason to believe that the Copyright Board has sanctioned Mr. Bouchard's involvement in this proceeding, or his reliance on information provided to him by CMRRA, I now fear that CMRRA may have to take additional precautions in the future to ensure that information that we provide to the Board is used only for its intended purpose, or at least that we are fully cognizant of the risk that the information may be used for other purposes and conduct our affairs accordingly.

38. CMRRA also has very serious concerns about Mr. Bouchard's continued involvement in the Section 77 Discussions. Certainly, we will most likely be unwilling to share any additional information with him under the circumstances.

**F. The Gervais Book**

39. On July 6, 2015, Mr. Bouchard wrote to Ms. Syrtash with a request for assistance, ostensibly in relation to his contribution to a book entitled *Collective Management of Copyright and Related Rights*, edited by Professor Daniel Gervais (the “**Gervais Book**”). Mr. Bouchard indicated that he had been asked to update a chapter dealing with the collective management of copyright in Canada and asked that Ms. Syrtash provide feedback on specific facts about CMRRA that were published within this text. Specifically, Mr. Bouchard wrote:

Specific facts about CMRRA are published within this text. I have compiled these facts in the attached document for your ease of reference, and would appreciate your expertise and any efforts you could make to confirm whether these facts remain accurate and if not, to suggest any necessary revisions.

A copy of Mr. Bouchard’s e-mail to Ms. Syrtash is attached as **Exhibit “F”** to this affidavit.

40. At the time, neither Ms. Syrtash nor I were aware of Mr. Bouchard’s involvement in the current proceeding. However, considering that he swore his affidavit in this matter less than two months later, on August 27, 2015, I presume that Mr. Bouchard had already been retained to provide his report by the time he wrote to Ms. Syrtash to ask for her assistance with the Gervais Book.

41. Shortly after receiving Mr. Bouchard’s e-mail, Ms. Syrtash forwarded it to me, indicating that she had significant concerns about the accuracy of several of the references to CMRRA in the Gervais Book. After reviewing the attachment to the e-mail, I shared those concerns. It was apparent that Mr. Bouchard was labouring under a number of serious misconceptions about CMRRA and its operations. Among other things, he seemed not to understand fully the nature of our clientele, the extent of our repertoire, or the way in which we distribute royalties.

42. Ms. Syrtash responded to Mr. Bouchard’s request on July 15, 2015 by providing extensive written comments on the document attached to his original e-mail. A copy of those comments, and of Ms. Syrtash’s cover note to Mr. Bouchard, is attached as **Exhibit “G”** to this affidavit.

43. Even after CMRRA was served with the Applicant’s materials, including the Bouchard Report, Mr. Bouchard continued to seek Ms. Syrtash’s assistance with the Gervais Book, writing to her again on September 10, 2015 to clarify some of her earlier comments. A copy of that e-mail is attached as **Exhibit “H”** to this affidavit.

44. Although we had serious misgivings about assisting Mr. Bouchard any further under the circumstances, I eventually instructed Ms. Syrtash to answer Mr. Bouchard's questions, reasoning that it was important to avoid the publication of misinformation about CMRRA and that the subject matter of these particular questions were unlikely to have much bearing on the current proceeding.

45. Given the serious flaws in his contributions to the Gervais Book, and his need to rely on the expertise of others to complete his work, I find it surprising that Mr. Bouchard claims in the Bouchard Report to have expert knowledge of "the operation of the Canadian mechanical licensing market and of [CMRRA]". Needless to say, I do not share that assessment of his expertise.

SWORN BEFORE ME at the City of Toronto,  
in the Province of Ontario on October 19,  
2015



Commissioner for Taking Affidavits  
*(or as may be)*



CAROLINE RIOUX

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.



This is Exhibit "A" referred to in the Affidavit of Caroline Rioux sworn October 19, 2015



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*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.

Court File No.: CV 0800360651 00CP

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN

THE ESTATE OF CHESNEY HENRY "CHET" BAKER JUNIOR BY ITS PERSONAL REPRESENTATIVE CAROL BAKER, and CHET BAKER ENTERPRISES LLC

Plaintiffs

- and -

SONY BMG MUSIC (CANADA) INC., EMI MUSIC CANADA INC., UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA CO., and their Parent, Subsidiary and Affiliated Companies, CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD. and SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS (SODRAC) INC.

Defendants

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c.6

AMENDED  
**FRESH AS AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

AMENDED THIS 3<sup>rd</sup> September 2008  
MODIFIÉ CE 3<sup>rd</sup> Septembre 2008  
RÈGLE 26.02 (1) A  
POURSUANT TO CONFORMEMENT A  
THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE  
REGISTRAR  
SUPERIOR COURT OF JUSTICE  
GREFFIER  
COUR SUPÉRIEURE DE JUSTICE

AMENDED THIS 06 Oct 08  
MODIFIÉ CE 06 Oct 08  
RÈGLE 26.02 (1) A  
POURSUANT TO CONFORMEMENT A  
THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE  
REGISTRAR  
SUPERIOR COURT OF JUSTICE  
GREFFIER  
COUR SUPÉRIEURE DE JUSTICE

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**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

Date: 14 August 2008

Issued by: " J. Richards "

393 University Ave.  
10th Floor  
Toronto, Ontario  
M5G 1E6

**TO:** SONY BMG MUSIC (CANADA) INC.  
190 Liberty Street, Suite 100  
Toronto, Ontario  
M6K 3L5

**AND TO:** EMI MUSIC CANADA INC.  
3109 American Drive  
Mississauga, Ontario  
L4V 1B2

**AND TO:** UNIVERSAL MUSIC CANADA INC.  
2450 Victoria Park Ave, Suite 1  
Toronto, Ontario  
M2J 5H3

**AND TO:** WARNER MUSIC CANADA CO.  
3381 Steeles Avenue East  
Main Floor, Suite 100  
Toronto, Ontario  
M2H 3S7

**AND TO:** CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.  
56 Wellesley Street West, Suite 320  
Toronto, Ontario  
M5S 2S3

**AND TO:** SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS,  
COMPOSERS AND PUBLISHERS (SODRAC) INC.  
759 Victoria Square, Suite 420  
Montreal, Québec  
H2Y 2J7

**THE RELIEF CLAIMED**

1. The Plaintiffs claim on behalf of class members:
  - (a) an Order certifying this matter as a class proceeding and appointing the Plaintiffs as the Representative Plaintiffs on behalf of the class;
  - (b) an Order appointing: (i) Sony BMG Music (Canada) Inc., (ii) EMI Music Canada Inc, (iii) Universal Music Canada Inc., and (iv) Warner Music Canada Co., (the "Defendant Record Companies") as Representative Defendants on behalf of each of their respective parent, subsidiary and affiliated corporations which have reproduced the musical works of the class members without a license to do so;
  - (c) a Declaration that the Defendant Record Companies have knowingly and deliberately infringed class members' copyright in musical works by systematically:
    - (i) making and authorizing the making of sound recordings of the musical works of the Plaintiffs and the class members, without securing a license to do so; and
    - (ii) and selling or renting out, distributing so as to prejudicially affect class members, by way of trade, distributing, exposing or offering for sale or rental or possessing for those purposes, copies of sound recordings of the musical works of class members which the Defendants Record Companies knew or should have known infringed the copyright of the Plaintiffs and the class members;

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- (d) a Declaration that the Defendant Record Companies have been unjustly enriched by their failure or refusal to compensate the class members for the exploitation of their musical works;
- (e) an Order requiring the Defendant Record Companies to account to the class members by paying for and submitting to an independent audit of their books and records, including the contents of the "Pending Lists", in respect of:
  - (i) the musical works reproduced by them without licence and any gains made as a result of such reproductions and;
  - (ii) the mechanical royalties unpaid and any interest earned thereon.
- (f) Damages and disgorgement of profits on an aggregate basis under section 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, or otherwise, for infringement of copyright pursuant to sections 35(1) and 38.1 of the *Copyright Act, R.S., 1985, c. C-42*;
- (g) Alternatively, damages and disgorgement for unjust enrichment on an aggregate basis under section 24 of the *Class Proceedings Act, 1992*, or otherwise for mechanical royalties not paid to the class members, including and any amounts earned by the Defendant Record Companies on the amounts unpaid;
- (h) an Order requiring the Defendant Record Companies to pay punitive and exemplary damages for their reckless, high-handed and arrogant conduct aggravated by their clandestine disregard for the copyright interests of the

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class members in contrast to their strict compliance enforcement policy and unremitting approach to consumers in the protection of their corporate copyright interests;

- (i) an Order requiring the Defendant Record Companies to pay an equitable rate in respect of pre-judgment and post-judgment interest on all amounts owing to class members;
- (j) an Order compelling the creation of a litigation trust to hold and distribute the monetary relief awarded pursuant to a plan of administration and distribution under sections 25 and 26 of the *Class Proceedings Act*, 1992;
- (k) an Order compelling the creation of a conspicuous notice program to class members pursuant to section 19 of the *Class Proceedings Act*, 1992 in order to facilitate the plan of distribution claimed herein;
- (l) a Declaration permitting the inclusion of any member of The Canadian Mechanical Rights Reproductions Agency ("CMRRA") and Society for Reproduction Rights of Authors, Composers and Publishers ("SODRAC") in the class, to the extent that such members have copyright interests in works exploited by the Defendant Record Companies without a license or payment of the applicable mechanical royalty;
- (m) costs of this action on a substantial indemnity basis including the costs associated with notice to class members and the plan of administration and distribution of relief, plus applicable taxes; and
- (n) such further and other relief as this Honourable Court may deem just.

## THE NATURE OF THE ACTION

### *The Defendant Record Companies Keep Lists of Works Exploited Without Licence or for Which Royalties Have Not Been Paid*

2. This class action, brought on behalf of certain copyright owners of musical works, concerns a systematic and internally documented practice by the Defendant Record Companies whereby musical works are exploited without securing a license to do so from their copyright owners or without payment of the applicable mechanical royalty.
3. The Defendant Record Companies record the works exploited by them on lists sometimes known in the Canadian recording industry as "Pending Lists". These lists have accumulated over 300,000 works for which no license has been obtained and no compensation has been paid to the class members. According to the Defendant Record Companies, the lists reflect liabilities for unpaid royalties in excess of \$50,000,000. The liabilities recorded on the Pending Lists do not reflect the value of compensation for infringement of copyright. Rather, they presume that a licence can be obtained from the copyright owner in exchange for payment of the prevailing "industry rate" payable for mechanical reproduction of musical works.
4. All class members are united by their common legal complaint against systematic practices of the Defendant Record Companies, specifically their failure to compensate the class members for the exploitation of musical works itemized on the Pending Lists.
5. The Defendants, CMRRA and SODRAC, operate as intermediaries between copyright owners and the Defendant Record Companies. They are named as

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Defendants in this proceeding to receive notice and be bound by any Orders made.

6. The Plaintiffs seek an order permitting the inclusion of members of CMRRA and SODRAC in the class to the extent that such members have a copyright interest in works exploited by the Defendant Record Companies without license or payment of the applicable mechanical royalty.
7. The Defendant Record Companies have frustrated the utility of CMRRA and SODRAC by restricting their access to the Pending Lists, by their unreliable accounting practices, by providing incomplete or inaccurate information in relation to the musical works used, and by generally refusing to compensate class members. As a result, CMRRA and SODRAC are unable to clear the rights referenced on the Pending Lists.

***The Class Members Have No Access to the Pending Lists***

8. The class members have no reasonable means of:
  - (a) accessing the Pending Lists;
  - (b) determining if their works have been exploited;
  - (c) assessing their claims to adequate compensation for the exploitation of their works.

***Copyright Interests***

9. Each class member has the exclusive right to make copies or reproductions of their works, including the exclusive right to make any sound recording or other contrivance by means of which the musical work might be mechanically



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reproduced or performed. A musical work cannot be reproduced in the form of a ~~record or compact disc~~ sound recording by any party person without permission of the copyright owner and the payment of compensation, known as a "mechanical royalty", to the copyright owner.

10. All class members have a copyright interest in musical works that have been copied, reproduced and sold by the Defendant Record Companies, labels including in the form of records and compact discs, in the course of their business without having obtained a license to do so and/or without payment of a mechanical royalty.

***The Obligations of the Defendant Record Companies***

11. As a result of the Defendant Record Companies' systematic failure to respect copyright law and the breach of their equitable obligations, they are each legally obligated to:
  - (a) account to the class and submit to an audit in respect of all musical works exploited without licence or payment of mechanical royalties;
  - (b) pay statutory damages of \$20,000 for each infringement of copyright for musical works which have been exploited without a license and disgorge any gains made as a result of such exploitation;
  - (c) alternatively, pay damages to the class members for the unpaid mechanical royalties and disgorge any interest earned thereon;
  - (d) pay an equitable rate of interest to the class members on damages, profits and any other compensation owing; and,

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- (e) comply with such further orders as may be made by this Honourable Court.

## THE PARTIES

### *The Plaintiffs and the Class*

12. The Plaintiff, the Estate of Henry Chesney "Chet" Baker Junior, by its personal representative Carol Baker (the "Chet Baker Estate") resides in the City of Toronto, in the Province of Ontario. The Chet Baker Estate is an owner of a copyright owner-of in musical works composed and arranged by Chet Baker.
13. Chet Baker Enterprises LLC is an Oklahoma corporation with principal operations in the City of Toronto in the Province of Ontario. Chet Baker Enterprises LLC is also an owner of copyright owner-of in musical works composed and arranged by Chet Baker.
14. Chet Baker was a prolific jazz musician known internationally as a trumpet player and vocalist. Mr. Baker composed and arranged several musical works between 1950 and 1988, the year of his death. The ~~Chet Baker Estate~~ Plaintiffs own a copyright interest in over 50 such works.
15. The Plaintiffs state that Chet Baker song titles are referenced over 100 times on the Pending Lists maintained by the Defendant Record Companies.
16. The Plaintiffs bring this action and claim the relief set out herein pursuant to the *Copyright Act*, equitable legal principles and the *Class Proceedings Act, 1992*, on behalf of a class defined as follows:

*"Any owner of a copyright in a musical work that has been reproduced by the Defendant Record Companies, or any one of them,*

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- (a) *on a sound recording or other contrivance, including compact discs, by means of which the musical work might be mechanically reproduced or performed;*
- (b) *made and/or distributed in Canada; and*
- (c) *without a licence from the owner of the copyright authorizing the reproduction or the payment of a mechanical royalty."*

### ***The Defendants***

#### **Representative Orders**

17. The four Defendant Record Companies are the Canadian ~~divisions~~ operations of multi-national corporations with various affiliates and subsidiaries, all of which have exploited the musical works of the class members.
18. The named Defendant Record Companies have been nominated by their subsidiary and affiliated companies to maintain the Pending Lists described herein in respect of the exploitation of the relevant musical works in or from Canada. As a result, the Plaintiffs seek an Order that the named Defendant Record Companies should be appointed as Representative Defendants on behalf of their parent, subsidiary and affiliated corporations which have exploited the musical works of the class members without a license or compensation.

#### **The EMI Defendants**

19. EMI Music Canada Inc. is an Ontario corporation with its head office located in the City of Mississauga, in the Province of Ontario. It is a subsidiary of EMI Music, which is a division of EMI Group plc, a United Kingdom corporation with its head office located in London, England.
20. EMI Group plc is owned by Terra Firma Capital Partners Limited, a United Kingdom private equity firm with its head office located in London, England.

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21. EMI Music is one of the world's largest music companies. It operates directly or via licensees in 59 countries. Its revenues for the financial year ended March 31, 2007 were £1,350,200,000.
22. EMI Music is affiliated with over 100 record labels through subsidiary or distribution relationships.
23. The Plaintiffs seek an Order appointing EMI Music Canada Inc. as a Representative Defendant on behalf of all parent, subsidiary, and affiliate corporations on whose behalf it maintains the Pending Lists in Canada.

#### **The Universal Defendants**

24. Universal Music Canada Inc. is an Ontario corporation with its head office located in the City of Toronto, in the Province of Ontario. It is a subsidiary of Universal Music Group.
25. Universal Music Group is a California corporation with its head office located in Santa Monica, California. It is a subsidiary of Vivendi SA, a French company with its head office located in Paris, France.
26. Universal Music Group is the largest business group and family of record labels in the music industry, with a 25.5% share of the global market. It operates directly or via licensees, joint ventures and subsidiaries in over 70 countries.
27. Universal Music Group is affiliated with over 300 record labels through subsidiary or distribution relationships.

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28. The Plaintiffs seek an Order appointing Universal Music Canada Inc. as a Representative Defendant on behalf of all parent, subsidiary, and affiliate corporations on whose behalf it maintains the Pending Lists in Canada.

#### **The Warner Defendants**

29. Warner Music Canada Co. is an Ontario corporation with its head office located in the City of Toronto, in the Province of Ontario. It is a subsidiary of Warner Music Group, a Delaware corporation, with its head office located in New York, New York.
30. In 2007, Warner Music Group reported revenues of \$3,385,000,000.
31. Warner Music Group is affiliated with over 100 record labels through subsidiary or distribution relationships.
32. The Plaintiffs seek an Order appointing Warner Music Canada Co. as a Representative Defendant on behalf of all parent, subsidiary, and affiliate corporations on whose behalf it maintains the Pending Lists in Canada.

#### **The Sony BMG Defendants**

33. Sony BMG Music (Canada) Inc. is an Ontario corporation with its head office located in the City of Toronto, in the Province of Ontario. It is a subsidiary of Sony BMG Music Entertainment, which in turn is a joint venture between Sony Corporation and Bertelsmann A.G.
34. Sony Corporation is a multinational conglomerate corporation with its principal place of business located in Minato-ku, Tokyo, Japan. Bertelsmann A.G. is a German corporation with its principal place of business located in Gütersloh,

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Germany. Sony Corporation and Bertelsmann A.G. each own 50% of Sony BMG Music Entertainment.

35. Sony BMG Music Entertainment affiliated with over 100 record labels through subsidiary or distribution relationships.
36. The Plaintiffs seek an Order appointing Sony BMG Music (Canada) Inc. as a Representative Defendant on behalf of all parent, subsidiary, and affiliate corporations on whose behalf it maintains the Pending Lists in Canada.

#### **The CMRRA and SODRAC Defendants**

37. CMRRA is a Canadian corporation, with its head office located in the City of Toronto, in the Province of Ontario.
38. SODRAC is a Canadian corporation, with its head office located in the City of Montreal, in the Province of Québec.
39. CMRRA and SODRAC are music licensing agencies or collective societies which represent certain music copyright owners doing business in Canada.
40. CMRRA and SODRAC issue licenses to users of their members' reproduction rights in copyrighted music. These licenses authorize the reproduction of music in CDs and in films, television programs and other audio-visual productions. Licensees pay royalties pursuant to these licenses to CMRRA and SODRAC, who in turn distribute the proceeds to their ~~publisher clients~~ members.

## THE UNLAWFUL ACTS OF THE DEFENDANT RECORD COMPANIES

### *Infringement of Copyright*

41. Section 3(1) of the *Copyright Act* provides owners of copyright owners ~~of in~~ musical works with the sole right, among other things, to produce, reproduce, perform, sell, and make a sound recording records, of their musical works.
42. Pursuant to section 27(1) of the *Copyright Act*, it is an infringement of copyright to do, without the consent of the owner of the copyright, anything that by the *Copyright Act* only the owner of the copyright has the right to do, such as making and authorizing the making of sound recordings.
43. Pursuant to section 27(2), it is an infringement to sell or rent out, distribute so as to prejudicially affect the owner of the copyright, by way of trade distribute, expose or offer for sale or rental, possess for those purposes and/or import into Canada for those purposes copies of sound recordings of musical works that a person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.
44. By reproducing the musical works of the class members, and making sound recordings or other contrivances, including CDs, by means of which the class members' musical works might be mechanically reproduced or performed, all without license or payment of a royalty, the Defendant Record Companies have infringed all of the class members' copyrights in their works.
45. Since at least 1988, the exact date being unknown to the Plaintiffs, the Defendant Record Companies have produced, reproduced, manufactured, distributed, imported, exported, marketed and sold hundreds of thousands of

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sound recordings of musical works and/or compilations of such sound recordings for distribution in Canada and in foreign markets.

46. Amongst those, the Defendant Record Companies have knowingly and deliberately made or authorized the making of, sold or rented out, distributed, exposed or offered for sale or rental, possessed and/or imported over 300,000 sound recordings of musical works and/or compilations of such sound recordings in Canada and/or for distribution in Canada and in foreign markets without:
  - (a) securing a licence to do so; and/or,
  - (b) paying the applicable mechanical copyright royalty or other compensation to the copyright owner.
47. Those works for which neither a licence has been obtained nor a royalty paid are memorialized by the Defendant Record Companies on lists known as the Pending Lists.
48. The Pending Lists facilitate the Defendant Record Companies' systematic "exploit now, pay later, if at all" approach. The lists are compiled on the basis that the Defendant Record Companies have purportedly been unable to locate the copyright owner in order to secure a license or pay a royalty. The Defendant Record Companies have made insufficient or no effort to locate and compensate those copyright owners whose works appear on the Pending Lists.
49. The existence of the lists is evidence that the Defendant Record Companies must pay damages and disgorge their profits for infringement of copyright, or alternatively, pay mechanical royalties and/or other compensation to the class



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members for the use made of their sound recordings. The Plaintiffs claim that the accounting and audit relief requested herein will be required before it can be determined whether the Pending Lists are complete or accurate or that the stated royalty amounts owing are correct or sufficient to compensate the class members for the exploitation of their musical works.

50. Over time, the monies earmarked by the Defendant Record Companies for the copyright owners on the Pending Lists, have grown to astronomical size, estimated by the Defendant Record Companies at \$50,000,000. The Plaintiffs do not accept the Defendant Record Companies' estimation of the amounts owing to the class members.
51. The Defendant Record Companies have unjustifiably failed or refused to:
  - (a) clear the rights associated with the works on the Pending Lists;
  - (b) clear the rights associated with other works used without a license; and/or,
  - (c) duly compensate the class members for the exploitation of their musical works.
52. The conduct of the Defendant Record Companies is copyright infringement on a grand scale. Once the Defendant Record Companies have made use of a copyrighted work, there is no incentive for them to exercise due diligence to locate the owner of the work to seek consent retroactively, or to pay the royalty that is owed for the exploitation of the work. The Defendant Record Companies have a duty to account to every member of the proposed class.

***Unjust Enrichment***

53. The Defendant Record Companies collectively have been unjustly enriched to the detriment of the class as a whole to the extent that the class members' musical works have been exploited without licence or the payment of appropriate compensation.
54. There is no juristic reason for the enrichment of the Defendant Record Companies.

***The Claims Against the CMRRA and SODRAC Defendants***

55. The Plaintiffs seek a declaration that any member of CMRRA and SODRAC whose owns the reproduction right in works that have been exploited by the Defendant Record Companies without a licence or the payment of the applicable mechanical royalty may be included in the class and participate in the within action.

***Claims Against The Defendant Record Companies***

56. The practice of systematically infringing copyright or permitting the infringement of copyright is conduct intertwined as between the Defendant Record Companies. It is conduct relied upon in common by each of the Defendant Record Companies to use and exploit the musical works owned by the class members without seeking license or making payment of the applicable royalty to the detriment of copyright owners.
57. The Plaintiffs state that the Defendant Record Companies have agreed and conspired together to create a scheme where they can not be effectively called to account for infringement of the class members' copyright.

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58. The entire scheme created by the agreement between the Defendant Record Companies was unlawful. It was intended to and did harm the class members by facilitating the reproduction of unlicensed musical works without payment of the compensation owed to them.
59. The conduct of all of the Defendant Record Companies has been concealed from the class members and from the public.

## **REMEDIES**

### ***An Accounting and The Copyright Royalty Audit***

60. The Defendant Record Companies have exploited the works of the class members in the course of their business.
61. The Plaintiffs claim an accounting for the works exploited, the compensation withheld and the profits received for the use of the class members' musical works.
62. The Plaintiffs seek a copyright royalty audit of the entirety of the Pending Lists and the books and records of the Defendant Record Companies. It is essential that the rights of the class members and the obligations of the Defendant Record Companies in respect of works which are or ought to be contained on the Pending Lists be accounted for and verified by an independent copyright royalty audit for all class members. The copyright royalty audit claimed is a precursor to the remainder of the relief claimed herein.

63. The Defendant Record Companies must accurately account for:
- (a) each musical work exploited by them without licence or payment of compensation to the copyright owner;
  - (b) the number of reproductions made of each musical work;
  - (c) any amounts obtained by them as a result of the exploitation of the class members' musical works;
  - (d) the applicable mechanical royalty which is unpaid or which should have been paid had a license been obtained;
  - (e) for any benefits obtained by them from the withheld funds.

***Conspicuous Publication of the Exploited Works and their Mechanical Copyright Owners***

64. The Plaintiffs claim the creation of a conspicuous and comprehensive notice program affording notice to the class members of the exploitation of their works and the compensation owed to them by the Defendant Record Companies pursuant to section 19 of the *Class Proceedings Act, 1992*.

***Monetary Remedies and Plan of Distribution***

65. As a result of the acts and omissions of the Defendant Record Companies as particularized above, the Plaintiffs and the class members have suffered losses and damages.
66. All amounts payable to the class on account of damages and disgorgement should be calculated on an aggregate basis pursuant to s. 24 of the CPA, or otherwise. Such damages ought to be housed in a litigation trust and distributed

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pursuant to a plan of distribution under sections 25 and 26 of the *Class Proceedings Act, 1992*.

67. Alternatively, if so elected, the appropriate mechanical royalties unpaid and any gains made thereon should be calculated on an aggregate basis or otherwise should be housed in a litigation trust and distributed pursuant to the plan of distribution under sections 25 and 26 of the *Class Proceedings Act, 1992*.

#### ***Punitive and Exemplary Damages***

68. The conduct of the Defendant Record Companies in exploiting the musical works of the class members without securing a license or making payment of the prevailing royalty is so reckless, arrogant and high-handed that an award of punitive and exemplary damages should be awarded to the class members.
69. The conduct of the Defendant Record Companies is aggravated by their strict and unremitting approach to the enforcement of their copyright interests against consumers.

#### **STATUTES RELIED UPON**

70. The Plaintiffs rely upon the *Copyright Act, R.S.C. 1985, c. C-43*, the *Class Proceedings Act, 1992, S.O. 1992, c. 6*, and the *Courts of Justice Act, R.S.O. 1990, c.C.43*.

#### **SERVICE OUTSIDE OF ONTARIO**

71. This originating process may be served without Court Order outside of Ontario in that the claim is:
- (a) in respect of a tort committed in Ontario (Rule 17.02 (g));

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- (b) in respect of damages sustained in Ontario arising from a tort or a breach of contract wherever committed (Rule 17.02 (b)), and;
- (c) against a person carrying on business in Ontario (Rule 17.02 (p)).

**PLACE OF TRIAL**

72. The Plaintiffs propose that this action be tried in Toronto, Ontario.

Date: August 14, 2008

**HARRISON PENZA <sup>LLP</sup>**

Barristers & Solicitors  
450 Talbot Street  
London, ON N6A 4K3.

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Co-Counsel for the Plaintiffs.

THE ESTATE OF CHESNEY HENRY "CHET" BAKER  
JUNIOR BY ITS PERSONAL REPRESENTATIVE  
CAROL BAKER, et al.

-and-

SONY BMG MUSIC (CANADA) INC., et al.

Court File No.: CV 0800360651 00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT TORONTO**

**AMENDED FRESH AS AMENDED  
STATEMENT OF CLAIM**

**HARRISON PENZA** <sup>LLP</sup>  
Barristers & Solicitors  
450 Talbot Street  
London, ON N6A 4K3.

**David B. Williams (LSUC #21482V)**  
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Tel: (519) 679-9660  
Fax: (519) 667-3362

Co-Counsel for the Plaintiffs

This is Exhibit "B" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



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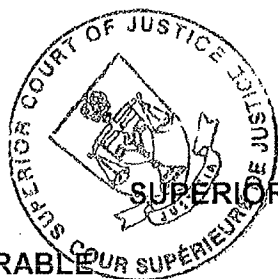
*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.



