

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

**AFFIDAVIT OF ALAIN LAUZON  
(sworn January 28, 2009)**

I, Alain Lauzon, of the City of Montreal, MAKE OATH AND SAY THAT:

1. I am the General Manager of the defendant Society for Reproduction Rights of Authors, Composers and Publishers (SODRAC) Inc. and SODRAC 2003 Inc. (collectively "**SODRAC**"). 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 SODRAC. 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.

2. I have read and reviewed the affidavit filed by David A. Basskin in the current proceeding, sworn on January 14, 2009. Where appropriate, I will refer to portions of Mr. Basskin's affidavit below.

### **I. Personal Background**

3. I hold a Bachelor of Business Administration from the École des Hautes Études commerciales of the Université de Montreal, which I was awarded in 1979. I am also qualified as a chartered accountant, a designation which I received in 1981. In 2006, I was awarded the "CA-IT" designation as a chartered accountant specialized in information technology.

4. Prior to joining SODRAC in 2002, I had over 20 years of business experience. I held a number of senior positions, including positions with Groupe Promexpo Inc., a division of DMG World Media (Canada) Inc., which is a leading edge company for the organization of public events.

5. As the General Manager of SODRAC, I manage the company's affairs, which include the negotiation and administration of industry-wide agreements for the licensing of music reproduction and distribution. I also direct the filing of tariffs by SODRAC with the Copyright Board of Canada.

6. I also serve as vice-president of CMRRA-SODRAC Inc. ("CSI"), a corporation formed jointly by SODRAC and the defendant Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA") for the purpose of licensing reproduction rights in music for certain uses and by certain users, including radio stations and online music services.

### **II. Summary**

7. 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., described below, for leave to intervene in this action as added parties.

8. SODRAC is a copyright collective whose objects are to carry on in Canada and other countries, either directly or indirectly through similar foreign societies, the collective administration of copyright. This includes, among other things, the reproduction right in musical works.

9. SODRAC was founded in 1985 by Société Professionnelle des Auteurs et des Compositeurs du Québec ("**SPACQ**"), Société des Auteurs, Compositeurs et Éditeurs de Musique ("**SACEM**"), and Performing Rights Organization of Canada ("**PROCAN**"), for the purpose of managing reproduction rights in musical works. In September 1997, SODRAC created a new department for the management of the rights of creators of artistic works.

10. SODRAC represents over 5,000 Canadian songwriters and publishers. It also has agreements with mechanical rights societies from some 87 countries and territories throughout the world, pursuant to which SODRAC represents the repertoire of each of those societies in Canada. In turn, those societies represent SODRAC's songwriters and publishers outside of Canada.

11. Like CMRRA, SODRAC has a great deal of experience and expertise concerning the existence and growth of Pending Lists, as that term is used in the Statement of Claim and in Mr. Basskin's affidavit. As Mr. Basskin describes in relation to CMRRA, it has proven to be economically infeasible for SODRAC to implement the systems that would be needed to resolve the issues internally, without the increased cooperation of the record labels. I also

agree with Mr. Basskin that, for their part, the record labels have generally been unwilling to take the steps that would help to resolve the Pending List problem.

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

13. Like CMRRA, in response to being named as a defendant, SODRAC was forced to consider whether, in fact, a class proceeding would be an appropriate vehicle to resolve the issues relating to the Pending Lists, retrospectively and prospectively. SODRAC believes that the answer to this question is yes. Accordingly, SODRAC, along with CMRRA, agreed to assist the plaintiffs in the pursuit of this action as a class proceeding. SODRAC believes this class action will benefit both its clients and songwriters and music publishers generally.

14. Pursuant to an agreement between the plaintiffs and CMRRA and SODRAC, the plaintiffs have agreed to seek the discontinuance of this action as against the named defendants CMRRA and SODRAC, who, with SODRAC 2003 Inc., described below, concurrently seek leave to intervene in this action.

