

FACTOR/RECIPIENT GENERAL AGREEMENT

for FACTOR programs funded under **THE NEW MUSICAL WORKS COMPONENT**

Agreement entered into on _____ (For FACTOR Use Only)

Between: **The Foundation Assisting Canadian Talent on Recordings**
30 Commercial Road
Toronto, Ontario
M4G 1V4
("FACTOR")

And **«BorrowerName»**
«Address»
«City», «PROVINCE»
«PostalCode»

WHEREAS FACTOR has agreed to disburse certain funds to the Recipient upon and subject to the terms and conditions hereinafter set forth; the parties hereto agree as follows:

ARTICLE 1 – INTERPRETATION

Definitions

1.01 The following terms shall have the following meaning for the purpose of this Agreement:

- a) "Agreement" means this agreement and all Annexes and any subsequent documentation hereto made by written agreement between the Recipient and FACTOR;
- b) "Application" means the written application from the Recipient to FACTOR;
- c) "Canadian" means a person who is a:
 - (i) "citizen" within the meaning of the *Citizenship Act*;
 - (ii) "permanent resident" within the meaning of the *Immigration and Refugee Protection Act*;
 - (iii) qualifying corporation
 - (iv) partnership, trust or joint venture in which a person or any group of persons referred to in (i), (ii), or (iii) immediately above beneficially owns or controls, directly or indirectly, interests representing in value at least 51% of the total monetary value of the assets of the partnership, trust or joint venture, as the case may be, and of which the chairperson or other presiding officer and more than half the directors or other similar officers are persons referred to in (i) or (ii) immediately above; or
 - (v) not-for-profit organization of which more than half its members and directors are persons referred to in (i) or (ii) immediately above.
- d) "Disbursement Amount(s)" means the funds allotted to the Recipient to complete a Project as approved by FACTOR;
- e) "Minister" means the federal Minister of Canadian Heritage or the Minister's duly authorized representatives;
- f) "Project" means the funding initiative(s) offered by a FACTOR program for which the Recipient has applied to, and been approved by FACTOR
- g) "Short-fall Amount" means the portion of the Recipient's projected Project costs documented in Recipient's Application that FACTOR has agreed to fund under the terms of this Agreement.

Recipient Initials: _____

FACTOR Representative Initials: _____

ARTICLE 2 – DISBURSEMENT AMOUNT FROM FACTOR

Disbursement Amount

2.01 FACTOR agrees to disburse to the Recipient an amount equal to the lesser of the Shortfall Amount or the percentage of the final and actual Project Costs approved by FACTOR, subject to the Maximum Amount set forth in the Program Guidelines.

Use of Disbursement Amount

2.02 The Recipient agrees to promptly use all of the amounts disbursed pursuant to Section 2.01 solely for the purpose as outlined in the Description of the Project and in accordance with all the information provided in the Application and all other terms and conditions of this Agreement.

Completion Certificate

2.03 The Recipient agrees that promptly following the completion of the Project, the Recipient shall execute and deliver to FACTOR a Completion Certificate in form and content satisfactory to FACTOR. This Completion Certificate shall include, but not be limited to, information certifying the total Project Costs incurred and expended, and the Recipient's explanation in narrative form of each variance between the budgeted costs and the actual costs incurred and shall identify each separate source of funding. Please note that a Completion Certificate is not required for the Demo and Commercially Released Single Program. Completion requirements for the Demo and Commercially-Released Single program include a copy of the finished project on disc, and lyrics for all recorded song(s).

Timing of Disbursements

2.04 FACTOR shall disburse the amount set forth in Section 2.01 within 60 days of receipt by FACTOR of the Completion Certificate(s) as required under Section 2.03. In the event that FACTOR chooses, in its sole discretion, to advance funds (an "initial disbursement") to the Recipient after the signature of this Agreement and any applicable Annex(es), such advance amount shall be deducted from the total Disbursement amount defined in Section 2.01, with the balance being payable within 60 days of receipt by FACTOR of the Completion Certificate(s). For the Demo and Commercially Released Single Program, FACTOR shall disburse the amount set forth in Section 2.01 after the signature of this Agreement and its applicable Annex, indicating the Recipient's acceptance of the terms of Agreement.

