Court File No. CV 0800360651 00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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.

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

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

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;

(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.

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.

For example, CMRRA represents an estimated 70% of musical works that are reproduced on sound recordings sold in Canada. The balance of those musical works (which include some by high-profile composers such as Bruce Springsteen, Bob Dylan and Paul Simon, as well as many lesser-known composers) are either licensed directly by their owners or represented by SODRAC. Some copyright owners license their works through music publishers who are not affiliated with CMRRA, while others are not represented by a music publisher at all (and are thus sometimes referred to as being "self-published").

24. As I will explain in more detail below, CMRRA is of the view that, despite its substantial market share of mechanical licensing activity in general, a very significant percentage of works on the various Pending Lists are not represented by CMRRA.

IV. The Structure of the Canadian Music Industry

25. Sound recordings released and sold in Canada fall into three major categories: those which are actually recorded in Canada and feature Canadian artists, those which are manufactured by Canadian record labels but feature master recordings produced by non-Canadians, and those which are manufactured elsewhere and imported into Canada for sale.

26. "Record label" is an industry term of art that refers generally to entities engaged in a variety of different activities. The common thread among them is that they are engaged in either the production of original sound recordings (in which case they will often own the copyright in the recordings in question) or the manufacture of sound recordings under licence. Some record labels are responsible for the distribution of their own product while others (particularly independent labels) contract that function out. Neither major labels nor independent labels manufacture their own products; that function is contracted out to one of a small number of so-called "pressing plants" active in Canada.

27. The so-called "major" record labels currently active in Canada are the defendants EMI Music Canada Inc. (**"EMI"**), Universal Music Canada Inc. (**"Universal"**), Warner Music Canada Co. (**"Warner"**) and SONY BMG Music (Canada) Inc. (**"SONY BMG"**). As I have come to understand it during my years with CMRRA, and from my personal contact with the management of these companies from time to time, these record labels engage both in the making of original sound recordings in Canada, featuring artists who are either signed to exclusive recording agreements with the record labels or who produce their own recordings and license them to the record labels for release, and in the release and distribution in Canada of recordings produced and/or licensed either by their parent or affiliated companies in other jurisdictions or by other unrelated companies in both Canada and other jurisdictions.

28. There are also a large number of so-called "independent" record labels active in Canada. Independent labels are those who are not affiliated with a multinational parent company, as the majors are, and as such they generally have much less extensive catalogues of sound recordings available for release and distribution in Canada. However, like a major label, the catalogue of an independent label will typically consist of a combination of owned and licensed recordings.

29. Only rarely will an independent label take responsibility for its own distribution; more commonly, that function will be contracted out to a third party, either a standalone distribution company or one of the major record labels. Each of the major record labels in Canada has distribution agreements in place with a number of independent record labels, both Canadian and otherwise.

30. Regardless of the origin of a particular recording, the Canadian label is generally responsible for administrative and accounting functions related to its distribution and sales activities in Canada, including the task of obtaining the necessary mechanical licences for the reproduction of the musical works that

the recording embodies. The responsibility to obtain mechanical licences for recordings manufactured and/or released in Canada falls with the Canadian labels by law, by industry custom, and by contractual agreement. The Canadian major labels named as defendants this action are also responsible for creating, maintaining and administering the so-called "Pending Lists" that are the subject of the current litigation.

31. As a result, in its day-to-day licensing activity, CMRRA deals extensively with the defendant Canadian major record labels. By contrast, CMRRA has very little contact with their parent companies or with their affiliates in other jurisdictions.

32. Copyright in a musical work, as distinct from the sound recording in which it is embodied, is generally owned and controlled not by a record label but by either the songwriter or a music publisher to whom that songwriter has assigned the copyright. In Canada, the vast majority of musical works are represented for licensing purposes by music publishers rather than individual songwriters (although, as I will explain below, the percentage of works on the Pending Lists that are so represented may be smaller). As in the case of record labels, there are a number of "major" music publishers active in Canada, specifically EMI Music Publishing Canada, Universal Music Publishing Canada, Warner/Chappell Music Canada and Sony/ATV Music Publishing Canada.

33. There are also a large number of independent music publishers active in Canada, ranging from large, professional operations such as Casablanca Music Publishing Inc. and Olé Media Management Inc. to individual songwriters who act as self-publishers. To facilitate licensing and the collection and administration of royalties, some self-published songwriters enter into publishing administration agreements with a major or independent music publisher. While CMRRA represents all of the major publishers, a large number of independent publishers and publishing administrators, and many

self-publishers, a significant number of independent publishers and unrepresented songwriters are not represented by CMRRA or any collective society.

V. Mechanical Licensing

34. The term "mechanical licensing" has its origin in section 3(1)(d) of the *Copyright Act*, which provides that the owner of copyright in a musical work has, among other things, the exclusive right "to make any sound recording, cinematograph film or other contrivance *by means of which the work may be mechanically reproduced or performed*" (emphasis added). The term is widely used to describe the reproduction of music onto physical products (for example, LPs, cassettes and compact discs).

35. The great majority of mechanical licensing activity in Canada is carried out by CMRRA or SODRAC as licensors (or, in the case of CMRRA, an agent for the licensors) and record labels as licensees. However, CMRRA and SODRAC also issue mechanical licences to individual makers of sound recordings who are not formally organized as "record labels" per se.

36. Prior to 1988, the *Copyright Act* contained a compulsory statutory licence for mechanical reproduction, which set royalties at two cents "per playing surface" but contained no particular accounting or reporting requirements. The compulsory licence allowed any person to make a reproduction of a work for sale or distribution in Canada after the initial release of a recording had occurred.

37. The Canadian compulsory licence was introduced in 1924 and paralleled a similar provision that had been long entrenched in the United States. However, unlike the United States equivalent, the Canadian compulsory licence did not contain very detailed accounting provisions, which made mechanical licensing activity difficult to track.

38. Until CMRRA was established in 1975, mechanical licensing in Canada was carried out either directly by copyright owners (i.e., songwriters and music publishers) or by the Harry Fox Agency, a licensing agency based in the United States.

39. By 1988, the two-cent statutory mechanical rate was less than half the rate in the United States. In fact, it was the lowest rate in the world, with the exception of territories without any effective music licensing infrastructure at all. Moreover, the drafting of the statutory provision arguably left it open to the interpretation that record labels were liable to pay only two cents for each side of a long-playing record.

40. Amendments to the *Copyright Act* in 1988 included the repeal of the statutory mechanical licence. The amendments also introduced a significant expansion of the then-existing system of collective administration, allowing the formation of collective societies to license, among other things, the reproduction rights in musical works.

41. The abolition of the statutory licence necessitated direct negotiation between record labels and music publishers with respect to all terms of each mechanical licence. This led to a significant change in the role of CMRRA. During the era of the statutory licence, CMRRA's principal function was to collect royalties at the statutory rate and remit them to its music publisher clients. Now, CMRRA assumed responsibility for the negotiation of both the mechanical licensing rates and the terms and conditions applicable to those licences.

(i) The Mechanical Licensing Agreement

42. In 1988, there were nine major record labels active in Canada: A&M Records of Canada Ltd., BMG Music Canada Inc., Capitol Records-EMI of Canada, CBS Records Canada Ltd., Island Records of Canada Ltd., MCA Records Canada, PolyGram Inc., Virgin Records Canada Inc., and WEA

Music of Canada, Ltd. All of these companies, as well as a number of independent record labels, were represented by a single trade association, the Canadian Recording Industry Association (**"CRIA"**). In all, CRIA represented the makers of a substantial majority of all sound recordings sold at that time in Canada. CMRRA, on the other hand, represented a smaller but still significant percentage of the musical works reproduced on those recordings.