15. This affidavit deals with the following subjects:

- (a) SODRAC and mechanical licensing in Canada;
- (b) The practice of mechanical licensing, with particular reference to the Mechanical Licensing Agreement between SODRAC, the Canadian Recording Industry Association (CRIA), and various record labels;
- (c) The origin and growth of the Pending Lists;
- (d) The size and characteristics of the Pending Lists today;

- (e) The difficulties encountered by SODRAC in attempting to deal with the Pending Lists; and
- (f) SODRAC'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. SODRAC

16. The named defendant, Society for Reproduction Rights of Authors, Composers and Publishers (SODRAC) Inc./La Société du Droit de Reproduction des Auteurs, Compositeurs et Éditeurs au Canada (SODRAC) Inc., is a copyright collective. Its objects are to carry on in Canada and other countries, either directly or indirectly through similar foreign societies, the collective administration of copyright in works, including, among other things, the reproduction rights in musical works.

17. SODRAC 2003 Inc. ("**SODRAC 2003**") is a non-profit corporation, with author and publisher members, created in July 2003. SODRAC 2003 has the same objects as SODRAC and took over all the assets and activities of SODRAC Inc. as of April 1, 2004. (Prior to that, SPACQ and SACEM were the only shareholders in SODRAC.) Rights previously assigned to SODRAC have been transferred gradually to SODRAC 2003 since April 1, 2004. Unless otherwise specified, "**SODRAC**" is used in this affidavit to designate both SODRAC and SODRAC 2003.

18. SODRAC 2003 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 through 2005. I agree with Mr. Basskin's description, at paragraph 19 of his affidavit, of the activities of CSI since that time.

19. Like CMRRA, SODRAC collects, on behalf of its songwriter and 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.

20. SODRAC represents more than 10 million international musical works through its reciprocal agreements with foreign societies, as described above. In Canada, it is the owner by assignment of copyright in works by over 5,000 Canadian songwriters and publishers, including the majority of authors, composers, and music publishers in Quebec.

21. The musical works assigned to SODRAC by its members are represented throughout the world by reciprocal agreement with foreign societies representing 87 countries and territories. All of these foreign societies, like SODRAC, are members of the International Confederation of Societies of Authors and Composers (“**CISAC**”) and/or Bureau International des Societies Gerant les Droits D’Enregistrement et de Reproduction Mecanique (“**BIEM**”). In turn, SODRAC represents the works in the repertoire of these foreign societies in Canada. As a result, there are more than 10 million musical works in the SODRAC licensing repertoire.

22. Through these reciprocal agreements, the societies in question become the exclusive representatives of each other’s repertoire within their respective territories. This enables users to obtain licensing directly in their country of origin for the use of musical works created by both national and foreign songwriters. It also enables Canadian songwriters and music publishers to be compensated more efficiently for the use of their compositions abroad.

23. Membership in SODRAC is open to any songwriter and music publisher. When a songwriter or publisher joins SODRAC, they execute an assignment of their right to authorize or prohibit the reproduction of the musical works owned or published, as the case may be. SODRAC’s rights are

exclusive, and each songwriter agrees that he or she will neither authorize the reproduction of their musical works nor collect royalties in that regard.

24. Some of SODRAC's well-known composer-artists include ABBA and the Scorpions. SODRAC songwriters have written songs that have been performed by well-known artists such as Céline Dion, Michael Buble, Madonna, Britney Spears, and Andrea Bocelli. SODRAC also represents well-known publishers, including both independent and major publishers.

25. SODRAC issues mechanical licences, synchronization licences and other types of reproduction licenses to users of the reproduction right in music. Pursuant to these licences, licensees pay royalties to SODRAC and, in turn, SODRAC distributes the bulk of the proceeds to its appropriate members. Since, as stated above, membership in SODRAC is open to songwriters directly, we distribute royalties directly to songwriters as well as to music publishers.

26. SODRAC has issued reproduction licences to more than 8,000 music users, including all major record companies and hundreds of independent labels and community organizations.

27. SODRAC is funded by a percentage of the administrative fees it collects from the revenues from its licensing activities.