Event of Adjustment

2.05 If any Project Costs are subsequently disallowed for any reason, or if the Recipient's Project Costs are less than the initial disbursement by FACTOR and an adjustment is necessary, the Recipient shall return to FACTOR the amount necessary to make the total amount received by the Recipient equal to the amount which should have been disbursed pursuant to Section 2.01 after adjusting for the revised Project Costs. This adjustment must take place within 10 business days upon Recipient receiving a notice of adjustment from FACTOR.

Conditions Precedent

2.06 Before disbursing any amounts pursuant to this Article 2, FACTOR shall be entitled to require and/or verify that the following conditions precedent be met:

- a) all representations and warranties of the Recipient set out in this Agreement and in the Application are true and correct;
- b) no Event of Default exists;
- c) upon request from FACTOR, the Recipient provide satisfactory evidence that the Recipient has the balance of the funding necessary to complete the Project; and
- d) the Recipient has signed and/or delivered to FACTOR any necessary or applicable Annex(es), Completion Certificate(s) or subsequent documentation.

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Funding Limitation

2.07 Notwithstanding any contrary provisions elsewhere in this Agreement, the obligation of FACTOR to disperse funds shall be subject to the provision of adequate funds being made available to FACTOR by the Government of Canada and private sponsors, and is further subject to any restrictions that may be imposed by the Government of Canada or private sponsors. In the event that FACTOR is required to lessen, or completely eliminate, any of the funding to be disbursed under this Agreement, FACTOR shall notify the Recipient of this fact within thirty business days of FACTOR determining that it is required to lessen or eliminate said funding. The Recipient's obligations under this Agreement shall not be released or diminished in the event that FACTOR has disbursed amount(s) subject to Article 2.

ARTICLE 3 – REPRESENTATIONS AND WARRANTIES

Representations and Warranties

- 3.01** The Recipient represents and warrants as follows to FACTOR, and acknowledges and confirms that FACTOR is relying on such representations and warranties in connection with the disbursement of funds as provided for in this Agreement:
- a) the Recipient has good and sufficient power, authority and right to enter into and deliver this Agreement and to fully perform all of the Recipient's obligations under this Agreement;
 - b) this Agreement and attached Annex(es), Completion Certificate(s) and any subsequent documentation, when executed and delivered, constitute valid and legally binding obligations of the Recipient, enforceable against the Recipient in accordance with their respective terms;
 - c) the Recipient is Canadian;
 - d) the information contained in the Application(s) is true and the projected costs therein are based on fact and have been prepared with due regard to reality and moderation
 - e) the Recipient holds sufficient intellectual property rights for the conduct of the activities in the Project, or the exploitation of any intellectual property resulting thereof;
 - f) no portion of the Disbursement Amount shall be used toward, and none of the Project Costs may include, the creation of intellectual property and/or material that is or contains:
 - (i) hate propaganda; obscene or child pornography; or any other illegal material as defined in the Criminal Code; nor
 - (ii) pornography or other material having significant sexual content unless it can be demonstrated that there is an overriding educational or other similar purpose; nor
 - (iii) excessive or gratuitous violence, nor
 - (iv) material that is denigrating to an identifiable group, or any other similarly offensive material;
 - g) the proceeds of the Disbursement Amount shall be used only for the purposes as outlined in the Description of the Project; all other possible sources of assistance are fully and accurately disclosed in the Application(s) and Completion Certificate(s), and provincial and federal sources (including FACTOR) do not cover more than 100% of all Project Costs;
 - h) none of the Project Costs set forth in the Application(s) have been or will be submitted to or financed under any other FACTOR program or by MUSICACTION, the Canada Council, the Department of Canadian Heritage or any other administrator of the federal Canada Music Fund, without FACTOR'S being advised thereof;
 - i) the Recipient hereby declares that it is not in default under any other agreements with FACTOR and has complied with all terms and conditions stipulated in Agreements for any and all previous programs in the music industry supported by the Government of Canada in which the Recipient has received assistance;
 - j) all information and documentation provided in and with the Completion Certificate(s) shall be truthful and accurate;
 - k) if the Recipient does have a contractual relationship(s) with an artist(s), that the Recipient has fulfilled, and will continue to fulfill the required contractual obligations to the artist(s);
 - l) the Recipient shall not mortgage, charge or encumber those accounts receivable, book debts and copyright assets that pertain to the Project without receiving express permission from FACTOR;
 - m) all those employed by the Applicant who are former public office holders or public servants are in compliance with the Values and Ethics Code for the Public Service and the Conflict of Interest and Post-Employment Code for Public Office Holders;

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ARTICLE 4 - OBLIGATIONS OF THE RECIPIENT

Books of Account

4.01 The Recipient shall at all times maintain complete, accurate and up-to-date books of account with respect to all financial matters relating to this Agreement. Such books of account shall be maintained in accordance with generally accepted accounting principles and must accurately reflect all costs and expenses incurred and expended under this Agreement.

