



CANADIAN FEDERATION OF MUSICIANS

An Organization of the American Federation of Musicians of the United States and Canada

October 11, 2016

Messrs. Michael Mitchell and John Murray
Changing Workplaces Review
ELCPB 400 University Ave., 12th Floor
Toronto, Ontario
M7A 1T7

OFFICE OF THE AFM
VICE PRESIDENT FROM CANADA
150 FERRAND DRIVE, SUITE 202
TORONTO, ONTARIO M3C 3E5
(416) 391-5161 • 1-800-463-6333
FAX (416) 391-5165
E-MAIL: afmcan@afm.org
www.cfmusicians.org

RE: RESPONSE TO THE CHANGING WORKPLACES REVIEW SPECIAL ADVISORS' INTERIM REPORT

Dear Sirs,

Preamble

We are the **Canadian Federation of Musicians (CFM)**, which is the Canadian component of the American Federation of Musicians of the United States and Canada, the largest entertainment organization in the world. The CFM is certified as the bargaining representative for all musicians in Canada under Federal Status of the Artist legislation, as per order No. 10413-u

Please consider this as **Phase One** of our response to the Changing Workplaces Review Special Advisors' Interim Report.

4.2.2 – Related and Joint Employer

Respectfully, the observations and possible solutions suggested in the review in determining the “true employer” or “related employer” does not address the shell game that exists within the media industry as it relates to musicians. As an example, let's use a hypothetical film entitled “Working Title”, which is being produced by a member of the Canadian Media Producers' Association (CMPA), for initial broadcast on Canadian TV or cable.

The independent producer generally retains the services of a composer, under a personal services contract, whereby the composer agrees to deliver a finished original recording as underscore for “Working Title”. The composer writes the score, and may perform some or all of the parts on a digital workstation (i.e. synthesizer). Or, the composer may hire additional musicians – in some cases a full orchestra – to record an even more elaborate score. Either way, the composer and the musicians would be covered under a CFM film agreement. These agreements contain language stipulating that the original score must remain synchronized to “Working Title”, and that the music cannot be extracted to be reused or repurposed for other programming, without adherence to the appropriate CFM agreement. But the independent producer is not the signatory (because they cannot be compelled to bargain with the CFM), and through their personal services with the



composer, require the composer to be signatory – and thus technically responsible for the recorded product.

Now it gets interesting. Let's assume that the terms of the CFM Agreement have not been adhered to, and the music for "Working Title" is now being used in a television spin-off programme. Who, then, is responsible for making the musicians (including the composer), whole? Is it the poor composer, who the independent producer insisted upon being the employer of the musicians? Is it the independent producer, who owns the intellectual property (copyright) on "Working Title"? Is it the broadcaster, who perhaps initially commissioned the film to be produced and subsequently lifted the music for their new TV show? Is it the (possible) US co-producer, who has invested heavily in the production as a silent partner? Is there any liability on the part of the Ontario government, who funded a significant part of the production through tax credits and grants?

There are many possible combinations of the above scenario, including multiple production companies, sometimes solely incorporated to payroll only "Working Title", and then disappear upon completion of the production to avoid further liability – or any detectable connection with a "true" employer.

While the suggested solutions in 4.2.2 – including rulings being made on a case by case basis may address more simple relationships, there is no way it can address the above convoluted example. Interestingly, **the above confusion is entirely avoided** if the CFM was able to negotiate a scale agreement with the independent producer.

The CFM therefore, recommends introduction of provincial Status of the Artist legislation, with a **collective bargaining component**, as contemplated in 4.6.1 – Broader-based Bargaining Structures, Option 9. In addition, we recommend that the Ontario Labour Relations Board is able to govern the Act, similar to how the Canadian Industrial Relations Board (CIRB) has assumed that responsibility formerly held by the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT).

In addition, we recommend that any single producer who becomes part of a producer association who is bound by a scale or other agreement, be automatically bound by such agreement upon joining. Conversely, a producer should not be allowed to escape the terms of an agreement by withdrawing membership from the producer association.

Further, once a provincial *Status of the Artist Act* becomes law, any existing collective or scale agreement negotiated by any of the Arts associations or unions, must be grandfathered to avoid any unforeseen impact in a negative way.

5.2.1 – Definition of Employee

Musicians represented by the CFM have a plethora of different employment scenarios, ranging from what are clear "independent contractor" gigs (such as weddings a concert work), to "dependent contractor" situations (such as symphony orchestras and long-run theatrical work) to instances where they are, indeed, employees by definition.

The CFM supports the notion that “dependent contractors” should be provided for in the ESA, under Option 6. We also support the premise that in the case of an employer attempting to avoid responsibilities under the ESA by classifying workers as self-employed, that the burden of proof be on the employer to make the case as to why they are not employees or dependent contractors, whichever the case may be.

5.2.2 - Who is the Employer and Scope of Liability

The CFM is in support of Option 2 in holding employers and/or contractors responsible for their contractors/subcontractors compliance with the ESA.

That said, determining who the players are, as explained in the “Working Title” example, would lead to unlimited confusion and long lines before the OLRB, in terms of proper application and remedy concerning employers of musicians. In terms of recorded work in audiovisual media, CFM recommends that the determinations of who is the employer include the question of intellectual property. Simply, who ultimately owns the copyright on the product? That entity (if not the contractor or subcontractor) should clearly be looked to, especially in the case of obligations and liabilities in the future, or in the case where the copyright is assigned to yet another party.

In Conclusion

The CFM has no objection to the various amendments suggested by our counterparts in the entertainment/media industry in terms of amendments and clarifications to the ESA and LRA. However, we cannot stress enough that such measure fall short of what is required to regulate employment of musicians, and remedy any situations that may arise perhaps years after the work is complete. We believe introduction of a provincial *Status of the Artist Act* is a solution which can only enhance the recommended changes, and simplify the relationship between employers and musicians who are traditionally self-employed contractors.

As Phase Two, the CFM has Status of the Artist legislation written and ready to present. We only require information as to whom this should be sent. This document would be endorsed by the CFM, and all of its Ontario Locals, along with a significant number of other industry partner associations and unions.

Respectfully submitted,



Alan Willaert
AFM Vice-President from Canada

Copies: Brantford Musicians' Association, Local 467, AFM
Upper Canada Musicians' Association, Local 384, AFM

Hamilton Musicians' Guild, Local 293, AFM
Kingston Musicians' Union, Local 518, AFM
Central Ontario Musicians' Association, Local 226, AFM
London Musicians' Association, Local 279, AFM
Niagara Region Musicians' Association, Local 298, AFM
Musicians' Association of Ottawa-Gatineau, Local 180, AM
Sault Ste. Marie Musicians' Association, Local 276, AFM
Stratford Musicians' Association, Local 418, AFM
Thunder Bay Musicians' Association, Local 591, AFM
Toronto Musicians' Association, Local 149, AFM
Windsor Federation of Musicians, Local 566, AFM