28. The majority of SODRAC's musical works which it licenses and which are recorded for distribution by the major record companies are part of SODRAC's international repertoire. The many international societies that SODRAC represents in Canada sign agreements with new members on a very regular basis. Many of the societies have a monopoly on the representation of rights holders in their countries. Accordingly, SODRAC represents the majority of the repertoires in these various countries and territories.

29. In order to carry out its licensing functions, SODRAC has built an infrastructure of information technology and human resources. At present, SODRAC employs 39 people, including four in information technology and eight in administration and licensing.

30. SODRAC estimates that it represents approximately 10 to 15% of all musical works that are reproduced on sound recordings sold in Canada. In Quebec, however, SODRAC's market share is considerably greater. SODRAC estimates that it represents more than 50% of all musical works that are reproduced on sound recordings produced in Quebec.

#### **IV. The Structure of the Canadian Music Industry**

31. I have reviewed Mr. Basskin's description of the structure of the music industry in Canada, at paragraphs 25 through 33 of his affidavit, and agree with it. Like CMRRA, SODRAC deals extensively with the defendant Canadian major record labels and has very little contact with their parent companies or with their affiliates in other jurisdictions.

32. Because of the different nature of its repertoire, SODRAC also deals extensively with Quebec-based independent record labels. Many of these record labels are represented by their own trade association, l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo ("**ADISQ**").

#### **V. Mechanical Licensing**

33. I have reviewed and generally agree with Mr. Basskin's discussion, at paragraphs 34 through 41 and 47 through 58 of his affidavit, of the history and practice of mechanical licensing in Canada. I do not have direct knowledge of the historical role of CMRRA in that process or of the details or operation of its mechanical licensing agreements with the major record labels or CRIA. As I will discuss below, however, the general process of mechanical licensing between SODRAC and CRIA is similar to that described by Mr. Basskin in



paragraphs 51 and 52 of his affidavit. The process of mechanical licensing between SODRAC and ADISQ is slightly different, as I will also describe below.

34. SODRAC has been engaged in mechanical licensing in Canada since 1985. Like CMRRA, the role of SODRAC in the mechanical licensing process changed substantially with the abolition of the statutory mechanical licence in 1988.

**(i) SODRAC's Mechanical Licensing Agreement with CRIA**

35. On or about March 2, 1990, SODRAC signed a letter agreement with CBS Records Canada Ltd. ("**CBS**"). By this letter agreement, CBS agreed to be bound by the terms of a proposed Mechanical Licensing Agreement ("**MLA**") between CRIA and SODRAC on the condition that a provision be added to the MLA regarding the royalty rate reduction for CBS Records Canada Ltd. Record Club. The proposed provision provided a royalty rate for recordings sold or distributed through the CBS record club after October 1, 1998. This letter agreement constituted an appendix to the MLA, described below. It contained no provision regarding the Pending Lists. Attached to this affidavit and marked as Exhibit "A" is a true copy of the letter agreement.

36. On March 14, 1990, SODRAC entered into a MLA with CRIA (the "**1990 MLA**"). The 1990 MLA covered vinyl records, audio cassettes and 8-track tapes and audio (but not audiovisual) compact discs manufactured or imported and sold or otherwise distributed by or on behalf of CRIA members in Canada. The 1990 MLA provided that a licence for mechanical reproduction for each musical work on a recording must be applied for prior to the release of that recording, subject to the availability of publishing particulars. The term "publishing particulars" is used in the 1990 MLA, but is not defined there. The 1990 MLA provided that "a copy of the label" of any recording was required to be sent by the CRIA member to SODRAC no later than 30 days after the release of such recording. The 1990 MLA set out the royalty rates and

payment schedule. This MLA made no provision for or reference to Pending Lists. Attached to this affidavit and marked as Exhibit "B" is a true copy of the 1990 MLA.

37. The royalty rate under the 1990 MLA was amended on July 12, 1991 by the Mechanical Licensing Amending Agreement between SODRAC and CRIA. Once again this amending agreement made no provision for or reference to Pending Lists. Attached to this affidavit and marked as Exhibit "C" is a true copy of this amending agreement.