- 1 -



Court File No.: CV080036065100CP

ONTARIO  
SUPERIOR COURT OF JUSTICE

THE HONOURABLE )  
MR. JUSTICE GEORGE R. STRATHY )  
MONDAY, THE 30<sup>th</sup> DAY  
OF MAY, 2011.

BETWEEN:

CRAIG NORTHEY

Plaintiff

- and -

SONY MUSIC ENTERTAINMENT CANADA INC., EMI GROUP CANADA INC.,  
UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA CO., and their  
Parent, Subsidiary and Affiliated Companies, CANADIAN MUSICAL  
REPRODUCTION RIGHTS AGENCY LTD., SOCIETY FOR REPRODUCTION  
RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS (SODRAC) INC. and  
SODRAC 2003 INC.

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c.6*

## ORDER

**THIS MOTION** made by the Plaintiff for an Order certifying this action as a class proceeding for settlement purposes as against Sony Music Entertainment Canada Inc., EMI Group Canada Inc., Universal Music Canada Inc., Warner Music Canada Co. (the "Record Label Defendants"), the Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA"), the Society For Reproduction Rights of Authors, Composers and Publishers (SODRAC) Inc. ("SODRAC") and SODRAC 2003 Inc. ("SODRAC 2003") (the "Collective Society Defendants") (collectively, the "Defendants") and for an Order approving the Settlement Term Sheets entered into by the Plaintiff with each of the Record Label

- 2 -

Defendants, the Key Terms of Settlement (the "CSI Term Sheet"), the Co-operation Agreement with CMRRA and SODRAC, the "Held Royalties Agreement" with CMRRA and SODRAC and the "Held Royalties Credit Agreement" between all parties (collectively, the "Settlement Agreements") was heard this day at the Court House, 130 Queen Street West, Toronto, Ontario.

**ON READING** the materials filed, including the Settlement Agreements attached to this Order as Exhibit "A", and on hearing the submissions of counsel for the Plaintiff and counsel for the Defendants:

1. **THIS COURT ORDERS** that this action is certified as a class proceeding as against the Defendants for settlement purposes only.
2. **THIS COURT ORDERS** that Class Member is defined as:

Any rights holder who holds, or who has held at any time, rights in a musical work embodied in an audio product or a video product first released or distributed in Canada by any of the Record Label Defendants at any time up to and including December 31, 2012, for which rights the applicable Record Label Defendant was required to obtain a reproduction licence (including, in relation to video products, any necessary synchronization licence) but for which either no such licence has been obtained for the reproduction of the musical work or for which the required royalties have not been paid for the reproduction of the musical work despite the issuance of such a licence.
3. **THIS COURT ORDERS** that Craig Northey be appointed as the Representative Plaintiff on behalf of the Class Members.
4. **THIS COURT ORDERS** that this action is certified as a class proceeding, for settlement purposes only, on the basis of the following common issue:

Did the Record Label Defendants make or authorize the making of physical copies of recorded audio and/or video performances of the Class Members' musical works, without a reproduction licence, including in relation to video products, any necessary synchronization license to do so and/or without the payment of the applicable royalties?
5. **THIS COURT ORDERS** that the Settlement Agreements, collectively exhibit as Exhibit "A", are hereby approved and are incorporated by reference into

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and form part of the Order.

6. **THIS COURT DECLARES** that the terms and conditions of the Settlement Agreements are fair, reasonable and in the best interests of Class Members.
7. **THIS COURT ORDERS** that Class Members may opt out of this class proceeding by sending a completed opt-out form attached as Exhibit "B" to this Order to Class Counsel no later than 60 days from the date on which the first publication of the Notice of Certification and Settlement Approval is made and that Class Counsel shall provide all opt-out forms received to the Defendants forthwith upon receipt.
8. **THIS COURT ORDERS** that the Settlement Class is defined as all Class Members who have not validly opted out in accordance with the terms of this Order;
9. **THIS COURT ORDERS** that any Class Member who has opted out of this action by submitting a timely and properly completed opt-out form to Class Counsel is not bound by the Settlement Agreements.
10. **THIS COURT ORDERS** that no Class Member may opt out of the action after the expiry of the opt-out period.
11. **THIS COURT ORDERS** that the Plaintiff shall serve and file an Affidavit, under seal, containing the list of the Class Members who have validly opted out of this class proceeding, and attaching all opt-out forms received, within 60 days following the expiry of the opt-out period.
12. **THIS COURT ORDERS** that each Record Label Defendant shall have the right but not the obligation, in its sole discretion, to terminate its Settlement Agreement and the CSI Term Sheet and proceed with the action as if the parties had never entered into the Settlement Agreement, if the percentage of class members who opt out of its

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settlement agreement exceeds the "opt-out threshold" as agreed upon between the parties and as filed under seal with the Court, in which case all funds paid by each Record Label Defendant pursuant to its settlement agreement, including any amount advanced to CSI from the Settlement Trust pursuant to section 2.06 of the CSI Term Sheet, shall be returned forthwith, with applicable interest thereon net of notice expenses and administration expenses, if any, which are payable to the Trustee of the Settlement Trust.

13. **THIS COURT ORDERS AND DECLARES** that the Order, including the Settlement Agreements, is binding upon the Representative Plaintiff and each Settlement Class Member who has not validly opted out, including those persons who are minors or mentally incapable, and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of this action.
  
14. **THIS COURT ORDERS** that each of the Plaintiff, Settlement Class Members, and the Collective Society Defendants, and their respective predecessors, successors, heirs, executors, administrators and assigns (collectively, for the purposes of this paragraph 14, the "Releasers") has released and shall be conclusively deemed to have forever and absolutely released the Record Label Defendants and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, and their respective past and future officers, directors, employees and agents, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing (collectively, the "Record Label Releasees") from any and all manner of claims, demands, actions, causes of action (including, but not limited to claims for administration, notice and legal costs), known or unknown, arising under law, statute, equity or otherwise, class or individual, which were asserted or could have been asserted in the within action filed in the Ontario Superior Court of Justice bearing court file No. CV-080036065100CP (the "Record Label Released Claims"). The Releasers shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly,

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whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Record Label Releasee, or any other person who may claim contribution or indemnity from any such Releasee in respect of any Record Label Released Claim, or any matter related thereto.

15. **THIS COURT ORDERS** that each of the Plaintiff and Settlement Class Members and their respective predecessors, successors, heirs, executors, administrators and assigns (collectively for the purposes of this paragraph 15, the "Releasors"), has released and shall be conclusively deemed to have forever and absolutely released the Collective Society Defendants and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, and their respective past and future officers, directors, employees and agents, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing (collectively, the "Collective Society Releasees") from any and all manner of claims, demands, actions, causes of action (including, but not limited to claims for administration, notice and legal costs), known or unknown, arising under law, statute, equity or otherwise, class or individual, which were asserted or could have been asserted in the within action filed in the Ontario Superior Court of Justice bearing court file No. CV-080036065100CP or in relation to the matters addressed in the Amendment to the Co-operation Agreement and Minutes of Settlement between the Plaintiff, CMRRA, SODRAC and SODRAC 2003 dated May 26<sup>th</sup>, 2011 (the "Co-Operation Agreement Amendment") (the "Collective Society Released Claims"). The Releasors shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Collective Society Releasee, or any other person who may claim contribution or indemnity from any such Releasee in respect of any Collective Society Released Claims, or any matter related thereto.

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16. **THIS COURT ORDERS** that each of the Record Label Defendants, and their respective predecessors, successors, heirs, executors, administrators and assigns (collectively for the purposes of this paragraph 16, the "Releasers"), has released and shall be conclusively deemed to have forever and absolutely released the Collective Society Defendants and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, and their respective past and future officers, directors, employees and agents, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing (collectively, the "Collective Society Releasees") from any and all manner of claims, demands, actions, causes of action (including, but not limited to claims for administration, notice and legal costs), known or unknown, arising under law, statute, equity or otherwise, class or individual, in respect of the Held Royalties received up to and including December 31, 2009 (as that term is defined in the Amendment to the Co-Operation Agreement and Minutes of Settlement) other than in respect of Held Royalties attributable to Class Members who have opted out of this action (the "Released Held Royalties Claims"). The Releasers shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Collective Society Releasee, or any other person who may claim contribution or indemnity from any such Releasee in respect of any Released Held Royalties Claims, or any matter related thereto.
17. **THIS COURT ORDERS** that the release and undertaking in paragraph 14 above shall apply to EMI Group Canada Inc. video products subject to the provision of the representation and warranty required by paragraph 2 of the EMI Settlement Agreement, and the completion of the Attestation and Due Diligence pursuant to paragraph 6 of that agreement, all in respect of such video products only.
18. **THIS COURT ORDERS** that this action be and the same hereby is dismissed against the Defendants without costs and with prejudice.

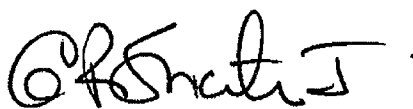
- 7 -

19. **THIS COURT ORDERS** that the Plan of Administration, attached hereto as Exhibit "C", is hereby approved pursuant to s. 26 of the *Class Proceedings Act*, 1992 and shall be implemented in accordance with its terms.
20. **THIS COURT ORDERS** that the Notice of Certification and Settlement Approval to Class Members is hereby approved in substantially the form attached hereto as Exhibit "D".
21. **THIS COURT ORDERS** that the Method of Disseminating the Notice of Certification and Settlement Approval, as set out in the Method of Dissemination, attached hereto as Exhibit "E", is hereby approved.
22. **THIS COURT ORDERS** that Class Counsel and/or the Settlement Administrator, CMRRA-SODRAC Inc. ("CSI") shall be reimbursed out of the Settlement Fund, in an amount of up to \$150,000, for expenses related to the dissemination of notice to class members.
23. **THIS COURT ORDERS** that CSI be appointed as the Settlement Administrator to administer the Settlement Funds in accordance with the terms of the Settlement Agreements and the Plan of Administration.
24. **THIS COURT ORDERS** that the compensation payable to CSI in respect of settlement administration pursuant to the Settlement Agreements and the Plan of Administration, including an initial advance of \$1,500,000.00, is fair and reasonable and is hereby approved.
25. **THIS COURT ORDERS** that TD Waterhouse Private Client Services shall be appointed as the Independent Trustee to maintain and invest the Settlement Funds in accordance with the terms of the Settlement Agreements and the Plan of Administration.
26. **THIS COURT ORDERS** that the agreement by the Record Label Defendants to collectively contribute \$600,000 in respect of fees, taxes and disbursements is approved, without prejudice to Class Counsel's ability to seek additional

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fees, taxes and disbursements out of the Settlement Fund.

27. **THIS COURT ORDERS** that the balance of the fees, taxes and disbursements payable to Class Counsel out of the settlement funds shall be determined at a subsequent hearing, on a date to be set and on notice to Class Members and the Defendants.
28. **THIS COURT ORDERS** that the Notice Regarding the Process to Claim Settlement Benefits and the Method of Disseminating the Notice Regarding the Process to Claim Settlement Benefits shall be approved at a subsequent hearing, on a date to be set.

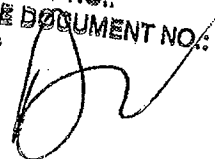


Strathy J.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

MAY 31 2011

AS DOCUMENT NO.:  
À TITRE DE DOCUMENT NO.:  
PER / PAR:





Court File No. CV 0800360651 00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CRAIG NORTHEY**

Plaintiff

- and -

**SONY MUSIC ENTERTAINMENT CANADA INC., EMI GROUP CANADA INC., UNIVERSAL  
MUSIC CANADA INC., WARNER MUSIC CANADA CO., and their Parent, Subsidiary and  
Affiliated Companies, CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.,  
SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS  
(SODRAC) INC. and SODRAC 2003 INC.**

Defendants

**PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992,  
S.O. 1992, c.6**

**KEY TERMS OF SETTLEMENT BETWEEN  
THE PLAINTIFF, CMRRA, SODRAC, EMI, SONY, UNIVERSAL AND WARNER**

1. **Determination and Payment of Pending Royalties**
  - 1.01 **Interpretation.** For the purposes of these Key Terms of Settlement,
    - (a) in addition to any terms specifically defined below, capitalized terms have the meanings ascribed to them in Schedule "A"; and
    - (b) any period of time described as being "between" two specific dates includes both the first and the last date of that period. (For example, reference to "Products Released in Canada between July 1, 2007 and December 31, 2009" includes both Products Released on July 1, 2007 and Products Released on December 31, 2009.)
  - 1.02 **Class Members.** For the purposes of this Term Sheet and each Settlement Agreement, the class will consist of any Rightsholder who holds, or who has held at any time, Rights in a Musical Work embodied in an Audio Product or a Video Product first Released by any of the Labels at any time, up to and including December 31, 2012, for which Rights the applicable Label was required to obtain a reproduction licence (including, in relation to Video Products, any necessary synchronization licence) but for which either no such licence has been obtained for the reproduction of the Musical Work or for which the required Royalties have not been paid for the reproduction of the Musical Work paid despite the issuance of such a licence.
  - 1.03 **Settlement Administrator.** CMRRA-SODRAC Inc. or another entity owned and controlled jointly by CMRRA and SODRAC ("CSI") will act as settlement administrator, reporting to the Trustee (as defined in paragraph 1.05) and responsible for the administration of the

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Settlement Trust (as defined in paragraph 1.05) in accordance with the principles, terms and conditions set out in this Term Sheet, all under the supervision of the court.

- 1.04 **First Report.** Within the time period set out for this purpose in each Label's Settlement Agreement, each Label will determine its total Pending Royalties as at its Reporting Date and provide to the plaintiff and CSI a report (the "**First Report**"), in a commercially reasonable electronic format mutually agreed to between the Labels and CSI, each acting reasonably, setting out:
- (a) its total Pending Royalties as at its Reporting Date, broken out into Pending Audio Royalties and Pending Video Royalties;
  - (b) separately, its total Pending Audio Royalties and Pending Video Royalties as at its Reporting Date for Products Released (i) at any time up to and including June 30, 2007 ("**Group I Product**"), and (ii) between July 1, 2007 and December 31, 2009, inclusive ("**Group II Product**");
  - (c) a comprehensive list of all Sound Recordings in relation to which Pending Royalties are recorded as at its Reporting Date, including, in relation to each such Sound Recording:
    - (i) all information that is reasonably available to the Label to assist in identifying the Musical Work embodied in the Sound Recording, the Rightsholder(s) associated with that Musical Work, and the Product(s) in which the Sound Recording has been Released in Canada, and
    - (ii) the amount of Pending Royalties recorded as at that date in relation to each Product in which the Sound Recording has been Released in Canada;
  - (d) a comprehensive list of Rightsholders to whom the Label paid Royalties between January 1, 2000 and its Reporting Date in relation to Audio Products and Video Products, including Royalties that have been paid to CMRRA and/or SODRAC as representative(s) of the Rightsholder in question;
  - (e) the most up-to-date contact information available to the Label in relation to each Rightsholder to whom the Label paid Royalties directly (i.e., not through CMRRA or SODRAC) between January 1, 2000 and its Reporting Date in relation to Products covered by this Term Sheet;
  - (f) the total Audio Royalties and Video Royalties paid to each Rightsholder (the "**Individual Rightsholder Payments**") in each year from January 1, 2000 through December 31, 2009 (except in the case of Universal, which, because of systems limitations described below, can provide such information in relation only to the period beginning January 1, 2003 and ending December 31, 2009), calculated on either a quarterly or an annual basis, in relation to sales of Products through December 31, 2009, including any amounts paid to CMRRA and/or SODRAC as representative of a Rightsholder;
  - (g) the total Audio Royalties and Video Royalties paid to all Rightsholders (the "**Aggregate Rightsholder Payments**") in each year from January 1, 2000 through December 31, 2009 (except in the case of Universal, which, because of systems limitations described below, can provide such information in relation only to the period beginning January 1, 2003 and ending December 31, 2009), calculated on either a quarterly or an annual basis, in relation to sales of Products through December 31, 2009, including any amounts paid to CMRRA and/or SODRAC as representative of a Rightsholder;

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- (h) any and all particulars available to the Label, after using all reasonable commercial efforts, in relation to any Existing Dispute relating to Royalties that are to be paid as part of that Label's Settlement Amount, including at minimum the identities of the parties to the Existing Dispute (if reasonably available to the Label) and the amount of Royalties at issue.

For greater certainty, the information required by subparagraphs 1.04(a), (b) and (c) shall be provided only in relation to Products (or, where a Product is only partially cleared, Musical Works embodied in that Product) for which Pending Royalties remain payable as at the Reporting Date and only to the extent of the amount actually paid by the applicable Label into the Settlement Trust pursuant to paragraph 1.05. Specifically, whenever an adjustment is made pursuant to subparagraph 1.05(b)(ii), the amounts paid to the applicable Rightsholders will be deducted from the amounts that would otherwise be reported pursuant to subparagraphs 1.04(a) and (b), and the list provided pursuant to subparagraph 1.04(c) will be adjusted to report only the amount of Pending Royalties (if any) that remains payable in relation to that Product or Musical Work – or, if all Pending Royalties have been paid to the applicable Rightsholders, to exclude that Product or Musical Work entirely.

The plaintiff, CMRRA and SODRAC acknowledge and accept that (i) as a result of changes made by EMI to its accounting systems effective on or about January 1, 2005, information provided by EMI in relation to the period ending December 31, 2004 may be somewhat less complete than information provided in relation to the period commencing January 1, 2005; and (ii) as a result of changes made by Sony to its accounting systems as part of its merger with BMG Music Canada Inc., information provided by Sony in relation to the period ending December 31, 2006 may be somewhat less complete than information provided in relation to the period commencing January 1, 2007; and (iii) as a result of changes made by Universal when it merged with Polygram in 1999, information relating to the pre-1999 time period may be somewhat less complete than information relating to the post-1999 time period and as a result of changes made by Universal to implement electronic licensing in 2004, the information provided by Universal in relation to the period prior to when it commenced electronic licensing may be less complete than information provided for the period following the implementation of electronic licensing, including but not limited to the fact that Universal does not have music publisher information relating to payments made to Rightsholders prior to January 1, 2003 for Musical Works represented by CMRRA and SODRAC.

#### 1.05 Initial Payment into Settlement Trust.

- (a) On the same day as its First Report is provided, each Label will pay its Settlement Amount, adjusted in accordance with subparagraph 1.05(b), into one or more interest-bearing trust accounts established specifically for those funds (the "**Settlement Trust**"). The trustee of the Settlement Trust (the "**Trustee**") will be approved by the court on the consent of the plaintiff, CMRRA, SODRAC and the Labels and appointed pursuant to a trust agreement to be negotiated in good faith by the parties to this Term Sheet, and will supervise the administration of the Settlement Trust in consultation with representatives of the plaintiff, CMRRA and SODRAC (and in consultation with the Labels in relation only to issues related to the potential repayment of monies to them out of the Settlement Trust pursuant to paragraphs 1.08(b) or 1.11). Any interest accrued on monies deposited into the Settlement Trust will be applied pro-rata to monies eventually distributed pursuant to the Settlement Agreement, including, where applicable, to the Label where funds are returned to the Label.

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- (b) The amount to be paid into the Settlement Trust by each Label will be adjusted to reflect only
- (i) In the case of Sony, Universal and Warner, increases to the Settlement Amount equal to the aggregate of (x) any and all additional Royalties payable in relation to additional sales of Group I and Group II Product during the applicable Label's Adjustment Period, calculated at the rate established in that Label's royalty accounting system in relation to each Product in question at the time of its Release, and (y) any and all additional Royalties payable in relation to Reserves taken for Group I and Group II Product and liquidated during that Label's Adjustment Period; and
  - (ii) In the case of each of the Labels, reductions to the Settlement Amount equal to the aggregate of (x) any and all amounts actually paid to Rightsholders or their authorized representatives during the applicable Label's Adjustment Period in satisfaction of Pending Royalties recorded by that Label for sales of Group I and Group II Product on or before its Settlement Cut-Off Date, and (y) Royalties payable in relation to units of Group I and Group II Product that are returned to the applicable Label during its Adjustment Period, but only to the extent that amounts potentially payable to Rightsholders for the returned Products are reflected in that Label's Settlement Amount.

Any adjustments made pursuant to this subparagraph 1.05(b) must be supported by either (x) documentation available to and provided by the Label, acting reasonably, summarizing the particulars of the Royalties payable by the Label pursuant to subparagraph 1.05(b)(i), the amounts actually paid by the Label pursuant to subparagraph 1.05(b)(ii), and any reductions made pursuant to subparagraph 1.05(b)(ii) on account of returns, with a letter from the Label's chief financial officer representing, warranting and certifying the accuracy of the information so summarized and full documentation to support payments of \$1,000 or greater pursuant to any Direct Licence, or (y) documentation satisfactory to each of CMRRA, SODRAC and the plaintiff, each acting reasonably, setting out the particulars of both the Royalties payable by the Label pursuant to subparagraph 1.05(b)(i), the amounts actually paid by the Label pursuant to subparagraph 1.05(b)(ii), and any reductions made pursuant to subparagraph 1.05(b)(ii) on account of returns. In the case of Sony, the information provided pursuant to clause (x) above will be limited for technical reasons to particulars of the Royalties payable pursuant to subparagraph 1.05(b)(i) and the amounts actually paid pursuant to subparagraph 1.05(b)(ii) and full documentation to support payments of \$1,000 or greater pursuant to any Direct Licence issued on or after July 1, 2010. In the event that any dispute as to any such adjustment cannot be resolved by the parties, using their best efforts, within 10 business days after the delivery of written notice by the disputing party to the others, the dispute will be submitted for summary binding resolution.

- (c) In the event of any inconsistency between this paragraph 1.05 and any Label's Settlement Agreement, the provisions of this paragraph 1.05 will govern to the extent of that inconsistency.

1.06 **Due Diligence.** Where a Label's Settlement Agreement provides for a Due Diligence Meeting, the Label will cause the Due Diligence Meeting to take place within the time specified in its Settlement Agreement and provide all information required by the Settlement Agreement in relation thereto. The plaintiff, CMRRA and SODRAC acknowledge that the Due Diligence Meeting for each of Sony and Warner has already taken place, that all

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information required by the Settlement Agreement in relation to each of those Labels' Due Diligence Meetings has been provided, and that, in all respects, each of Sony and Warner has fully complied with its Due Diligence obligations. The plaintiff, CMRRA and SODRAC further acknowledge that the Due Diligence Meeting for EMI has taken place only in relation to EMI's Audio Royalties, that all information required by the EMI Settlement Agreement in relation to those Audio Royalties, has been provided, and that EMI has fully complied with its Due Diligence obligations in that respect; further, although no Due Diligence Meeting has yet taken place in relation to EMI's Video Royalties, EMI will not be in breach of its Settlement Agreement provided that it proceeds in good faith to cause that Due Diligence Meeting to take place within a reasonable time after confirming its Video Settlement Amount as required by its Settlement Agreement.

- 1.07 **Attestation or Royalty Verification.** Where a Label's Settlement Agreement provides for an Attestation or a Royalty Verification, that Label will provide, within the time specified in its Settlement Agreement, the Attestation or Royalty Verification so required. The plaintiff, CMRRA and SODRAC acknowledge that this paragraph 1.07 does not apply to either Sony or Warner.
- 1.08 **Additional Information and Payment.** In the event that a Due Diligence Meeting, Attestation and/or Royalty Verification is required, then, if applicable, within 10 business days after the latest of the Due Diligence Meeting, the delivery of its Attestation or Royalty Verification or the payment of its Settlement Amount into the Settlement Trust,
- (a) the applicable Label will pay into the Settlement Trust an amount equal to any difference between (i) the total Pending Audio Royalties and Pending Video Royalties, respectively, discovered as a result of the Due Diligence Meeting or disclosed in the Attestation or Royalty Verification, as applicable, and (ii) the Agreed Audio Royalties and the Agreed Video Royalties, respectively – multiplied, in the case of EMI, by a percentage equal to the percentage that its Settlement Amount bears to the Audio Royalties as defined in its Settlement Agreement (the “**EMI Adjustment Percentage**”) – plus interest on any amount so paid, calculated from the date on which the Label paid its Settlement Amount into the Settlement Trust at the average prime lending rate of the Bank of Nova Scotia during that period plus 2%;
  - (b) CSI will direct the Trustee to reimburse that Label for any difference between the Agreed Audio Royalties and the Agreed Video Royalties, respectively, and the total Pending Audio Royalties and Pending Video Royalties, respectively, discovered as a result of the Due Diligence Meeting or disclosed in the Attestation or Royalty Verification, as applicable – multiplied, in the case of EMI, by the EMI Adjustment Percentage – plus interest accrued on any such amounts from the date of the Label's payment of its Settlement Amount into the Settlement Trust; and
  - (c) if the Due Diligence Meeting reveals that changes are required to, or the Attestation or Royalty Verification purports to revise, any information previously provided by that Label pursuant to paragraph 1.04, the Label will provide a revised report to CSI containing the accurate information.

Further, if any challenge by the plaintiff or CSI to an Attestation or Royalty Verification causes the parties to agree or the court to determine that: (i) additional Pending Royalties are to be paid by the applicable Label, that Label will pay those additional Pending Royalties (multiplied, in the case of EMI, by the EMI Adjustment Percentage), plus interest on any amount so paid, calculated from the date on which the Label paid its Settlement Amount into the Settlement Trust at the average prime lending rate of the Bank of Nova Scotia during that period plus 2%, into the Settlement Trust within 15 business days of that

agreement or determination, and its Settlement Amount will thereafter be deemed to include the principal amount (but not the interest) so paid; or (ii) the total Pending Audio Royalties and Pending Video Royalties, respectively, for a given Label are less than that Label's Agreed Audio Royalties and Agreed Video Royalties, respectively, CSI will direct the Trustee to pay the difference (multiplied, in the case of EMI, by the EMI Adjustment Percentage) to the Label, plus interest accrued on any such amounts from the date of the Label's payment of its Settlement Amount into the Settlement Trust, within 15 business days of that agreement or determination, and that Label's Settlement Amount will thereafter be deemed to exclude the principal amount (but not the interest) so paid. The plaintiff, CMRRA and SODRAC acknowledge that this paragraph 1.08 does not apply to either Sony or Warner.

- 1.09 **Cooperation by Labels.** Each Label will provide every commercially reasonable form of cooperation and assistance to CSI and the plaintiff in order to assist them to analyze and understand the information provided pursuant to paragraph 1.04 and subparagraph 1.05(b), and any revised information provided pursuant to paragraph 1.08(b), provided that CSI or the plaintiff, as the case may be, provide written notice to that Label, setting out the nature (and, if possible, the specific questions) in relation to which CSI requires such cooperation and assistance.
- 1.10 **Preliminary Calculation of Group I Market Share.** CSI will use the information provided pursuant to paragraphs 1.04 and 2.01(a) to calculate, in relation to each Label, the total Canadian market share for each Rightsholder to whom that Label has paid Royalties between January 1, 2000 and December 31, 2007 (or, in the case of Universal, between January 1, 2003 and December 31, 2009), by dividing the Individual Rightsholder Payments received by each Rightsholder from that Label between January 1, 2000 and December 31, 2007 (or, in the case of Universal, between January 1, 2003 and December 31, 2009) by the Aggregate Rightsholder Payments made by that Label during that period.
- 1.11 **Opt-Outs.**
- (a) The parties agree to seek, as part of the process approving their respective Settlement Agreements, a court order requiring any class member who wishes to opt out of the settlement to provide, as a prerequisite to opting out, detailed information about the Musical Works in which that class member claims to own rights in Canada, including, in relation to each such Musical Work, (i) its title, (ii) the percentage of the copyright that the class member purports to own, (iii) any applicable publishing agreement (or a statutory declaration that the class member's interest in the Musical Work is not subject to any publishing agreement), (iv) the recording artist(s) who recorded the Musical Work in question, if known, (v) the title, Universal Product Code (UPC) and International Code Product Number (ICPN) of each Product on which the Musical Work appears, if known, and (vi) any evidence available to establish the class member's ownership of rights in the Musical Work in Canada (such as, for example, a SOCAN registration or royalty statement). If these opt-out requirements are not approved by the court, the parties agree to renegotiate the provisions of this paragraph 1.11, in good faith, in order to develop workable standards to determine how to assess the claims of any class member who wishes to opt out of the settlement and the amounts to be reimbursed to each Label in relation to each such class member.
- (b) At the conclusion of the opt-out period to be agreed by the parties and defined in the final judgment of the Ontario Superior Court (the "**Opt-Out Period**"), CSI will compile a list of class members who have purported to exercise their right to opt out of the settlement and report that list to the plaintiff, along with the information

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provided by each such class member in relation to the Musical Works in which it claims to own rights in Canada. The plaintiff will have up to 45 days to review the list and the information provided, to confirm whether the claims of each such class member in relation to its ownership of rights in Musical Works are valid, and to take appropriate action in relation to such class members. At the conclusion of that period, the plaintiff will either confirm the list or provide a revised list to CSI, along with an explanation of the basis for any revisions, and each class member who has validly exercised its right to opt out of the settlement will thereafter be considered an "Opt-Out" for the purposes of the Settlement Agreements and this Term Sheet.