43. Following the amendments to the Copyright Act, CRIA and CMRRA entered into negotiations with a view to settling both the rates and the terms for mechanical licensing in the absence of a statutory licence. The negotiations were lengthy and adversarial, with the record labels arguing that as little as possible should change so as to avoid disruption to well-established commercial practices. However, some progress was made, and CRIA eventually agreed to increase the mechanical licensing rate to CDN5.25¢ per song (mirroring the USD 5.25¢ rate that was then in effect in the United States), but the resulting Mechanical Licensing Agreement (**"MLA"**), attached as **Exhibit B** to this affidavit, was not particularly comprehensive.

44. The first MLA expired at the end of September 1990, and another lengthy and difficult negotiation ensued. This time, CMRRA and CRIA negotiated a much more detailed code of conduct and rate determination in an agreement that ran from October 1990 through December 1997. The 1990 MLA is attached as **Exhibit C** to this affidavit.

45. Successor agreements to the 1990 MLA were executed in 1998 (**Exhibit D**), 2004 (**Exhibit E**), 2006 (**Exhibit F**) and 2008 (**Exhibit G**). During this time, CRIA has gradually come to represent fewer record labels, both as a result of industry consolidation (for example, the merger of Sony and BMG and Universal's acquisition of PolyGram and MCA) and because of the resignation of a number of independent record labels from the association.

46. The current MLA, executed in September 2008, is effective as of January 1, 2007 and runs through December 31, 2012.

(ii) Mechanical Licensing Outside the MLA

47. As indicated above, not all sound recordings made in Canada are made by labels represented by CRIA and are therefore not subject to the MLA with CRIA. CMRRA offers other mechanical licensing schemes for these labels (and, for that matter, other individual makers of sound recordings) when they seek mechanical licences from CMRRA. Some of these labels sign their own MLAs with CMRRA while others are subject to the "pay as you press" program discussed below. However, in every case, the basic royalty rate remains the same.

48. Similarly, not all music publishers doing business in Canada are represented by CMRRA. Some are represented by SODRAC, and therefore subject to mechanical licensing arrangements authorized by SODRAC from time to time, while others are not represented by either CMRRA or SODRAC and therefore license their repertoire directly to makers of sound recordings. I do not have direct knowledge of the mechanical licensing practices of these publishers. However, on the basis of many conversations with these publishers over the years, I have come to understand that the usual practice is to license their repertoire at the rates in effect under the then-current MLA.

(iii) Mechanical Licensing Practice

49. In Canada, as in most territories, the common practice is for major labels to release new records without first obtaining mechanical licences. This practice had its origin in the pre-1988 era, when the combination of a statutory compulsory licence and a legislated two-cent royalty rate made the issuance of a mechanical licence a foregone conclusion; the only issue was locating and paying the copyright owner.

50. After the repeal of the statutory licence, this practice continued. Although it would be desirable if mechanical licences were to be sought and obtained in advance, there are significant practical barriers to such a system.

Chief among these is that the maker of a sound recording may not have complete or accurate information as to who owns the copyright in the underlying musical work, particularly when there are multiple authors, each of whom may own a share of copyright. Indeed, in many cases the authors will not have directed their own minds to resolving ownership issues by the time a recording of their composition is ready to be released; this may not be settled until months later. As a consequence, if a licence needed to be obtained in advance for every song on an album, it would often take a very long time before a completed record could be released.

51. As a practical response to this conundrum – and despite the fact that the absence of a compulsory licence means that a given copyright owner is entitled to refuse a licence request and might well do so – the practice remains for record labels to release their new product before obtaining the requisite mechanical licences. Instead, the licensing process set out in the MLA, broadly speaking, is as follows:

(a) Prior to the execution of each successive MLA, CMRRA is to provide each label with a list of all music publishers whom it represents and who have authorized CMRRA to license their compositions pursuant to the MLA (**"Affiliated Publishers"**), all music publishers whom it represents but who have authorized CMRRA to license their compositions on terms other than those set out in the MLA (**"Non-Affiliated Publishers"**), and specific musical works which, while owned by an Affiliated Publisher, are specifically excluded from the scope of the MLA by instruction of their owners (**"Non-Authorized Compositions"**).

(b) During the term of the MLA, each label is to apply to CMRRA for mechanical licences for all recordings that the label sells or distributes in Canada and which contain reproductions of musical works. These applications are to be made by way of the label's

providing CMRRA with one copy of each physical contrivance on which the recording is released.

(c) As soon as possible, once CMRRA has ascertained that a recording contains one or more compositions authorized for licensing under the MLA (**"Authorized Compositions"**), it is to grant a licence permitting the label to reproduce each such Authorized Composition on recordings manufactured or imported by or on behalf of the Manufacturer in Canada, and to distribute those recordings in Canada.

(d) If the label applies to CMRRA for a mechanical licence for a work that CMRRA knows it does not represent, or does not represent the entire work (i.e., where there is more than one copyright owner and CMRRA represents some but not all of the resulting copyright interests), CMRRA is to advise the label as soon as possible.

(e) If the recording supplied by way of licence application (and/or the packaging of that recording) does not disclose enough information to enable CMRRA to identify and issue licences for the musical works that it contains, CMRRA is to request in writing, and the label is required to provide, additional data in relation to that recording. The required data is to include, at minimum, (i) the name and address of the label, (ii) the name of the musical work, (iii) the name(s) of the performer(s) or group featured on the recording, (iv) the label's catalogue number for the recording, (v) the type(s) of product on which the recording was released, (vi) the title of the recording, and (vii) the release date.

(f) Where a mechanical licence has not been obtained for any ownership interest in a musical work reproduced on a recording,

the label is required to record, on a so-called "Unlicensed Recording List" (the **"Pending List"**), certain identifying information (discussed below) about the work and the recording thereof. The label is required to provide an updated cumulative Pending List to CMRRA with each quarterly payment of royalties under the MLA.

(g) Upon receipt of the Pending List, CMRRA is to review the list and attempt to identify and issue mechanical licences for any musical works that it is authorized to license pursuant to the MLA. Depending on the reason that the work ended up on the Pending List, interest may be payable on royalties payable pursuant to the licences so issued. The interest provisions of the current MLA, which set out the circumstances in which interest is and is not payable, are found in paragraph 4(f) of the CMRRA-Manufacturer Mechanical Licensing Agreement that is included as part of **Exhibit G** to this affidavit (at page 23 of that exhibit).

52. In practice, the system works as follows:

(a) Sometime after the release of a given product (or occasionally before the release), the record label submits information about the musical works that it contains, by submitting a copy of the product itself and, in some cases, a separate transcription of the product's label copy.

(b) Upon receipt of that material, CMRRA manually reviews the product or label copy and inputs all available information about the songs into its computer system.

(c) CMRRA attempts to match the information supplied by the record label with information in the CMRRA song database.

(d) If there is a match, and CMRRA represents a musical work in whole or in part, then a licence is issued for the interest that CMRRA represents. The licence takes the form of a paper document, a copy of which is attached as **Exhibit H** to this affidavit. Where there are multiple copyright owners and CMRRA represents more than one of the ownership shares, a separate licence is issued for each share.

(e) If there is a match but the rightsholder information is incomplete – that is, less than 100% of the publishing interest in the musical work has been allocated – CMRRA conducts further research to identify the missing ownership shares and, where the copyright owner is a CMRRA client, obtains a formal work registration from the client as confirmation of its ownership share. (This is sometimes necessary because CMRRA's clients do not always register all their works with CMRRA before those works become active in Canada.) Once the work registration is received, the information is recorded in CMRRA's works database and a licence is issued for the additional share(s).

(f) If there is a match but CMRRA does not represent the work or understands that it is in the public domain, CMRRA notifies the record label. Further, if CMRRA knows who represents a musical work that it does not represent itself, it often provides that information to the record label as a courtesy. Either way, it is then the responsibility of the record label to find the copyright owner(s) and obtain the necessary licence.

(g) If there is no match, and it appears that the information supplied by the record label is insufficient, CMRRA requests the supplementary information set out in paragraph 51(e) above.

