



## Mediation: a chat with Elizabeth MacPherson

You're locked into negotiations for a scale agreement under the *Status of the Artist Act*, and things just aren't moving forward. Or you've already got an agreement under the *Act*, and you're trying to resolve a dispute about the application of one of its provisions. You know everyone involved is reasonable, or can be persuaded to be, but you can't seem to get things unblocked. Where do you turn?



Parties to scale agreements under the *Status of the Artist Act*, or parties trying to negotiate agreements, often need help in clarifying issues and resolving disputes. When this happens, a neutral third party can make all the difference. With the Federal Mediation and Conciliation Service (FMCS), that neutral third party can be available to you—and at no cost.

Under section 45 of the *Act*, the Minister of Labour may name a mediator to confer with parties who are unable to reach agreement and assist them to enter into a scale agreement. The Minister may do this on his or her own initiative, or at the request of one or both of the parties.

Also, when a complaint is filed with the Tribunal and it appears possible to resolve it without a hearing, the Tribunal may recommend mediation. If all participants agree, a mediator is assigned to the case to help the parties reach a settlement.

Whether it's to reach a scale agreement or to resolve a complaint, the FMCS can provide mediation services at no cost to the parties.

The FMCS is well known for providing dispute resolution and dispute prevention assistance to trade unions and employers under the jurisdiction of the *Canada Labour Code*. It provides the same assistance to artists associations and producers under the *Status of the Artist Act*.

The FMCS provides conciliation and mediation assistance to artists' associations and producers engaged in collective bargaining, and offers preventive mediation and grievance mediation services when an agreement is in force. It also administers the Ministerial appointment of arbitrators when parties request it under section 36 of the *Act*.

To get more information about the FMCS and how to make use of their services, visit their web site at [www.fmcs.ca](http://www.fmcs.ca). And read in the next article what Elizabeth MacPherson, Director General of the FMCS and a former Executive Director and General Counsel of CAPPRT, had to say in her recent interview with Brian K. Stewart, Director of the Planning, Research and Communications branch at the Tribunal.

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**BKS:** You have experience with both the Canadian Artists and Producers Tribunal and the Federal Mediation and Conciliation Service (FMCS), is that correct?

**EM:** Yes. After graduating from Law School, I went to work at the Tribunal as one of the founding staff members. Then in 1999 I came to the FMCS as the Director General.

**BKS:** Please tell us about the mediation service the FMCS provides.

**EM:** We have two different streams. One is the mediation that takes place during bargaining. The objective of that is to assist the parties in negotiating a scale agreement. The other is when the parties run into difficulties during the term of a scale agreement. We provide assistance in those situations, not only to help them work out the particular issue, but also to try and create relationships that will serve them in good stead when they get into the next round of bargaining. Much of the success of collective bargaining is predicated on a relationship of mutual trust and respect, so those are the kinds of relationships we try to promote during the life of a collective agreement or a scale agreement.

Traditional collective bargaining uses the adversarial approach—positional bargaining based on power. With both our *Canada Labour Code* clients and *Status of the Artist Act* clients, we try to promote a more interest-based, collaborative approach. We try to get people to work together to try and make the pie bigger for everyone, instead of arguing over the division of the pie.

**BKS:** Have mediations under the *Status of the Artist Act* come up often in your time with the FMCS?

**EM:** It's not a huge part of our caseload, but it's probably one of the more interesting parts. The mediation officers enjoy it, because it's different from standard labour-management disputes.

**BKS:** What kinds of issues have been mediated?

**EM:** They tend to be the issues that employers and unions, or producers and associations, are usually most concerned with, ultimately boiling down to the financial issues. Whether you are talking about a copyright issue or direct wage payment, it's a financial issue: it's the fruits of the labour of the individual, and how they get compensated for that.

There are also issues around conditions of work. Producers, like employers, are under an obligation to provide a safe work place. Working out the modalities of that is often an issue as well.

**BKS:** Are there important differences that your mediators have found under the *Status of the Artist Act*?

**EM:** It's hard to generalize, but if I were going to, I would say that the ability to be creative, and to think of new solutions, is greater in the *Status of the Artist* sector. It's a creative sector to begin with, and if people bring that creativity to the bargaining table it's always helpful.

**BKS:** Often somebody who is an artist in one situation will be a producer in another. Does that play into it at all?

**EM:** It really does, because it gives the individuals at the bargaining table a better perspective on the concerns of the other party. In interest-based bargaining, we try to get people to see each other's point of view. If someone has been an artist *and* a producer, it's a lot easier for them to see both sides of the issue and be creative about ways to resolve it.

**BKS:** From your experience with both the Tribunal and the FMCS, are there particular things that you've learned that you think could be useful to artists' associations and producers?

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**EM:** Labour relations are human relations, and it helps if people approach negotiations from that point of view. At the end of the day, it's all about learning to live together and make an organization work so that everybody benefits. It's not in anyone's interest to have conflict that makes the organization dysfunctional.

I keep telling people, "You spend such a huge amount of your waking life at work, it should be a place you enjoy going to. Otherwise, why do it?" That is one lesson learned from the artistic sector.

**BKS:** Are there other FMCS services or programs that you would like to draw to the attention of artists' associations and producers?