- (c) After receiving the final list of Opt-Outs from the plaintiff, CSI will have up to 30 days to use the information provided pursuant to paragraphs 1.04 and 2.01(a), and its calculations under paragraph 1.10, to prepare a schedule of Opt-Outs and their respective Canadian market shares, if any, in relation to each Label. CSI will deliver to each Label a copy of that schedule, when complete, along with a summary of the calculations used to arrive at the market share for each Opt-Out (supported by documentation satisfactory to the applicable Label, acting reasonably), and will direct the Trustee to repay to each Label an amount from the Settlement Trust, determined as follows, in relation to each Opt-Out:
- (i) Where the Opt-Out has demonstrated to the satisfaction of each of the applicable Label, CMRRA, SODRAC and the plaintiff, each acting reasonably (provided that, if the applicable Label is satisfied but some or all of the other applicable parties are not, the parties will submit the matter for summary binding resolution), a bona fide entitlement to Pending Royalties accrued in relation to specific Products on that Label's pending list, the Label will be entitled to repayment in an amount determined by multiplying (x) the total Pending Royalties recorded by the Label in relation to each such Product on the pending list provided by the Label pursuant to subparagraph 2.01(b)(ii), by (y) the percentage that the Label's Settlement Amount bears to the total Pending Royalties recorded on the same pending list, as each of the foregoing amounts have been adjusted under this Term Sheet (if applicable), which percentage in the case of EMI, for clarity, will be equal to the EMI Adjustment Percentage (a "Line Item Opt-Out Refund"); plus
  - (ii) An amount determined by multiplying (i) the Label's Settlement Amount by (ii) the Canadian market share of the Opt-Out in relation to that Label, then deducting from the product of that calculation any Line Item Opt-Out Refund payable to the Label in relation to the Opt-Out; plus
  - (iii) Interest on the sum of (i) and (ii), calculated from the date of the Label's Settlement Amount into the Settlement Trust.

If any of the plaintiff, CSI or the applicable Label, acting reasonably, are of the view that the amount so determined is not an accurate reflection of the Pending Royalties potentially owed by that Label to the particular Opt-Out, the party disputing the amount so determined will notify the other parties (which, for clarity, will not include the other Labels) within 10 business days of its receiving notice of that amount and such parties will attempt in good faith to arrive at a more accurate figure. If such parties are unable to do so within 10 business days after delivery of notice, the matter will be submitted for summary binding resolution. Failing the receipt of such notice from a Label, CSI will direct the Trustee to pay to that Label any amounts payable pursuant to this paragraph within 10 business days after the delivery of the

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list of Opt-Outs to the Label. Opt-Outs will be excluded from consideration and treatment as class members under the Settlement Agreement.

- 1.12 **Recalculation of Group I Market Share.** After completion of the process set out in subparagraph 1.11, CSI will recalculate, in relation to each Label, the total Canadian market share for each Rightsholder to whom that Label has paid Royalties between January 1, 2000 and December 31, 2007 (or, in the case of Universal, between January 1, 2003 and December 31, 2009), other than Opt-Outs, by dividing (i) the Individual Rightsholder Payment received by each Rightsholder (other than Opt-Outs) from that Label between January 1, 2000 and December 31, 2007 (or, in the case of Universal, between January 1, 2003 and December 31, 2009) by (ii) the Aggregate Rightsholder Payments made by that Label during that period (each Rightsholder's "**Group I Market Share**").
- 1.13 **Second Report.** Within 60 days after delivering its First Report, each Label will provide to the plaintiff and CSI a report (the "**Second Report**") setting out, only in relation to Group II Product,
- (a) the information required by paragraph 1.04, prepared on the same basis as the First Report; and
  - (b) with respect to each Medium-Value Group II Item and each High-Value Group II Item (each as defined below), the information required under subparagraph 4(d) of the current Mechanical Licensing Agreement between CMRRA and CRIA. This information will be provided in an electronic format mutually acceptable to CSI and the Labels, each acting reasonably.
- For greater certainty, the information provided in the Second Report will be current as at December 31, 2010, reflecting all sales of Group II Product through that date, and in relation to the information required by subparagraphs 1.04(d) through (h), inclusive, the Labels will be required to report only information not already included in the First Report. Further, CSI and any Label may agree to combine that Label's First Report and Second Report and/or to change the date on which its Second Report is to be submitted.
- 1.14 **Calculation of Group II Market Share.** CSI will use the information provided pursuant to paragraph 1.13 to calculate, in relation to each Label, the total Canadian market share for each Rightsholder to whom that Label has paid royalties between January 1, 2005 and December 31, 2010 by dividing the Individual Rightsholder Payments received by each Rightsholder from that Label between January 1, 2005 and December 31, 2010 by the Aggregate Rightsholder Payments made by that Label during that period (that Rightsholder's "**Group II Market Share**").
- 1.15 **Third Report.** On or before March 31, 2014, each Label will provide a report to the plaintiff and CSI (the "**Third Report**") setting out, in relation to Audio Products and Video Products Released between January 1, 2010 and December 31, 2012, inclusive ("**Group III Product**"),
- (a) the information required by paragraph 1.04, prepared on the same basis as the First Report; and
  - (b) with respect to each Medium-Value Group III Item and each High-Value Group III Item (each as defined below), the identifying information required under subparagraph 4(d) of the current MLA. This information will be provided in an electronic format mutually acceptable to CSI and the Labels, each acting reasonably.



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For greater certainty, (i) the information provided in the Third Report will be current to sales through December 31, 2013, reflecting all sales of Group III Product through that date, (ii) in relation to the information required by subparagraphs 1.04(d) through (h), inclusive, the Labels will be required to report only information not already included in the First Report or the Second Report, and (iii) Pending Royalties in relation to Group III Product will be calculated at the then-current MLA rate multiplied by a percentage, to be negotiated by the parties in good faith by no later than September 30, 2013, reflecting a reasonable discount for the possible application of controlled composition clauses and other applicable reductions. In the event that the parties are unable to agree on the said percentage by September 30, 2013, the matter will be submitted to summary binding resolution. Further, the plaintiff, CMRRA, SODRAC and Sony agree to negotiate in good faith with a view to determining appropriate treatment of Products on Sony's so-called "Unmatched Pending List" for the purposes of this paragraph 1.15.

1.16 **Group III Payment.** Within 10 days of the date its Third Report is provided, each Label will pay the amount of its Pending Audio Royalties and Pending Video Royalties for Group III Product, as disclosed in that report, into the Settlement Trust.

1.17 **Calculation of Group III Market Share.** CSI will use the information provided pursuant to paragraph 1.15 to calculate, in relation to each Label, the total Canadian market share for each Rightsholder to whom that Label has paid royalties between January 1, 2008 and December 31, 2013 by dividing the Individual Rightsholder Payments received by each Rightsholder from that Label between January 1, 2008 and December 31, 2013 by the Aggregate Rightsholder Payments made by that Label during that period (that Rightsholder's "Group III Market Share").

## 2. Distribution of Pending Royalties

### 2.01 Claims Website.

(a) Within 45 days after providing its First Report, each Label will provide to CSI, with respect to each Medium-Value Group I Item and each High-Value Group I Item (each as defined below) listed in its First Report, and all in an electronic format reasonably acceptable to CSI, the following identifying information:

- (i) in the case of EMI: song title, label, ICPN, album title, artist name (some artist data may be incomplete), Release date, ISRC, track timing, writer, liability, the cumulative number of units for which Royalties are payable and the rate at which such Royalties have been accrued (some ISRC data may be incomplete);
- (ii) in the case of Sony: song title, catalogue prefix, catalogue core, total pending royalties, product title, artist name, song time, ISRC, Release date, configuration, report type, disk number, track band number, split percentage, publisher name and songwriter;
- (iii) in the case of Universal: catalogue number, song title, royalty units, royalty dollars, artist name, song writer (when available), Release date, album title, Universal's internal song number, ISRC (when available), song time, UPC, and the percentage of each work for which Royalties are pending; and
- (iv) in the case of Warner: song title, calculated transaction royalty rate, extended value, composer, artist name, product title, track time, ISRC, Release date, UPC, side number, track number, publisher name, unit information and publisher split,

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in each case to the best of the applicable Label's knowledge and ability, and will provide the same information on an ongoing basis in relation to any item subsequently identified as a Medium-Value Group I Item or a High-Value Group I Item as a result of the process undertaken by CSI in accordance with subparagraph 2.02(a) below. Universal will also use all reasonable commercial efforts to provide, in addition to the information set out in subparagraph 2.01(a)(iii), the rate at which Royalties have been accrued in relation to each Medium-Value Group I Item and High-Value Group I Item. Further, if the Label has paid Royalties directly to a Rightsholder in relation to the Sound Recording, upon request by CSI on a case-by-case basis, the Label will advise CSI as to the percentage shares of the Musical Work(s) embodied in the Sound Recording that have been licensed, the name and contact information of the licensor(s), and the amount of Royalties paid directly to such licensor(s) in relation to each Product in which the Sound Recording has been Released in Canada, provided in each case that the information in question is reasonably available to the Label and that, in the case of Sony, the date on which Sony first paid Royalties to a particular licensor may be provided in lieu of the amount of Royalties paid directly to that licensor. In the event that the applicable parties are unable to reach agreement as to whether the information provided in any particular case is consistent with this subparagraph 2.01(a), the matter will be submitted to summary binding resolution.

- (b) As soon as reasonably practicable after receiving from every Label the information required under subparagraph 2.01(a), CSI will initiate an internal process intended to
- (i) reconcile the data provided by the Labels pursuant to paragraph 1.04 and subparagraph 2.01(a);
  - (ii) to the extent reasonably practicable, review that data against the current backlog of licences that have already been issued by CMRRA and SODRAC and, where any Product is successfully matched with an existing licence, direct the Trustee to facilitate distribution to the appropriate Rightsholder(s) of an amount equal to the total Pending Royalties recorded by the applicable Label in relation to that Product and remove that Product from the applicable pending list; and
  - (iii) conduct additional research to identify the owner(s) of copyright in each High-Value Group I Item (as defined below), provided that the resources expended on researching each item shall not exceed 15% of the royalty value of that item as recorded on the applicable pending list.
- (c) Within no more than 120 days after receiving from every Label the information required under subparagraph 2.01(a), CSI will
- (i) give notice to class members, in the manner prescribed or approved by the court, of the individual claims processes to be established pursuant to the applicable provisions of this section 2; and
  - (ii) publish a publicly-accessible website (the "**Claims Website**") containing the identifying information provided by the Label with respect to each Medium-Value Group I Item and each High-Value Group I Item, any additional information generated or obtained by CSI in relation to each such item, an online facility for filing claims and disputes as to ownership, and any other features or information prescribed by the court, but not the Pending Royalties recorded in relation to that item.

2.02 **Distribution of Settlement Trust.** The Settlement Trust will be distributed to class members other than the Opt-Outs (the "**Settling Rightsholders**") in accordance with the following processes:

- (a) **Line Item Value.** For purposes of this paragraph 2.02, where it appears to CSI that the same Musical Work or Sound Recording is reflected in multiple line items (for example, where a Product has been re-released or where royalties payable at different rates are itemized separately), CSI will, wherever reasonably practicable, aggregate the royalties payable in relation to each separate line item and treat the multiple line items as a single line item when determining whether it is to be treated as a High-Value, Medium-Value or Low-Value Item.
- (b) **Low-Value Group I Items.** The following process will apply to line items representing Group I Product and valued at \$1,000.00 or less ("**Low-Value Group I Items**"):
  - (i) Within 100 days after the conclusion of the Opt-Out Period, provided that all required Royalty Verifications have been completed to the reasonable satisfaction of the plaintiff, CMRRA and SODRAC and that there is no outstanding dispute in relation to the amount potentially owed by a Label to a particular Opt-Out, CSI will direct the Trustee to divide among all class members, according to their respective Group I Market Shares, an amount determined by multiplying the entire amount then contained in the Settlement Trust by a fraction, the numerator of which is the aggregate of the Pending Royalties referable to Low-Value Group I Items on the pending lists reported by the four Labels to CMRRA and SODRAC as at their respective Reporting Dates (the "**Reporting Date Pending Lists**") and the denominator of which is the aggregate of all Pending Royalties on the Reporting Date Pending Lists, except that an amount (the "**Rightsholder Holdback**") determined jointly by the plaintiff, CMRRA and SODRAC following their review of the First Reports (and, in particular, the total recorded value of the Low Value Group I Items on the 1Q10 Pending Lists) will be held back from that distribution to compensate Rightsholders for claims submitted in relation to Low Value Group I Items in accordance with subparagraph 2.02(b)(ii).
  - (ii) For a period commencing upon the delivery of each Label's First Report and concluding on the 181<sup>st</sup> day thereafter (the "**Low-Value Group I Research Period**"), the plaintiff's counsel, CMRRA and/or SODRAC may research, distribute, and/or attempt to verify claims from Rightsholders in relation to Low-Value Group I Items. In the event that the plaintiff's counsel, CMRRA or SODRAC are able to verify any such claim, they will submit to CSI the particulars of the claim (including the name of the claimant, the title of the Musical Work, particulars of the Product(s) on which the Musical Work was Released, references to such Product(s) on one or more pending list(s), evidence substantiating the claim, and the amount to be paid to the claimant), and CSI will direct the Trustee to facilitate payment of the recommended amount to the claimant out of the Rightsholder Holdback, each such payment to be made on the second Payment Date after the conclusion of the Low-Value Group I Research Period. For greater certainty, only a Rightsholder who holds Rights in a particular Musical Work as at the date on which that Rightsholder submits a claim will be entitled to receive any Royalties in relation to the reproduction of that Musical Work. Any amount remaining in the Rightsholder Holdback after that Payment Date will be distributed to Rightsholders, according to their respective Group I Market

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Shares, such payments to be made together with the amounts that are to be distributed in relation to Medium-Value Group I Items pursuant to subparagraph 2.02(c)(v)(B). For greater certainty, CMRRA, SODRAC and CSI will not be responsible in any way for the solicitation or verification of claims related to Low-Value Group I Items by the plaintiff's counsel or the distribution of amounts in relation to those claims.

- (iii) Where an individual Settling Rightsholder is eligible to receive less than \$100.00 pursuant to subparagraph 2.02(b)(i), the amount otherwise payable to that Settling Rightsholder will instead be redistributed on a pro-rata basis to Settling Rightsholders eligible to receive amounts greater than \$100.00 for Low-Value Group I Items.
  - (iv) Where a cheque issued to a particular Settling Rightsholder has not been cashed within 180 days of its being sent, the cheque will be cancelled and the amount otherwise payable to that Settling Rightsholder will be redistributed on a pro-rata basis to other Settling Rightsholders who have received payment for Low-Value Group I Items, such payments to be made together with the amounts that are to be distributed in relation to Medium-Value Group I Items pursuant to subparagraph 2.02(c)(v)(B).
  - (v) Amounts that are to be redistributed pursuant to subparagraphs 2.02(b)(iii) will be distributed no later than the next Payment Date following the Payment Date on which those amounts would have been paid, pursuant to subparagraph 2.02(b)(i), to the Settling Rightsholders otherwise entitled to receive them.
  - (vi) Notwithstanding anything else in this subparagraph 2.02(b), if CSI, the Trustee and the plaintiff deem it expedient and in the best interests of class members to do so, they may delay the distribution of any amount pursuant to subparagraph 2.02(b)(i) or 2.02(b)(ii) until a reasonable time after CSI has calculated the Group II Market Shares, such that the distribution of amounts referable to Low-Value Group I Items and to Low-Value Group II Items may take place in a single distribution.
- (c) **Medium-Value and High-Value Group I Items.** The following process will apply to line items representing Group I Product and valued at greater than \$1,000.00 and less than \$2,500.00 ("**Medium-Value Group I Items**"), and to line items representing Group I Product and valued at \$2,500.00 or greater ("**High-Value Group I Items**"):
- (i) Within no more than 120 days after receiving from every Label the information required under subparagraph 2.01(a), CSI will post on the Claims Website, in relation to each Medium-Value Group I Item and each High-Value Group I Item (including those items categorized as such following the process undertaken by CSI in accordance with subparagraph 2.02(a)), the information set out in subparagraph 2.01(c)(ii).
  - (ii) Once an ownership claim to a Musical Work embodied in a Medium-Value Group I Item or a High-Value Group I Item has been established to the satisfaction of CSI, in accordance with standards agreed upon by CSI and the plaintiff and approved by the court, and subject to subparagraph 2.02(c)(iv), CSI will
    - (A) remove the item from the Claims Website;

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- (B) direct the Trustee to facilitate payment to the claimant in an amount equal to the total Pending Royalties recorded in relation to that item, in accordance with subparagraph 2.02(c)(v)(A) or subparagraph 2.02(c)(vi)(A), as applicable; and
- (C) if the claimant is a member of CMRRA or SODRAC, facilitate the issuance of a mechanical licence to the Label by either CMRRA or SODRAC, as applicable, in the usual way in which licences are issued to that Label by CMRRA or SODRAC, as applicable, for the future reproduction of the particular Musical Work as embodied in the particular Product to which the item relates – or, where a mechanical licence has previously been issued in relation to that Musical Work as embodied in that Product, notify the Label of the existence of that previous licence – and deal with any future Royalties in relation to such reproduction in accordance with its usual procedures,

and, subject to subparagraph 2.02(c)(iii), the Label will update its internal records to ensure the timely payment of Royalties in relation to the Product to the Rightsholder(s) entitled to receive them from that point forward (including, where applicable, by paying such Royalties to CMRRA or SODRAC in accordance with the applicable MLA). Without limitation, CSI may require, but need not require, any claimant to provide documentary evidence of, and/or a statutory declaration in relation to, the claimant's purported claim to any Musical Work. For greater certainty, only a Rightsholder who holds Rights in a particular Musical Work as at the date on which that Rightsholder submits a claim will be entitled to receive any Royalties in relation to the reproduction of that Musical Work.

- (iii) Notwithstanding anything to the contrary in subparagraph 2.02(c)(ii), if a mechanical licence is issued to a Label pursuant to subparagraph 2.02(c)(ii)(C) in relation to a Product, the cumulative sales of which since that Label's Reporting Date have not reached 250 units (the "**Sales Threshold**"), the Label will not be required to update its internal records in relation to that Product, and may elect to continue paying royalties in relation to that Product into the Settlement Trust, subject to the following:
  - (A) if cumulative sales of the Product reach the Sales Threshold at any time after the Label's Reporting Date, with no fewer than 50 units of the Product having been sold in the then-most-recent calendar year, the Label will notify CSI of the attainment of the Sales Threshold, update its internal records in relation to that Product within 60 days after the end of the calendar quarter in which the Sales Threshold is attained, and thereafter pay Royalties in relation to that Product to CMRRA or SODRAC in accordance with the terms of the applicable MLA;
  - (B) if either CMRRA or SODRAC notifies the Label that it has previously issued a mechanical licence to the Label in relation to the same Musical Work as embodied in that Product (either by indicating on the face of the new mechanical licence that a mechanical licence has previously been issued in relation to that Product or by rendering to the Label from time to time an electronic report containing all outstanding mechanical licences issued to that Label by CMRRA and/or SODRAC as of the date of such report, whichever may be

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agreed between CSI and each Label), but the Label has not processed or executed that previously-issued licence, the Label may require CMRRA or SODRAC, as applicable, to reissue or reprint the previously-issued licence, and the Label will process and execute the licence within no more than 45 days after a new mechanical licence is issued pursuant to subparagraph 2.02(c)(ii)(C) or notice of the previously-issued mechanical licence (or, if applicable, the reissued or reprinted licence) is received, whichever is earlier, and will thereafter pay Royalties in relation to that Product to CMRRA or SODRAC, as applicable; and

- (C) In the case of Sony, Universal and Warner, notwithstanding subparagraph 2.02(c)(iii)(B), the following processing times shall apply to new mechanical licences issued pursuant to subparagraph 2.02(c)(ii)(C) and to notices of previously-issued mechanical licences issued pursuant to subparagraph 2.02(c)(iii)(B):
- (1) If a new mechanical licence or notice of a previously-issued mechanical licence is received by the applicable Label during its quarterly royalty processing period – which, for greater certainty, shall last no longer than 42 days following the first day of each calendar quarter – such that the mechanical licence cannot be processed within 45 days as otherwise required pursuant to subparagraph 2.02(c)(iii)(B), the applicable Label will process and execute the mechanical licence by no later than: (a) in the case of a mechanical licence issued electronically, 14 days after the end of the quarter-end royalty processing period; and (b) in the case of any other mechanical licence, 45 days after the end of the quarter-end processing period, provided that in no event shall any mechanical licence be processed and executed later than the last day of the calendar quarter in which the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later; and
  - (2) In all other cases, the applicable Label will process and execute the mechanical licence by no later than: (a) in the case of a mechanical licence issued electronically, two business days after the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later; and (b) in the case of any other mechanical licence, 45 days after the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later, provided that, if a mechanical licence is issued or notice of a previously-issued mechanical licence is given and the label rejects the licence, the Label, CMRRA and SODRAC shall work together to resolve such issues expeditiously.

For greater certainty, the Rightsholder(s) on behalf of whom the mechanical licence is issued pursuant to subparagraph 2.02(c)(ii)(C) will have no entitlement to any amounts previously paid out of the Settlement Trust in relation to that Product, whether such amounts were paid according to market share or otherwise.

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- (iv) If conflicting ownership claims (a “**Claims Dispute**”) are made in relation to a Medium-Value Group I Item or a High-Value Group I Item and cannot be resolved by the parties, or if a Medium Group I Item or a High-Value Group I Item is subject to an Existing Dispute (as identified by a Label to CSI pursuant to subparagraph 1.04(h)), CSI will provide notice of the conflicting claims to each party and segregate the Pending Royalties payable in relation to the disputed item until the conflicting claims have been resolved by agreement or binding adjudication. However,
  - (A) if CSI determines that all of the parties to a Claims Dispute or an Existing Dispute are represented by either CMRRA or SODRAC, CSI may direct the Trustee to facilitate payment of the Pending Royalties recorded in relation to the disputed item to either CMRRA or SODRAC, as applicable, to be dealt with in accordance with their usual dispute resolution and/or royalty distribution procedures; and
  - (B) if CSI determines that all parties to a Claims Dispute or an Existing Dispute are represented by the same music publisher, CSI may direct the Trustee to facilitate payment of the Pending Royalties directly to that publisher and direct that the dispute be dealt with in accordance with the publisher's usual dispute resolution and/or royalty distribution procedures.
- (v) On or about the 181<sup>st</sup> day after posting the Medium-Value Group I Items on the Claims Website, CSI will remove those items from the Claims Website and, within a further 30 days,
  - (A) in relation to each Medium-Value Group I Item to which an ownership claim has been established to the satisfaction of CSI, in accordance with standards agreed upon by CSI and the plaintiff and approved by the court, direct the Trustee to facilitate payment to the claimant in an amount equal to the total Pending Royalties recorded in relation to that item; and
  - (B) direct the Trustee to facilitate the distribution of (1) any amounts accrued in relation to Medium-Value Group I Items that have not been claimed and are not subject to known disputes, (2) any portion of the Rightsholder Holdback that was not distributed within 180 days of the Settlement Date, and (3) any amounts that are to be redistributed among Settling Rightsholders pursuant to paragraphs 2.02(b)(iii) and (iv), to Settling Rightsholders according to their respective Group I Market Shares.
- (vi) On or about the 366<sup>th</sup> day after posting the High-Value Group I Items on the Claims Website, CSI will remove those items from the Claims Website and, within a further 30 days,
  - (A) in relation to each High-Value Group I Item to which an ownership claim has been established to the satisfaction of CSI, in accordance with standards agreed upon by CSI and the plaintiff and approved by the court, direct the Trustee to facilitate payment to the claimant in an amount equal to the total Pending Royalties accrued in relation to that item; and

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- (B) direct the Trustee to facilitate the distribution of any amounts accrued in relation to High-Value Group I Items that have not been claimed, and are not subject to known disputes, to Settling Rightsholders according to their respective Group I Market Shares.

2.03 **Group II Product.** The process outlined in paragraphs 2.01 and 2.02 in relation to Group I Product will apply mutatis mutandis to line items representing Group II Product, with the following modifications:

- (a) In addition to the process outlined in paragraph 2.01, each of CMRRA, SODRAC and the Labels will continue in their efforts to license Group II Product in accordance with their usual practices (including but not limited to substantial compliance with the procedures set out in the applicable MLAs) and the Canadian Licensing Practices (as defined below and as and when agreed and implemented) and in the case of the Labels, where any Rights to a particular Group II Product are not represented by CMRRA or SODRAC, to obtain a licence for those Rights directly from the Rightsholder(s) (a "**Direct Licence**"), provided that the obligations in this subparagraph 2.03(a) will remain in effect only through December 31, 2010.
- (b) Each Label will provide the identifying information required pursuant to subparagraph 2.01(a) by no later than 75 days after the delivery of its Second Report. In addition to the information required pursuant to subparagraph 2.01(a), Sony will provide, in relation to each Medium-Value and High-Value Group II Item (including, for greater certainty, in relation to any item that is subsequently identified as a Medium-Value or High-Value Group II Item), the cumulative number of units for which Royalties are payable and the rate at which such Royalties have been accrued.
- (c) The process set out in subparagraph 2.02(b)(i) will commence in relation to Low-Value Group II Items within 90 days after CSI has received the Second Report from each Label (and not, for greater certainty, 100 days after the conclusion of the Opt-Out Period);
- (d) CMRRA, SODRAC and the plaintiff's counsel will jointly determine whether and how the process set out in subparagraph 2.02(b)(ii) will apply to Low-Value Group II Items, including whether the amount to be distributed will be subject to a Rightsholder Holdback, and, if so, the amount of the Rightsholder Holdback;
- (e) Where a Label is successful, in accordance with subparagraph 2.03(a), in obtaining a Direct Licence for the Rights to a particular Musical Work as embodied in a Group II Product,
  - (i) the Label will provide CSI with complete information about that Product and the Rightsholder from whom the Direct Licence has been obtained, including the name and contact information of the Rightsholder and its or their percentage share of copyright in the Musical Work, and a detailed royalty statement setting out any and all sales of the Product between the Reporting Date and the date of the Label's most recent payment into the Settlement Trust and the Royalties payable in relation to those sales under the applicable MLA (redacted to exclude any information unrelated to the particular Product);
  - (ii) the provisions of subparagraphs 2.02(c)(ii), (iii) and (iv) will apply to that Product regardless of whether it is considered a Low-Value, Medium-Value or High-Value Item;



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- (iii) the Label will direct CSI and the Trustee to pay any Pending Royalties referable to the Musical Work as embodied in that Product, and any additional Royalties paid into the Settlement Trust in relation to that Musical Work as embodied in that Product pursuant to section 3, to the Rightsholder or its authorized representative, but only to the extent that such Royalties have not already been distributed in accordance with this Term Sheet;
- (iv) the Label will thereafter pay royalties directly to the Rightsholder(s) or otherwise in accordance with the terms of the Direct Licence; and
- (v) the release given to the Label pursuant to paragraph 5.01 will not apply to Claims made by such Rightsholder(s) for breach of the terms of the Direct Licence.

As an alternative to the information required pursuant to subparagraph 2.03(e)(i), any Label may elect to provide to CSI, on at least a quarterly basis, a report itemizing any and all Direct Licences issued since its Reporting Date, the form and content of which report will be negotiated in good faith by CSI and each Label within no more than 30 days after the Settlement Date but will include, at minimum, information sufficient to identify both the Product and the Musical Work, the name and contact information of the Rightsholder from whom the Direct Licence has been obtained, and the Rightsholder's percentage share of copyright in the Musical Work.