38. The 1990 MLA expired on June 30, 1992. On or about September 22, 1995, SODRAC and CRIA entered into a further MLA ("the **"1995 MLA"**"), with a term commencing on July 1, 1992 and ending on December 31, 1997. The 1995 MLA was more detailed than the 1990 MLA. It applied to the mechanical licensing of CDs, digital audio recordings on tape or any other "contrivance" (specifically excluding CDs), vinyl records and audio-cassette tapes or other related analogue tape format (specifically excluding any audiovisual tape in any format). The 1995 MLA provided that a mechanical licence for each composition on a recording must be applied for, whenever reasonably possible and subject to the availability of publishing particulars, prior to the release date of any recording. The agreement provided that "a copy of the label copy" of each recording was required to be sent by a manufacturer to SODRAC within 30 days after the release date of such recording when reasonably possible. It provided different royalty rates for specified periods during the term. The 1995 MLA contained no provision for or reference to Pending Lists. Attached to this affidavit and marked as Exhibit "D" is a true copy of the 1995 MLA.

39. The 1995 MLA provided that payments of royalties were to be accompanied by separate, accurate statements for each composition for which royalties were paid, indicating at least the following information:

- (a) the title of each composition in respect of which royalties were being paid;
- (b) the catalogue number of the recording;
- (c) the number of units for which royalties were being paid in the quarterly period to which the statement related;
- (d) the royalty rate; and
- (e) the total royalties paid respecting each composition.

The manufacturers were required to supply the statements in "printed form" or such other medium as the parties agreed to.

40. The 1995 MLA ended in 1997 and the parties have not entered into another written agreement. However, the mechanical licensing practice outlined under the 1995 MLA has continued to date, with updated royalty rates from time to time. To the best of my knowledge, the updated royalty rates charged by SODRAC have mirrored those negotiated as between CMRRA and CRIA and set out in the various MLAs between CMRRA and CRIA.

41. At various points in time, SODRAC and CRIA have discussed entering into a new MLA. That has not taken place, however, as SODRAC and CRIA have not been able to come to terms on a final agreement.

**(ii) SODRAC's Mechanical Licensing Agreement with ADISQ**

42. As stated above, most independent record labels in Quebec are represented by ADISQ. Accordingly, SODRAC has entered into separate mechanical licensing agreements with ADISQ on behalf of its members

43. The current mechanical licensing agreement between SODRAC and ADISQ, a true copy of which is attached as Exhibit "E", is dated July 15, 2003. It has been amended twice: first, by a Letter of Intent dated December 21,

2004, a true copy of which is attached as Exhibit "F", and later, by an Amending Agreement dated as of June 7 2005, a true copy of which is attached as Exhibit "G".

44. As is described below, SODRAC's licensing practice with ADISQ is different from its practice with CRIA.

***(iii) Mechanical Licensing Practice***

45. In its dealings with the defendant record labels, SODRAC has faced the same challenges described by Mr. Basskin in paragraphs 55 through 58 of his affidavit. It has also faced other challenges that appear to be unique to our own experience with those record labels.

46. The 1995 MLA, which was effective as of July 1, 1992, expired on December 31, 1997. As set out above, SODRAC and CRIA have been unsuccessful in negotiating a new MLA, so the mechanical licensing process between SODRAC and the major record companies has continued without a formal agreement, but with changes to royalties that have generally followed the changes negotiated between CMRRA and CRIA in its MLAs.

47. The licensing process set out in the 1995 MLA was very simple. A mechanical license for each recorded composition for which the copyright has been assigned to SODRAC was to be applied for prior to the release date for the recording. Further, and notwithstanding that provision, a label copy of any recording subject to the agreement was to be provided to SODRAC within 30 days of the release date of the recording, "when reasonably possible." SODRAC, in turn, agreed to issue mechanical licenses for the musical works for which the copyright had been assigned to SODRAC.