(h) If there is still no match after reviewing all of the initial and supplementary information provided by the label, CMRRA notifies the label that the song has not been licensed and flags the song for further work and investigation, as time and resources permit, to verify its ownership.

(i) Notification of unrepresented and/or unidentified musical works is provided in the form of an "Unlicensed Composition Sheet," which CMRRA prepares on a product-by-product (i.e., album-by-album) basis, showing which works on the particular product are not represented by CMRRA, which are in the public domain, and which simply cannot be identified.

(j) For songs licensed by CMRRA, the labels regularly provide electronic statements identifying the royalties payable for songs on products they have sold, and pay those royalties to CMRRA. If CMRRA becomes aware of any changes in the ownership of a song, it amends the applicable licence(s) and makes the necessary adjustments to the royalty statement.

(k) CMRRA issues its own statements to its music publisher clients and remits the royalties due and owing them, less its commission.

53. That describes the system in general. However, there are also certain exceptions. For example:

(a) Since about August 2004, Universal has submitted its licence requests electronically, in addition to providing product samples and/or label copy, and CMRRA has issued licences to Universal in electronic rather than paper format.

(b) If a dispute is raised with respect to the ownership of all or part of the copyright in a song, record labels will often refuse to pay any

royalties for that song until the dispute is resolved – sometimes even if there are shares of the copyright that are not in dispute and that CMRRA has confirmed that it represents those shares.

(c) For smaller licensees, whether labels or other entities, who seek mechanical licenses, CMRRA has implemented a "pay-as-you-press" system, whereby the licensee pays royalties in advance, at the prevailing MLA rates, on the basis of the volume of product actually produced.

54. CMRRA has achieved some very significant milestones in relation to mechanical licensing. In its 33 years of operation, it has issued over 2 million mechanical licences and has developed a song and publisher database containing over 1.6 million songs.

55. However, the CMRRA mechanical licensing system faces a number of challenges. Fundamentally, we cannot issue a licence for a musical work until we have confirmed who owns it and that the owner is in fact represented by CMRRA. However, CMRRA is dependent for this confirmation upon information provided by third parties – both its record label licensees and its own music publisher clients.

56. Until 1998, the record labels were unwilling to agree contractually to any required categories or format for the provision of information required for licensing purposes. Physical products (and their packaging) vary widely in terms of the amount and quality of information that they contain; for example, some CD covers contain comprehensive information about each song, including the names of the songwriters and music publishers, while others contain none of that information at all. Even where the information is provided, it may not be entirely accurate or complete.

57. Further, CMRRA's repertoire changes continuously. New music publishers become affiliated with CMRRA on a regular basis, while existing

clients expand or modify their catalogues by buying and selling copyrights. Consequently, on a daily basis, CMRRA receives notification both of new works and of changes in the ownership of existing repertoire (which sometimes leads to the removal of songs from the scope of CMRRA's representation). As such, the accuracy and completeness of the CMRRA song and publisher database depends heavily on the timely and accurate submission of changes by its clients.

58. The quality of third-party information is not, however, the only constraint on the comprehensiveness of CMRRA's records. CMRRA does not represent all of the music publishers whose repertoire is in use in Canada. Accordingly, CMRRA's information resources are necessarily limited; there are many songs that are not included in the CMRRA song database because we do not represent them and never have. Although the database does contain information about many songs that we do not represent, mostly because we have encountered them on recordings released over the years and taken note of them for purposes of attempted matching, the information about those songs may not be complete and there are some songs that we have not encountered at all. There are some third-party resources available that CMRRA uses for research purposes, to help identify potential owners of certain musical works, but these cannot be considered authoritative.

VI. Pending Lists

59. When I arrived at CMRRA in 1989, I learned for the first time that, for a number of different reasons, a significant number of musical works were being recorded and released by record labels for which licence had not been obtained and royalties were not being paid to the owner of the copyright in those musical works. I became aware from CMRRA staff at the time that, in situations where a record label had not identified or could not contact the person to whom mechanical royalties should be paid for the use of a musical work, the record label accrued the unpaid royalties in their financial records.

60. From the time I started at CMRRA, these unlicensed recordings were a frequent topic of discussion with the record labels. CMRRA had learned from the major labels that that they maintained one or more lists of unlicensed recordings against which they recorded unpaid royalties. Depending upon the record label, these lists were referred to by a number of names that could change: "no address", "unmatched", "unlicensed", "disputed" and "pending." Although they are referred to in the MLA as "Unlicensed Recording Lists," they are most frequently referred to in the industry by the colloquial term, "pending lists," or collectively as "the pending list."

61. Subsequently, through extensive experience at CMRRA with the Pending Lists, I have learned that musical works end up on the lists in a variety of ways and for a variety of reasons, including the following:

(a) The record label has not applied for a mechanical licence;

(b) Although CMRRA has advised the record label that it does not represent the work, the record label has not secured a licence directly from the music publisher or other copyright owner;

(c) Although a mechanical licence has been issued, signed and returned, no royalties have been paid for reasons unknown to CMRRA;

(d) CMRRA has issued a mechanical licence but the record label has not signed and returned it as required under the MLA. Most record labels take the position that royalties are not payable until the licence has been signed and returned;

(e) A mechanical licence has been issued but the record label has paid less royalties than required; and

(f) A licence has been sought by the record label but either (i) CMRRA has not yet responded to the request because we

cannot yet confirm whether or not the work is within our repertoire, or (ii) the licence was sought for a work that CMRRA represents, but was sought too close to the cut-off date in the relevant accounting period for royalties to be released in time for the work to be removed from that quarter's Pending List;

(g) CMRRA has not been able to confirm whether or not it represents the work in question, either because the record label has failed to provide sufficient or accurate information to identify it (e.g., an unrecognizable or inaccurate song title or catalogue number) or because CMRRA has sent a request to one of its clients to verify its suspected representation of the work but the publisher has not responded;

(h) The work is in the public domain but has not been identified by the record label as such or has not been identified with sufficient particularity to allow CMRRA to determine whether it falls into the public domain;

(i) The work is subject to an ownership dispute in which CMRRA has issued a mechanical licence but the record label purports to have obtained a conflicting licence from a third party. In these situations, the label will usually provide CMRRA with information about the third-party claim and will not release royalties until the situation is resolved. CMRRA will notify all the claimants of the dispute and ask that they advise when it has been resolved so that licences can be issued in accordance with the resolution;

(j) The musical work does not actually appear on the product in question, but the record label has pended royalties on it nonetheless.

62. Since even before the inception of the MLA licensing process, CMRRA has received information from the major record labels about their Pending Lists. Before I arrived at CMRRA, and in the early years of my tenure, CMRRA received Pending Lists from the record labels in the form of paper printouts of information. The information contained on these lists varied from record label to record label, and might consist of as little information as an album title or catalogue number and accrued royalties, or as much information as song title, unit amounts, label catalogue number and/or UPC codes.

63. For the larger labels, these lists were huge. In fact, within a few days after my arrival at CMRRA, I recall my predecessor, Paul Berry, directing my attention to a large stack of paper, about two feet high, and informing me that it was PolyGram's most recent Pending List. Prior to that introduction, I had never heard of Pending Lists.

64. In the days of the statutory compulsory licence, this was primarily a payment issue; since there was no question as to whether the record label could obtain a licence to use any particular composition, it was simply a matter of to whom the necessary royalties were to be paid. Since the repeal of the compulsory licence, however, it has become a licensing issue: the availability of a mechanical licence, or the rate at which a licence might be granted, is no longer a certainty (at least in the case of songs that fall outside the repertoire of CMRRA and SODRAC), and songs that are on the Pending List are likely unlicensed.