- (f) References to Group I shall be deemed to be references to Group II, and references to the First Report shall be deemed to be references to the Second Report.
- (g) The value of each line item, for the purpose of categorizing it as Low-Value, Medium-Value or High-Value, will be determined as of December 31, 2010 (but, for greater certainty, will not be determined by CSI until a reasonable time after receiving the Second Report from the applicable Label).

**2.04 Group III Product.** The process outlined in paragraphs 2.01 and 2.02 in relation to Group I Product will apply mutatis mutandis to line items representing Group III Product, with the following modifications:

- (a) In addition to the process outlined in paragraph 2.01, each of CMRRA, SODRAC and the Labels will continue in their efforts to license Group III Product in accordance with their usual practices (including but not limited to substantial compliance with the procedures set out in the applicable MLAs) and the Canadian Licensing Practices (as defined below), as and when agreed and implemented, and in the case of the Labels, where any Rights to a particular Group III Product are not represented by CMRRA or SODRAC, to obtain a Direct Licence for those Rights provided that the obligations in this subparagraph 2.03(a) will remain in effect only through December 31, 2013.
- (b) In addition to the identifying information required pursuant to subparagraph 2.02(a)(i), Sony will provide, in relation to each Medium-Value and High-Value Group III Item (including, for greater certainty, in relation to any item that is subsequently identified as a Medium-Value or High-Value Group III Item), the cumulative number of units for which Royalties are payable and the rate at which such Royalties have been accrued.
- (c) The process set out in subparagraph 2.02(b)(i) will commence in relation to Low-Value Group III Items within 90 days after CSI has received the Third Report from

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each Label (and not, for greater certainty, 100 days after the conclusion of the Opt-Out Period);

- (d) CMRRA, SODRAC and the plaintiff's counsel will jointly determine whether and how the process set out in subparagraph 2.02(b)(ii) will apply to Low-Value Group III Items, including whether the amount to be distributed will be subject to a Rightsholder Holdback, and, if so, the amount of the Rightsholder Holdback;
  - (e) The provisions of subparagraph 2.03(e) will apply mutatis mutandis, with references to Group II deemed to be references to Group III.
  - (f) References to Group I shall be deemed to be references to Group III, and references to the First Report shall be deemed to be references to the Third Report.
  - (g) The value of each line item, for the purpose of categorizing it as Low-Value, Medium-Value or High-Value, will be determined as of December 31, 2013 (but, for greater certainty, will not be determined by CSI until a reasonable time after receiving the Third Report from the applicable Label).
- 2.05 **Timing of Distributions.** Payments required to be made pursuant to paragraphs 2.02, 2.03 and 2.04 and section 3 will be made quarterly, on the Payment Dates, as applicable and practicable. In the event that CSI becomes aware of a required payment within 45 days or less before any Payment Date, it may elect to direct the Trustee to facilitate that payment on the Payment Date next following the soonest Payment Date.
- 2.06 **CSI Commission.** As compensation for administering the settlement and distributing Pending Royalties to class members, CSI shall be entitled to deduct a commission of 10% from any and all amounts distributed pursuant to paragraphs 2.02 and section 3, and any references to payment of "the total Pending Royalties" recorded in relation to any Product shall be deemed and understood to be subject to the commission payable to CSI. Within no more than 10 days after the first payment by a Label into the Settlement Trust, CSI will be paid the initial sum of \$1,500,000 out of the Settlement Trust, as an advance against the commission payable to it pursuant to this paragraph 2.06, to fund the start-up costs related to the distribution of the Settlement Trust. For clarity, CSI shall not be entitled to any commission on amounts returned to any Label, pursuant to subparagraph 1.08(b) or paragraph 1.11, or on any amounts paid directly by a Label to a Rightsholder pursuant to a Direct Licence.
- 3. Future Sales**
- 3.01 **Low-Value Group I Items.** Where Pending Royalties in relation to a Low-Value Group I Item have been distributed pursuant to paragraph 2.02, each Label will pay any Royalties payable in relation to sales of the Product after that Label's Reporting Date ("**Future Sales**") into the Settlement Trust on a quarterly basis, on the same date as Royalties are payable by that Label to CMRRA and SODRAC pursuant to the applicable MLA, and beginning in the second calendar quarter following that Label's Reporting Date (such that the first payment pursuant to this paragraph 3.01 is referable to Future Sales during the first calendar quarter after that Label's Reporting Date). Subject to subparagraph 3.03, CSI will direct the Trustee to facilitate distribution of those Royalties pro-rata, as set out in subparagraph 2.02(b) (Low-Value Group I Items) .
- 3.02 **Medium-Value Group I Items and High-Value Group I Items.** Any Royalties payable in relation to Future Sales of Products corresponding to Medium-Value or High-Value Group I Items will be treated as follows:

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- (a) Where a Settling Rightsholder has been identified as an owner of the Musical Work and the cumulative sales of the item since the applicable Label's Reporting Date have reached the Sales Threshold, the Label will pay all future Royalties directly to the Settling Rightsholder or to its authorized representative, or as otherwise instructed by or on behalf of the Settling Rightsholder from time to time; and
- (b) Subject to subparagraph 3.03, where Pending Royalties in relation to the item have been distributed in accordance with subparagraph 2.02(c)(v)(B) or 2.02(c)(vi)(B), the Label will pay future Royalties into the Settlement Trust on a quarterly basis, and CSI will direct the Trustee to facilitate distribution of those Royalties pro-rata, as set out in subparagraph 2.02(c)(v)(B) or 2.02(c)(vi)(B), as applicable.

For greater certainty, once the cumulative sales of any Product since the applicable Label's Reporting Date have reached the Sales Threshold, such that the Label is required to update its internal records in accordance with subparagraph 2.02(c)(iii), the Label will pay any and all Royalties payable in relation to sales of that Product since the end of the last quarter for which sales were reported to CSI and paid into the Settlement Trust, and for any Future Sales of that Product thereafter, directly to the Settling Rightsholder or to its authorized representative, or as otherwise instructed by or on behalf of the Settling Rightsholder from time to time.

3.03 **Attainment of Sales Threshold.** Notwithstanding anything in paragraphs 3.01 or 3.02, where Royalties payable in relation to Future Sales of any Product have been paid in accordance with paragraph 3.01 or 3.02(b) and the cumulative sales of that Product since the applicable Label's Reporting Date subsequently attain the Sales Threshold,

- (a) if either CMRRA or SODRAC has previously issued a mechanical licence to the Label in relation to any Musical Work as embodied in that Product, but the Label has not processed or executed that previous mechanical licence,
  - (i) CMRRA or SODRAC, as applicable, will notify the Label of the previously-issued mechanical licence, either by indicating on the face of the new mechanical licence that a mechanical licence has previously been issued in relation to that Product or by rendering to the Label from time to time an electronic report containing all outstanding mechanical licences issued to that Label by CMRRA and/or SODRAC as of the date of such report, whichever may be agreed between CSI and each Label;
  - (ii) if the Label is unable to locate the previously-issued mechanical licence, the Label will notify CMRRA or SODRAC, as applicable, and CMRRA or SODRAC will reissue or reprint the licence in question;
  - (iii) in the case of EMI, the Label will process and execute the mechanical licence within no more than 45 days after a new mechanical licence is issued pursuant to subparagraph 2.02(c)(ii)(C) or notice of the previously-issued mechanical licence is received, whichever is later; and
  - (vii) in the case of Sony, Universal and Warner:
    - (A) if a new mechanical licence or notice of a previously-issued mechanical licence is received by the applicable Label during its quarterly royalty processing period – which, for greater certainty, shall last no longer than 42 days following the first day of each calendar quarter – such that the mechanical licence cannot be processed and executed within 45 days as otherwise required

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pursuant to subparagraph 2.02(c)(iii)(B), the Label will process and execute the mechanical licence by no later than: (a) in the case of a mechanical licence issued electronically, 14 days after the end of the quarter-end royalty processing period; and (b) in the case of any other mechanical licence, 45 days after the end of the quarter-end processing period, provided that in no event shall any mechanical licence be processed and executed later than the last day of the calendar quarter in which the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later; and

- (B) in all other cases, the applicable Label will process and execute the mechanical licence by no later than: (a) in the case of a mechanical licence issued electronically, two business days after the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later; and (b) in the case of any other mechanical licence, 45 days after the new mechanical licence is issued or notice of the previously-issued mechanical licence is received, whichever is later, provided that if a mechanical licence is issued or notice of a previously-issued mechanical licence is given and the Label rejects the licence, the Label, CMRRA and SODRAC shall work together to resolve such issues expeditiously; and

- (b) if neither CMRRA nor SODRAC has previously issued a mechanical licence to the Label in relation to any Musical Work as embodied in that Product, the Label will apply to CMRRA and SODRAC for a new mechanical licence in relation to that Musical Work as embodied in that Product and, if either CMRRA or SODRAC is able to issue a mechanical licence in relation to the Musical Work in question, the Label will process and execute the new mechanical licence within no more than 45 days after it is issued.

In either case, upon processing the applicable mechanical licence, the Label will update its internal records to ensure the timely payment of Royalties for sales of that Product since the end of the last quarter for which sales were reported to CSI and paid into the Settlement Trust, and for any Future Sales of that product thereafter, to the Rightsholder(s) entitled to receive them from that point forward.

- 3.04 **Group II and III Items.** Paragraphs 3.01 and 3.02 will apply, mutatis mutandis, to royalties payable in relation to sales of Group II Product after December 31, 2010 and sales of Group III Product after December 31, 2013 (which will also be considered "Future Sales" for the applicable Products for the purposes of this Term Sheet).
- 3.05 **Reserves and Returns.** Paragraphs 3.01 and 3.02 will apply, mutatis mutandis, to Pending Royalties payable by each Label following the liquidation of a Reserve taken against potential returns of any Product. Conversely, in the event that units of any Product are returned to any Label following its payment of Royalties in relation to the Musical Works embodied in those units into the Settlement Trust (including, for greater certainty, that Label's Settlement Amount), and provided that such payment of Royalties has not been made subject to any Reserve in respect of the returns in question (or has been made subject to a Reserve that has already been liquidated and the arising Royalties paid into the Settlement Trust), that Label will be entitled to deduct from its next payment of Royalties for Future Sales of the same Product pursuant to this section 3, on a song-by-song basis, an amount equal to the amounts paid into the Trust in relation to each Musical Work as

embodied in the returned units, provided that, in the event of any such deduction, that Label will also provide to CSI and the Trustee documentation satisfactory to each of them, setting out the particulars of the returns and confirming that no Reserve has been maintained (or that any Reserve taken has been liquidated and the resulting Royalties paid into the Settlement Trust) in relation to the applicable returns.

- 3.06 **Payment of Royalties for Future Sales.** Royalties paid by the Labels under this section 3 are to be accumulated in the Settlement Trust and paid out to Rightsholder(s) only when the accumulated Royalties exceed \$100,000 or at such earlier time as CSI and the Trustee may determine.

#### 4. Termination of the Settlement Trust

- 4.01 **Termination of the Settlement Trust.** Where the aggregate royalties paid into the Settlement Trust do not exceed \$10,000 for two consecutive Payment Dates, and the total amount in the Settlement Trust is \$25,000 or less, the Settlement Trust shall be wound up and the balance of the Settlement Trust, and any future royalties paid by the Labels under this section 4, shall be paid into a charitable fund established for the general benefit of music industry professionals, including but not limited to songwriters and musicians.

#### 5. Release

- 5.01 **Release.** As a condition of settlement, and subject to the provisions of this section 5, the court order approving this settlement (the "**Court Order**") will provide that

- (a) each of CMRRA, SODRAC, CSI, each Label, their respective subsidiary, parent and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns are fully and finally released from any and all claims, demands or actions by class members (other than Opt-Outs) (each, a "**Claim**") in relation to the uses in respect of which the Label has accrued and reported Pending Royalties as set out in this Term Sheet, up to and including that Label's Settlement Cut-Off Date, and in relation to the Pending Royalties in question;
- (b) provided that each of them complies substantially with its obligations under subparagraph 1.05(b), each Label, their respective subsidiary, parent and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns will be fully and finally released from any and all Claims in relation to the uses in respect of which the Label has accrued and reported Pending Royalties as set out in this Term Sheet, at any time between its Settlement Cut-Off Date and its Reporting Date, and in relation to the Pending Royalties in question, and each of CMRRA, SODRAC, CSI, their respective subsidiary, parent and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns will in any event be fully and finally released from any and all such Claims; and
- (c) provided that each of them is substantial compliance at all times with the material provisions of this Term Sheet and each applicable Settlement Agreement,
  - (i) each of CMRRA, SODRAC, CSI, each Label, their respective subsidiary, parent and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns will be fully and finally released from any and all Claims in relation to the uses in respect of which the Label has paid Pending Royalties after that Label's Reporting Date,

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including any Future Sales of the Products arising out of such uses, and in relation to the Pending Royalties in question; and

- (ii) each of CMRRA, SODRAC, CSI, their respective subsidiary, parent and affiliate companies, and each of their respective directors, officers, employees, agents, successors and assigns will be fully and finally released in the Court Order from and against any and all Claims in relation to the distribution of Royalties pursuant to the Settlement Agreement.

5.02 **No Further Claims or Proceedings.** Each of the plaintiff, CMRRA and SODRAC further undertakes not to make any claim or take proceedings, in relation to the matters hereby released, against any other person or entity which might claim contribution or indemnity from any Label or, in the case of the plaintiff, against CMRRA, SODRAC or CSI.

5.03 **Qualifications.** For greater certainty,

- (a) the release in paragraph 5.01 will not apply in relation to any Musical Work as embodied in a particular Product for which Pending Royalties have not been reported under the Settlement Agreement or, as required, pursuant to this Term Sheet (including in relation to Future Sales of such Product);
- (b) the failure of any party to comply substantially with any material provision of this Term Sheet and/or any applicable Settlement Agreement will not affect the validity of this release as against those parties who remain in substantial compliance (or, in the case of an entity who is a party to more than one Settlement Agreement, the validity of this release as between that entity and the parties to any Settlement Agreement with which that entity remains in substantial compliance);
- (c) in the event that any party alleges that any other party is not in substantial compliance with the material provisions of this Term Sheet (including but not limited to any allegation that such other party is not in substantial compliance with the licensing procedures set out in any applicable MLA and/or the Canadian Licensing Practices) and/or any applicable Settlement Agreement, the party alleging the breach will give written notice to the party against whom the breach is alleged, which will then have 10 business days to cure the breach (or if the alleged breach cannot reasonably be cured within 10 business days, to take all commercially reasonable steps toward curing the alleged breach as soon as possible thereafter), failing which the issue of whether the breach has been cured shall be referred to summary binding resolution and, if the arbitrator determines that the breach has not been cured, the arbitrator will direct the breaching party to take specific actions to cure it;
- (d) the failure of any party to comply substantially with the licensing procedures set out in any applicable MLA or the Canadian Licensing Practices will not affect the validity of this release as against the breaching party, and the sole obligation of the breaching party and the sole remedy of the moving party will be to cure the breach in question, either to the satisfaction of the non-breaching parties or as directed by the arbitrator; and
- (e) the failure of any Label to comply substantially with its material obligations in relation to any particular Musical Work in accordance with subparagraphs 5.01(b) and (c) will not affect the validity of this release in relation to any other Musical Work (including, for greater certainty, any fractional share of the same Musical Work in relation to which the Label has complied substantially with its material obligations).

## 6. Future Mechanical Licensing

6.01 **Audio Products Released On or After January 1, 2013.** To avoid the accumulation of pending lists in the future, and to promote the timely payment of royalties to all Rightsholders, the parties agree to use all reasonable commercial efforts to develop and implement the following four-step licensing process in relation to Audio Products, to commence by no later than January 1, 2013 in relation to Products Released in Canada on or after that date:

### (a) Step 1: Submission of Licence Requests

- (i) Each Label will upload complete and accurate information (to be determined mutually by CMRRA, SODRAC and the Labels, each acting reasonably, and set out in detail in the Revised MLAs (as defined below)) on each new Audio Product to an electronic mechanical licensing database (the "**Licensing Database**") built by CSI in accordance with specifications agreed upon by CMRRA, SODRAC, the Labels and the plaintiff. Information will be delivered in the DDEX format (as it may exist and/or be modified by agreement of the parties from time to time) and will include at least
  - (A) the information that is currently required to be provided in respect of a new licence application pursuant to the current Mechanical Licensing Agreement between CMRRA and CRIA, which will be provided at least 30 days before the Release of any new Audio Product (or, where that information is not available 30 days before Release, as soon as the information becomes available and, in any event, within a commercially reasonable time, it being understood and agreed that, where some but not all of that information is available before Release, the Label will deliver any and all information that is so available before Release and will supplement it on an ongoing basis with information that becomes available after Release); and
  - (B) a digital copy of each track released, provided in accordance with each Label's digital security protocol, to which digital audio fingerprinting technology may be applied to facilitate song identification, which will be provided within 14 days following the Release of any new Audio Product unless the Label does not have the right to post a particular track in digital format.

The parties further agree that the details of the information to be provided pursuant to this subparagraph 6.01(a)(i), and the timing of its provision, will be discussed and considered by the working group formed pursuant to paragraph 6.06.

- (ii) On request by CSI, the Label will supplement the data provided with two sample physical copies of the Audio Product (one for CMRRA and one for SODRAC), provided that the physical copy need not be supplied sooner than 14 days after its Release.
- (iii) In addition, the Labels, CMRRA and SODRAC will implement, as soon as reasonably practicable, those of the "Default Rules" and "Best Practices" set out in the Memorandum of Understanding dated as of November 10, 2009 between the Recording Industry of America, Inc. (RIAA), on the one hand, and the National Music Publishers' Association, Inc. (NMPA) and The Harry

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Fox Agency, Inc. (HFA), on the other hand (the "U.S. MOU") as are reasonably applicable to mechanical licensing in Canada, with such modifications as the parties agree are necessary in the circumstances, as well as any further processes and procedures as the parties agree would assist in reducing unlicensed reproduction and the accumulation of pending lists (the "Canadian Licensing Practices"). In the event that the Labels, CMRRA and SODRAC (or any of them) are unable to agree on any aspect of the Canadian Licensing Practices after reasonable negotiation among them in good faith, any outstanding dispute will be submitted to summary binding resolution.

- (iv) The Canadian Licensing Practices will be set out in amendments to the existing mechanical licensing agreements to be entered into by each Label with each of CMRRA and SODRAC (the "Revised MLAs"), which will differ from the mechanical licensing agreement currently in effect between CMRRA and each respective Label (the "Existing MLAs") only to the extent necessary to implement this section 6 and to address any matters arising as a necessary consequence of doing so. By way of example but not limitation, the parties agree that there will be no changes to any provision of the existing mechanical licensing agreements between them that relates to royalty rates, or to the term of those agreements, and that (i) in the case of CMRRA, controlled composition clauses will continue to be dealt with in accordance with section 7 of the Existing MLAs, without modification, and (b) in the case of SODRAC, nothing in this paragraph (iv) or otherwise is to derogate (1) from its position that controlled composition clauses do not apply to works in its repertoire, or (2) from the Label's position that controlled composition clauses do apply to works in SODRAC's repertoire.

(b) **Step 2: Song Matching and Initial Return**

- (i) Data from the Licensing Database will be transmitted to CMRRA and SODRAC, who will, within 180 days after receiving the data,
- (A) issue mechanical licences electronically, in the DDEX format, for those Musical Works that are identified as being within their respective repertoires;
- (B) conduct a reasonable amount of internal research for the purpose of identifying Musical Works that are not matched immediately, and issue mechanical licences electronically for additional Musical Works that are identified as being within their respective repertoires; and
- (C) confirm to each Label, on an ongoing basis, any Musical Works that are identified as not being within their respective repertoires.
- (ii) During the same 180-day period, the Label will continue their efforts to obtain Direct Licences from any Rightsholder in relation to songs or shares that have been positively identified as not being within the repertoire of CMRRA or SODRAC for the necessary use(s) ("Non-CSI Repertoire").
- (iii) Each of CMRRA, SODRAC and the Label will update the Licensing Database on a regular basis to reflect which Musical Works have been licensed and which remain to be licensed.



(c) **Step 3: Public Licensing Period**

At the conclusion of the procedure set out in subparagraph 6.01(a), the following procedures will apply:

- (i) Other than in the case of a dispute, the owner of any Musical Work not yet identified will be deemed "unlocated" and, on the next date for the payment of Royalties to CMRRA and SODRAC pursuant to the applicable MLA, each applicable Label will pay an amount equal to the cumulative Royalties due and owing in relation to that Musical Work, at the then-current MLA rate (which, if the MLA rate differs as between CMRRA and SODRAC, will be deemed to be the weighted average of the two rates, determined on the basis of estimates provided by CMRRA and SODRAC, acting reasonably, as to their respective shares of the Canadian market for mechanical licensing) – subject to the terms of any controlled composition clause, if and to the extent applicable and as limited by the terms of the applicable MLA – less any applicable Reserves and/or returns, into an interest-bearing trust account established for the benefit of unlocated Rightsholders (the "**Licensing Trust**"). So long as the Rightsholder remains unlocated, each applicable Label will continue to pay Royalties in relation to that Musical Work into the Licensing Trust on a quarterly basis, at the then-current MLA rate (as defined above), at the same time as Royalties are due to be paid to CMRRA and SODRAC pursuant to the MLA, and any interest generated on those Royalties will accrue to the benefit of the Rightsholder. For greater certainty, the Label will not pay Royalties into the Licensing Trust in relation to Non-CSI Repertoire, or where a Direct Licence has been sought by the Label and declined by the applicable Rightsholder other than by reason of the Rightsholder's being represented by CMRRA or SODRAC.
- (ii) Information regarding Musical Works that remain unidentified, including, where the necessary rights are available to the Label, a digital excerpt of the Sound Recording itself, will be published on a publicly-available licensing website (the "**Licensing Website**") built and maintained by CSI in accordance with specifications agreed upon by CMRRA, SODRAC, the Labels and the plaintiff. The Licensing Website will include a facility for the online submission of ownership claims, subject to proper documentation of ownership (including prior claims by other Rightsholders). As each Rightsholder in a Musical Work is identified and its claims verified, either through the Licensing Website or as a result of further research by CSI (which will continue during this period) or further information obtained by a Label, CSI or the Label, as applicable, will
  - (A) update the Licensing Database as each Rightsholder is identified (whether or not each Musical Work claimed by that Rightsholder is within the repertoire of CMRRA or SODRAC);
  - (B) in the case of CSI, facilitate the electronic issuance by CMRRA or SODRAC, as the case may be, of a mechanical licence for each Musical Work that is identified as being in the applicable collective's repertoire, or which is added to either repertoire during this period, and update the Licensing Database as each such licence is issued;
  - (C) in the case of a Label, update the Licensing Database to reflect any and all Direct Licences obtained;

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- (D) no later than the second Payment Date following the completion of steps (A) through (C) (or, in the case of any payment required to be made directly by a Label pursuant to a Direct Licence, within no more than 90 days following the completion of steps (A) through (C)),
  - (1) pay to the Rightsholder any Royalties due and owing to that Rightsholder (provided that CSI shall not be required to pay any amount greater than the Royalties then held in the Licensing Trust on behalf of the Rightsholder in relation to the Musical Work) for the reproduction in Audio Products of the Musical Works identified as belonging to that Rightsholder; and
  - (2) if the Label has paid Royalties into the Licensing Trust at a higher rate than is ultimately determined to be required pursuant to the applicable MLA or Direct Licence, refund to the Label any excess Royalties so paid;
- (E) update the Licensing Database, within 30 days after the date on which royalties are first paid to any Rightsholder pursuant to this subparagraph 6.01(c)(i), to reflect the amount of Royalties paid to each such Rightsholder in relation to each Musical Work that the Rightsholder claims; and
- (F) remove the Musical Work from the Licensing Website as soon as reasonably practicable after all Rightsholders in the Musical Work have been identified and their claims verified.

Thereafter, the Label will pay any Royalties owed in relation to future sales of Products embodying each such Musical Work either to CMRRA, SODRAC, the Rightsholder or its authorized representative, as the Rightsholder may direct.

(d) **Step 4: Unlocatable Rightsholders**

- (i) If any Musical Work remains unlicensed 90 days after it has been posted on the Licensing Website in accordance with subparagraph 6.01(c)(i) (other than works whose ownership is in dispute, as above), the Rightsholder(s) in that work will be deemed "unlocatable" for the purposes of this system. CSI will then apply, on behalf of the Label, for a licence from the Copyright Board of Canada under section 77 of the *Copyright Act*. Royalties paid pursuant to any licence issued by the Board will be paid into the Licensing Trust (or a separate interest-bearing trust established by CSI expressly for this purpose) or otherwise as directed by the Board, and any interest accrued on those royalties will likewise be dealt with as directed by the Board. CSI will notify the Label of the issuance of the licence, update the Licensing Database accordingly, and maintain a separate public website on which the details of such licences would be made public in a further effort to locate the Rightsholder(s).
- (ii) In the event that a licence issued pursuant subparagraph to 6.01(d)(i) has retroactive effect and requires the payment of Royalties into the Licensing Trust (or other trust established by CSI pursuant to subparagraph 6.01(d)(i)) at a lower rate than the rate at which the applicable Label has previously paid Royalties into the Licensing Trust pursuant to subparagraph 6.01(c)(ii), then, unless directed otherwise by the Copyright Board, CSI will refund to

- 27 -

the Label any excess Royalties so paid on the second Payment Date following the issuance of the licence.

- (iii) If a Rightsholder is located after a licence is issued pursuant to subparagraph 6.01(d)(i), CSI will update the Licensing Database accordingly, deal with any accrued Royalties in accordance with the *Copyright Act*, and either issue a mechanical licence to the Label (if the Rightsholder is or chooses to become represented by CMRRA or SODRAC) or provide the information necessary for the Label to seek a Direct Licence from the Rightsholder, in which case the Label will continue to update the Licensing Database as required by subparagraph 6.01(c) in relation to other songs or shares licensed directly by the Label.

6.02 **Changes in Status.** In the event that CSI determines that a particular Musical Work is no longer in the repertoire of CMRRA or SODRAC, CSI will update the Licensing Database and electronically notify each Label to which the applicable collective has previously issued a mechanical licence in relation to that Musical Work and, if possible and to the best of its knowledge, indicate to whom future Royalties are to be paid.

6.03 **Disputes.** Where a particular Musical Work cannot be licensed as a result of an ownership dispute, the various claimants will be invited to submit their dispute to one of an approved roster of mediators or arbitrators for resolution. The resolution will be applicable only to the mechanical royalties in dispute in Canada and specifically non-precedential to other royalty disputes in Canada or other territories. Unless and until the dispute is resolved, the accruing royalties will continue to be paid into the Licensing Trust, and the Musical Work will be noted in the Licensing Database as subject to a dispute. CMRRA and SODRAC will work together to develop policies and procedures for the handling of disputes of this nature.

6.04 **Indemnity.**

- (a) CSI, CMRRA and SODRAC will jointly and severally indemnify, save and hold each of the Labels, their parent, subsidiaries, affiliates, successors and assigns, and any of their respective officers, directors, employees, representatives and agents, or each of them, harmless from and against any and all damages, liabilities, costs, losses and expenses (including reasonable legal costs and attorneys' fees) arising out of or in connection with any claim, demand or action related to the unauthorized use of any Musical Work, other than Non-CSI Repertoire, in a Sound Recording newly Released in Canada on or after January 1, 2013 and distributed in physical format, excluding any claim, demand or action for breach of the terms of a Direct Licence by a Label or for the unauthorized use of the Musical Work in question before or after the term of the Direct Licence (collectively, "**Losses**"), provided that the Label claiming indemnity has complied substantially with its material obligations under the applicable MLA and this section 6 in relation to any Sound Recording in relation to which this indemnity is claimed, and provided further that the Label has reported the particulars of both the claim, demand or action and the Losses to CSI in a timely fashion, having regard to the information reasonably available to the Label using its best commercial efforts. In such case, CSI, CMRRA and SODRAC will be liable jointly and severally to reimburse the applicable Label, on demand, for any payment reasonably made at any time with respect to the Losses to which this indemnity applies. Notwithstanding the foregoing,
  - (i) in the case of any claim, demand or action arising out of or in connection with circumstances in which the claimant has expressly declined to grant a Direct Licence to the Label, other than by reason of the claimant's being represented by CMRRA or SODRAC, the obligation of CSI, CMRRA and

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SODRAC to indemnify the Label will be limited to claims, demands or actions arising up to seven (7) days after the claimant declined to grant the Direct Licence; and

- (ii) in the event that any claim, demand or action for breach of the terms of a Direct Licence by a Label, or for the unauthorized use of the Musical Work in question before or after the term of the Direct Licence, is finally resolved in favour of the claimant, CSI will refund to the Label any and all amounts paid by the Label into the Licensing Trust in relation to that claimant's interest in the Musical Work(s) embodied in the Sound Recording(s) and not already paid by CSI to the claimant, plus any interest accrued on those amounts since their payment by the Label into the Licensing Trust.