48. 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 the product's label copy (and, in the case of the defendant Universal Music Canada Inc. ("Universal"), a copy of the product itself as well).
  - (b) Upon receipt of this material, SODRAC manually reviews the product or label copy and inputs all available information about the songs into its computer system.
  - (c) SODRAC attempts to match the information supplied by the record label with information in the SODRAC song database and using the CISAC databases, which are described below.
  - (d) If there is a match, and SODRAC represents a musical work in whole or in part, then a licence is issued for the interest that SODRAC represents. The licence takes the form of a paper document, a true copy of which is attached as Exhibit "H" to my affidavit. Each licence is for one song.
  - (e) If there is a match but SODRAC does not represent the work, or if SODRAC determines that it is in the public domain, SODRAC takes no further action. It is then the responsibility of the record label to find the copyright owner(s) and obtain the necessary licence.
  - (f) If there is no match, and it appears that the information supplied by the record label is insufficient, SODRAC requests the following information: (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 from the record label.

- (g) If there is still no match after reviewing all of the initial and supplementary information provided by the label, SODRAC takes no further action.
- (h) For songs licensed by SODRAC, the major labels regularly provide electronic statements identifying the royalties payable for songs on products they have sold, and pay those royalties to SODRAC. The Canadian offices of the major labels actually send the royalty cheques to SODRAC. If SODRAC 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.
- (i) SODRAC issues its own statements to its members and sister societies and remits the royalties due and owing them, less its administration fee.

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

- (a) Since about 2004, Universal has submitted its licence requests electronically, in addition to providing product samples and/or label copy, and since January 2006, SODRAC 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 – even if there are shares of the copyright that are not in dispute and that

SODRAC has confirmed that it represents those shares. Universal has identified to SODRAC that it keeps a list of disputed works. The defendant Sony BMG Music Canada Inc. (“**Sony BMG**”) will not provide its list of disputed works on confidentiality grounds. SODRAC does not even know whether the defendants EMI Music Canada Inc. (“**EMI**”) or Warner Music Canada Co. (“**Warner**”) even maintain a list of disputed works.

- (c) For smaller licensees, whether labels or other entities, who seek mechanical licenses, SODRAC has implemented a “pay-as-you-press” system, whereby the licensee applies for a license online at the SODRAC web site and pays royalties and an administration fee in advance by credit card or cheque, at the prevailing independent rates, on the basis of the volume of product actually produced.

50. SODRAC uses the following “tools” in issuing mechanical licences for products distributed by major record companies:

- (a) **Analysis of Label Copy** – In order to determine whether SODRAC represents a work or not, SODRAC requires label copy with information regarding the songwriter’s and publisher’s names. For each work recorded on an album, SODRAC looks into its database to see whether SODRAC already has a registration of the works and the rights-owners. If the work is not in SODRAC’s database, SODRAC looks into other databases, IPI System and CIS-NET, which are described below. SODRAC tries to verify the identities of the rights-owners of the works and their respective societies’ affiliation. If SODRAC represents any of the respective societies in Canada, SODRAC issues the licences based on the original ownership and the sub-publishing agreements that may be signed, as the case may be. SODRAC

only enters into its database information regarding the rights-owners and works that are active in Canada. New works that are recorded on new albums are not in SODRAC's system until SODRAC has researched these works using the CISAC tools described below.

- (b) **IPI System (Interested Parties Information)** – The IPI System is a CISAC database in which SODRAC finds authors, composers and publisher members and their affiliations with the different societies throughout the world. There are more than 2.8 million rights owners in this database. SODRAC downloads new entries from the IPI System onto its own system every week.
- (c) **CIS-NET (Common Information System Network)** – This is another CISAC database into which each society downloads its works. There are more than 17 million works listed in CIS-NET and thousands of new works added every month. This program is available to CISAC-affiliated societies only.