65. Prior to 1990, Pending Lists were provided to CMRRA by the major labels only in paper format and with no consistency as to form or content. Each label's Pending Lists were different and it was left to CMRRA to review them by hand and attempt to reconcile the information where possible. While I have limited personal knowledge of the practices that were observed in those days, I am informed by Anatole Banner, who has been engaged by CMRRA as an IT consultant continuously since the mid-1980s, and believe on that

basis that relatively few songs could be identified successfully on the basis of the material provided in hard copy format.

66. More recently, as I will detail below, the Pending Lists have been provided to CMRRA in electronic format.

VII. Pending Lists Today

67. Data provided by the defendant record labels in relation to the second calendar quarter of 2008 indicate that the total aggregate value of the four companies' Pending Lists at that time was $53,110,684.08 and the four lists contained a total of 385,673 line items with an average assigned royalty value of $137.71 each. The breakdown of the four Pending Lists as at that time was as follows:

Label	Total Value	Number of Line Items	Average Value per Line Item	Average Value per Product
Universal	$30,313,444.52	248,423	$122.02	$1,593.31
Warner	$7,779,390.37	43,559	$178.59	$1,883.04
Sony BMG	$7,973,108.28	74,777	$106.63	$1,122.09
EMI	$7.044,740.91	18,914	$372.46	$1,886.05
TOTAL	**$53,110,684.08**	**385,673**	**$137.71**	**$1,621.12**

68. In 2006, CMRRA performed an analysis of Pending List data from the fourth quarter of 2005 to determine the number of individual line items that fell within certain ranges of value. The results of that analysis are as follows:

Range	Number of Line Items	Percentage of Total Line Items	Total Value	Percentage of Total Value	Average Value per Line Item in Range
> $10,000	194	0.1%	$3,097,339	6.1%	$15,965.66
$5,000.01 to $10,000.00	760	0.3%	$5,067,215	10.0%	$6,667.39
$1,000.01 to $5,000.00	9.005	3.2%	$17,418,509	34.3%	$1,934.32
$500.01 to $1,000.00	11,557	4.1%	$8,106,738	15.9%	$701.46
< $500	257,839	92.3%	$17,154,766	33.7%	$66.53
TOTAL	**279,355**		**$50,844,566**		**$182.01**

69. In a similar study performed in 2005, CMRRA determined that 71.63% of all items on the record labels' cumulative Pending Lists had an assigned royalty value of less than $100. The total value of those items was $4,630,232 – just 9.43% of the $49,085,502 cumulative value of the Pending Lists at that time.

70. Each of the defendant record labels has recently provided CMRRA with Pending List data for the third quarter of 2008. The current breakdown of the lists, by record label, is as follows:

Label	Total Value
Universal	$30,255,712.30
Warner	$7,858.575.66
Sony BMG	$8,086,709.61
EMI	$8,011,674.34
TOTAL	**$54,212,671.91**

Although we have not yet had an opportunity to analyze the latest data in detail, I expect the breakdown of Pending List items to be roughly the same as in the previous quarter.

71. It is also worth mentioning that Sony BMG delivers two separate Pending Lists to CMRRA each quarter. One of the lists is called "Unlicensed" and the other is called "Unmatched." Only the "Unlicensed" list provides information regarding the value of each line item. The items on the "Unmatched" list do not contain sufficient information to assess their value; at times, not even the title of the musical work is included. Accordingly, only the value of the "Unlicensed" list is included in the figures cited in paragraphs 67 to 70 above. However, I am advised by Caroline Rioux, CMRRA's Vice President of Operations, and believe on that basis that the "Unmatched" list could account for as much as $1.5 million more in unpaid royalties.

72. CMRRA has no specific data on the percentage of Pending List items that it represents. However, we have always believed that the Pending Lists contain significant numbers of works in our repertoire. From time to time, both we and the record labels have analyzed samples of the Pending Lists and generated results that might be indicative to some degree.

73. For example, during the negotiations leading to the 2004 MLA, it was agreed that CMRRA and each record label would analyze a random sample of 100 items on that record label's Pending List, each with a per-item value of $100 or less. Tables and charts summarizing the full results of that study, as conducted by CMRRA, are attached as **Exhibit I** to this affidavit. CMRRA was able to estimate that it represented 29.17% of works on Warner's Pending List, 15.70% of BMG's, 35.14% of Sony's, 14.21% of EMI's, and 38.27% of Universal's. When the numbers were revised to extrapolate for items for which CMRRA representation was "unsure" – neither confirmed nor negated conclusively – the numbers grew to 38% for Warner, 29% for BMG, 55% for Sony, 35% for EMI, and 56% for Universal.

74. Each of the record labels other than EMI performed a similar analysis, the results of which are attached as **Exhibit J** (Warner), **Exhibit K** (Universal), **Exhibit L** (Sony), and **Exhibit M** (BMG). Separately, Warner and EMI analyzed all products (i.e., albums or other multi-track configurations) on their Pending Lists with aggregate per-product values of over $10,000. Those results are attached as **Exhibit N** (Warner) and **Exhibit O** (EMI). Warner's analysis was generally the most comprehensive, and its findings were as follows:

(a) On the products researched with a per-product value greater than $10,000, 66.15% of the total royalty value related to musical works that were not represented by CMRRA, 5.73% related to works that had been licensed (either by CMRRA or otherwise) and for which royalties were about to be paid, and 0.98% related to works that were the subject of disputes about the ownership of rights. The balance (27.14%) related to works that were being processed by CMRRA but had not yet been licensed successfully.

(b) Of the individual items researched with a per-item value less than $100, 62% were not represented by CMRRA, 1% were in dispute, and 1% were charity releases that were not subject to royalties. The balance (36%) were being processed by CMRRA but had not yet been licensed successfully.

75. Where musical works referred to in the Warner study had not yet been licensed successfully, it cannot be determined on the basis of the study alone whether or not the musical works in question were represented by CMRRA at that time. That conclusion is reinforced by the parallel study that CMRRA conducted at that time, which established that CMRRA was unable to confirm the ownership status of 33.17% of the items in the Warner study with values under $100.

76. Similarly, in 2006, Universal analyzed the results of its "Royalty Recovery Program," a short-term program (discussed below) that it undertook to resolve Pending List items, and determined that, of $6.4 million in royalties that it managed to resolve, 40% of songs were represented by CMRRA, 11% were represented by SODRAC, 14% were not represented by either, and 35% were in the public domain. It should be noted that these percentages reflect Universal's appraisal of the resolved items; CMRRA is not in a position to verify the ownership or copyright status of works for which Universal has not applied to CMRRA for licences, including those that Universal determined to be in the public domain.

77. These results may or may not be predictive of the precise degree of CMRRA's representation of all items on the Pending Lists. However, if we rely on the low end of the various analyses and assume that about 30% of the line items on the Pending List represent musical works within our repertoire, it would appear that, at current levels, the Pending List is likely to contain at least $16 million in unpaid royalties owed to CMRRA clients – before interest.

78. Consequently, with justification, the Pending List has long been a matter of serious concern for CMRRA. So long as works within our repertoire remain unlicensed, CMRRA is unable to collect the royalties to which our clients are entitled or to receive our commission on the collection of those royalties. However, the sheer magnitude of the problem – more than 385,000 individual line items, about 90% of which have an average individual value of less than $100 – coupled with CMRRA's limited resources and the apparent unwillingness or inability of the record labels to address the problem in a meaningful way, has made it next to impossible for us to make any significant progress toward ensuring that copyright owners are paid for the use of their musical works.

VIII. Difficulties Encountered by CMRRA in Addressing the Pending Lists

79. Over the years, CMRRA has found it very difficult to identify works on the Pending Lists in order to issue mechanical licences for those that are in our repertoire. A number of factors have contributed to this difficulty.