For greater certainty, a Sound Recording will be considered "newly Released" for the purposes of this subparagraph 6.01(a) to the extent that it is included on an Audio Product newly Released in Canada on or after January 1, 2013, regardless of whether that Sound Recording has been previously Released on a different Audio Product, but the indemnity will apply only to the newly-Released Audio Product and not to any other Audio Product (whether or not Released prior to January 1, 2013) on which the Sound Recording was included.

- (b) Pending the determination of any claim, demand or action to which this indemnity applies, the applicable Label may, at its election, withhold payment of any monies otherwise payable to CSI, CMRRA or SODRAC in relation to the specific Sound Recording(s) to which the claim, demand or action relates, provided that (i) the Copyright Board has not issued a licence in relation to the Sound Recording(s) pursuant to paragraph 6.01(d), which licence has not been terminated by the Rightsholder or the Copyright Board; and (ii) the amount withheld does not exceed the potential liability of CSI, CMRRA, SODRAC or the Label in relation to the Sound Recording(s) pursuant to the claim, demand or action and this paragraph 6.04.
- (c) In the event that CSI, CMRRA and/or SODRAC alleges that any Label has not complied substantially with its material obligations under the applicable MLA and/or this section 6 in relation to one or more particular Sound Recording(s), the party alleging the breach will give written notice to the Label, which will then have 10 business days to cure the breach (or, if the alleged breach cannot reasonably be cured within 10 business days, to take all commercially reasonable steps toward curing the alleged breach as soon as possible thereafter). If the breach is not cured within that period of 10 business days (or, if the alleged breach cannot reasonably be cured within 10 business days, the Label has not taken all commercially reasonable steps toward curing the alleged breach as soon as possible thereafter), any party to the dispute may submit for summary binding resolution the question of whether the Label is in substantial compliance with the obligations at issue, failing which the indemnity in subparagraph 6.04(a) will be deemed no longer to apply to that Label in relation to the Sound Recording(s) at issue, and in the event that any claim, demand or action in relation to those Sound Recording(s) is finally resolved in favour of the claimant, CSI will refund to the Label any and all amounts paid by the Label into the Licensing Trust in relation to that claimant's interest in the Musical Work(s) embodied in the Sound Recording(s) and not already paid by CSI to the claimant, plus any interest accrued on those amounts since their payment by the Label into the Licensing Trust. For greater certainty,
  - (i) the failure of any Label to comply substantially with its material obligations in relation to any particular Musical Work will not affect the validity of this

- 29 -

indemnity in relation to any other Musical Work (including, for greater certainty, any fractional share of the same Musical Work in relation to which the Label has complied substantially with its material obligations);

- (ii) the failure of any Label to comply substantially with its material obligations under the applicable MLA and this section 6 in relation to any Sound Recording in which this indemnity is claimed will not affect the availability of this indemnity to those Labels who remain in compliance; and
- (iii) the obligation to provide any and all required information in relation to the particular Sound Recording, subject to para. 6.01(a)(i), and the failure of the Labels to continue their efforts to obtain Direct Licences where applicable, will be deemed in all cases to be "material."

- (d) In the event of any claim, demand or action in respect of which a Label intends to claim indemnity pursuant to this paragraph 6.01, that Label will report the particulars of both the claim, demand or action and the Losses to CSI in a timely fashion, having regard to the information reasonably available to the Label using its best commercial efforts, and will use reasonable commercial efforts to consult CSI in relation to, and to permit CSI to participate in, the resolution of the claim, demand or action.

6.05 **Implementation.** Each of the Labels, CMRRA and SODRAC agrees to take immediate steps, working collaboratively and, to the extent appropriate, with the other Labels, to develop the necessary systems and capacity to implement the licensing standards set out in this section 6 and ultimately embodied in the Revised MLAs. The parties will further collaborate to develop and agree upon a schedule for the completion of agreed milestones for the development and implementation of the systems and capacity necessary to implement these standards. Each of the parties expressly acknowledges and agrees that it will be responsible for 100% of all costs associated with its own implementation of these standards and further agrees that, subject to reasonable compliance by all other parties with their respective obligations under this section 6, its implementation will be complete by no later than December 31, 2012.

6.06 **Working Group.** The Labels, CMRRA and SODRAC agree to take immediate steps to form an industry-wide working group, including representatives of each of them and any other members whose participation appears to all of them to be useful and desirable, to meet at least quarterly to develop the Canadian Licensing Practices and to address other matters related to the improvement of music licensing practices in Canada. The first meeting of the working group will take place on or before February 1, 2011, on a date and at a place mutually agreed by each of the Labels, CMRRA and SODRAC, and will include up to two representatives designated by each of the Labels, CMRRA and SODRAC. At the first meeting, in addition to any other matters that the participants may agree to address, the participants, acting in good faith, will negotiate and determine the specific composition, mandate and manner of operation of the working group going forward.

## 7. Other Matters

7.01 **Payment of Costs to Plaintiff's Counsel.** On the date its Settlement Amount is paid into the Settlement Trust pursuant to paragraph 1.05(a), each Label will pay directly to the plaintiff's counsel the amount of costs agreed by each Label pursuant to its Settlement Agreement. The parties further acknowledge and consent to payment of the plaintiff's class action counsel of additional amounts out of the Settlement Trust, on account of fees, disbursements and taxes, in an amount to be determined by application to the court pursuant to the *Class Proceedings Act*.

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- 7.02 **Payment of Notice Expenses.** Notice costs to a maximum of \$150,000 will be paid out of the Settlement Trust, subject to approval of the court in relation to the plan of notice.
- 7.03 **CSI Commission.** On or before December 31, 2015, CSI will submit a report to the court with respect to its administration of the Settlement Trust, including a summary of all costs incurred in relation to the costs of administration of the Settlement Trust and the costs of the design, acquisition, construction, implementation and maintenance of the necessary systems and resources to give effect to the new licensing process contemplated by section 6, other than the costs of the implementation of that process by each Label. If the costs incurred by CSI comprise less than 90% of the total commission paid to CSI, CSI will distribute the difference in the same manner as remaining funds are distributed pursuant to para. 2.02(b) of this Term Sheet.
- 7.04 **Summary Binding Resolution.** Where this Term Sheet indicates that any dispute is to be submitted to "summary binding resolution," that matter is to be resolved by The Hon. Mr. Justice Colin L. Campbell of the Ontario Superior Court of Justice or, in the event that Mr. Justice Campbell is unavailable to resolve the dispute within 10 business days after it is submitted for resolution, by such other neutral third-party arbitrator as the parties to the dispute may agree or as Mr. Justice Campbell may designate after receiving recommendations from those parties.
- 7.05 **EMI Video Royalties.** Notwithstanding anything to the contrary contained in this Term Sheet, in the event that EMI is not required to pay the Video Settlement Amount into the Settlement Trust in accordance with its Settlement Agreement, the provisions of this Term Sheet applicable to Video Products, Video Royalties, Agreed Video Royalties and Pending Video Royalties will not apply in relation to EMI. However, if EMI is required to pay the Video Settlement Amount into the Settlement Trust, the provisions of this Term Sheet applicable to Video Products, Video Royalties, Agreed Video Royalties and Pending Video Royalties will apply mutatis mutandis, and with such adjustments as may be reasonably required in relation to reporting, payment and distribution dates, to EMI's Video Products, Video Royalties, Agreed Video Royalties and Pending Video Royalties.
- 7.06 **Paramountcy.**
- (a) This Term Sheet supersedes and replaces the previous version of the Term Sheet executed by the Estate of Chesney Henry "Chet" Baker Junior and Chet Baker Enterprises, LLC (collectively, the "**Former Plaintiffs**"), CMRRA, SODRAC, EMI, Sony and Warner as of October 25, 2010, and the subsequent version of the Term Sheet executed by the Former Plaintiffs, CMRRA, SODRAC, EMI, Sony, Universal and Warner as of January 31, 2011, both of which are confirmed by the parties to be of no further force and effect.
  - (b) This Term Sheet is to be read together, and interpreted harmoniously, with each Label's Settlement Agreement. To the extent of any apparent inconsistency between this Term Sheet and any Settlement Agreement that cannot reasonably be given a harmonious interpretation, the applicable Settlement Agreement will govern in relation only to the rights and obligations of the parties to it; however, any such inconsistency will not affect the applicability of this Term Sheet to the rights and obligations of the other parties. Notwithstanding the foregoing, in the event of any inconsistency between para. 1.05 of this Term Sheet and any provision of any Settlement Agreement, para. 1.05 of this Term Sheet will govern.

**7.07 Communications.**

- (a) The parties will agree with each other on all communications concerning settlement to be made by any of them, with the goal of stakeholders receiving accurate and complete information about the features of settlement.
- (b) The parties will consult and agree on either joint press releases or separate press releases to be issued, first, following execution of each Settlement Agreement and, subsequently, following approval of the settlement by the Court.
- (c) The parties will collaborate on and agree to a Frequently Asked Questions document (the "**FAQ**"). All public statements respecting the settlement will be consistent with the FAQ.
- (d) Nothing in this Term Sheet will limit the communications between plaintiff's counsel or any Label and individual class members or persons who opt out, or between CMRRA, SODRAC and their respective members.
- (e) Notwithstanding anything to the contrary in any Settlement Agreement, any irreconcilable dispute respecting the content of any communications will be submitted for summary binding resolution in accordance with paragraph 7.04.

**7.08 Additional Parties.** In the event that any other party to the Proceeding (the "**Other Party**") offers or is offered a settlement agreement with the plaintiff, none of CMRRA, SODRAC and the plaintiff will agree to vary materially the terms of this Term Sheet as applicable to the Other Party (the "**Variations**") or otherwise enter into an agreement with the Other Party which agreement addresses subject matter similar to that contained in this Term Sheet (the "**Other Agreement**") if the Variations or the Other Agreement, as applicable, would either be:

- (a) less favourable to class members than the terms of this Term Sheet as agreed by the Labels; or
- (b) more favourable to the Other Party than the terms of this Term Sheet are to the Labels.

CMRRA, SODRAC and the Plaintiff will provide each of the Labels with a copy of any draft Variations or the Other Agreement, as applicable, at least five (5) business days prior to intended execution. In case of disagreement as to whether the draft Variations or Other Agreement, as applicable, conform to the requirements of this paragraph 7.08; the matter will be submitted to summary binding resolution.

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Accepted and agreed by the parties as of May , 2011.

In the presence of:

\_\_\_\_\_

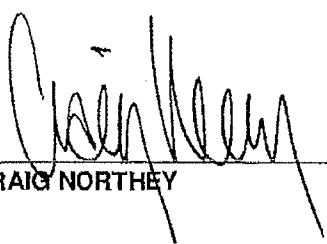
Witness

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

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\_\_\_\_\_

**CRAIG NORTHEY**

**EMI GROUP CANADA INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**SONY MUSIC ENTERTAINMENT CANADA INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**UNIVERSAL MUSIC CANADA INC.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**WARNER MUSIC CANADA CO.**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



Accepted and agreed by the parties as of May 26, 2011.

In the presence of:

\_\_\_\_\_

Witness

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CRAIG NORTHEY

EMI GROUP CANADA INC.

By: \_\_\_\_\_

Name: *Deanne Cameron*

Title: *President*

SONY MUSIC ENTERTAINMENT CANADA INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

UNIVERSAL MUSIC CANADA INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

WARNER MUSIC CANADA CO.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Accepted and agreed by the parties as of May 9, 2011.

In the presence of:

\_\_\_\_\_

Witness

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CRAIG NORTHEY

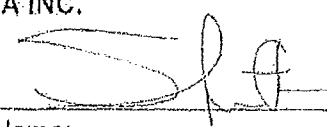
EMI GROUP CANADA INC.

By: \_\_\_\_\_

Name:

Title:

SONY MUSIC ENTERTAINMENT CANADA INC.

By:  \_\_\_\_\_

Name:

Title:

UNIVERSAL MUSIC CANADA INC.

By: \_\_\_\_\_

Name:

Title:

WARNER MUSIC CANADA CO.

By: \_\_\_\_\_

Name:

Title:

Accepted and agreed by the parties as of May 26, 2011.

In the presence of:

\_\_\_\_\_  
 Witness  
 Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
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 \_\_\_\_\_

\_\_\_\_\_  
**CRAIG NORTHEY**

**EMI GROUP CANADA INC.**

By: \_\_\_\_\_  
 Name:  
 Title:

**SONY MUSIC ENTERTAINMENT  
CANADA INC.**

By: \_\_\_\_\_  
 Name:  
 Title:

**UNIVERSAL MUSIC CANADA INC.**

By: *Sarlene Gilliland*  
 Name: SARLENE GILLILAND  
 Title: VP, BUS DEV + CORPORATE AFFAIRS

Accepted and agreed by the parties as of May 9, 2011.

In the presence of:

\_\_\_\_\_  
 Witness  
 Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 \_\_\_\_\_  
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\_\_\_\_\_  
CRAIG NORTHEY

EMI GROUP CANADA INC.

By: \_\_\_\_\_  
 Name:  
 Title:

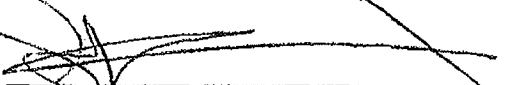
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By: \_\_\_\_\_  
 Name:  
 Title:

UNIVERSAL MUSIC CANADA INC.

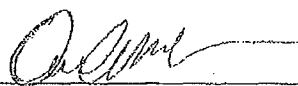
By: \_\_\_\_\_  
 Name:  
 Title:

WARNER MUSIC CANADA CO.

By:   
 Name: Steven Kane  
 Title: President

- 33 -

**CANADIAN MUSICAL REPRODUCTION  
RIGHTS AGENCY LTD.**

By:   
Name: DAVID A. BASSELIN  
Title: PRESIDENT AND CEO

**SOCIETY FOR REPRODUCTION RIGHTS  
OF AUTHORS, COMPOSERS AND  
PUBLISHERS (SODRAC) INC.**

By: \_\_\_\_\_  
Name:  
Title:

**SODRAC 2003 INC.**

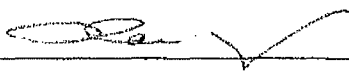
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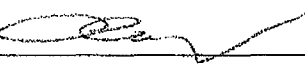
**CANADIAN MUSICAL REPRODUCTION  
RIGHTS AGENCY LTD.**

By: \_\_\_\_\_  
Name:  
Title:

**SOCIETY FOR REPRODUCTION RIGHTS  
OF AUTHORS, COMPOSERS AND  
PUBLISHERS (SODRAC) INC.**

By:  \_\_\_\_\_  
Name: ALAIN LUSSIER  
Title: General Manager

**SODRAC 2003 INC.**

By:  \_\_\_\_\_  
Name: ALAIN LUSSIER  
Title: GENERAL MANAGER

## SCHEDULE "A"

### DEFINITIONS

For the purposes of the Term Sheet, in addition to any terms specifically defined in the text of the agreement, the following definitions apply:

- **"Adjustment Period,"** in relation to each Label, means the period beginning on the first day after its Settlement Cut-Off Date and ending on the last day before its First Report is provided to the plaintiff and CSI pursuant to paragraph 1.04;
- **"Aggregate Rightsholder Payments"** has the meaning given to it in subparagraph 1.04(g)
- **"Agreed Audio Royalties"** and **"Agreed Video Royalties"** mean, in relation to each Label, the Audio Royalties and Video Royalties, respectively, that the applicable Label has agreed to pay pursuant to its Settlement Agreement;
- **"Attestation,"** in relation to each Label, has the meaning given to it, if applicable, in that Label's Settlement Agreement;
- **"Audio Products"** means audio-only products, released or distributed in physical formats (e.g., CDs, LPs, cassettes, etc.), that contain Musical Works embodied in Sound Recordings; for EMI, Sony and Universal, Audio Products may also include so-called "CD/DVD Combos";
- **"Audio Royalties"** means amounts payable for the reproduction of Musical Works in Audio Products;
- **"Canadian Licensing Practices"** has the meaning given to it in subparagraph 6.01(a)(iii);
- **"Claim"** has the meaning given to it in paragraph 5.01;
- **"Claims Dispute"** has the meaning given to it in subparagraph 2.02(c)(iv);
- **"Claims Website"** has the meaning given to it in subparagraph 2.01(c)(ii);
- **"Court Order"** has the meaning given to it in subparagraph 5.01(a);
- **"CSI"** has the meaning given to it in paragraph 1.03;
- **"Direct Licence"** has the meaning given to it in subparagraph 2.03(a);
- **"Due Diligence Meeting,"** in relation to any Label, means the meeting required by its Settlement Agreement in order to assist the plaintiff, CMRRA and SODRAC in understanding the calculation and recording of its Audio Royalties and Video Royalties and other related matters as specified in that particular Settlement Agreement;
- **"EMI"** means EMI Group Canada Inc.;
- **"EMI Adjustment Percentage"** has the meaning given to it in subparagraph 1.08(a);
- **"Existing Dispute"** means a known dispute among Rightsholders in relation to the ownership of a Musical Work, which has caused any Label to withhold payment of Royalties in relation to a Product embodying that Musical Work pending resolution of the dispute;
- **"Existing MLAs"** has the meaning given to it in subparagraph 6.01(a)(iv);
- **"FAQ"** has the meaning given to it in subparagraph 7.07(c);

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- “**First Report**” has the meaning given to it in paragraph 1.04;
- “**Future Sales**” has the meaning given to it in paragraph 3.01;
- “**Group I Market Share**” has the meaning given to it in paragraph 1.12;
- “**Group I Product**” has the meaning given to it in subparagraph 1.04(b);
- “**Group II Market Share**” has the meaning given to it in paragraph 1.14;
- “**Group II Product**” has the meaning given to it in subparagraph 1.04(b);
- “**Group III Market Share**” has the meaning given to it in paragraph 1.17;
- “**Group III Product**” has the meaning given to it in paragraph 1.15;
- “**High-Value Group I Items**” has the meaning given to it in subparagraph 2.02(c);
- “**Individual Rightsholder Payments**” has the meaning given to it in subparagraph 1.04(f);
- “**Label**” means any one of the settling record labels, namely EMI, Sony, Universal and Warner, and “**Labels**” means all four of them collectively;
- “**Licensing Database**” has the meaning given to it in subparagraph 6.01(a)(i);
- “**Licensing Trust**” has the meaning given to it in subparagraph 6.01(c)(i);
- “**Licensing Website**” has the meaning given to it in subparagraph 6.01(c)(ii);
- “**Line Item Opt-Out Refund**” has the meaning given to it in subparagraph 1.11(c)(i);
- “**Losses**” has the meaning given to it in subparagraph (a);
- “**Low-Value Group I Items**” has the meaning given to it in subparagraph 2.02(b);
- “**Low-Value Group I Research Period**” has the meaning given to it in subparagraph 2.02(b)(ii);
- “**Medium-Value Group I Items**” has the meaning given to it in subparagraph 2.02(c);
- “**MLA**” means, as the context requires or as specified, the Mechanical Licensing Agreement between a particular Label and either CMRRA or SODRAC, as applicable, including in each case the relevant provisions of the Mechanical Licensing Agreement between the Canadian Recording Industry Association (CRIA) and either CMRRA or SODRAC, as applicable;
- “**Musical Work**” has the meaning given to it in the *Copyright Act*, R.S.C. 1985, c. C-42, and a reference to any Musical Work includes any fractional share of the copyright in that work;
- “**Non-CSI Repertoire**” has the meaning given to it in subparagraph 6.01(b)(ii);
- “**Opt-Out**” has the meaning given to it in subparagraph 1.11(b);
- “**Opt-Out Period**” has the meaning given to it in subparagraph 1.11(b);
- “**Other Agreement**” has the meaning given to it in paragraph 7.08;
- “**Other Party**” has the meaning given to it in paragraph 7.08;
- “**Payment Dates**” mean, in any year, March 15, June 15, September 15 and December 15, being the dates on which payments to Rightsholders are to be made by the Trustee or CSI, as



the case may be, and any reference to a particular "Payment Date" refers to such of those dates as the context requires;

- **"Pending Royalties"** means, in relation to each Label, the total amounts recorded by that label in its royalty system, representing royalties potentially due and unpaid for Musical Works embodied in Audio Products or Video Products released or distributed at any time in Canada, for which no reproduction licence has been obtained, or for which the required royalties have not been paid, irrespective of whether those amounts have previously been reported to CMRRA and/or SODRAC or included on a so-called "pending list" (including, for example, Products that have appeared on a so-called "suspense list," "unmatched list" or "address unknown list"), including any amounts withheld by that Label as a result of Existing Disputes, and **"Pending Audio Royalties"** and **"Pending Video Royalties"** mean Pending Royalties recorded specifically in relation to Audio Products and Video Products, respectively;
- **"Proceeding"** means the lawsuit commenced by the plaintiff, court file no. CV 0800360651 00CP;
- **"Product"** means Audio Products and Video Products, collectively;
- **"Release"** means, in relation to an Audio Product or a Video Product, the act of releasing or distributing that Product, for commercial sale in Canada;
- **"Reporting Date"** means, in relation to EMI, March 31, 2010, and in relation to each of Sony, Universal and Warner, the last day of the calendar quarter immediately preceding its respective Settlement Date;
- **"Reporting Date Pending Lists"** has the meaning given to it in subparagraph 2.02(b)(i);
- **"Reserves"** means the reserve taken by any Label, in accordance with the applicable provisions of the applicable MLA (or, in relation to Musical Works not within the repertoire of CMRRA or SODRAC, in accordance with that Label's usual accounting practices), against the return of Products sold or otherwise distributed by that Label;
- **"Revised MLAs"** has the meaning given to it in subparagraph 6.01(a)(iv);
- **"Rightsholder"** means a holder of reproduction rights in and to a Musical Work, including but not limited to songwriters and music publishers, and **"Rights"** means the reproduction rights held by the Rightsholder in that Musical Work;
- **"Rightsholder Holdback"** has the meaning given to it in subparagraph 2.01(b)(i);
- **"Royalties"** means, as the context requires, either or both of Audio Royalties and Video Royalties;
- **"Royalty Verification,"** in relation to any Label, has the meaning given to it, if applicable, in that Label's Settlement Agreement;
- **"Sales Threshold"** has the meaning given to it in paragraph 2.02(c)(iii);
- **"Second Report"** has the meaning given to it in paragraph 1.13;
- **"Settlement Agreement"** means, in relation to each Label, the settlement term sheet executed by that Label with the plaintiff, CMRRA and SODRAC;
- **"Settlement Amount"** means, in relation to each Label, the settlement amount specified in that Label's Settlement Agreement;

- 37 -

- **“Settlement Cut-Off Date”** means, in relation to Warner, December 31, 2009, and in relation to EMI, Sony and Universal, March 31, 2010;
- **“Settlement Date”** means, in relation to each Label, the date on which the court approves the final Settlement Agreement between the plaintiff, CMRRA, SODRAC and that Label;
- **“Settlement Trust”** has the meaning given to it in subparagraph 1.05(a);
- **“Settling Rightsholders”** has the meaning given to it in paragraph 2.02;
- **“SODRAC”** means and includes both Society of Reproduction Rights of Authors, Composers and Publishers (SODRAC) Inc. and SODRAC 2003 Inc., a corporation that took over the assets and activities of SODRAC as of April 1, 2004 and to which SODRAC has since then gradually assigned rights that were previously assigned by copyright owners to SODRAC;
- **“Sony”** means Sony Music Canada Inc. (formerly Sony BMG Music (Canada) Inc.);
- **“Sound Recording”** means a recording embodying a Musical Work and, in the case of an Audio Product, refers to an individual track of recorded music, whether it embodies one or more than one Musical Work;
- **“Term Sheet”** means these Key Terms of Settlement;
- **“Third Report”** has the meaning given to it in paragraph 1.15;
- **“U.S. MOU”** has the meaning given to it in subparagraph 6.01(a)(iii);
- **“Universal”** means Universal Music Canada Inc.;
- **“Variations”** has the meaning given to it in paragraph 7.08;
- **“Video Products”** means audiovisual products, released or distributed in DVD or other physical formats, that feature primarily audiovisual representations of Musical Works embodied in Sound Recordings (including but not limited to music videos and live concert performances);
- **“Video Royalties”** means amounts payable for the reproduction and synchronization of Musical Works in Video Products; and
- **“Warner”** means Warner Music Canada Co.

This is Exhibit "C" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



---

*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law,  
Expires March 21, 2017.

## Owners Who Cannot be Located

### Circumstances in which licence may be issued by Board

77. (1) Where, on application to the Board by a person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performer's performance,
- (c) a published sound recording, or
- (d) a fixation of a communication signal

in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

### Conditions of licence

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

### Payment to owner

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

### Regulations

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1).

1997, c. 24, s. 50.

This is Exhibit "D" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



---

*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.

**Mayzel, Eric**

---

**From:** David Basskin [basskin@me.com]  
**Sent:** Friday, November 13, 2009 8:27 AM  
**To:** Mario.Bouchard  
**Cc:** Chisick, Casey  
**Subject:** Re: Unlocatable Owners

Terrific! We'll come by your office around noon next Friday. Thanks for making the time.

-----  
 David A. Basskin  
 President and CEO  
 CMRRA Ltd.

Office: (416) 926-1966 x222  
 Cell: (416) 562-3603  
 Email: [dbasskin@cmrra.ca](mailto:dbasskin@cmrra.ca)

On 2009-11-13, at 7:42 AM, "Mario.Bouchard" <[Mario.Bouchard@cb-cda.gc.ca](mailto:Mario.Bouchard@cb-cda.gc.ca)> wrote:

Available. Lunch open.

---

**From:** David Basskin [<mailto:dbasskin@cmrra.ca>]  
**Sent:** 12 novembre 2009 17:48  
**To:** Bouchard, Mario: CB-CDA  
**Cc:** [cchisick@casselsbrock.com](mailto:cchisick@casselsbrock.com)  
**Subject:** Unlocatable Owners

Dear Mario:

Might you have some time on Friday, November 20 to meet with me and Casey Chisick? We'd like to discuss a very interesting potential development in the area of unlocatable owner song licensing arising from a recent meeting we had with the representatives of the major record labels. If you can meet with us, we'd be most grateful. If lunch is a possibility, so much the better.

I look forward to hearing from you.

Best regards,

David A. Basskin  
 President and CEO  
 CMRRA Ltd.  
 56 Wellesley St. W. #320  
 Toronto ON  
 Canada M5S 2S3

P: (416) 926-1966 x222  
 F: (416) 926-7521  
 M: (416) 562-3603  
 E: [dbasskin@cmrra.ca](mailto:dbasskin@cmrra.ca)

---

This email has been scanned by the MessageLabs Email Security System.

This is Exhibit "E" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



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*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

**Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.**



December 21, 2009

BY E-MAIL

Mr. Gilles McDougall, Acting Secretary General  
Copyright Board of Canada  
56 Sparks Street, Suite 800  
Ottawa, Ontario  
K1A 0C9  
Canada

cchisick@casselsbrock.com  
tel (416) 869-5403  
fax (416) 644-9326  
file # 36957-17

Dear Mr. McDougall

**Re: Administration of Licence Applications under Section 77 of the *Copyright Act* in relation to the Reproduction of Musical Works**

Over the past several weeks, we have engaged in discussions with Mario Bouchard in relation to the possibility of entering into an arrangement by which CMRRA-SODRAC Inc. (CSI) would assist the Board with the processing and administration of licences issued by the Board, pursuant to section 77 of the *Copyright Act*, for the reproduction of musical works in sound recordings in circumstances where the owner of copyright in those works cannot be located. We now attach, for the consideration of the Board, a proposed Memorandum of Understanding in relation to such an arrangement.