51. Since the beginning of SODRAC's relationship with the major record companies, SODRAC has requested that they send label copy for all the albums they distribute. The major record companies have not always provided SODRAC with label copy, notwithstanding that SODRAC has explained repeatedly that it must receive label copy even if the record companies have already received a licence from someone else, as that person may or may not have the right to issue the licence. Accordingly, when a third party issues a licence for the same share as SODRAC, the share is then "in dispute" and the record company keeps the royalties in the Pending List until it is resolved. SODRAC has explained to the major record companies from time to time, and also during attempted negotiations for a new written MLA and MLA rates, that they can use the IPI System described above (which is available to record



companies for a fee) in order to determine in advance whether SODRAC actually represents a particular songwriter or publisher.

52. SODRAC has achieved some very significant milestones in relation to mechanical licensing. Since 1991, it has issued 318,257 mechanical licences. Prior to 1991, licenses were issued manually. It is therefore difficult for SODRAC to calculate the exact number of licenses issued prior to 1991.

53. The SODRAC 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 SODRAC. SODRAC is dependent upon information provided by third parties in order to confirm ownership – namely, its record label licensees, its music members, and its sister societies.

54. Given the absence of a written MLA, the record companies do not have any required categories or format for the provision of information required for licensing purposes. Physical products (and their packaging and label copy) vary widely in terms of the amount and quality of information that they contain; for example, some label copy contains comprehensive information about each song, including the names of the songwriters and music publishers, while other products contain none of that information at all. Even where the information is provided, it may not be entirely accurate or complete.

55. Further, SODRAC's repertoire changes continuously. SODRAC signs up new members on a regular basis, and assigns their copyrights to SODRAC. Existing members create new musical works. SODRAC enters into new agreements with foreign societies, and the repertoires of the foreign societies change constantly. Consequently, on a daily basis, SODRAC 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 SODRAC's representation. As such, the accuracy and completeness of the

SODRAC song database depends heavily on the timely and accurate submission of changes by its client-members and societies.

56. The incomplete quality of third-party information is not, however, the only limit on the comprehensiveness of SODRAC's records. SODRAC does not represent all of the composers, publishers, owners and societies whose music is in use in Canada. Accordingly, SODRAC's information resources are necessarily limited; there are many songs that are not included in the SODRAC song database because SODRAC does not represent them and never has.

## **VI. Pending Lists**

57. While I do not have firsthand knowledge of CMRRA's experience with Pending Lists, I have reviewed and agree with Mr. Basskin's general explanations of what Pending Lists are, how items seem to proliferate on them, and the difficulties associating with identifying musical works on the Pending Lists so that royalties can be paid to the appropriate rightsholders.

58. I am advised by SODRAC staff, and, in particular, Guylaine Th  roux, the Director of Operations of SODRAC, that unlicensed recording and Pending Lists have been a frequent topic of discussion between SODRAC and the major record labels. Where facts set relate to the period prior to my joining SODRAC in 2002, they are based upon information received by Ms. Th  roux.

59. Prior to 1998, SODRAC received Pending List information from BMG and Universal, but no other major record label. These lists were always provided to SODRAC in paper form and were extremely voluminous. The information provided in each Pending List varied greatly from record company to record company. Ms. Th  roux informs me that these paper lists were extremely hard to work with and resulted in the identification of relatively few recorded musical works for the purpose of licensing.

60. Following the expiration of the 1995 MLA in 1997, SODRAC and CRIA began extensive and ultimately unsuccessful negotiations towards a new MLA. These negotiations continued from 1998 to approximately 2002. During this period of time, SODRAC either stopped receiving Pending Lists from each of the major record labels or did not receive them on a regular basis. Ms. Th  roux and her staff approached each of the major record companies to request Pending List information, but were frequently advised that SODRAC would not be supplied this information because it had not signed a new MLA with CRIA. Notwithstanding this, we continued to request Pending Lists from the major labels.

61. Between 2003 and 2007, there were further negotiations between CRIA and SODRAC for a new MLA, without success. However, SODRAC progressively succeeded in negotiating the release of the Pending Lists from each of the major record companies. By 2007, all of the major labels were providing the Pending Lists in electronic format. During this same period, SODRAC developed a new computer program, which allowed it to read and manage the Pending Lists received more effectively.