(i) Insufficient Information Provided by the Record Labels

80. The record labels have failed to provide sufficient information to enable CMRRA to identify compositions on the Pending Lists. They have not provided complete or accurate information for the fields of data required under the MLA (as discussed below). The name of the composition is sometimes reported in an obviously incorrect way – for example, a recent review of EMI's Pending List disclosed multiple references to "Canadian Other Unknown Tune," which I do not believe to be a real song title – and the catalogue number of the product on which the song supposedly appears is often unrecognizable or inconsistent with other available data, which makes it difficult or impossible for CMRRA to cross-reference the song title with the recording to obtain further clarification. Moreover, while the MLA has provided, since 1990, for the name of the composer to be provided on an optional basis, only Universal and Warner provide that information, and then only sporadically and often inaccurately.

81. As I have already indicated, the record labels have refused in successive MLA negotiations to agree to provide information that, in my view, would go a considerable way toward clearing the Pending Lists. Some of this information is contained on the face of the products as released and/or required in response to a request under the MLA for supplemental identifying information, yet the record labels have resisted including it on their Pending Lists. Other information, such as the percentage interests of songs that are licensed and unlicensed, is sometimes withheld as well. Attached as **Exhibit P**

to this affidavit is a list of the data fields currently provided by each of the major record labels.

(ii) No Standard Format for Pending List Data

82. Until very recently, the record labels have also refused to agree to a standard format for the submission of their Pending Lists to CMRRA. In the most recent MLA, as discussed below, the record labels have agreed to work with CMRRA toward the establishment of a standard format, but that has not yet occurred. For now, each record label continues to provide its Pending List data in a unique format and often changes the format without prior notice to CMRRA. From time to time, certain record labels have simply stopped providing CMRRA with Pending List data for months at a time. This inconsistency has inhibited the ability of CMRRA to process the Pending Lists and make them available to our clients.

(iii) Poor Maintenance and Administration of Pending Lists

83. In my view, the record labels have also done a poor job of maintaining and administering their Pending Lists. Beyond the misidentification of works, they have routinely included works on their Pending Lists that should not be there at all, including some that have already been licensed in whole or in part (without any indication, in that case, of what percentage interest has in fact been licensed). This confuses matters and makes the Pending Lists even more difficult and expensive for CMRRA to analyze.

84. On numerous occasions, record labels have either lost or simply failed to sign and return mechanical licences sent to them by CMRRA, instead adding the works in question to their Pending Lists. For example, I am informed by Caroline Rioux and believe on that basis that Sony BMG had over 25,000 unsigned licences in its possession as of January 2008. Some of these licences related to products released 25 years ago or earlier.

85. The only significant attempt that any of the record labels has made to address the Pending List problem, to my knowledge, was made by Universal in 2006 and 2007, when it established its "Royalty Recovery Program." Universal hired John Redmond, an experienced former music publisher, to work through its Pending List and, among other things, flag songs that had been licensed by CMRRA in the past and might therefore involve royalties that could be released from the Pending List. In early 2006, Universal provided CMRRA with a list of 698 flagged line items, which resulted in the release of approximately $415,000 in royalties. Universal increased the list to 6,635 line items in fall 2006.

86. The Royalty Recovery Program was fairly successful. It allowed us to recover over $2,750,000 in royalties for CMRRA clients. However, in or around mid-2007, Universal ceased staffing the Royalty Recovery Program.

87. In general, I believe that the record labels have devoted insufficient resources to identifying and paying the owners of musical works on the Pending Lists. To my knowledge, none of them currently have dedicated personnel devoted to the Pending Lists; only Universal has ever had staff dedicated to this purpose, and then only in the context of the Royalty Recovery Program. Whenever we have attempted to encourage the record labels to devote increased resources to the Pending Lists, they have indicated to us that this would require them to reduce the number of staff assigned to the processing of current licences. Some labels have gone so far as to indicate to CMRRA in the past that, in their view, addressing the Pending Lists would simply be an unproductive use of their time.

(iv) Economic Infeasibility of Complete Pending List Analysis by CMRRA

88. Since at least 1995, CMRRA has generally had at least one full-time staff member devoted exclusively to Pending List research and licensing. We are aware that it would take a much larger dedicated work force to clear the

Pending Lists entirely. We simply do not have sufficient financial or human resources to allocate to the task. Since CMRRA is funded entirely on commission, we must give a higher priority to top-selling items, namely the current hits. Further, at present, we are only interested in the musical works in our repertoire, which appear to constitute less than 50% of all line items on the Pending Lists.

89. CMRRA performed a "time and motion" study in 2005, in which we put five of our best licensing administrators – those individuals most familiar with each of the major record labels and the content of their respective Pending Lists – to work for one full day (35 person-hours), without any interruptions, in order to research as many Pending List items as they could during that time. Of a random sample of 1,000 items per Pending List produced for this purpose, the team was able to research only 172 items by the end of the day.

90. Of the 172 line items analyzed, the licensing team determined that 22.31 of the musical works (or 13% of the total line items) were represented by CMRRA – and 6.57 of those had already been licensed but no royalties had been paid. The balance of the musical works were either not represented by CMRRA (80.34 items, or 46.7% of the total), subject to a dispute (five items, or 2.9% of the total), or either unverified, unlocatable, or unidentifiable within the time allocated (69.33 items, or 40.3% of the total). The total value of the line items that contained musical works represented by CMRRA was $22,212.77, about 30.7% of the total royalties payable in relation to the 172 line items. In other words, for the equivalent of $1,000 in salaries paid to that team for that day, plus an estimated $2,000 in additional salary costs to issue mechanical licences and collect the resulting royalties, CMRRA realized only $1,332.76 in commission at its then-current rate of 6%.

91. At the moment, CMRRA has no staff devoted full-time to the Pending List, primarily because several of the record labels have changed their Pending List formats and the new data cannot readily be accessed or

analyzed at this time. However, members of our licensing staff continue to devote time to researching and clearing items on older versions of the Pending Lists, among their other duties.

(v) Non-Comprehensiveness of CMRRA Repertoire

92. CMRRA has also been disadvantaged by its status as non-exclusive agent for less than all publishers whose works are in use. If our representation were comprehensive, as it is in many European jurisdictions (for example), we might be in a better position to persuade the record labels to pay the pended royalties to us and would then have more resources and strategies available to identify and pay the appropriate rightsholders.

IX. Attempts to Address the Pending Lists Through Negotiation

(i) The 1990 MLA Negotiations

93. Although, as I have already indicated, Pending Lists were very much a reality of the Canadian music industry even during the days of the statutory licence, they were not addressed in the 1988 MLA. There were no set policies or procedures governing the treatment of Pending Lists; they were simply dealt with in whatever way each individual record label wished and submitted to CMRRA in unpredictable formats and on an irregular basis.

94. In the negotiations leading to the 1990 MLA, which were the first MLA negotiations that I conducted on behalf of CMRRA, my goal was to codify as much about the relationship between CMRRA and the record labels as possible so that, going forward, there would be less reliance on undocumented "industry custom." In that context, Pending Lists were an important issue.

95. In these negotiations – which began near the end of 1989 and continued through 1992 – I found that CRIA and the record labels were unwilling to agree to provisions which could have had a positive impact on the

Pending Lists. As I recall, CMRRA made three substantive proposals to address the problem. Specifically, we proposed:

(a) An advance on the payment of royalties accrued on the Pending Lists, which would have permitted us to dedicate more resources to identifying and clearing the works;

(b) A commitment by CMRRA and each of the record labels each to hire one dedicated staff member to work exclusively on clearing the Pending Lists; and

(c) A standard format for the submission of Pending Lists.

Each of these proposals was rejected by CRIA and the record labels.

96. In the end, however, CMRRA was able to secure the record labels' agreement to:

(a) submit Pending Lists on a quarterly basis, rather than occasionally or irregularly, as had been the case until then;

(b) include, in relation to each entry on the Pending Lists: (i) the title of the musical composition; (ii) the catalogue number of the recording on which the composition was reproduced; (iii) the cumulative number of units for which royalties were payable from the first distribution of the recording through the end of the quarterly period to which the Pending List relates; (iv) the applicable royalty rate; and (v) the total royalties payable in relation to the composition at issue;

(c) provide the Pending Lists on nine-track computer tape or other mutually agreeable computer medium, with lists in paper format now optional; and

(d) pay interest, at the Bank of Canada prime rate plus 2%, on royalties paid pursuant to compositions licensed by CMRRA where the label had either failed to apply for a mechanical licence, failed to provide the minimum information required in relation to its application, or simply withheld royalties payable pursuant to a mechanical licence and included it on the Pending List without just cause.