The proposed MOU contemplates two discrete situations in which an application might be made under section 77. The first is the ordinary case contemplated by the *Act*, in which a prospective licensee would apply directly to the Board for a licence. In that situation, the Board would refer the application to CSI for processing, leading to a recommendation by CSI as to whether a licence should be issued and, if so, on what terms.

The second situation would arise if CSI were to enter into an agreement with a record label by which the label would appoint CSI as its representative for the purpose of applying to the Board for a licence. It is anticipated that this would be an extension of the mechanical licensing processes currently in effect between the labels, on the one hand, and CMRRA and SODRAC, on the other. However, the current process is unsatisfactory in the sense that, if neither the label nor the collective is able to identify the owner of copyright in the musical work, the recording ends up on the label's so-called "pending list" and no royalties are paid unless and until the copyright owner is located. The result is a good deal of unlicensed reproduction. Indeed, as the Board may be aware, there is currently a proposed class action pending in the Ontario Superior Court that seeks to recover royalties due and unpaid to songwriters and music publishers whose works appear on these "pending lists." The arrangement proposed in the MOU would see a licence issued under section 77 replace an entry on the pending list as the final step in the mechanical licensing process in circumstances where all reasonable efforts to locate the owner have failed. We are confident that this would go a long way toward reducing the volume of unlicensed activity in the sound recording industry.





Page 2

As will be apparent from the draft MOU, CSI acknowledges that some important issues remain to be discussed. Perhaps the most important issue is how to deal with royalties paid to CSI pursuant to a section 77 licence. From CSI's perspective, it will be important to ensure that its costs of processing and administering the licences are somehow covered, with some reasonable compensation for its efforts. In general, CSI would probably prefer the approach adopted by the Board in its arrangement with Access Copyright, in which the collective is permitted to apply the royalties immediately to its own accounts, to be used for the general benefit of its members, subject to an undertaking to pay the appropriate royalties to any copyright owner who learns of the use and makes a claim to those royalties within five years after the expiry of a licence. However, CSI recognizes that, depending on the amount of royalties at issue, the optics of this approach may be difficult for the Board in the current circumstances, particularly if CSI and the record labels agree to incorporate the section 77 process into the general flow of mechanical licensing. If that is so, then the Board might consider allowing CSI to deduct a reasonable commission from royalties received, even though that would admittedly represent a departure from the Board's usual practice. CSI would be pleased to canvass these and other potential solutions with the Board.

The Board will also note that the standard terms and conditions of licence, as contemplated in Appendix 2, are still to be completed. It is anticipated that these would reflect the general terms of the mechanical licences currently issued by CMRRA and SODRAC, which are well accepted and understood in the music industry, subject to the additional considerations presented by section 77 and the terms of the MOU. We propose to defer final drafting of these terms and conditions until the Board has provided its feedback on the proposed arrangement in general.

Lastly, it may occur to the Board that, financial considerations aside, the proposed arrangement may present other benefits for CSI. For example, it is possible that the licensing infrastructure that CSI would create for purposes of the arrangement might be used for other business activities, or that CSI's efforts to locate copyright owners might result in the affiliation of new members. These benefits, while certainly possible, are not certain. What is certain, however, is what CSI believes to be the chief benefit of the proposal: the certainty and finality that it would bring to the mechanical licensing process by reducing unlicensed reproduction, promoting increased efforts to locate copyright owners, and ensuring that, to the greatest extent possible, songwriters and music publishers are paid for the use of their works.

We look forward to the opportunity to discuss this proposal with the Board.

Yours truly,

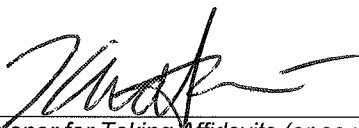
Cassels Brock & Blackwell LLP  
Per:

A handwritten signature in black ink, appearing to read "C. Chisick", written over a light blue horizontal line.

Casey M. Chisick

cc: Mario Bouchard, David Basskin, Alain Lauzon

This is Exhibit "F" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



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*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.

From: Mario Bouchard <mario.bouchard@outlook.com>  
To: "vsyrtash@cmrra.ca" <vsyrtash@cmrra.ca>,  
Date: 07/06/2015 01:54 PM  
Subject: Request for information for collective management publication

---

Dear Veronica

The 2010 publication *Collective Management of Copyright and Related Rights*, edited by Professor Daniel Gervais and published by Kluwer Law International is being re-edited. I have been asked to update the chapter dealing with Collective Management in Canada. Specific facts about CMRRA are published within this text. I have compiled these facts in the attached document for your ease of reference, and would appreciate your expertise and any efforts you could make to confirm whether these facts remain accurate and if not, to suggest any

necessary revisions.

Due to my procrastination, my contribution is long overdue. I have already sent the text for proofing but should be able to make any required corrections when the proofs are sent back to me.

Thank you in advance for your kind assistance.

Mario Bouchard

[attachment "03 CMRRA.docx" deleted by Veronica Syrtash/CMRRA]

This is Exhibit "G" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015



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*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.



RE: Request for information for collective management publication

Mario Bouchard

to:

Veronica Syrtash

07/15/2015 05:38 PM

Hide Details

From: Mario Bouchard <mario.bouchard@outlook.com>

To: Veronica Syrtash <vsyrtash@cmrra.ca>

All excellent comments. The person in charge of proofs will hate me, but I'll try to include as much as I can. I may have a few questions and if so, I'll be back.

Thanks

Mario

> Subject: Re: Request for information for collective management publication

> To: mario.bouchard@outlook.com

> From: VSyrtash@cmrra.ca

> Date: Wed, 15 Jul 2015 17:22:47 -0400

>

> Mario,

>

> My apologies for the late response -- I hope that there is still time for

> some changes to be made to the text (when proofs are sent back, as you

> mention), because I have inserted a few comments for you to consider.

> Please let me know if you'd like clarification on any of my points, or

> further discussion.

>

> Thanks,

> Veronica

> (See attached file: VS comments -- CMRRA.docx)

>

> Veronica Syrtash | V.P., Legal and Business Affairs

> CMRRA (Canadian Musical Reproduction Rights Agency Ltd.)

> 320 - 56 Wellesley Street West, Toronto, ON M5S 2S3

> Phone: 416-926-1966. ext. 281 | Fax: 416-926-7521 | Email:

> VSyrtash@cmrra.ca

>

>

>

>

>

> From: Mario Bouchard <mario.bouchard@outlook.com>

> To: "vsyrtash@cmrra.ca" <vsyrtash@cmrra.ca>

> Date: 07/06/2015 01:54 PM

> Subject: Request for information for collective management publication

>

>  
>  
>  
>  
> Dear Veronica  
>  
> The 2010 publication Collective Management of Copyright and Related Rights,  
> edited by Professor Daniel Gervais and published by Kluwer Law  
> International is being re-edited. I have been asked to update the chapter  
> dealing with Collective Management in Canada. Specific facts about CMRRA  
> are published within this text. I have compiled these facts in the attached  
> document for your ease of reference, and would appreciate your expertise  
> and any efforts you could make to confirm whether these facts remain  
> accurate and if not, to suggest any necessary revisions.  
>  
> Due to my procrastination, my contribution is long overdue. I have already  
> sent the text for proofing but should be able to make any required  
> corrections when the proofs are sent back to me.  
>  
> Thank you in advance for your kind assistance.  
>  
> Mario Bouchard  
> [attachment "03 CMRRA.docx" deleted by Veronica Syrtash/CMRRA]

## CMRRA

CMRRA acts both as a centralized licensing and a collecting agency, for Canadian and American publishers who control approximately 75 per cent of the music recorded and performed in Canada. With some exceptions,<sup>1</sup> licensing is done on a per use basis.

CMRRA acts only for music publishers.

The nature of the rights secured by related CMOs in the same market also varies. SODRAC administers all aspects of the non-paper reproduction of musical works, while CMRRA administers only certain aspects of it.

CMRRA acts as an agent in the synchronization rights market, licenses directly some Internet uses and secures exclusive assignments of the right to authorize radio broadcasters, satellite radio services and online music services to reproduce musical works.<sup>2</sup>

The speed at which each CMO distributes royalties to its rights holders varies. Some collectives, such as CMRRA, have initiated electronic licensing and are encouraging users to adopt a common licensing protocol for electronic licensing. Such measures may help to diminish "distribution lag", as the delay between usage and payment should decrease given lower human intervention requirements.

The extent to which CMOs represent the available repertoire varies considerably. Only SOCAN and Re:Sound can claim to represent anything close to the world's eligible repertoire.<sup>3</sup> CMRRA and SODRAC together also probably can make such a claim, at least with respect to the reproduction of musical works by radio stations and online music services.

**Comment [VS1]:** We represent publishers from around the world who are doing business in Canada (i.e. whose works are being reproduced in Canada)

**Comment [VS2]:** Depends on the licensing activity. For instance, we know from the settlement of the class action that CMRRA represents up to 85% of the market from major labels. For online, CMRRA represents 95% of the amounts invoiced by CSI to date. For commercial radio, the figure is also considerably higher than 75%. It would probably be more accurate to say something like "CMRRA represents as much as 90% of the music recorded and performed in Canada".

**Comment [VS3]:** Satellite radio is a private agreement (tariff was withdrawn)

**Comment [VS4]:** Includes songwriters who own their own songs (i.e. songwriters may be their own publishers)

**Comment [VS5]:** This may be a good place to write about the various types of licensing done by CMRRA, including the new lines of business we are entering into – happy to discuss further

**Comment [VS6]:** Perhaps worth adding that CMRRA has the option of filing tariffs with the Copyright Board or negotiating private agreements directly with users

**Comment [VS7]:** A distinction could be made here between delays in collecting vs distributing royalties and between blanket vs work by work invoicing models. Nevertheless, the most challenging task that affects delays in the collection or distribution of royalties is the identification of the musical works and of the rights owners. This can only be improved by the proper use and propagation of robust metadata and standard identifiers, which CMRRA has been strongly advocating

<sup>1</sup> For the reproduction of musical works by radio stations, online music services and satellite radio, among others, CMRRA, jointly with SODRAC, asked for tariffs.

<sup>2</sup> This was done in order to facilitate the certification of a tariff by the Copyright Board.

<sup>3</sup> Re:Sound's repertoire is certainly smaller than that of SOCAN. The right of remuneration for sound recording performances does not extend to nationals of countries that do not recognize this right. The recent extension of rights to WPPT countries will "grow" the repertoire, but the refusal of the US to extend performing rights to the use of sound recordings on radio will prevent full expansion: see 2012 Act, supra, note xx, ss. 19(1.2), 19.2, 20(1.2); Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries SOR/2014-181, s. 2(2)(a).



Information concerning revenues and expenses is altogether a different matter. SODRAC, SOCAN, Access Copyright and COPIBEC willingly disclose them. [CMRRA and CONNECT do not divulge their revenues, but do publicize their administrative fee structure.]

**Comment [V58]:** Why is this relevant? CMRRA is a private company that makes full disclosure of this information to its Board of Directors (the Board represents the majority of the rights-holders represented by CMRRA)

CMOs account for their expenses in a variety of ways. SOCAN, Access Copyright, CPCC, Re:Sound and SODRAC pay their expenses before allocating royalties for distribution. CMRRA, COPIBEC and CONNECT generally charge a straight commission, something that is truly possible only when individual transactions are tracked.<sup>4</sup>

CMOs are not required to use any particular methodology when distributing royalties. As for CMRRA, since it [acts only for music publishers], it pays nothing directly to creators.

**Comment [V59]:** See note above re creators who may also be music publishers themselves

<sup>4</sup> Thus, what CMRRA's practice may be with respect to royalties collected pursuant to a tariff of the Copyright Board remains to be determined.

This is Exhibit "H" referred to in the Affidavit of Caroline Rioux  
sworn October 19, 2015




---

*Commissioner for Taking Affidavits (or as may be)*

**KWAKU TABI**

Kwaku Albert Tabi, a  
Commissioner, etc., Province of  
Ontario, while a Student-at-Law.  
Expires March 21, 2017.

Re: Gervais book on CMO's   
 Veronica Syrtash to: Mario Bouchard

09/11/2015 04:25 PM

Mario,

You're correct - CMRRA is no longer involved in synchronization licensing. That activity is handled by our publisher clients directly.

As for new lines of business, we have filed new tariffs for A/V licensing -- both for commercial television and online uses.

Best,  
 Veronica

**Veronica Syrtash** | V.P., Legal and Business Affairs  
 CMRRA (Canadian Musical Reproduction Rights Agency Ltd.)  
 320 - 56 Wellesley Street West, Toronto, ON M5S 2S3  
 Phone: 416-926-1966. ext. 281 | Fax: 416-926-7521 | Email: VSyrtash@cmrra.ca

Mario Bouchard

As I'm going through the proofs, I noticed somet...

09/10/2015 03:31:59 PM

From: Mario Bouchard <mario.bouchard@outlook.com>  
 To: "vsyrtash@cmrra.ca" <vsyrtash@cmrra.ca>,  
 Date: 09/10/2015 03:31 PM  
 Subject: Gervais book on CMO's

As I'm going through the proofs, I noticed something that I'm not sure I understand in your comments about what I say of CMRRA.

In the paragraph reading

CMRRA acts as an agent in the synchronization rights market, licenses directly some Internet uses and secures exclusive assignments of the right to authorize radio broadcasters, satellite radio services and online music services to reproduce musical works

I noticed that you strick out the words "acts as an agent in the synchronization rights market". Does that mean that CMRRA is no longer active in that market?

You then added, in a comment, that this may be a good place to write about new lines of business CMRRA has entered into. Cold you be more precise?

Thanks.

Mario

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the "**Act**");  
**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

**STARGROVE ENTERTAINMENT INC.**

Applicant

. and .

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
 UNIVERSAL MUSIC CANADA INC.,  
 SONY/ATV MUSIC PUBLISHING CANADA CO.,  
 SONY MUSIC ENTERTAINMENT CANADA INC.,  
 ABKCO MUSIC & RECORDS, INC.,  
 CASABLANCA MEDIA PUBLISHING, and  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**AFFIDAVIT OF CAROLINE RIOUX SWORN OCTOBER 19, 2015**

**(Motion to Exclude Report of Mario Bouchard)**

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**Cassels Brock & Blackwell LLP**  
 2100 Scotia Plaza  
 40 King Street West  
 Toronto, ON M5H 3C2

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Christopher M. Hersh LSUC #: 43080N  
 Tel: 416.869.5387  
 Fax: 416.640.3017  
 chersh@casselsbrock.com

Casey M. Chisick LSUC #: 46572R  
 Tel: 416.869.5403  
 Fax: 416.644.9326  
 cchisick@casselsbrock.com

Eric Mayzel LSUC #: 58663P  
 Tel: 416.860.6448  
 Fax: 416.642.71445  
 emayzel@casselsbrock.com

---

Lawyers for the respondent, Canadian Musical  
 Reproduction Rights Agency Ltd

**TAB 3**

**Memorandum of Fact and Law of CMRRA**

File No. CT.2015.009

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the “**Act**”);

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> October 19, 2015 CT-2015-009  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 41

**STARGROVE ENTERTAINMENT INC.**

Applicant

- and -

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
 UNIVERSAL MUSIC CANADA INC.,  
 SONY/ATV MUSIC PUBLISHING CANADA CO.,  
 SONY MUSIC ENTERTAINMENT CANADA INC.,  
 ABKCO MUSIC & RECORDS, INC.,  
 CASABLANCA MEDIA PUBLISHING, and  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY,  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

**(Motion to Exclude the Affidavit of Mario Bouchard)**

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October 19, 2015

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File No. CT.2015.009

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the “**Act**”);

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

**STARGROVE ENTERTAINMENT INC.**

Applicant

- and -

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
UNIVERSAL MUSIC CANADA INC.,  
SONY/ATV MUSIC PUBLISHING CANADA CO.,  
SONY MUSIC ENTERTAINMENT CANADA INC.,  
ABKCO MUSIC & RECORDS, INC.,  
CASABLANCA MEDIA PUBLISHING, and  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

**MOVING PARTY'S MEMORANDUM OF FACT AND LAW****PART I - OVERVIEW**

1. This is a motion by the respondent, Canadian Musical Reproduction Rights Agency Ltd. (“**CMRRA**”), to exclude the purported expert report of Mario Bouchard (the “**Bouchard Report**”), filed by the applicant, Stargrove Entertainment Inc. (“**Stargrove**”), in support of its application for leave.

2. The Bouchard Report is expressly based upon information that CMRRA provided to Mr. Bouchard in his former role as counsel to the Copyright Board of Canada (the “**Copyright Board**”), for the sole purpose of negotiating and facilitating the settlement of a class action. Not only is the Bouchard Report therefore inadmissible on the ground of settlement privilege, but allowing it into evidence would also risk compromising the integrity of the processes of Copyright Board, which effectively acted as a neutral third party in the settlement discussions in question. The Competition Tribunal (the “**Tribunal**”) ought not to countenance such an abuse of the Copyright Board’s process.

3. In the alternative, the Bouchard Report fails to satisfy the test for admissibility of expert evidence. It blatantly opines on matters of domestic law and contractual interpretation, which are properly the functions of the Tribunal itself, not of a purported expert. Mr. Bouchard also lacks the knowledge necessary to be qualified as an expert. He does not have, or even claim to have, any direct experience in the areas in which he asserts expertise.

4. For these reasons, the Bouchard Report is unnecessary and has no probative value. As such, its exclusion will not prejudice Stargrove. By contrast, if it is not excluded, CMRRA will suffer significant prejudice resulting from the breach of settlement privilege, while the integrity of the Copyright Board’s processes could be compromised by the misuse of privileged information. This prejudice far outweighs any probative value that the Bouchard Report may have, which is denied, and the Bouchard Report ought to be excluded as a result.

## PART II - SUMMARY OF FACTS

### 1. The Bouchard Report Relies Upon Privileged Information

#### a. Mr. Bouchard Relies Upon Information Obtained in Settlement Negotiations

5. Stargrove has tendered the Bouchard Report in support of its applications for leave and interim relief. Mr. Bouchard purports to be an expert in copyright law and “the operation of the Canadian mechanical licensing market and of [CMRRA].”<sup>1</sup>

6. Mr. Bouchard does not have,<sup>2</sup> or claim to have, any direct experience with the mechanical licensing process or the operations of CMRRA, which are the specific areas on which he purports to provide an expert opinion. Rather, he asserts expertise based upon his role as external counsel to the Copyright Board in proceedings involving CMRRA.<sup>3</sup>

7. Troublingly, Mr. Bouchard relies expressly on information that he has obtained as a representative of the Copyright Board in ongoing settlement negotiations between CMRRA-SODRAC Inc. (“**CSI**”), an affiliate of CMRRA,<sup>4</sup> and certain major record labels, in relation to a class action involving those parties:

My knowledge was further increased as a result of my involvement, on behalf of the Board, in discussions between CMRRA-SODRAC Inc. (“**CSI**”), major record labels and the Board following the settlement reached in the pending list class action.<sup>5</sup>

8. The discussions on which Mr. Bouchard relies (the “**Section 77 Discussions**”) arose in the context of a proposed class action (the “**Pending List Class Action**”) that was commenced in 2008 against certain major record labels, including the respondents Sony Music Entertainment Canada Inc. (“**Sony**”) and Universal Music Canada Inc. (“**Universal**”), along with CMRRA and

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<sup>1</sup> Bouchard Report (as originally filed in Stargrove’s application record), Motion Record of CMRRA dated October 19, 2015 (“**CMRRA Motion Record**”), Tab 3, p. 141, paras. 2-3.

<sup>2</sup> Affidavit of Caroline Rioux sworn October 19, 2015 (“**Rioux Affidavit**”), CMRRA Motion Record, Tab 2, p. 15, para. 30.

<sup>3</sup> Bouchard Report, CMRRA Motion Record, Tab 3, p. 141, para. 3.

<sup>4</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 10, para. 9.

<sup>5</sup> Bouchard Report, CMRRA Motion Record, Tab 3, p. 141, para. 3.

SODRAC,<sup>6</sup> in relation to sound recordings that had been released commercially but for which mechanical licences had not been obtained and royalties had not been paid.<sup>7</sup>

9. The Section 77 Discussions have involved all of the parties to the Pending List Class Action, as well as the Copyright Board. Their purpose is to develop a streamlined process for the Copyright Board to issue licences under section 77 of the *Copyright Act* (each, a “**Section 77 Licence**”), on application by CSI as agent for a record label, where the copyright owner cannot be located through reasonable effort.<sup>8</sup> The parameters of that process are to be set out in a Memorandum of Understanding between CSI and the Copyright Board (the “**MOU**”).<sup>9</sup>

10. The issuance of Section 77 Licences is an integral part of the mechanical licensing process approved, in relation to products released on or after January 1, 2013, in the May 30, 2011 order of the Ontario Superior Court approving the settlement of the Pending List Class Action (the “**Settlement Approval Order**”). However, it is generally understood by the parties to the Section 77 Discussions that it would be costly and impractical for a large number of Section 77 Licences to be applied for and issued in a timely way without a streamlined process for doing so.<sup>10</sup> Thus, the parties have understood at all material times that the Section 77 Discussions are integral to achieving a final, lasting, and effective settlement of the Pending List Class Action.<sup>11</sup>

11. The Section 77 Discussions have taken place through a variety of means from time to time. They have included, among other things, e-mail and other written correspondence, the filing of written submissions with the Copyright Board, telephone conferences, and a number of

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<sup>6</sup> Société du Droit de Reproduction de Auteurs, Compositeurs, et Éditeurs au Canada (SODRAC) Inc. (“SODRAC”). SODRAC is another Canadian music licensing agency based in Montreal. CMRRA and SODRAC formed CSI in 2002. See Rioux Affidavit at para. 9.

<sup>7</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 11, paras. 10-11.

<sup>8</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 12, paras. 15-16; and see section s.77 of the Copyright Act, Exhibit “C” to the Rioux Affidavit CMRRA Motion Record, Tab 2-C, p. 94.

<sup>9</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 12-13, paras.19-23.

<sup>10</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 12-13, paras. 16 and 21.

<sup>11</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 13, para 22.

in-person meetings. Mr. Bouchard has been actively involved in every aspect of the Section 77 Discussions.<sup>12</sup>

12. Contrary to Mr. Bouchard's description,<sup>13</sup> the Section 77 Discussions did not take place *following* the settlement of the Pending List Class Action. In fact, the Section 77 Discussions commenced in November 2009,<sup>14</sup> more than 18 months before the issuance of the Settlement Approval Order, with the parties to the Pending List Class Action and their litigation counsel involved at various times.<sup>15</sup>

13. Moreover, while the reference quoted above ("My knowledge **was** further increased ...") suggests that the Section 77 Discussions are complete, they are in fact still underway, with the MOU understood by all participants in the discussions to be integral to the settlement of the Pending List Class Action.<sup>16</sup>

14. Mr. Bouchard is still actively involved in the Section 77 Discussions. In fact, he was corresponding with CMRRA's counsel on outstanding issues as recently as July 2015, shortly before Stargrove served its application materials in August 2015.<sup>17</sup>

**b. CMRRA Disclosed Information to Mr. Bouchard In His Role As the Representative of the Copyright Board to Facilitate Settlement**

15. Mr. Bouchard has represented the Copyright Board in the Section 77 Discussions as General Counsel and then, following his retirement from civil service, as independent counsel.<sup>18</sup> As such, he has been charged with promoting and protecting the interests of the Copyright Board.

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<sup>12</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 12-15, paras. 17-20, 23-24, 26-27, 29, 31.

<sup>13</sup> Mr. Bouchard states that he participated in the Section 77 Discussions "*following* the settlement reached in the pending list class action"(emphasis added). See: Bouchard Report, CMRRA Motion Record, Tab 3, p. 141, para. 3.

<sup>14</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 12, para. 17.

<sup>15</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 13, para. 23.

<sup>16</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 13, paras. 21-24.

<sup>17</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 13, para. 24.

16. At all times, the Copyright Board's principal interest has been to facilitate the settlement of the final aspect of the Pending List Class Action, namely the MOU,<sup>19</sup> while ensuring that its statutory obligations and administrative requirements are met.<sup>20</sup> The Copyright Board is otherwise impartial as between the parties to that litigation. This has been evident in practice, where Mr. Bouchard has often appeared to function as a facilitator or intermediary between CMRRA and SODRAC, on one hand, and the record labels, on the other, to help resolve outstanding deal points in the MOU.<sup>21</sup>

17. Because the purpose of the Section 77 Discussions is to facilitate the court-approved settlement of the Pending List Class Action, and because Mr. Bouchard has been acting on behalf of an impartial administrative body interested in assisting with that settlement, CMRRA has always understood that Mr. Bouchard would use the information provided to him solely for the purpose of helping to finalize the MOU, and not disclose it to any third party for any reason.

18. In other words, until it was served with the Bouchard Report, CMRRA reasonably believed that the information it shared with Mr. Bouchard was confidential, without prejudice, and subject to settlement privilege.<sup>22</sup> As a result, CMRRA felt at liberty to share with Mr. Bouchard details of its mechanical licensing processes and systems that might otherwise have been kept confidential, in the interest of advancing the cause of settlement.<sup>23</sup>

19. In practice, it has been necessary for CMRRA to provide Mr. Bouchard with a good deal of information based on these understandings because he has appeared to have limited knowledge

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<sup>18</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14, paras. 27.

<sup>19</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14, para. 29.

<sup>20</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14, para. 28.

<sup>21</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14, para. 29.

<sup>22</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14-15, paras. 28, 32.

<sup>23</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 14, para. 29.

of actual mechanical licensing practices and processes.<sup>24</sup> The information provided has included not only formal documents, such as CMRRA's various forms of mechanical licensing agreement with major and independent record labels, but also anecdotal information about the mechanical licensing process, the contractual terms that are of primary importance to CMRRA (and why they are so important), specific challenges faced by CMRRA in the course of mechanical licensing, and other matters either that Mr. Bouchard has asked about or that have appeared relevant from time to time during the Section 77 Discussions.<sup>25</sup>

20. It never occurred to CMRRA, when providing this information to Mr. Bouchard, that Mr. Bouchard might later purport to use the information provided to him against CMRRA in an unrelated proceeding. Had CMRRA known this, or even had reason to fear it, CMRRA would never have disclosed any information to Mr. Bouchard or authorized its counsel to do so, and may have asked the Copyright Board to appoint a different representative who could be trusted not to misuse the information provided.<sup>26</sup>

### **c. Implications for the Copyright Board Process**

21. As a collective society under the *Copyright Act*, CMRRA has had extensive dealings with the Copyright Board for many years, without any reason to question the impartiality or fairness of the Board's process.<sup>27</sup>

22. CMRRA has no reason to believe that the Copyright Board has sanctioned Mr. Bouchard's involvement in the current proceeding or his use of information provided to him by CMRRA. Nevertheless, it has serious concerns about the misuse of information provided to a representative of the Copyright Board, both in general and in relation to the ability of the parties to

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<sup>24</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 15, para. 30.

<sup>25</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 15, para. 31.

<sup>26</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 15, para. 33.

<sup>27</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 16, para. 34.



the Pending List Class Action to comply with the Settlement Approval Order by completing the Section 77 Discussions. As a result, CMRRA believes that it may be required to take additional precautions in the future to ensure that information it provides to the Copyright Board is used only for its intended purpose.<sup>28</sup>

## **2. Mr. Bouchard Continues to Rely on Others for His Understanding of Mechanical Licensing and of CMRRA**

23. On July 6, 2015, Mr. Bouchard requested CMRRA's assistance, ostensibly in relation to his contribution to a book edited by Professor Daniel Gervais (the "**Gervais Book**").<sup>29</sup> He specifically requested the "expertise" of CMRRA's Vice President of Legal and Business Affairs, Veronica Syrtash, to clarify certain information about CMRRA:

Specific facts about CMRRA are published within this text. I have compiled these facts in the attached document for your ease of reference, and would appreciate your expertise and any efforts you could make to confirm whether these facts remain accurate and if not, to suggest any necessary revisions.