**EM:** I put a lot of emphasis on our preventive mediation work. If parties, for example, want to gain some experience in collective bargaining before they actually start to do it, we offer joint training for the union and management committee, a "best practices" workshop that shows them ways to approach difficult problems. We have grievance resolution workshops. We have a workshop for people who are new to collective bargaining. Another workshop that's just been launched helps parties deal with consequences of major organizational change like mergers and amalgamation, where the union and management need to develop an industrial relations action plan.

We also maintain a roster of individuals who are qualified to act as arbitrators. If the parties can't agree on the selection of an arbitrator to deal with a dispute over the interpretation of a scale agreement, they can request that the Minister select and appoint one.

**BKS:** Do you have any final comments you'd like to add?

**EM:** Only a general invitation to parties covered by the *Status of the Artist Act* to consult the FMCS web site. Get in touch with us, and we will try to help.

## Settlement by arbitration and determinations by an arbitrator—a reminder

Under section 36 of the *Status of the Artist Act* ("the Act"), every scale agreement between artists' associations and producers subject to the Act must contain

"a provision for final settlement without pressure tactics, by arbitration or otherwise, of all differences between the parties or among artists bound by the agreement, concerning its interpretation, application, administration or alleged contravention."

When a difference between the parties to an agreement is submitted for final settlement to an arbitrator or an arbitration board that was chosen by the parties or nominated by the Minister of Labour, the determination issued at the end of the proceedings is final and cannot be questioned or reviewed in court.

This determination is important because it sets out the decision rendered to the parties, with their consent, and indicates final settlement of the dispute between them. Under section 38 of the Act, a copy of every determination of an arbitrator or arbitration board **must** be sent to the parties, filed with the Minister of Labour and, in the circumstances prescribed by regulation, made available to the public. The copy addressed to the Minister must be sent to the following address: Minister of Labour, Ottawa, Ontario, K1A 0J2.

It is also strongly suggested that a copy of the determination be sent to the Tribunal Secretariat. This information helps us update our files as well as monitor developments in negotiations in the cultural sector.

Copies of determinations by arbitrators, as well as copies of notices to bargain and scale agreements negotiated, can be obtained free of charge by contacting Human Resources and Social Development Canada's

Workplace Information Directorate (WID). Requests should be made to:

Workplace Information Directorate  
Labour Program  
Human Resources and Social Development Canada  
Ottawa, Ontario K1A 0J2

Toll-free: 1-800-567-6866  
Telephone: 819-997-3117  
Fax: 819-953-9582

<http://www110.hrdc-drhc.gc.ca/information/index.cfm?doc=english&Aloc=2>

## The Ontario Divisional Court delivers a decision in *Writers Guild of Canada v. Canadian Broadcasting Corporation* [2006] O.J. No. 2979

On July 20, 2006, the Ontario Divisional Court delivered a decision that dealt with the jurisdiction of an arbitrator appointed under the *Status of the Artist Act* (“the Act”).

In this matter, the Writers Guild of Canada (“the WGC”) filed a grievance alleging that, as some of the work performed by an individual hired by CBC was writing, his services should be covered by the scale agreement between the WGC and the CBC.

The grievance was referred to arbitration. At the outset, the WGC submitted that subsection 41(1) of the Act confers exclusive jurisdiction on the Canadian Artists and Producers Professional Relations Tribunal (“the Tribunal”) to determine whether a particular individual is an employee or an independent contractor. The arbitrator dismissed the WGC’s argument. The WGC brought an application for judicial review to quash this preliminary award.

The question put to the Court was whether the arbitrator erred in concluding that he had jurisdiction to determine if the individual was an employee or an independent contractor.

In its analysis, the Court concluded that, pursuant to subsection 41(1), the Tribunal has the jurisdiction to determine whether a scale agreement applies to an “artist.” The Court also concluded that subsection 41(1) does not state that the Tribunal has exclusive jurisdiction to determine whether a person is an independent contractor or an employee. The Court, noting that considerable deference should be shown to the arbitrator’s decision, concluded that the arbitrator’s decision that he had jurisdiction to determine the grievor’s employment status was not unreasonable. The application for judicial review was dismissed.

## Changes to the Tribunal’s web site

In our February 2006 Information Bulletin, we proudly announced the end of phase one of our web site revision project. With this first step, we revised the visual presentation of the site, reviewed the organization of the content of its pages, and added new documents and information.

In the coming months, we will launch phase two of our revitalization project and offer

- new sections featuring personalized contents;
- a navigational format that emphasizes what the Tribunal can do for you;
- a clearer and more precise presentation of the services provided by the Tribunal;
- easy access to documents, procedures and reference tools that may be useful to you;
- smoother and easier navigation through the site.

We want our web site to meet the needs of the public, of artists and artists’ associations, and of producers subject to the *Status of the Artist Act*. We will continue to modify and improve our site with regular updates and additions as appropriate. We will be starting phase three of our project soon. Don’t hesitate to contact us and offer suggestions!

# To contact us

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*Are you currently preparing a course or  
organizing a conference on professional  
relations in the cultural sector?*

Tribunal personnel are available to make presentations  
regarding the *Status of the Artist Act* and the role,  
procedures and activities of the Tribunal.

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