97. I find it difficult to understand why the record labels would not agree to provide, in relation to each item on the Pending List, at least the same information that they agreed to provide in relation to initial licence applications. This would include such basic information as the name of the album on which the composition appeared or the performing artist to whom the recording was credited. The only additional information that the labels were willing to consider providing was the name of the author of the composition, but only on an optional basis.

98. Following the execution of the 1990 MLA, we gradually began to receive the Pending Lists on nine-track computer tape and enter the data into our computer systems. I am advised by Anatole Banner and believe on that basis that this information was received from various record labels at various times between 1991 and 1997, and that some of the labels had begun to provide the data in this format even before the execution of the MLA.

(ii) The 1998 MLA Negotiations

99. Negotiations leading to a new MLA began toward the end of 1997. Pending List issues were on the table again.

100. By 1995, CMRRA had begun to develop software tools to analyze the Pending Lists. We had realized that a major reason for the proliferation of items on the lists appeared to be that the record labels, who were then in the practice of applying for mechanical licences by submitting "label copy" –

which, as I understand it, were essentially written transcriptions of the song identification material that appeared on each product's printed label – were not actually applying for licences until an average of six months (and sometimes up to two years) after the product's release. The record labels indicated that this was a function of their own difficulty obtaining label copy, something that I found difficult to understand. Either way, until a licence application was made, all songs contained on the product would appear on the record label's Pending List.

101. In the 1998 negotiations, CMRRA and the record labels agreed that, going forward, licence applications would be made by submitting copies of the actual products as released, rather than separate transcriptions of their label copy. We believed that this would significantly improve the timing of licence applications, and it has. However, it seems to have had little impact on the overall size and value of the Pending Lists.

102. Also in the 1998 MLA negotiations, agreement was reached on a standard format for the royalty statements submitted by the record labels. However, when we tried to secure agreement on a standard format for Pending Lists, the record labels refused. As a result, Pending Lists continued to be submitted in a wide variety of different formats. As I have explained above, this has compromised our ability to deal with the Pending Lists on a timely basis or at all, a problem that persists to this day.

(iii) Audit Negotiations

103. From time to time, CMRRA has exercised its right under the MLA to conduct audits of record labels, including the defendant record labels. As is common in any audit process, the process generally concludes with the settlement of various line items in which discrepancies are discovered. Typically, the labels agree to settle on some items while refusing to settle on others.

104. Each time we have audited one of the defendant record labels, we have attempted to reach a settlement of its Pending List by requesting an amount derived by multiplying the total amount of pended royalties by CMRRA's then-current estimated market share. These attempts have always been rejected with the explanation that the record labels are prepared only to pay the actual owner of copyright in each listed musical work.

(iv) The 2004 MLA Negotiations

105. During the negotiations leading to the 2004 MLA, which were conducted with the assistance of a mediator because of the tension that existed at that time between CMRRA, on one hand, and CRIA and the record labels, on the other, the Pending List was a very significant issue. This time, CMRRA hoped that it would be possible to achieve a settlement of the lower-value items on the Pending Lists – individual line items with a per-item value of less than a certain small amount – so that the parties could then focus on working together to clear the higher-value items individually.

106. By this time, CMRRA had conducted the analysis described above to determine how long it would likely take to clear individual Pending List items. Also as discussed above, we agreed during the negotiations that CMRRA and each record label would research randomly-generated selections of Pending List items. As I have already indicated above, results provided by Warner showed that:

(a) On the products researched with a per-product value greater than $10,000, 66.15% of the total royalty value related to musical works that were not represented by CMRRA, 5.73% related to works that had been licensed (either by CMRRA or otherwise) and for which royalties were about to be paid, and 0.98% related to works that were the subject of disputes about the ownership of rights. The balance (27.14%) related to works that were being

processed by CMRRA but had not yet been licensed successfully; and

(b) Of the individual items researched with a per-item value less than $100, 62% were not represented by CMRRA, 1% were in dispute, and 1% were charity releases that were not subject to royalties. The balance (36%) were being processed by CMRRA but had not yet been licensed successfully.

107. Based on the combination of our research and that of the record labels, CMRRA made a proposal to settle a portion of the Pending List as it then existed and to introduce a system that would reduce the proliferation of items on the Pending List and ensure payment to rightsholders going forward. The specifics of that proposal were already outlined in a letter that I sent to the mediator on April 4, 2005 (a copy of which is attached as **Exhibit Q** to this affidavit). In essence, the proposal involved:

(a) The settlement of all items on the Pending List arising out of products released before 1998 by the payment by each record label of an amount equal to the aggregate royalties payable in relation to those items multiplied by CMRRA's average market share of that record label's mechanical licensing payments between 1990 and 1997, with CMRRA giving each record label a quitclaim and indemnity in relation to royalty claims on behalf of all CMRRA-represented publishers;

(b) The introduction of a new standard industry format for Pending List data, with mandatory fields including, at minimum, song title, performer name, release date, catalogue number and unlicensed percentage interest for each item; and

(c) An ongoing process by which CMRRA would continue to work with each record label to research remaining Pending List data in

two-year tranches, with an amount equal to CMRRA's market share of unreleased pending amounts being paid to CMRRA at the end of each two year-period.

108. Although CRIA objected to the notion that royalties paid pursuant to this mechanism might not be distributed to the proper rightsholders, we understood until late in the negotiations that the record labels were open to exploring this proposal. However, very late in the process, the labels finally indicated that they would not agree to the settlement unless CMRRA agreed never again to raise the prospect of settlement. They insisted that their change in position was due to their desire only to pay the actual owners of copyright in the works at issue, which I found difficult to understand. At any rate, this counterproposal was unacceptable to CMRRA and, as a result, there were no changes to the treatment of the Pending List in the 2004 MLA.

(v) The 2007 MLA Negotiations

109. The 2004 MLA had only a two-year term and was extended by mutual written agreement for an additional year. Negotiations toward a new MLA began in early 2007 and concluded in the fall of 2008.

110. Once again, the Pending List was on the agenda for these negotiations, which were conducted on behalf of CMRRA primarily by Veronica Syrtash, CMRRA's Director of Business Affairs. I am advised by Ms. Syrtash and believe on that basis that, at the outset of the negotiations, which began with discussions between CMRRA and each of the record labels individually, several of the labels seemed amenable to the idea of settling a portion of the lower-value items on their respective Pending Lists. As the negotiations progressed, and the record labels formed a joint negotiating committee that also involved CRIA, the notion was discussed again but was less well-received by the record labels. In the end, the record labels indicated that they would not agree to make a blanket payment to CMRRA to settle any portion of the

Pending Lists because they did not want CMRRA to hold any money that did not belong to CMRRA or its clients.

111. In the 2007 MLA, CMRRA was able to secure agreement on several matters related to the Pending Lists:

(a) Going forward, each record label's Pending List is to include, with respect to each unlicensed musical work, at least the following information:

(i) the title of the musical work;

(ii) the catalogue number of the recording on which the work appears;

(iii) the cumulative number of units for which royalties are payable from inception of distribution of the recording until the end of the quarterly period that is the subject of the statement;

(iv) the applicable royalty rate;

(v) the total royalties payable in relation to the use of the musical work;

(vi) the title of the album containing the recording in question;

(vii) the name of each artist to whom the recording is credited;

(viii) the running time of the recording; and

(ix) the International Standard Recording Code (ISRC) number assigned to the recording, where the recording was released after January 1, 2007 (with best efforts required to obtain the ISRC number for recordings

acquired from another record label, under certain circumstances).