## **VI. Pending Lists Today**

62. Data provided to SODRAC by the four defendant record labels in relation to the third calendar quarter of 2008 indicate that the total aggregate value of these four companies' Pending Lists at that time was \$54,530,466.55. The four Pending Lists contained a total of 357,706 line items with an average assigned royalty value of \$152.44 each. The breakdown of the four Pending Lists as at that time was as follows:

LABELS	ITEMS	%	SALES	%	AVERAGE PER TITLE
EMI	18,862	5.27%	\$8,011,674.34	14.69%	\$424.75
SONY BMG	46,995	13.14%	\$8,086,612.46	14.83%	\$172.07
UNIVERSAL	248,743	69.54%	\$30,573,604.09	56.07%	\$122.91
WARNER	43,106	12.05%	\$7,858,575.66	14.41%	\$182.31
	<b>357,706</b>	<b>100.00%</b>	<b>\$54,530,466.55</b>	<b>100.00%</b>	<b>\$152.44</b>

I should note that SODRAC and CMRRA have not compared the pending list information supplied by the major labels to each of them to determine whether SODRAC receives the same pending list information as CMRRA.

63. SODRAC has performed its own analysis with respect to the number of individual line items that fall within certain ranges of value. The results of that analysis are as follows:

AMOUNTS	ITEMS	%	AVERAGE PER TITLE
> \$10,000	289	0.08%	\$21,130.55
\$ 5000.01 => <= \$10,000	857	0.24%	\$6,694.03
\$ 1000.01 => <= \$5,000	9,072	2.54%	\$1,958.64
\$ 500.01= > <= \$1,000	10,346	2.89%	\$698.72
\$ 250.01= > <= \$500	17,734	4.96%	\$350.21
\$ 100.01= > <= \$250	38,065	10.64%	\$158.34
\$ 50.01= > <= \$100	37,088	10.37%	\$71.44
<= \$50	244,255	68.28%	\$11.47
	<b>357,706</b>	<b>100.00%</b>	<b>\$152.44</b>

64. Sony BMG delivers two separate Pending Lists to SODRAC each quarter, as I understand it does to CMRRA. 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 on these "unmatched" lists. Accordingly, only the value of the "Unlicensed" list is included in the figures provided above. I also note that SODRAC understands from Sony

BMG that neither of its lists contain items that are known to be in dispute. Such items would further increase the value of the Sony BMG Pending List.

65. SODRAC has no specific data on the percentage of Pending List items that it represents. However, SODRAC has always understood that the Pending Lists contain significant numbers of works in our repertoire. For example, in the course of the Universal "Royalty Recovery Program," a number of items on the Universal Pending List were identified and ultimately licensed by SODRAC. I also note the statistics for the Universal program cited at paragraph 73 of Mr. Basskin's affidavit. Although SODRAC is not in a position to verify those statistics, they do suggest that a significant number of SODRAC-represented works are contained on the Pending Lists.

66. The Pending List is therefore a matter of serious concern for SODRAC. So long as works within our repertoire remain unlicensed, SODRAC is unable to collect the royalties to which our members are entitled or to receive our administration fee on the collection of those royalties.

67. By contrast, I should note that with respect to the independent Quebec labels represented by ADISQ, there is no Pending List. In the past, SODRAC has often experienced difficulty getting timely reporting from many of these labels, because they tend to be small, with fewer resources. Accordingly, in its MLA with ADISQ, SODRAC has negotiated the right to receive detailed sales information for each ADISQ-represented label directly from the distribution companies that distribute that label's products. Accordingly, SODRAC is automatically notified about each ADISQ member's release that has any sales, and SODRAC can then confirm from its records whether it has received a notification of that release for the purpose of licensing. If not, SODRAC requests and receives the label copy for the recording so that it can determine whether it represents any of the musical works on the recording, and issue a license accordingly. As a consequence, to SODRAC's knowledge, neither ADISQ nor its members maintain Pending Lists.