24. It is likely that Mr. Bouchard was already retained by Stargrove at the time that he wrote to Ms. Syrtash, given that he swore his affidavit in this matter less than two months later, on August 27, 2015.<sup>30</sup>

25. It is clear from the document that Mr. Bouchard provided to Ms. Syrtash for comment that he seriously misunderstood CMRRA and its operations, including with respect to the nature of CMRRA's clientele, the extent of its repertoire, and the way it distributes royalties.<sup>31</sup> Ms. Syrtash provided extensive written comments on that document to correct those errors.<sup>32</sup>

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<sup>28</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 16, para. 37.

<sup>29</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 17, para. 39.

<sup>30</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 17, para. 40.

<sup>31</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 17, para. 41.

<sup>32</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 17, para. 42 and Exhibit "G".

26. Mr. Bouchard continued to request information from CMRRA for the Gervais Book even after Stargrove filed its application materials. Despite serious misgivings, CMRRA responded to Mr. Bouchard in an effort to prevent the publication of misinformation about CMRRA.<sup>33</sup>

27. Mr. Bouchard also relies extensively on an affidavit sworn by CMRRA's former President and CEO, David A. Basskin (the "**Basskin Affidavit**"). For example, the Bouchard Report purports to describe CMRRA's licensing process "succinctly", but refers the Tribunal to the Basskin Affidavit for a "much more detailed" description.<sup>34</sup> Notably, Mr. Basskin made the statements in his affidavit expressly "without the intention of waiving any applicable privilege."<sup>35</sup>

28. Based on the above, CMRRA disagrees with Mr. Bouchard's claim to have expert knowledge in "the operation of the Canadian mechanical licensing market and of [CMRRA]."<sup>36</sup> He plainly has misconceptions about CMRRA and its operations, and relies on others for his understanding of such matters, which nevertheless remains inaccurate and incomplete in material ways.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

29. The issues on this motion are as follows:

1. Should the Bouchard Report be excluded from evidence on the basis of settlement privilege?
2. Does the Bouchard Report meet the *R. v. Mohan* standard for admission as expert opinion evidence? Specifically:
  - a) Does it fail to meet the standard of relevance, in that the confusion and prejudice it will cause outweighs any probative effect and reliability?

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<sup>33</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 17, para. 43.

<sup>34</sup> Bouchard Report, CMRRA Motion Record, Tab 3, p. 146, para. 31.

<sup>35</sup> Affidavit of David A. Basskin, sworn January 14, 2009 (originally filed in Stargrove's application record), CMRRA Motion Record, Tab 4, p. 150, para. 1.

<sup>36</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 18, para. 45.

- b) Does it fail to meet the standard of necessity, as it constitutes an opinion on the application of domestic law and the ultimate issue in this proceeding?
- c) Does Mr. Bouchard fail to meet the standard of an adequately qualified expert?

## 1. The Bouchard Report Must Be Excluded to Protect Settlement Privilege

### a. The Section 77 Discussions are Subject to Settlement Privilege

30. Settlement privilege is a recognized class privilege, and communications tendered in respect of settlement are therefore *prima facie* privileged.<sup>37</sup>

31. Settlement privilege serves the important policy purpose of promoting the settlement of litigation.<sup>38</sup> The Supreme Court of Canada has observed that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed: “What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.”<sup>39</sup>

32. Thus, the Supreme Court has held that settlement privilege applies to protect all communications between parties in the course of negotiating the settlement of a dispute against subsequent disclosure, whether or not a settlement was achieved.<sup>40</sup>

33. Settlement privilege applies to the Section 77 Discussions upon which Mr. Bouchard bases his report. The Section 77 Discussions comprise communications exchanged for the specific purpose of attempting to settle the Pending List Class Action. The negotiations began

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<sup>37</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, Book of Authorities of CMRRA dated October 19, 2015 (“**CMRRA Book of Authorities**”), Tab 1, para. 12.

<sup>38</sup> *Ibid*, para. 2,

<sup>39</sup> *Ibid*, paras. 2 and 13.

<sup>40</sup> *Ibid*, paras. 2, 17-18. See also *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, 1995 CarswellNat 2834 (Comp. Trib.) CMRRA Book of Authorities, Tab 2, para. 4, citing with approval Hon. J. Sopinka et al., *The Law of Evidence in Canada* (Toronto: Butterworths, 1992).

long before the action was settled and have continued thereafter as a post-settlement matter that is integral to achieving a lasting, effective, and final settlement of the dispute.

34. CMRRA has disclosed information to Mr. Bouchard in the course of the Section 77 Discussions with the intention that he would use it only for the purposes of that settlement and the reasonable belief that he would not use or rely on it for any other purpose – much less as a purported expert in another litigious matter adverse to CMRRA.

35. As such, the Section 77 Discussions are subject to settlement privilege. Accordingly, Mr. Bouchard cannot use or rely on information gathered from CMRRA, or from other parties to those discussions, as the basis for evidence to be given in this proceeding. His decision to do so is particularly egregious considering that three of the participants in the Section 77 Discussions – CMRRA, Sony, and Universal – are also respondents in this proceeding, as are several of CMRRA's music publisher clients.

**b. Admitting the Bouchard Report Into Evidence Would Risk Compromising the Integrity of the Copyright Board's Process**

36. There is also an overriding policy interest against permitting testimony from a mediator or other neutral third party regarding the content of a dispute resolution process. Admitting such testimony impairs the integrity and the appearance of impartiality of that process, which is corrosive to the public's willingness to participate in such proceedings.<sup>41</sup>

37. In *Rudd v. Trossacs Investments Inc.*, the Ontario Divisional Court held that a mediator could not be compelled as a witness to testify as to whether one of the parties to the mediation intended to be bound by a settlement agreement in his personal capacity. The court ruled against the introduction of that evidence on a number of bases, including:

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<sup>41</sup> *Rudd v. Trossacs Investments Inc.*, 2006 CarswellOnt 1417 (Div. Ct.), CMRRA Book of Authorities, Tab 3.

- (a) The risk to the mediation process generally if mediators could be compelled to testify about the conduct of the mediation;
- (b) The risk of the mediator's inadvertently disclosing further privileged information during examination; and
- (c) The conflict of interest between the mediator's duty to act as a neutral third party and testifying against one of the participants in respect of what transpired at that mediation.

38. Similarly, in *Pepper v. Canada*, the Canada Public Service Labour Relations Board held that it was necessary, in order to maintain the integrity of its process, to respect the confidentiality of mediations that occur as part of that process:

Under the *PSLRA*, mediation is a voluntary process. The voluntariness of the process, however, should not detract from the fact that the participants must be able to have confidence in its integrity ....

The administration of the mediation process also affects the credibility of the Board's processes. If the Board does not preserve the confidentiality of the mediation process, it is difficult to see how participants can be open and frank in their settlement discussions. An allegation of a breach of confidentiality flowing from the mediation process or a motion to the Board asking that settlement discussions be disclosed must be decided in light of whether the conduct or request impedes the policy goal of effectively and fairly resolving disputes.<sup>42</sup>

39. Similarly, the integrity of the Copyright Board's processes would be seriously harmed if the Tribunal were to permit Mr. Bouchard to file evidence that he acquired as the representative of the Copyright Board, which acted as an independent third party for the purpose of facilitating the settlement of the Pending List Class Action.

40. In CMRRA's respectful submission, it is vital that parties be able to rely on the Copyright Board's impartiality, and its commitment to the protection of confidential information, when interacting with its employees or representatives in any official capacity, whether as participants in

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<sup>42</sup> *Pepper v. Canada (Treasury Board – Department of National Defence)*, 2008 PSLRB 8, CMRRA Book of Authorities, Tab 4, paras. 121-22.

a tariff proceeding or arbitration or, as in this case, in negotiations concerning the exercise of other statutory powers of the Board. The perception of impartiality, if not also the reality, would be undermined if parties have reason to be concerned that those employees or representatives may later use information provided in the course of those interactions in ways that could harm the interests of those who provided it.<sup>43</sup>

41. This is especially important in cases like the Section 77 Discussions, in which *only* the Copyright Board has the statutory authority to fulfill the function at issue, i.e., the issuance of Section 77 Licences. The parties to the Pending List Class Action are now left in a difficult position: they will not be able to comply with the Settlement Approval Order without cooperating with the Board, but may be hesitant to share relevant information for fear of its being misused.<sup>44</sup> Indeed, CMRRA is concerned that it may now have to take additional precautions to ensure that information it provides to the Board is used only for its intended purposes, or at least to assess the likelihood that such information may be used for other purposes and conduct itself accordingly.<sup>45</sup>

42. The Competition Tribunal ought not to countenance the abuse of the Copyright Board's process, and ought not to allow the integrity of that process (or the parties' confidence in it) to be compromised, by permitting Mr. Bouchard to use information that he obtained in privileged settlement discussions for the purpose of supporting an unrelated complaint against the very party who provided that information, namely CMRRA.

## **2. The Bouchard Report Does Not Satisfy the Admissibility Test for Expert Evidence**

43. In the alternative, to the extent that settlement privilege does not bar the Bouchard Report, which is denied, the report fails to satisfy the test for admissibility.

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<sup>43</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 16, para. 35.

<sup>44</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 16, para. 36.

<sup>45</sup> Rioux Affidavit, CMRRA Motion Record, Tab 2, p. 16, para. 37.

44. The test for the admissibility of expert evidence – often referred to as the *Mohan* test – is well established. As an exception to the general bar against opinion evidence, a court may admit the opinion evidence of an expert if it satisfies the following criteria:

- (a) Relevance;
- (b) Necessity in assisting the trier of fact;
- (c) The absence of any exclusionary rule; and
- (d) The proper qualification of the expert.<sup>46</sup>

45. This test applies in intellectual property cases as well as in civil cases generally.<sup>47</sup>

**a. The Bouchard Report is Prejudicial and Has No Probative Value**

46. Under the first branch of the *Mohan* test, it is not enough that proposed evidence be relevant. Rather, in its role as “gatekeeper”, the trier of fact must also weigh the “benefits” of the proposed evidence, namely its probative effect and reliability, against the “costs” it may introduce by way of delay, prejudice, and/or confusion.<sup>48</sup>

47. The Bouchard Report is neither probative nor reliable. As discussed under the other branches of the *Mohan* test, the Bouchard Report improperly opines on questions of domestic law, which is the role of a court or tribunal, and is therefore unnecessary and lacks any probative value. Moreover, Mr. Bouchard is not a properly qualified witness, and his evidence is therefore unreliable.

48. Admitting unnecessary and unreliable evidence will inevitably result in needless costs and delays. Moreover, it will prejudice both CMRRA and the integrity of the Copyright Board’s

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<sup>46</sup> *R. v. Mohan*, [1994] 2 S.C.R. 9, CMRRA Book of Authorities, Tab 5.

<sup>47</sup> *Cinar Corporation v. Robinson*, 2013 SCC 73, CMRRA Book of Authorities, Tab 6, para. 49.

<sup>48</sup> *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref’d 2010 CarswellOnt 4827 (S.C.C.), CMRRA Book of Authorities, Tab 7, paras. 76 *et seq.*

processes, as discussed above. Thus, even if the Bouchard Report had probative value, which is denied, that value would be greatly outweighed by the prejudice caused by admitting it.

### b. Expert Opinion on Domestic Law Is Unnecessary and Inadmissible

49. Expert evidence that opines on questions of domestic law is unnecessary and therefore inadmissible<sup>49</sup> and “not permitted.”<sup>50</sup>

50. A trier of fact does not require assistance in interpreting the law.<sup>51</sup> This is true no matter how technical or complex the area of law at issue.<sup>52</sup> It is the role of a trier of fact to make conclusions based on the legal submissions of counsel. The public is entitled to be confident that decision makers can adequately interpret the law without the help of hired experts. To permit an expert to opine on such matters would usurp the role of the trier of fact.

51. This Tribunal recognizes that expert evidence on domestic law is inadmissible because such matters are within the competence of the Tribunal’s judicial member:

... the Tribunal was satisfied that the opinion was in substance an opinion with respect to a matter of domestic law. Thus, the Tribunal was not satisfied that the opinion was necessary, as required by the *Mohan* test. ***The interpretation of domestic law is within the competence of the Tribunal’s judicial members.***<sup>53</sup>

52. An expert report addressing legal issues raises other concerns as well. First, it improperly cloaks what are effectively legal submissions as expert evidence, giving the submissions an air of

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<sup>49</sup> Hon. J. Sopinka et al., *The Law of Evidence in Canada*, 4th ed. (Markham, Canada: LexisNexis, 2014), CMRRA Book of Authorities, Tab 15, p. 836, para. 12.164.

<sup>50</sup> *Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FC 1328, CMRRA Book of Authorities, Tab 8, para. 13.

<sup>51</sup> *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463, CMRRA Book of Authorities, Tab 9, paras. 51 *et seq.*

<sup>52</sup> *Ibid.*, para. 89.

<sup>53</sup> *B-Flier Inc. v. Bank of Nova Scotia*, 2006 CarswellNat 6422 (Comp. Trib.), CMRRA Book of Authorities, Tab 10, paras. 256-59 (emphasis added).



greater authority than they deserve.<sup>54</sup> Second, it may lead to the untenable result of requiring counsel for the other party to cross-examine the expert on his or her legal conclusions. Courts have cautioned against this “unseemly and totally inappropriate process of cross-examination of experts on the very questions of domestic law that are to be decided by the court.”<sup>55</sup>

53. Moreover, expert opinion on legal matters will often opine on the “ultimate issue” for determination. Such evidence must be viewed sceptically and ought to be excluded:

In the final analysis, the closer the experts’ testimony both in opinion and in words comes to the very issue that the court has to decide, the more jittery it becomes in receiving such evidence. This is so because ***the evidence then begins to overlap not only the fact-finding function of the court but the legal analysis that must be applied to the facts in rendering the ultimate decision.***<sup>56</sup>

54. The Bouchard Report unequivocally opines on matters domestic law. It is effectively drafted in the form of a factum, in that it extensively cites and interprets statutes and jurisprudence and applies certain facts so as to draw legal conclusions, under headings such as “Some Fundamentals of Canadian Copyright Law”. This is not expert evidence; rather, it is precisely the sort of submission that would be expected of counsel.

55. The Bouchard Report contains innumerable instances of Mr. Bouchard’s providing his preferred interpretation of the law and the way the market ought to be regulated by statute. Indeed, a great deal of the Bouchard Report, including the first 20 paragraphs, is nothing more than a summary of the *Copyright Act*, its history, and related jurisprudence.

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<sup>54</sup> *Québec (Procureur général) c. Canada*, 2008 FC 713, CMRRA Book of Authorities, Tab 11, para. 161, citing *Surrey Credit Union v. Wilson* (1990), 45 B.C.L.R. (2d) 310 (B.C.S.C.) and *Samson Indian Nation & Band v. Canada* (2001), 199 F.T.R. 125 (Fed. T.D.).

<sup>55</sup> *Royal Bank v. Société générale (Canada)*, 2005 CarswellOnt 2201, CMRRA Book of Authorities, Tab 12.

<sup>56</sup> *Quebec (Procureur general) c. Canada*, 2008 FC 713, CMRRA Book of Authorities, Tab 11, para. 162, citing with approval Hon. J. Sopinka et al., *The Law of Evidence in Canada*, 5th ed. (Toronto: Butterworths), p. 546 (emphasis added) (this reference appears to be to *The Law of Evidence in Canada*, 1st ed (1992), but the current statement may be found at *The Law of Evidence in Canada*, 4th ed., CMRRA Book of Authorities, Tab 15, p.833.

56. Even worse, Mr. Bouchard takes the liberty of suggesting how this Tribunal ought to interpret certain contracts in a manner that plainly supports the position taken by his client, Stargrove, in this leave application. The interpretation of a contract is clearly within the competence and jurisdiction of this Tribunal, rendering Mr. Bouchard's evidence patently unnecessary and improper.

57. Moreover, Mr. Bouchard does not even purport to engage in a reasoned exercise of contractual interpretation; instead, he simply draws the Tribunal's attention to certain provisions of the contracts and draws bald conclusions:

- (a) "The standard affiliation agreement... otherwise **does not provide for the possibility** that CMRRA or the publisher may decline to issue a license to a record label that complies with the terms of its MLA." (Para. 34)
- (b) "**Nothing in the MLAs stipulates that CMRRA or the publisher retains the right to refuse to issue a license** to a record label that complies with the terms of its MLA." (Para. 37)
- (c) "Third, under these same terms, **it would appear impossible that CMRRA or its affiliated publishers retain a residual discretion to refuse to issue a mechanical license.**" (Para. 48)

58. Simply put, this is not expert evidence. It is not for Mr. Bouchard to speculate as to what does and does not "appear impossible" under the contracts. This is a legal submission that ought to be made by counsel, in respect of a matter of contractual interpretation that is properly determined by the Tribunal. However, it is instead cloaked in the authority of expertise – the precise concern that courts have warned against in the cases cited above (see para. 52).

59. Indeed, Mr. Bouchard's principal conclusions – that "it would appear to be impossible that CMRRA or its affiliated publishers retain a residual discretion to refuse to issue a mechanical

license”,<sup>57</sup> and that the practice of pressing CDs on the assumption that a virtually compulsory license is forthcoming is a “necessity”<sup>58</sup> – are, respectively, the legal conclusion urged upon the Tribunal by his client and the practical outcome that the client desires. In other words, in addition to expressing a bare legal opinion, Mr. Bouchard is plainly advocating for both conclusions to be accepted by the Tribunal, thus shedding any semblance of objectivity or independence.<sup>59</sup>

### **c. Mr. Bouchard Lacks the Knowledge Required of an Expert**

60. Expert evidence is admissible only if it is “given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify”.<sup>60</sup>

61. Mr. Bouchard has no such special or peculiar knowledge or experience regarding the mechanical licensing process or the operations of CMRRA. In particular:

- (a) he does not have or claim to have any direct experience with the mechanical licensing process or the operations of CMRRA;<sup>61</sup>
- (b) he found it necessary to seek the “expertise” of a CMRRA employee regarding the mechanical licensing process and CMRRA’s operations even after accepting a retainer and swearing an affidavit in this proceeding;<sup>62</sup>
- (c) his description of CMRRA and its operations for the Gervais Book contained significant misconceptions and errors, requiring extensive corrections by CMRRA;<sup>63</sup>

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<sup>57</sup> Bouchard Report, CMRRA Motion Record, Tab 3, p. 149, para. 48.

<sup>58</sup> Bouchard Report, CMRRA Motion Record, Tab 3, p.145, para. 30.

<sup>59</sup> *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd. (“The Ikarian Reefer”)*, [1993] 2 Lloyd’s Rep 68 (Q.B. [Commercial]), CMRRA Book of Authorities, Tab 13. Adopted, *inter alia*, in *Es-Sayyid v. Canada*, 2012 FCA 59, CMRRA Book of Authorities, Tab 14, para. 43.

<sup>60</sup> *R. v. Mohan*, [1994] 2 S.C.R. 9, CMRRA Book of Authorities, Tab 5, p. 25.

<sup>61</sup> See paragraph 6 above.

<sup>62</sup> See paragraphs 23 to 26 above.

<sup>63</sup> See paragraph 25 above.

- (d) his knowledge of these matters is generally limited to evidence and submissions that he has observed as general counsel for the Copyright Board, including the Section 77 Discussions.<sup>64</sup> He is therefore in no better position than this Tribunal to draw legal conclusions based on such information;
- (e) he also relies extensively on the Basskin Affidavit, which was filed approximately six years ago, on a without prejudice basis,<sup>65</sup> further demonstrating that he requires information from third parties regarding the very matters in which he asserts expertise; and
- (f) during the course of the Section 77 Discussions, it was necessary for CMRRA to provide Mr. Bouchard with a good deal of information because he appeared to have limited knowledge of actual mechanical licensing practices and processes.<sup>66</sup>

62. In light of all of the above, it is inappropriate to qualify Mr. Bouchard as an “expert” in the subject matter of this application for leave.

#### **PART IV - CONCLUSION**

63. If admitted, the Bouchard Report would result in significant prejudice. First, it would sanction Mr. Bouchard’s breach of settlement privilege, based on his use of information that he obtained while representing a neutral administrative tribunal, in the course of settlement discussions, against the party that provided it. Second, it would compromise the integrity of the processes of the Copyright Board and would be likely to have a chilling effect on the frank and forthright disclosure of information to the Copyright Board in future proceedings.

64. In any event, the Bouchard Report is unnecessary and has no probative value. Mr. Bouchard effectively usurps the function of the Tribunal by asserting legal conclusions and opining on the meaning of contracts, contrary to well-established principles of evidence law. Mr. Bouchard has also demonstrated repeatedly that he does not have sufficient knowledge to be

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<sup>64</sup> See paragraphs 6 and 7 above.

<sup>65</sup> See paragraph 27 above.

<sup>66</sup> See paragraph 19 above.

qualified as an expert, including by seeking the expertise of CMRRA to clarify his understanding of matters on which he now asserts expertise.

65. Each of the foregoing is sufficient to exclude the Bouchard Report, while the sum total makes clear that any probative value of the report, which is denied, is greatly outweighed by the prejudice that would result from its admission.

#### **PART V - ORDER REQUESTED**


66. CMRRA respectfully requests an order striking the Bouchard Affidavit, with costs on a solicitor-client basis or, in the alternative, costs to be fixed at the highest end of Column V of Tariff B of the *Federal Courts Rules*, S.O.R./98-106.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19<sup>th</sup> day of October, 2015.



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Casey Chisick



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Christopher Hersh

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Lawyers for the respondent  
Canadian Musical Reproduction Rights Agency  
Ltd.

**SCHEDULE “A”****LIST OF AUTHORITIES****Primary Sources**

1. *B-Flier Inc. v. Bank of Nova Scotia*, 2006 CarswellNat 6422 (Comp. Trib.)
2. *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, 1995 CarswellNat 2834 (Comp. Trib.).
3. *Cinar Corporation v. Robinson*, 2013 SCC 73.
4. *Es-Sayyid v. Canada*, 2012 FCA 59.
5. *Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FC 1328.
6. *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd. (“The Ikarian Reefer”)*, [1993] 2 Lloyd’s Rep 68 (Q.B. [Commercial]).
7. *Pepper v. Canada (Treasury Board – Department of National Defence)*, 2008 PSLRB 8
8. *Quebec (Procureur general) c. Canada*, 2008 FC 713.
9. *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref’d 2010 CarswellOnt 4827 (S.C.C.)
10. *R. v. Mohan*, [1994] 2 S.C.R. 9.
11. *Royal Bank v. Société générale (Canada)*, 2005 CarswellOnt 2201 (S.C.)
12. *Rudd v. Trossacs Investments Inc.*, 2006 CarswellOnt 1417 (Div. Ct.).
13. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37.
14. *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463.

**Secondary Sources**

15. Hon. J. Sopinka, *The law of evidence in Canada*, 4th ed (Markham, Canada: LexisNexis, 2014)

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the “**Act**”);  
**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

**STARGROVE ENTERTAINMENT INC.**

Applicant

. and .

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
 UNIVERSAL MUSIC CANADA INC.,  
 SONY/ATV MUSIC PUBLISHING CANADA CO.,  
 SONY MUSIC ENTERTAINMENT CANADA INC.,  
 ABKCO MUSIC & RECORDS, INC.,  
 CASABLANCA MEDIA PUBLISHING, and  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY,  
 CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

**(Motion to Exclude the Affidavit of Mario Bouchard)**

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Lawyers for the respondent, Canadian Musical  
 Reproduction Rights Agency Ltd



**TAB 4**

**Affidavit of Mario Bouchard**

File No. CT-2015-

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act");

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76 and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**B E T W E E N:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> October 19, 2015 CT-2015-009  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 42

**STARGROVE ENTERTAINMENT INC.**

Applicant

- and -

**CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD., ABKCO MUSIC & RECORDS, INC., CASABLANCA MEDIA PUBLISHING, SONY/ATV MUSIC PUBLISHING CANADA CO., SONY MUSIC ENTERTAINMENT CANADA INC., UNIVERSAL MUSIC PUBLISHING GROUP CANADA, and UNIVERSAL MUSIC CANADA INC.**

Respondents

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**AFFIDAVIT OF MARIO BOUCHARD**

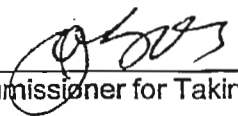
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I, Mario Bouchard, of the City of Ottawa, in the Province of Ontario, **MAKE OATH AND SAY:**

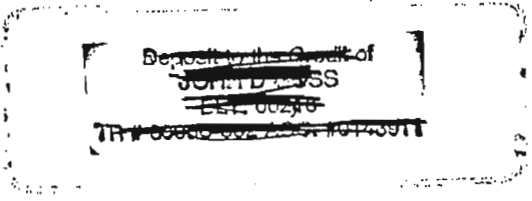
1. I have been retained by the Respondent, Stargrove Entertainment Inc., to provide an expert opinion, a copy of which is attached hereto and marked as **Exhibit "A"**.

- 2. A copy of my curriculum vitae is attached hereto as **Exhibit "B"**.
- 3. A copy of my Certificate Concerning Code of Conduct for Expert Witnesses, which I have signed, is attached hereto as **Exhibit "C"**.

Sworn before me at the City of Ottawa, in )  
 the Province of Ontario, )  
 this 27<sup>th</sup> day of August, 2015 )

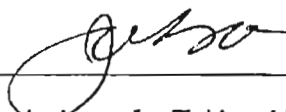
  
 Commissioner for Taking Affidavits )

  
 Mario Bouchard )



*JOHN DENYS GOSS*, Barrister & Solicitor &  
 Notary Public, Province of Ontario, Canada  
 Goss, McCorriston, Stel, 203-2430 Bank Street  
 Ottawa, Ontario K1V 0T7

This is **Exhibit "A"** to the Affidavit of Mario Bouchard  
sworn before me this 27 day of August, 2015



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Commissioner for Taking Affidavits

*JOHN DENYS GOSS*, Barrister & Solicitor &  
Notary Public, Province of Ontario, Canada  
Goss, McCarriston, Stel, 203-2430 Bank Street  
Ottawa, Ontario K1V 0T7

## Introduction

1. My name is Mario Bouchard. I have been a member of the Québec Bar since 1975.
2. From 1990 to 2013, I was general counsel to the Copyright Board of Canada (“**Board**”). In this role, I participated in the writing of every decision of the Board, appeared before the Federal Court of Appeal, authored papers dealing with copyright (including the work of the Board, collective administration of copyright and orphan works) and was involved in many files dealing with copyright law reform and new technologies. Through my work, I developed expertise in copyright law, collective administration, the regulation of copyright collective societies and of copyright markets, and the interpretation of copyright contracts. I sit on the external advisory board of the Intellectual Property Law and Technology Program at Osgoode Hall Law School.
3. My knowledge of the operation of the Canadian mechanical licensing market and of the Canadian Musical Reproduction Rights Agency Ltd (“**CMRRA**”) is largely the result of my participation in several Board proceedings dealing with proposed tariffs for the use of CMRRA’s repertoire. My knowledge was further increased as a result of my involvement, on behalf of the Board, in discussions between CMRRA-SODRAC Inc. (“**CSI**”), major record labels and the Board following the settlement reached in the pending list class action, discussed below.

## Some Fundamentals of Canadian Copyright Law

### *What is copyright?*

4. Copyright is one’s right to control, to the exclusion of others, certain uses of specific copyright subject matters for a certain time.
5. In Canada, “copyright law is purely statutory law, which ‘simply creates rights and obligations upon the terms and in the circumstances set out in the statute’”.<sup>1</sup>

### *What does copyright protect?*

6. Copyright protects specific subject matters, such as musical works and sound recordings.<sup>2</sup>
7. A musical work is “any work of music or musical composition, with or without words, and includes any compilation thereof.”<sup>3</sup>
8. A sound recording is “a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work”.<sup>4</sup> A sound recording includes a recording of

<sup>1</sup> *Bishop v Stevens*, [1990] 2 SCR 467 at 477, quoting *Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357 at 373. Copyright law is exclusively within the jurisdiction of the federal government: *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91.25, reprinted in RSC 1985, Appendix II, No 5.