(b) In addition, to the extent that any of the following data fields are either in the record label's royalty system or provided to an online music service licensed by the record label, they are also to be included in that record label's Pending List by no later than September 30, 2008:

(i) the ISRC number assigned to the recording, where the Recording was released prior to January 1, 2007;

(ii) the name of the author(s) of the musical work;

(iii) the percentage interest in the work in respect of which the record label has not obtained a mechanical licence at the time the Pending List was prepared;

(iv) the unique track identifier assigned to the recording;

(v) the release date of the recording;

(vi) information respecting whether the product containing the recording is still active or has been discontinued;

(vii) the date on which the recording was deleted from the record label's catalogue of products offered for sale to its customers, if applicable;

(viii) information respecting whether the ISRC is valid or separately created by manufacturer;

(ix) the Universal Product Code (UPC) assigned to the album on which the recording appears;

(x) the disc number associated by the record label with the recording; and

(xi) the track number of the recording on the album on which it appears.

(c) To the extent that the following information is available in the record label's royalty system or provided by the record label to an online music service, the information may be included in the record label's Pending List:

(i) the name of the music publisher(s) associated with the musical work;

(ii) the internal identification number assigned by the record label to such music publisher;

(iii) the internal identification number assigned by the record label to such musical composition;

(iv) the reason why the musical work was included in the Pending List;

(v) the contrivance (i.e., the type of physical medium) on which the product is distributed;

(vi) the calendar quarter applicable to the Pending List;

(vii) the International Standard Work Code (ISWC) of the musical work;

(viii) the label name associated with the recording; and

(ix) the distribution method (i.e., whether the product is distributed through normal retail channels or otherwise).

(d) The parties agreed to form a working group, comprising qualified technical and operational personnel from CMRRA and each record label, to implement benchmarks for the electronic exchange of information. Among these benchmarks is a standard format for Pending Lists, which is to be agreed upon on or before February 28, 2009 and implemented within six months of reaching an agreed format.

(e) CMRRA and each record label were to negotiate independently, diligently and in good faith to reach agreement, on or before September 30, 2008, either to arrive at a settlement of a portion of the label's Pending List or for each party to make "an increased dedicated effort" to clearing existing Pending Lists, with any settlement including an appropriate quit-claim and indemnity by CMRRA for the period in question for all claims, whether or not the claimant is represented by CMRRA. To the extent that any record label had already made a substantial increase in the dedication of resources within its company, since January 1, 2006, to work specifically on clearing its Pending List, that record label was to negotiate with CMRRA with a view to reaching agreement by September 30, 2008 for each party to maintain "an appropriate dedicated effort" to clearing existing Pending Lists. (The latter provision was added at the insistence of Universal in recognition of the Royalty Recovery Program in which it engaged between 2006 and 2007, as discussed above.)

112. While all of these developments are welcome, they fall short of an acceptable solution to the Pending List problem. Even if the record labels populate all of the required data fields, and do so in a standard electronic format (which remains to be agreed upon), it seems unlikely to me that they will be able to address the many gaps and inaccuracies in their current Pending Lists, which date back more than 35 years in some cases. I do not

believe that, at present, any of the record labels have available, or are prepared to commit, anywhere near the resources that would be required to address this task. In any event, I am advised by Caroline Rioux and believe on that basis that the most recent Pending List data, provided in relation to the third quarter of 2008, does not appear to contain the newly required data (except to the extent that certain record labels may already have been providing this information voluntarily).

113. Moreover, it is worth noting that, although the negotiations referred to in subparagraph 111(e) were to have been completed by September 30, 2008, the 2007 MLA was not actually signed until that date, so those negotiations have yet to begin. CMRRA was approached by Sony BMG on October 30, 2008 to commence negotiations, but has declined to do so at this time because of the pendency of the current litigation. None of the other record labels have indicated a desire to commence negotiations.

114. Further, I am advised by Veronica Syrtash, and believe on that basis, that, notwithstanding their formal agreement to consider either a settlement of a portion of their Pending Lists or an increased dedicated effort to clearing them, the record labels have made clear that they are not in fact willing to consider any settlement of the Pending Lists pursuant to the MLA at this time.

X. Internal Attempts by CMRRA to Address the Pending Lists

115. By 2000, there were seven different Pending Lists received periodically, in seven different formats, each containing different fields of information. By that time, CMRRA had developed customized computer software that allowed it to handle the different formats and incorporate the label information into a single database that could be used as a tool to assist in the research necessary to attempt to identify a song. Even then, however, each record label would unilaterally change the formats of its Pending List from time to time, without warning or notice to CMRRA. Each time a record label did this, it became necessary to reprogram the software to deal with the new format,

putting CMRRA to additional time and expense and frustrating our efforts to identify and clear songs on the lists.

116. During this period and ever since, CMRRA has devoted research resources on a continuing basis to attempt to positively identify items on the Pending Lists. We have engaged in a series of projects and studies, employing both human and information technology resources, to analyze the data and develop improved systems to process it. Some of these initiatives have included:

(a) Creating sophisticated databases to house, review and categorize the Pending List data provided by the record labels;

(b) Making Pending List information available to CMRRA clients via CMRRA Direct as of 2000, as discussed in detail below;

(c) Requiring licensing staff to spend a certain number of hours per week researching Pending List items;

(d) Hiring a dedicated Pending List administrator in 2003 to work extensively on the Universal Pending List, from highest to lowest value items, and work with CMRRA's IT staff to improve the accuracy of our automated "fuzzy matching" process; and

(e) Undertaking, in 2004, 2005 and 2006, three extensive projects on behalf of Universal Music Publishing Canada to license works that they identified on the Universal Pending List;

(f) Undertaking Pending List research each time a significant new music publisher joins CMRRA, in order to license the works in that publisher's catalogue and collect pending royalties;

(g) Providing extensive lists of unsigned mechanical licences to the record labels in an effort to have them process those licences and release the corresponding royalties from the Pending Lists,

and advising the record labels of specific items for which royalties were still pended despite the existence of fully-executed mechanical licences;

(h) Hiring dedicated staff to work through items flagged by Universal as part of its Royalty Recovery Program; and

(i) On a quarterly basis, reviewing the top 50 products sold in Canada against the Pending Lists in order to ensure that all CMRRA licences have been issued and executed by the record labels and that royalties are not being pended unnecessarily.

117. Whenever representation of a musical work by CMRRA can be verified following research, CMRRA will issue a mechanical licence and disburse the royalties when received.

118. However, CMRRA has found over the years that the process of identifying items on the pending list is extremely labour-intensive and costly, even where specialized information technology is employed in the identification process, as it is at CMRRA. Accordingly, CMRRA has generally focused its identification efforts and limited resources on the higher value pending list items.

(i) CMRRA Direct

119. Beginning in 2000, CMRRA has made its Pending List databases available to its music publisher clients for online searches via CMRRA Direct, a private password-protected area of the CMRRA website. That facility continues to today. If a music publisher locates a recording on the Pending List for which it holds the rights to the musical work, it can file a claim with CMRRA. If CMRRA verifies the match between the recorded song and the publisher's musical work, a license is issued and, if accepted by the record label, the royalties paid and distributed. Since 2002, our music publisher

clients have used CMRRA Direct to make claims worth just under $10,725,000 in Pending List items.

120. The Pending List information available via CMRRA Direct is presented in two ways:

(a) a search engine, which consists of four primary fields (Dollar Amount, Units, Catalogue Number and Song Title) plus up to three additional fields (Author/Composer, Album Title and Artist) where the information is available, and allows users to search all four defendant record labels' Pending Lists; and

(b) four downloadable spreadsheets, each containing a single defendant record label's Pending List and containing the same four primary fields, which are intended to assist our clients to keep track of their findings while researching the main database using the search engine. The spreadsheets do not contain all of the information otherwise available on CMRRA Direct.