## **VII. Difficulties Encountered by SODRAC in Addressing the Pending Lists**

68. Like CMRRA, SODRAC has found it very difficult over the years to identify works on the Pending Lists in order to issue mechanical licences for those that are in our repertoire. In particular, SODRAC shares the concerns outlined by Mr. Basskin in relation to:

- (a) the insufficient information provided by the record labels (paragraphs 80 and 81 of Mr. Basskin's affidavit);
- (b) the lack of any standard format for Pending List data, together with variations from time to time and label to label, and the periodic non-supply of data (paragraph 82 of Mr. Basskin's affidavit);
- (c) the poor maintenance and administration of Pending Lists by the record labels (paragraphs 83 through 87 of Mr. Basskin's affidavit);
- (d) the economic infeasibility of complete analysis of the Pending Lists because of the lack of sufficient financial or human resources to address an enormous task with an unpredictable economic outcome (paragraph 88 through 91, although SODRAC has not engaged in the same analysis as Mr. Basskin describes in relation to CMRRA); and
- (e) the non-comprehensiveness of SODRAC's repertoire (paragraph 92 of Mr. Basskin's affidavit).

## **VIII. SODRAC's Involvement in this Litigation**

69. SODRAC was first informed of this litigation on August 25, 2008, when outside counsel to CMRRA provided a copy of the issued statement of claim to Colette Matteau, SODRAC's usual outside counsel. SODRAC subsequently

decided to retain the same counsel in Ontario as CMRRA for purposes of this litigation. Like CMRRA, SODRAC 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.

70. Like CMRRA, SODRAC was surprised and disappointed to be named as a defendant in the action. However, following consultation with the plaintiffs' counsel, as well as with CMRRA, SODRAC management determined that it would be in the best interests of SODRAC to cooperate with the plaintiffs. At a SODRAC board meeting on September 30, 2008, the board authorized me to commit SODRAC to a Cooperation Agreement with the plaintiffs and CMRRA. A true copy of the Cooperation Agreement, which was executed on October 2, 2008, is attached as Exhibit "I" to this affidavit.

71. While I was not pleased to see SODRAC named as a defendant in a proposed class proceeding, I have concluded following consultation with Mr. Basskin, with SODRAC management and with our outside counsel, that, from SODRAC's perspective, a class proceeding would be the most appropriate approach to the resolution of the Pending List problem. I have reached that conclusion for substantially the same reasons outlined by Mr. Basskin in paragraphs 125 through 135 of his affidavit.

#### **IX. SODRAC's Intervention in this Litigation**

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

73. Given the extensive efforts that SODRAC 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 SODRAC 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 positive implications for both SODRAC and its clients, as well as for songwriters and music publishers generally.

74. SODRAC believes that it should be granted leave to intervene because its members have a substantial interest in this proceeding and they will be seriously affected by the outcome. SODRAC'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, as described above.

75. With leave of the Court, SODRAC proposes to intervene in this proceeding to address many aspects of the Pending List, given the extensive experience and expertise that SODRAC has gained over the last 20 years concerning the existence and growth of the Pending List. Given that the record labels have generally been unwilling to take the steps that would help to resolve the problem, SODRAC believes that a class proceeding is an appropriate vehicle to resolve the issues relating to the Pending List in a comprehensive fashion, both retrospectively and prospectively. This proceeding is likely to benefit both its music publisher clients and songwriters and music publishers generally.

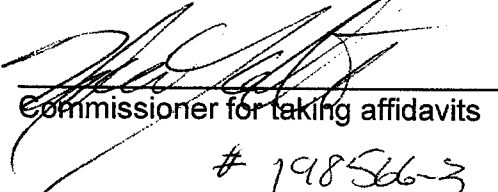
76. SODRAC proposes to be an active party throughout the proceeding and to take part in the certification motion as well as the trial of common issues, or alternatively, in settlement approval hearings.

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



78. If granted leave to intervene, SODRAC 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 SODRAC's involvement as an intervener.

SWORN BEFORE ME at the City of  
Montreal, on January 28, 2009.

  
\_\_\_\_\_  
Commissioner for taking affidavits  
# 198566-3

  
\_\_\_\_\_  
Alain Lauzon