<sup>2</sup> *Copyright Act*, RSC, 1985, c C-42, s 2 (definition of “copyright”) (“*Act*”).

<sup>3</sup> *Act*, *ibid*, s 2 (definition of “musical work”).

someone playing an instrument, of someone singing a song or of street noises, onto any recording medium (CD, tape, downloadable file).

*Which uses does copyright protect?*

9. Copyright protects certain uses but not others. A public performance is protected, however, a private performance is not.
10. Under certain circumstances, a use that would otherwise be protected is not. Broadcasters do not need a licence to keep copies of sound recordings on their hard drives for short periods of time to facilitate their broadcasts. Also, I do not need a licence to make a backup copy of software for which I own a licence.
11. How these and other limits to copyright protection are interpreted depends in large part on the purpose of copyright in different countries. In general, “*droit d’auteur*” jurisdictions (e.g., France) view copyright as an inherent “author’s right”, similar to any other fundamental human right. In contrast, “copyright” jurisdictions generally adopt a more utilitarian approach to copyright. The Supreme Court of Canada endorsed the utilitarian view when it described the purpose of copyright as striking:

[...] a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).<sup>5</sup>

12. In the same vein, the Supreme Court has found that copyright exceptions are users’ rights that are to be interpreted liberally, so as to ensure that users get their full benefit<sup>6</sup> and that copyright protection must not be extended beyond its natural limits, and must take proper account of user rights.<sup>7</sup>

*How long does copyright last?*

13. Copyright is limited in its duration. A subject matter that is no longer protected by copyright is said to be in the public domain. The term of protection is different for works and sound recordings.
14. As a general rule, copyright in a musical work lasts for “the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.”<sup>8</sup>
15. Until recently, a sound recording was protected until the later of 50 years from its creation and 50 years from its publication. Since June 23, 2015, a published recording is

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<sup>4</sup> *Act, supra* note 2, s 2 (definition of “sound recording”).

<sup>5</sup> *Théberge v Galerie d’Art du Petit Champlain inc*, 2002 SCC 34 at para 30.

<sup>6</sup> *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 48.

<sup>7</sup> *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at para 80.

<sup>8</sup> *Act, supra* note 2, s 6.

protected 70 years from its publication.<sup>9</sup> Since all sound recordings found on CDs are published, copyright in these recordings has been extended by recent amendments to the *Act* by 20 years to 70 years from publication.<sup>10</sup>

16. Sound recordings that were in the public domain on June 23, 2015 remain in the public domain.<sup>11</sup> As a result, the Canadian copyright in sound recordings found on the Beatles' *A Hard Day's Night* LP, released on July 10, 1964, ended with the year 2014 and remain in the public domain. The copyright in sound recordings found on the Beatles' *Help* LP, however, released on August 6, 1965, will end 21 years later, on December 31, 2035.
17. A work is often protected longer (life of author + 50 years) than the sound recording on which it first appears (70 years from publication). The difference can be quite significant. The sound recording of *Can't Buy Me Love* found on the Beatles' *A Hard Day's Night* LP is in the public domain, but the musical work will be protected during the life of Paul McCartney and 50 years hence. The sound recording of *Yesterday* found on the Beatles' *Help* LP is protected until the end of 2035, but the musical work will be protected at least until the end of 2065, since McCartney is still alive.

#### Licences Needed to Make a CD

18. A sound recording of a musical work comprises three copyright inputs: the work; the performances of the singers and musicians heard on the record; and the sound recording itself.
19. Re-releasing a pre-existing sound recording (e.g., on a compilation CD) may require a licence to copy the sound recording ("**master recording licence**"), a licence to copy the musical work ("**mechanical licence**") or both, depending on whether either or both are protected by copyright.<sup>12</sup>
20. If the sound recording is not protected but the work is, only a licence to copy the work is required. This is the case with the sound recording of *Can't Buy Me Love* found on the Beatles' *A Hard Day's Night* LP.

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<sup>9</sup> Different copyright rules apply to sound recordings that are not published and to sound recordings that are published more than 30 years after they are created.

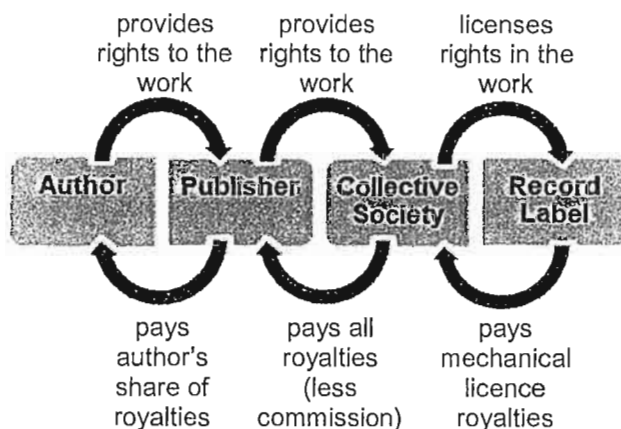
<sup>10</sup> *Act*, *supra* note 2, s 23(1.1), as amended by *Economic Action Plan Act 2015, No 1*, SC 2015, c 36, s 81. Copyright in a sound recording also extends to December 31 of the year during which it expires. In this report, I do not always specify this, for ease of reading.

<sup>11</sup> *Economic Action Plan Act 2015, No 1*, SC 2015, c 36, s 82.

<sup>12</sup> Re-releasing a pre-existing sound recording does not require a permission from the performers: the right to control a performance, once fixed, is "spent" to the extent that the fixation was allowed for the purpose of making CDs: *SOCAN (2008-2010)*; *Re:Sound (2008-2011)*; *CMRRA-SODRAC Inc. (2008-2012)*; *AVLA-SOPROQ (2008-2011)*; *ArtistI (2009-2011)*, (9 July 2010), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf>> at para 80.

## The Mechanical Licensing Market: Key Players

21. Reproducing a copyrighted musical work onto a CD requires a mechanical licence.



**Figure 1:** Flow of rights and the associated flow of compensation regarding mechanical licences.

22. A mechanical licence is obtained from the copyright owner or from someone acting on the owner's behalf. The first owner of the copyright in a musical work is the **author**. Few authors administer their own rights; instead, they generally assign the right to issue mechanical licences to a music publishing company ("**publisher**") in exchange for receiving a share of all royalties the publisher will collect from licensing, either directly or through other agents.
23. In Canada, most publishers ask a **collective society** to issue mechanical licences. A collective society carries on the business of collective administration of copyright for the benefit of those who authorize the society to act on their behalf.<sup>13</sup> Three collective societies are active in the Canadian mechanical licensing market: CMRRA, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada ("**SODRAC**"),<sup>14</sup> and CSI.<sup>15</sup>
24. CMRRA is a not for profit corporation formed in 1975 to represent the interests of publishers doing business in Canada. It does not deal with authors; rather, it deals with publishers and users. CMRRA issues mechanical licences for the vast majority of CDs sold in Canada. It distributes royalties to publishers, who then pay royalties to authors.

<sup>13</sup> *Act, supra* note 2, s 2 (definition of "collective society").

<sup>14</sup> SODRAC acts for the benefit of authors and publishers. SODRAC issues licences for 10 to 15% of CD sales in Canada, and more than 50% in Quebec.

<sup>15</sup> CSI is a joint venture of CMRRA and SODRAC. It licenses the reproduction right in the joint repertoire of CMRRA and SODRAC, generally in markets where administering the repertoires separately would be either not possible or not efficient.



25. Collective societies, like CMRRA, issue mechanical licences to companies that release sound recordings, known as **record labels**. Record labels produce original sound recordings to be released on CD, release CDs of existing sound recordings under licence from the owner of the copyright in the sound recording, or do both.
26. **Major record labels** are affiliated with multinational companies, while **independent record labels** are not. For example, Universal Music Canada is affiliated with Universal Music Group. Similarly, **major publishers** are linked to major record labels, while **independent publishers** are not. For example, Universal Music Publishing Group Canada is affiliated with Universal Music Canada.

### The Canadian Mechanical Licensing Process: Law and Practice

27. From 1924, when it came into force, until 1988, the *Act* provided for a compulsory licence to record a musical work that had already been recorded and released. The provision applied to new recordings of the work (“**cover**”) and to re-issues of an existing recording (“**re-release**”). It did not apply to the first recording of a work (“**first release**”).<sup>16</sup>
28. The compulsory mechanical licence was repealed in 1988. As a result, the rates, terms and conditions applicable to mechanical licences had to be either negotiated with the recording industry and set out in an agreement, or set by CMRRA. Today, record labels essentially do business with CMRRA according to one of a few Mechanical Licensing Agreements (“**MLA**”) reviewed below.<sup>17</sup>
29. In law, a record label should obtain the necessary mechanical licences before pressing a CD, let alone releasing it. In practice, labels almost always release CDs without first obtaining licences. The market operates as if the compulsory licence, abolished in 1988, still exists and as if it applies equally to all recordings.
30. The MLAs, the pending list class action settlement discussed below and even some tariffs certified by the Board<sup>18</sup> reflect the necessity of allowing this system to continue.<sup>19</sup>

<sup>16</sup> However, the Canadian recording industry operated, at least to some extent, as if the compulsory licence also applied to first releases. The Québec business model may have been different.

<sup>17</sup> CMRRA operates a “pay-as-you-press” system for small and one-shot uses. Royalties are paid at the prevailing MLA rate, based on the number of CDs the user plans to release, before CMRRA determines whether it can issue a licence. A refund is issued only for works that are not in CMRRA’s repertoire. There are no refunds if fewer CDs are pressed or if the CD is not released. The pay-as-you-press system is not tailored for those who wish to release multiple albums. It represents a very small proportion of CMRRA’s overall business.

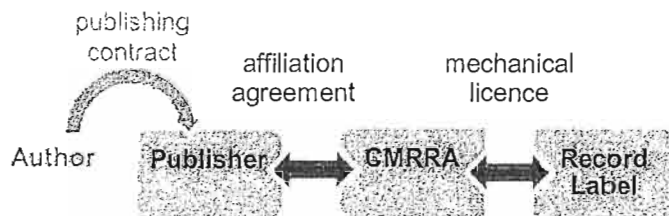
<sup>18</sup> *CMRRA/SODRAC Inc. (Online Music Services) for the Years 2005 to 2007* (16 March 2007), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2007/20070316-rm-b.pdf>> at para 150.

<sup>19</sup> For the reasons for this continued practice, see Affidavit of David A. Basskin, sworn January

31. Described succinctly, the licensing process at CMRRA is as follows:<sup>20</sup>
- The record label applies for a mechanical licence for each musical work found on a CD by providing to CMRRA, before or after the release, a copy of the CD (and cover slip) on which the work is released.
  - CMRRA issues a licence for each work that it represents pursuant to the MLA, as soon as it determines that it represents the work. If CMRRA knows that it does not represent a work, it notifies the record label accordingly. Other works remain unlicensed, unless the label secures a licence directly from the publisher.
  - Quarterly, the record label provides a statement of royalties payable and pays those royalties to CMRRA.
  - CMRRA issues its own statements and remits royalties to its publishers, less its commission.
  - The publisher pays the author.

#### Contractual Relationships between Publishers and CMRRA, and between CMRRA and Record Labels

32. In a nutshell, the necessary rights flow from one party to the other through contracts is as follows:



**Figure 2:** Typical contractual relationships between authors, publishers, CMRRA and record labels.

33. I am concerned only with the contractual relationships between publishers, CMRRA and record labels.

14, 2009 in respect of *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 (Sup Ct), Court File No CV-080036065100 CP (“**Baskin Affidavit**”), Appendix 2 at paras 49 to 51.

<sup>20</sup> For a much more detailed description, see Basskin Affidavit, *ibid*, Appendix 2 at paras 49-53. The process is slightly different under the Indie MLA Model 2: see note 26 below.

*Publishers' affiliation agreements with CMRRA*

34. Publishers enter into affiliation agreements with CMRRA. The standard affiliation agreement:
- provides that CMRRA acts as a non-exclusive licensing agent for the publisher;<sup>21</sup>
  - instructs CMRRA to issue mechanical licences on generally applicable business terms;<sup>22</sup>
  - provides, in only one instance, that the publisher can prevent CMRRA from issuing a licence: when the publisher intends to issue a licence directly to the record label;<sup>23</sup>
  - otherwise does not provide for the possibility that CMRRA or the publisher may decline to issue a licence to a record label that complies with the terms of its MLA.

*Mechanical licensing agreements between record labels and CMRRA*

35. Typically, CMRRA issues mechanical licences pursuant to the MLA signed by CMRRA and the record label.<sup>24</sup> I know of three MLAs. The CRIA MLA was negotiated between CMRRA and the Canadian Recording Industry Association (“**CRIA**”, now Music Canada), acting on behalf of all major and several independent labels; it accounts for a substantial majority of sound recordings sold in Canada.<sup>25</sup> The Indie MLA Model 1 and Model 2 are offered to independent labels not represented by CRIA.<sup>26</sup>
36. All three MLAs appear to be identical in all relevant respects. Each MLA:
- divides CMRRA publishers, for the purposes of the MLA, into **affiliated publishers** (who authorize CMRRA to license their catalogue pursuant to the MLA) and **non-affiliated publishers** (who authorize CMRRA to issue mechanical licences on terms other than the MLA).<sup>27</sup> The record label receives a list of both types of publishers;<sup>28</sup>

<sup>21</sup> Publisher affiliation agreement general terms & conditions, Appendix 4, s 2.

<sup>22</sup> Publisher affiliation agreement general terms & conditions, Appendix 4, Schedule A, s 3.

<sup>23</sup> Publisher affiliation agreement general terms & conditions, Appendix 4, Schedule A, s 3.

<sup>24</sup> The MLA is not a licence; it is an agreement to licence.

<sup>25</sup> The last version of the CRIA MLA known to me ended on December 31, 2012. Based on past experience, I expect that mechanical licences are still being issued pursuant to that MLA while the new one is under negotiation. Though the CRIA MLA is negotiated by CRIA, each record label represented by CRIA must first sign the CRIA MLA before it applies to the label.

<sup>26</sup> The main difference between the two MLAs appears to be in the calculation of royalties. Under Model 1, the label does most of the work. Under Model 2, the label pays an advance royalty linked to the label's market share and CMRRA does most of the accounting.

<sup>27</sup> Indie Model 1 MLA, Appendix 3, s 1, s 2(b.2) (“non-affiliated publishers”).

- stipulates that the MLA is not a licence;<sup>29</sup>
  - provides that CMRRA “shall” issue licences to the record label for the use of a musical work in the catalogue of an affiliated publisher pursuant to the terms of the MLA,<sup>30</sup> unless the label secured a licence directly from the publisher;<sup>31</sup>
  - provides that a licence, once issued, cannot be cancelled during the term of the MLA, even if a publisher leaves CMRRA;<sup>32</sup>
  - provides that licences for works owned by a non-affiliated publisher are issued according to instructions given, or to be given, by the publisher;<sup>33</sup>
  - provides, in only one provision (dealing with budget recordings), for an affiliated publisher to provide specific instructions in respect of the issuance of a licence.<sup>34</sup>
37. Nothing in the MLAs stipulates that CMRRA or the publisher retains the right to refuse to issue a licence to a record label that complies with the terms of its MLA. Nothing on the website of CMRRA informs labels that CMRRA may seek specific instructions from an affiliated publisher. I know of only two circumstances where CMRRA seeks instructions from an affiliated publisher in the mechanical licensing market. The first concerns budget recordings, already mentioned. The second concerns labels wishing to pay royalties at a rate that is lower than the MLA.<sup>35</sup>

### The Pricing of Mechanical Licences

38. To my knowledge, the price of a mechanical licence remains the same whether:
- the record label creates a new recording (whether a first release or a cover) of the licensed work;
  - the record label re-releases a pre-existing sound recording of the licensed work and the sound recording is protected by copyright, thus requiring the payment of an additional royalty for the use of the sound recording; or

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<sup>28</sup> The record label also receives a list of works owned by an affiliated publisher that are specifically excluded from the MLA. The only work I have known to be so excluded is Irving Berlin's *White Christmas*.

<sup>29</sup> Indie Model 1 MLA, Appendix 3, s 2(d).

<sup>30</sup> Indie Model 1 MLA, Appendix 3, s 2(b.1), 2(d)(v).

<sup>31</sup> Indie Model 1 MLA, Appendix 3, s 2 (d)(i.c) [not found in the CRIA MLA], 2(e)(ix). The obligation to advise CMRRA that a direct licence is issued falls on the publisher according to the affiliation agreement, and on the record label according to the MLAs.

<sup>32</sup> Indie Model 1 MLA, Appendix 3, s 2 (b.1).

<sup>33</sup> Indie Model 1 MLA, Appendix 3, s 2(b.2).

<sup>34</sup> Indie Model 1 MLA, Appendix 3, s 9(f) [not found in the Indie Model 2 MLA].

<sup>35</sup> Testimony of David Basskin before the Copyright Board, transcript, September 12, 2006, Appendix 5 at pp 932-934.

- the record label re-releases a pre-existing sound recording of the licensed work and the sound recording is in the public domain, and therefore can be used royalty-free.
39. To my knowledge, the price of a mechanical licence has always been the same at any given time whether the musical work was put on a CD, a vinyl or a cassette, even though the price at which each recording medium was sold at any given time was very different.
  40. Publishers that issue mechanical licenses directly usually do so at the rates found in the applicable MLA.<sup>36</sup>

### The “Pending List” Class Action Settlement

41. Until recently, most record labels maintained and regularly supplied to CMRRA a list (“**pending list**”) of works that the label had released and for which the label has not obtained a licence.
42. In 2008, a class action was initiated on behalf of copyright owners whose musical works had been released in Canada by the major record labels, when unpaid royalties had accrued on the labels’ pending lists.<sup>37</sup>
43. In May 2011, the Ontario Superior Court of Justice certified a class and approved a settlement with respect to CDs and other products first released or distributed in Canada by the major labels up to and including December 31, 2012. CSI has been appointed as settlement administrator.
44. The settlement calls for the implementation of a new mechanical licensing system for all CDs released in Canada from January 1, 2013. The new system is intended to avoid the accumulation of pending royalties and to promote the timely payment of royalties.
45. The settlement is relevant to my report for four reasons.
46. First, pending lists exist because record labels release most CDs before obtaining the necessary mechanical licences.
47. Second, the Key Terms of Settlement between CMRRA, SODRAC and the major labels filed as part of the class action settlement presuppose that the practice of releasing CDs before obtaining the necessary mechanical licences will continue in the future, with one key change: CSI, not the labels, will retain the royalties owed to rights holders who remain unidentified or unknown.
48. Third, under these same terms, it would appear impossible that CMRRA or its affiliated publishers retain a residual discretion to refuse to issue a mechanical licence.
49. Fourth, according to the CMRRA website, all CDs released since January 1, 2013 have been licensed through the new system set out in the settlement.

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<sup>36</sup> Basskin Affidavit, *supra* note 19, Appendix 2 at para 48.

<sup>37</sup> *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105.

**TAB 5**

**Excerpt of the Affidavit of David A. Basskin  
sworn January 14, 2009**

Court File No. CV 0800360651 00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE ESTATE OF CHESNEY HENRY "CHET" BAKER JUNIOR BY ITS  
PERSONAL REPRESENTATIVE CAROL BAKER, and CHET BAKER  
ENTERPRISES LLC**

Plaintiffs

- and -

**SONY BMG MUSIC (CANADA) INC., EMI MUSIC CANADA INC.,  
UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA CO., and  
their Parent, Subsidiary and Affiliated Companies, CANADIAN MUSICAL  
REPRODUCTION RIGHTS AGENCY LTD. and SOCIETY FOR  
REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND  
PUBLISHERS (SODRAC) INC.**

Defendants

**PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992,  
S.O. 1992, c.6**

**AFFIDAVIT OF DAVID A. BASSKIN  
(sworn January 14, 2009)**

I, David A. Basskin, of the City of Toronto, MAKE OATH AND SAY  
THAT:

1. I am the president and chief executive officer of the defendant Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA"). As such, I have knowledge of the matters set out herein. The matters set forth in this affidavit are within my personal knowledge based on my position and my review of the records of CMRRA. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of the information and believe it to be true. The statements made in this affidavit are made without the intention of waiving any applicable privilege.

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
<b>FILED / PRODUIT</b> October 19, 2015 CT-2015-009 <small>Jos LaRose for / pour          REGISTRAR / REGISTRAIRE</small>	
OTTAWA, ONT	# 43

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## I. Personal Background

2. I was educated at the University of Toronto, from which I received my B.A. in 1974, and at Osgoode Hall Law School, where I obtained my LL.B. in 1977 and my LL.M. in 1999. In 2003, I graduated from the M.B.A. program at the Rotman School of Management at the University of Toronto. I was called to the bar of Ontario in 1979.

3. Prior to joining CMRRA, I worked as a Law Clerk to the Chief Justice of the High Court of Ontario, as Corporate Secretary and Legal Counsel to CTV Television Network Ltd., and as a member of the legal department of Nelvana Limited, a major Canadian producer of films and television programs. I joined CMRRA in September 1989.

4. CMRRA is Canada's largest music licensing agency and licenses music publishing rights on behalf of thousands of music publishers and copyright owners to record companies, internet music distributors and film and television producers. As CMRRA's President, I direct the negotiation and administration of industry-standard agreements for the licensing of music reproduction and distribution. I also direct the filing of tariffs of royalties with the Canada Copyright Board.

5. In addition to my duties with CMRRA, I also act as legal counsel to CMRRA's parent body, the Canadian Music Publishers Association ("**CMPA**"). In that capacity, I am involved with CMPA's activities respecting copyright reform, telecommunications and broadcast policy in appearances before parliamentary committees, the CRTC and other bodies.

6. I also serve as president of CMRRA-SODRAC Inc. ("**CSI**"), a corporation formed jointly by CMRRA and SODRAC 2003 Inc. ("**SODRAC**"), a successor company to the defendant Society for Reproduction Rights of Authors, Composers and Publishers (SODRAC) Inc., for the purpose of



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licensing reproduction rights in music for certain uses and by certain users, including radio stations and online music services.

7. My full curriculum vitae is attached as **Exhibit A** to this affidavit.

## II. Summary

8. This affidavit is sworn in support of

- (a) the plaintiffs' motion to certify this action as a class proceeding;
- (b) the plaintiffs' motion to discontinue this action as against CMRRA and SODRAC, and to approve the settlement arrived at between the plaintiffs and those defendants; and
- (c) the motion by CMRRA, SODRAC, and SODRAC 2003 Inc. for leave to intervene in this action as added parties.

9. CMRRA is the largest music reproduction rights licensing agency in Canada. It has been engaged since 1975 in issuing mechanical licences that permit record labels and others to reproduce musical works on physical media such as LPs, cassettes and compact discs. Practical realities of the music industry have dictated that a good deal of CMRRA's mechanical licensing activity take place after the release of the recordings in question, which in turn has given rise to the issues raised in the statement of claim concerning the accumulation of unlicensed musical works on what is known in the Canadian music industry as the "Pending List."

10. CMRRA has a great deal of experience and expertise concerning the existence and growth of the Pending List. Over the last 20 years, it has made a number of attempts to resolve the underlying issues and reduce or eliminate the Pending List problem. It has proven to be economically infeasible to implement the systems that would be needed to resolve the issues internally, without the increased cooperation of the record labels. For their part, the

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record labels have generally been unwilling to take the steps that, in the view of CMRRA, would help to resolve the problem.

11. CMRRA had no prior notice of this lawsuit and did not consent to being named as a defendant by the plaintiffs.

12. In response to being named as a defendant, CMRRA was forced to consider whether, in fact, a class proceeding might be an appropriate vehicle to resolve the issues relating to the Pending List in a comprehensive fashion, both retrospectively and prospectively. Having answered that question in the affirmative, CMRRA agreed to assist the plaintiffs in the pursuit of this action as a class proceeding, which it believes will benefit both its music publisher clients and songwriters and music publishers generally.

13. Pursuant to an agreement between the plaintiffs and CMRRA and SODRAC, the plaintiffs have agreed to seek the discontinuance of this action as against CMRRA and SODRAC, who concurrently seek leave to intervene in this action.

14. This affidavit deals with the following subjects:

- (a) The history and function of CMRRA, and its role in the Canadian music industry;
- (b) The structure of that industry from the perspective of the owners of musical works;
- (c) The nature and history of mechanical licensing in Canada;
- (d) The practice of mechanical licensing, with particular reference to the Mechanical Licensing Agreement between CMRRA, the Canadian Recording Industry Association (CRIA), and various record labels;
- (e) The origin and growth of the Pending Lists;

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- (f) The size and characteristics of the Pending Lists today;
- (g) The difficulties encountered by CMRRA in attempting to deal with the Pending Lists;
- (h) CMRRA's specific attempts to address the Pending Lists through negotiation with the record labels and through various internal initiatives; and
- (i) CMRRA's involvement in this litigation and the basis on which I have concluded that a class proceeding may be the best way to deal with the Pending List issue.

### **III. CMRRA**

15. CMRRA is a non-profit music licensing agency that represents the reproduction rights of the vast majority of music publishers whose repertoires are in use in Canada.

16. CMRRA was formed in 1975 to represent the interests of music publishers doing business in Canada. Today, CMRRA represents the owners of more than 44,000 catalogues of musical works and has issued licenses on their behalf to more than 19,500 music users, including all major record companies and hundreds of individuals, independent labels and community organizations.

17. On behalf of its music publisher clients, CMRRA issues licences to users of the reproduction right in copyrighted music. These licences authorize the reproduction of music in compact discs, cassettes and other physical media (usually called "mechanical licences") and in films, television programs and other audio-visual productions ("synchronization licences"). Pursuant to these licences, licensees pay royalties to CMRRA and, in turn, CMRRA distributes the proceeds to its clients. The publisher then distributes the songwriter's portion of those revenues to the songwriter(s) involved.

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18. CMRRA is funded by a fixed commission that it deducts from the proceeds of its licensing activities. Membership in CMRRA is open to any music publisher with respect to the Canadian use of the reproduction right in its music.

19. CMRRA is a 50% shareholder in CSI. CMRRA and SODRAC incorporated CSI in 2002, initially as a vehicle to collect the royalties derived from their initially distinct Commercial Radio Tariffs for the years 2000 through 2005. Since then, CSI has applied for a series of other tariffs certified by the Copyright Board, including successive iterations of the Commercial Radio Tariff and the Online Music Services Tariff (2005-2007). Tariffs currently pending before the Copyright Board include the CSI Commercial Radio Tariff (2008-2012), the CSI Online Music Services Tariff (2008 and 2009), and the Multi-Channel Subscription Radio Services Tariff (2006-2009). In addition, CSI has entered into private licence agreements with other users of music.

20. As a contractor to CSI, CMRRA is responsible for the bulk of the administration of royalties collected pursuant to CSI tariffs and private agreements. A portion of those royalties are paid to CMRRA, which in turn distributes them to its music publisher clients.

21. In addition, CMRRA collects, on behalf of its music publisher clients, royalties paid to the Canadian Private Copying Collective for the private copying of sound recordings embodying musical works in the repertoires of those clients.

22. In order to carry out these functions, CMRRA has built an extensive infrastructure of information technology and human resources. At present, CMRRA employs over 100 people, including a team of eight IT professionals devoted to licensing and administration.

23. Although CMRRA represents a substantial percentage of the musical works used in Canada, its representation is neither exclusive nor exhaustive.

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C.34 (the “Act”);

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

**AND IN THE MATTER OF** an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

**BETWEEN:**

**STARGROVE ENTERTAINMENT INC.**

Applicant

. and .

**UNIVERSAL MUSIC PUBLISHING GROUP CANADA,  
UNIVERSAL MUSIC CANADA INC.,  
SONY/ATV MUSIC PUBLISHING CANADA CO.,  
SONY MUSIC ENTERTAINMENT CANADA INC.,  
ABKCO MUSIC & RECORDS, INC.,  
CASABLANCA MEDIA PUBLISHING, and  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

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**MOTION RECORD OF THE MOVING PARTY,  
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

**(Motion to Exclude the Affidavit of Mario Bouchard)**

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Lawyers for the respondent, Canadian Musical  
Reproduction Rights Agency Ltd.

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