Retain All Documentation

4.02 The Recipient shall also retain all contracts, invoices, cancelled cheques, credit card receipts, money order receipts, royalty statements and any other documentation supporting each entry in the books of account. All books of account and supporting documentation shall be retained for not less than seven (7) years from the date of the final amount disbursed by FACTOR for the Project.

Inspection Rights

4.03 An agent acting on behalf of FACTOR or the Minister shall have the right to enter onto the premises of the Recipient for the purpose of inspecting, auditing and making photocopies and extracts of the books of account, ledgers and all other documents and information of the Recipient insofar as they pertain to this Agreement or any other agreement entered into between the Recipient and FACTOR. Any inspection may be made on 24 hours' written notice from FACTOR or the Minister to the Recipient and shall be made during normal business hours on normal business days. The Recipient shall hold harmless FACTOR or the Minister from any and all consequential damages, costs and inconvenience as may result from the execution of audits undertaken by FACTOR or the Minister, as the case may be.

Post-Inspection Repayment

4.04 Upon request from FACTOR post-inspection pursuant to section 4.03, the Recipient shall provide a signed commitment stating that any amounts identified by an audit as being owed to FACTOR shall be repaid without delay.

Subsequent Change(s) to the Recipient

4.05 Until such time as the completion of the obligations of the Recipient under this Agreement, attached Annex(es), Completion Certificate(s) and any subsequent documentation, the Recipient shall notify FACTOR within 10 days of any changes to the corporate structure or business ownership such as an amalgamation, reorganization, change to its name, or any material matter that may affect the Recipient's eligibility under FACTOR, or that may in any way affect the Recipient's capacity to fully perform the Recipient's obligations under this Agreement.

Exclusive Use of Canadian Suppliers

4.06 The Recipient is obliged to make use of Canadian individual(s) and/or businesses for all goods and services required in the Recipient's Project for Canadian-based initiatives. Any exception to this obligation must be approved by FACTOR. With regards to those Projects in which the initiatives are not based in Canada, the Recipient shall make use of Canadian individuals and/or businesses for any portion of the Project for which it is reasonable to use a Canadian goods-and-services supplier.

Completion of Project

4.07 The Recipient is required to complete each Project by the deadline determined by FACTOR. Failure to complete a Project by the FACTOR determined deadline will be considered an Event of Default as defined in this Agreement. The Recipient may, in writing, make a request to FACTOR to extend a Project deadline, however, FACTOR retains the sole discretionary right to approve or deny the request for an extension. The date of the Completion of the Project shall be determined by the date in which FACTOR has received the Completion Certificate(s) considered by FACTOR as adequately completed.

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Credit

4.08 The financial contribution that the Recipient is receiving from FACTOR under this Agreement is made possible by the Government of Canada through the New Musical Works Component of the Canada Music Fund of the Department of Canadian Heritage and Canada's private radio broadcasters. The Recipient shall affix the FACTOR and "Canada" wordmark logos on any promotional materials, press releases or any written communications supported by this financial contribution. The logos are available on the FACTOR website at: www.factor.ca.

Deposit with National Library

4.09 In the event that the Project is a sound recording project, Under the *Library and Archives of Canada Act*, Recipients are required to send a copy of any commercially released sound recordings or commercially released digital video recordings to the Library and Archives Canada. Upon request from FACTOR, the Recipient agrees to submit to FACTOR documentary evidence of compliance with the "legal deposit" requirements outlined in subsection 13(1) of the *National Library Act*.