121. To my knowledge, CMRRA is the only collective society anywhere in the world that makes unlicensed product lists available to its clients in this fashion. Converting the data received from the record labels so that it can be presented in a relatively consistent format on CMRRA Direct requires a considerable amount of work, especially since the Pending Lists received from the record labels are not in a standard format and since the record labels often change their own formats from time to time without notice. CMRRA has invested a great deal of time and money in the creation of customized computer programming solutions for this purpose.

122. Because of these technical challenges, and because of the lack of a standard format for the delivery of Pending List data by the record labels, not all of the information received from the record labels is uploaded to CMRRA Direct. These factors also make it difficult to keep the lists completely up to

date. Every time one of the labels changes its Pending List format, the data conversion software needs to be reprogrammed, which is time-consuming and expensive.

123. The volume of claims made by our clients through CMRRA Direct has diminished in recent years. I expect that this the result of the factors described above, as well as the poor quality of the data provided by the record labels. I understand from CMRRA clients that it is difficult and time-consuming for them to decipher the fragmentary information that is provided.

124. CMRRA Direct is available only to CMRRA clients. We do not make our Pending List data available to the general public. To the best of my knowledge and information, the record labels have not made their Pending Lists available to the public, either. I understand that the record labels make their Pending Lists available to SODRAC and that, on occasion, certain record labels have made their Pending Lists available, in whole or in part, to certain music publishers at their request.

XI. CMRRA's Involvement in this Litigation

125. CMRRA first received notice of this litigation on August 25, 2008, when a copy of the issued statement of claim was sent to our outside counsel by Mr. Bates, counsel to the plaintiffs. We had no prior indication that the plaintiffs were considering a class action in relation to the Pending List and had not been consulted in relation to it.

126. Given our extensive efforts to address the Pending List problem, as discussed above, we were surprised and disappointed to be named as defendants in the action. However, following consultation with the plaintiffs' counsel, CMRRA management determined that it would be in the best interests of CMRRA to cooperate with the plaintiffs. CMRRA entered into a Cooperation Agreement with the plaintiffs and SODRAC on October 2, 2008. A copy of the Cooperation Agreement is attached as **Exhibit R** to this affidavit.

127. CMRRA neither asked nor consented to being joined as a party defendant to this proceeding. However, having been sued by the plaintiff in a proposed class proceeding, I and others at CMRRA were forced to consider, whether from CMRRA's perspective, a class proceeding might be an appropriate approach to the resolution of the Pending List problem. In my view, and from my experience at CMRRA, a class proceeding may be the best way to deal with the Pending List issues, for reasons set out in the following paragraphs. I am aware of no other avenue that would appear to be as or more effective in this regard.

128. First, there is no doubt that substantial amounts are owing in respect of Pending List items. For each musical work that is *properly* on the Pending List, there is no licence for reproduction of the work, and there will be an amount payable to the owner or owners of the copyright in that work. When I say "properly," I mean to exclude items that ought not to be on the Pending List in the first place, such as works that are in the public domain and works that have been licensed but have not been removed from the Pending List.

129. These royalties for Pending List items are owed in respect of musical works that are identifiable. For each work properly on the Pending List, there is a corresponding owner or owners of the musical work. Even if that owner is presently unidentified, there is available a recording by an identified artist or artists, and a physical product produced containing some information. There should be sufficient information either in the possession of the record labels, or ascertainable by the labels from those involved in the making of the recording, in respect of almost all of the items on the Pending List, for someone properly resourced to be able to investigate, identify, locate and pay the owner of the musical work.

130. Alternatively, that information available about the recording and the musical work, if made available and promoted to the songwriting and publishing community, should be sufficient for many owners of musical works

to become aware of the fact that their works are being used without licenses, and to be able to claim payment on past recordings sold.

131. The present system of mechanical licensing has proven to be inadequate to deal with the Pending List problem. I believe this to be the case notwithstanding the improvements contained in the most recent MLA. The fundamental problem is a structural one. The combination of:

(a) the accepted practice of licensing musical works after the release of the physical product;

(b) the fact that there is no comprehensive representative of the music publishers, or accepted default representative for unidentified musical works;

(c) the fact that the overwhelming majority of the items on the Pending List are of relatively small value; and

(d) the fact that the time and manpower required to properly investigate, identify, locate and pay the owner of the musical work can be significant

have all led to a situation where the incentive for the record labels to process and resolve Pending List items on a timely basis is extremely low.

132. Similarly, the same factors that limit the record labels' incentive to deal with pending list items, combined with the fact that CMRRA will only represent a portion of the items on the Pending List and will only be paid for a resolved Pending List item that it represents (and then only at a fixed commission rate without regard to the actual resources used to resolve the item), also limit the ability of CMRRA to deal with the Pending Lists comprehensively on its own.

133. CMRRA has been unable to arrive at a comprehensive solution to the Pending List situation by voluntary agreement with the record labels. Agreement on measures relating to the Pending List has been achieved only

incrementally, after extensive negotiation, and relate to information and processes rather than resolution of the list itself. Generally, any bolder proposal from CMRRA for resolution of all or a substantial portion of the Pending List has been summarily rejected by the record labels.

134. Given all of the above, there has likewise been no attempt to change the structure of the mechanical licensing process to ensure that the Pending List does not grow any further in the future.

135. In the end, I believe that a class proceeding may be the "missing piece" of the Pending List "puzzle," in terms of providing a comprehensive vehicle to resolve the current items on the Pending List and a basis to revise the current process to ensure that the Pending List does not grow again. I am aware of no other avenue that would appear to be as or more effective in this regard.

XII. CMRRA's Intervention in this Litigation

136. In the event that the Court allows the proposed representative plaintiffs' motion to discontinue the proposed class action as against CMRRA and SODRAC, CMRRA wishes to intervene in the proposed class action.

137. Given the extensive efforts that CMRRA has made to deal with the Pending List issues over the years, as particularized above, and what appears to be a substantial amount of potential royalties or other compensation to which CMRRA clients are likely entitled as a consequence of the unlicensed use of works on the Pending Lists, I believe that the class proceeding, if certified, would have far-reaching implications for both CMRRA and its clients, as well as for songwriters and music publishers generally.

138. CMRRA believes that it should be granted leave to intervene because its clients have a substantial interest in this proceeding and they will be seriously affected by the outcome. CMRRA's intervention would assist in the determination of the legal issues in the class proceeding because of its

expertise, special knowledge and separate and different perspective regarding the Pending Lists, all as described above.

139. With leave of the Court, CMRRA proposes to intervene in this proceeding to address many aspects of the Pending List. Over the last 20 years, CMRRA has gained extensive experience and expertise concerning the existence and growth of the Pending List. This experience, as well as the further knowledge and information gained through CMRRA's numerous attempts to resolve the underlying issues and reduce or eliminate the Pending List problem, would be of considerable assistance to the Court in its assessment of issues of fact and law.

140. CMRRA proposes to be an active party throughout the proceeding and to take part in the certification motion as well as the trial of common issues or, alternatively, in settlement approval hearings.

141. The proposed representative plaintiffs and the defendants would not be prejudiced if CMRRA were to be granted leave to intervene. On the contrary, CMRRA's involvement would assist all parties in the resolution of the issues in dispute.

142. If granted leave to intervene, CMRRA would serve and file its evidence and submissions at such times prescribed by the *Class Proceedings Act, 1992* and the *Rules of Civil Procedure* and/or directed by this Honourable Court, throughout the proceeding. The conduct of this proposed class action would not be delayed at all by CMRRA's involvement as an intervener.

SWORN BEFORE ME at the City of Toronto, on January 14, 2009.

Casey M. Chisick
Commissioner for taking affidavits

David A. Basskin

Court File No. CV 0800360651 00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

B E T W E E N :

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)

(Filed this » day of January, 2009)

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