ARTICLE 5 – DEFAULT

Events of Default

5.01 Each of the following events shall be considered an Event of Default:

- a) the existence of a misrepresentation or of a material inaccuracy in a representation or the breach of a warranty made by the Recipient in this Agreement or in any document furnished by the Recipient pursuant to this Agreement including, without limitation, the Application and Completion Certificate;
- b) the failure or refusal by the Recipient to perform or comply with any term, obligation, condition or provision of this Agreement where the failure continues un-remedied for 10 business days after the Recipient has received written notice from FACTOR pertaining to this failure or refusal;
- c) the failure by the Recipient to pay in full any sum payable by the Recipient under this Agreement or any other agreement between FACTOR and the Recipient when due;
- d) the existence of any forged, falsified or fabricated document, intended to substantiate the payment or receipt of any of the Project Costs;
- e) the failure by the Recipient to complete the Project by the deadline determined by FACTOR.
- f) the Recipient becomes bankrupt or insolvent or is placed in receivership or takes the benefit of any statute relating to bankrupt and insolvent debtors;
- g) a resolution is passed, or order is made, for the winding-up of the Recipient, or the Recipient is dissolved;
- h) the failure to notify FACTOR of a Subsequent Change to the Recipient required under Section 4.05;
- i) a Subsequent Change(s) to the Recipient renders the Recipient ineligible to receive FACTOR funding;
- j) due to a Subsequent Change(s) to the Recipient, FACTOR, at its discretion, considers it improbable that the Project as initially contemplated by the Recipient can be successfully completed;
- k) due to a circumstantial change(s) to the Recipient, FACTOR, at its discretion, considers it improbable that the Project as initially contemplated by the Recipient can be successfully completed;

Effects of Default

5.02 Each of the following shall be considered an Effect of Default:

- a) all of the Disbursement Amount(s) received by the Recipient from FACTOR under this Agreement and all other agreements between FACTOR and the Recipient, shall become immediately due and payable with interest at the rate of prime plus 2% per annum calculated in respect of the unpaid balance from the date of each disbursement made by FACTOR, to the date of actual repayment thereof, all without further demand or notice (which are expressly waived by the Recipient). Payments received by FACTOR shall be deemed to have been credited first against accrued and unpaid interest (if any) and then against the unpaid principal sum of the Disbursement Amount(s). Without any limitation whatsoever of this right, FACTOR may, at its sole discretion, direct the Recipient to repay less than the full Disbursement Amount(s) received by the Recipient under this Agreement, and all other agreements between FACTOR and the Recipient;

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- b) FACTOR may resort to any rights or remedies provided herein or available under any applicable law and these rights and remedies shall be enforceable successively, concurrently or cumulatively, pursuant to section 6.03;
- c) FACTOR may, in the exercise of its unrestricted discretion, refuse to advance any further funds to the Recipient under this Agreement and/or any other agreements and may decline to accept any further applications from the Recipient for FACTOR funding of any kind whatsoever. In addition, FACTOR may similarly exercise these rights in conjunction with any affiliate of the Recipient – an affiliate being considered as any entity controlled by, controlling, or under common control as the Recipient;

Cross Default

5.03 If an Event of Default exists, the Recipient shall be considered also in default under any and all present or future agreements between FACTOR and the Recipient and the corresponding contractual and legal remedies shall apply to such present or future agreements between FACTOR and the Recipient.

End of Default

5.04 FACTOR, at its sole discretion, shall advise the Recipient if, and when, it considers the Recipient no longer in default with FACTOR for this Agreement or future agreements.

ARTICLE 6 - GENERAL

Indemnity of FACTOR

6.01 The Recipient shall at all times indemnify and save harmless FACTOR and FACTOR’s employees and agents from and against any and all reasonable claims, losses, damages, costs, expenses, actions (including, without limitation, court costs and counsel fees on a solicitor client basis) and other proceedings arising out of or connected with any claim in which it is asserted that any of the representations, warranties or agreements made by the Recipient in this Agreement have been breached, or in which assertions are made which are in any way inconsistent with any such representations, warranties or agreements, or proceedings or claims arising from the Recipient’s negligence or unlawful acts within the Project’s activities;

Indemnity of the Minister

6.02 The Recipient shall at all times indemnify and save harmless the Minister, his officers, employees, servants and agents, successors and assigns from and against any and all claims, liabilities, and demands arising directly or indirectly from any act, omission, or negligence of the Recipient, and breach of this Agreement by FACTOR, and performance or non-performance (in whole or in part) of FACTOR’s obligations under this Agreement, and any claims, liabilities, and demands that may arise from the Recipient entering into any loan, capital lease or long term obligation. Such indemnification will survive the termination or expiration of this Agreement.

Cumulative Rights and Remedies

6.03 The rights, remedies, undertakings and obligations under this Agreement or under any other document or instrument executed pursuant to this Agreement are cumulative and none of them shall be in limitation of any other remedy, right, undertaking or obligation of either party available at law or in equity. Any waiver by FACTOR of the strict observance, performance or compliance with any term, obligation, condition or agreement herein contained and any indulgence granted, either expressly or by course of conduct, by FACTOR shall be effective only in the specific instance and for the purpose for which it was given and shall be deemed not to be a waiver of any rights and remedies of FACTOR under this Agreement or any other document or instrument executed pursuant to this Agreement.

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FACTOR Representative Initials: _____

Severability

6.04 If any provision of this Agreement is determined to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to that provision or part hereof and the remaining part of that provision and all other provisions hereof shall continue in full force and effect.

Assignment

6.05 The rights of FACTOR under this Agreement may be assigned by FACTOR without the prior consent of the Recipient. The Recipient may not assign this Agreement or any of its benefits or obligations hereunder without the prior written consent of FACTOR, which consent may be withheld at FACTOR's sole discretion.

Notices

6.06 Any demand, notice or other communication to be given in connection with this Agreement shall be given in writing and may be given by personal delivery or by registered mail addressed to the Recipient at the respective address set forth on the first page of this Agreement or such other address as may be designated by notice by any party to the other. Any Communication shall be conclusively deemed to have been given, if given by personal delivery or prepaid courier service, on the day of actual delivery thereof and, if given by registered mail, on the fifth business day following the deposit thereof in the mail.

Endorsement Clarification/Use of Recipient's Name and Likeness

6.07 This Agreement is not to be construed in any manner as an endorsement by FACTOR or any of FACTOR'S directors, officers, members or supporters of the Recipient or of the Project or any part thereof; however, FACTOR shall have the right to and to authorize other persons to publicize and advertise in any manner whatsoever in all media (including but not limited to print, radio, broadcast and pay television), the fact that FACTOR provided the Recipient support under this Agreement by using the names and likenesses of the Recipient for institutional advertising of FACTOR. If requested by FACTOR, in the event that the Recipient is a representative of an Artist, the Recipient shall obtain the Artist's consent to the use of the Artist's name and likeness for the purposes herein.

FACTOR Not Agent

6.08 FACTOR represents that it is not an agent of the Department of Canadian Heritage or of Her Majesty in Right of Canada.

Disclosure of Agreement to the Minister

6.09 Shall it be requested by the Minister, FACTOR shall, on a confidential basis, have the right to provide the Minister with a copy of this Agreement, Annex(es), Completion Certificate(s) and any subsequent documentation.

Annual Recipient Questionnaire Form and Survey

6.10 Shall either the Minister or FACTOR request it, the Recipient shall complete and submit, within 12 months following the receipt of funds hereunder, a Recipient's Questionnaire Form designed by the Department of Canadian Heritage. The Recipient may also be obliged to complete the Statistics Canada annual survey on the sound recording industry.

Governing Law

6.11 This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

Recipient Initials: _____

FACTOR Representative Initials: _____

Understanding and Acceptance of this Agreement

6.12 The Recipient acknowledges that the Recipient has read this Agreement and that the Recipient has the right to consult with legal counsel concerning this Agreement. The Recipient additionally acknowledges that Recipient has either consulted with such legal counsel or, without having consulted such legal counsel, is satisfied that Recipient fully understands and agrees to this Agreement.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed by their respective representatives thereunto duly authorized.

**THE FOUNDATION ASSISTING CANADIAN
TALENT ON RECORDINGS**

«BorrowerName»

Phil Gumbley
Director, Operations

Authorized Signatory

Printed Name

Title

Authorized Signatory (2)

Authorized Signatory (2)

Printed Name

Title

If the recipient of this funding is an individual or sole-proprietorship, a second signatory is not required.

FACTOR has provided the space for a second signatory for corporations or registered partnerships where a second signatory is required.