



Reference: *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*,
2015 Comp. Trib. 26
File No.: CT-2015-009
Registry Document No.: 079

IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

Stargrove Entertainment Inc.
(applicant)

and

**Universal Music Publishing Group Canada,
Universal Music Canada Inc.,
Sony/ATV Music Publishing Canada Co.,
Sony Music Entertainment Canada Inc.,
ABKCO Music & Records, Inc.,
Casablanca Media Publishing, and
Canadian Musical Reproduction Rights Agency Ltd.**
(respondents)



Decided on the basis of the written record.
Before Judicial Member: Barnes J.
Date of Reasons for Order and Order: December 14, 2015

**REASONS FOR ORDER AND ORDER GRANTING AN APPLICATION FOR
LEAVE UNDER SECTION 103.1 OF THE COMPETITION ACT**

I. OVERVIEW

[1] The Applicant, Stargrove Entertainment Inc. (“Stargrove”), seeks leave under section 103.1 of the *Competition Act*, RSC, 1985, c C-34 as amended, to bring an application against the Respondents for the following substantive relief:

- (a) an Order pursuant to subsection 75(1) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to the Canadian Musical Reproduction Rights Agency Ltd.;
- (b) an Order pursuant to subsection 76(2) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;
- (c) an Order pursuant to subsection 76(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA;
- (d) an Order pursuant to subsection 76(8) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;
- (e) an Order pursuant to subsection 76(8) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA;
- (f) an Order pursuant to subsection 77(2) of the Act prohibiting the Respondents from continuing to engage in exclusive dealing;
- (g) an Order pursuant to subsection 77(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA.

[2] In support of the application for leave Stargrove filed an Application Record and a Supplementary Application Record. The Respondents replied with Written Representations. Included with the responding material was an affidavit sworn on behalf of Sony Music Entertainment Canada Inc. (“Sony Canada”) stating that it “does not own or control any copyright rights in musical works”. This was filed in support of Sony Canada’s argument that it is not a proper party to this proceeding. A similar affidavit was filed on behalf of Casablanca Media Publishing (“Casablanca”). Casablanca sought leave to file under Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141, but Sony Canada neglected to do so. When Stargrove filed its Reply, it, too, included an affidavit without seeking permission. That affidavit attached a relevant email that was deliberately withheld from the Application Record ostensibly for privacy concerns.

[3] Subsequently the Canadian Musical Reproduction Rights Agency Ltd. (“CMRRA”), asked for leave to file a 10-paragraph sur-reply that, for the most part, repeated arguments it had made in its Written Representations. That submission drew an objection from Stargrove. It, too, took the opportunity to repeat some of its earlier arguments. The CMRRA then filed a sur-sur-sur-reply, this time without the courtesy of seeking leave.

[4] While the *Competition Tribunal Rules* contemplate a degree of informality, they do not countenance unlimited, unrestrained and unauthorized filings. Where leave is required to file affidavit evidence or to make a further submission, it must be sought.

[5] There is similarly no authority in the Rules to file Reply evidence as of right and the only basis to do so is under Rule 2 with leave. This also applies to the filing of arguments in sur-reply, sur-sur-reply and sur-sur-sur-reply.

[6] Notwithstanding the above-noted irregularities, I have considered the additional evidentiary materials received. I have done so on the basis that those affidavits would have been admitted had leave been properly sought.

[7] Leave is denied for the CMRRA’s sur-reply and sur-sur-sur-reply and for Stargrove’s response in sur-sur-reply. Nothing in those submissions adds anything of significance to the issues before me and, on that basis, I have ignored them.

II. BACKGROUND

[8] Stargrove says that, since 2014, it has carried on business as a record label manufacturing and selling competitively-priced musical compact discs (“CDs”). It characterizes the Respondent, CMRRA, as a music licensing collective representing the interests of music publishers on whose behalf it issues licenses for the reproduction of musical works on payment of appropriate fees. The remaining corporate Respondents are said to be record labels and/or music publishers who, in this case, allegedly hold or control copyright in certain musical works for which the issuance of a mechanical license is required before reproduction can take place. Stargrove is aggrieved by the refusal of the Respondents to issue mechanical licenses authorizing the reproduction by Stargrove of five recordings, namely: the Beatles “*Love Me Do*”, the Beatles “*Can’t Buy Me Love*”, the Rolling Stones “*Little Red Rooster*”, Bob Dylan “*It Ain’t Me Babe*” and The Beach Boys “*Fun, Fun, Fun*”. In each case, copyright in the sound recording has expired but copyright in the musical work still exists in favour of at least some of the Respondents.

[9] According to the affidavit of the sole Director and Officer of Stargrove, Mr. Terry Perusini, its business model is based on the production and sale of low-cost CDs for musical works of three types:

- (a) sound recordings for which Stargrove owns the sound recording copyright;

- (b) sound recordings licensed to Stargrove from various independent labels; and
- (c) sound recordings that are now in the public domain and for which master recording licenses are no longer legally required but where mechanical licenses are still required from the publishers.

[10] In early 2015, Stargrove applied to the CMRRA seeking mechanical licenses to reproduce the five titles noted above. It submitted a royalty payment of \$13,799.10 based on a “standard” mechanical royalty rate of \$0.083 per song. The CMRRA cashed Stargrove’s cheque and Stargrove proceeded to produce CDs (12,400 units) for sale through a distributor to Walmart at a retail price of \$5. Sales of some of these CDs were strong.

[11] According to Mr. Perusini, from January 22, 2015 each of the Respondents took steps to refuse or to block the issuance of mechanical licenses to Stargrove or to otherwise discourage the sale of its CDs. On February 25, 2015, the CMRRA returned Stargrove’s royalty payment. At the same time negative reviews began to appear on the Walmart website criticizing the quality of Stargrove’s CDs. According to evidence filed on behalf of Stargrove, these supposed customer reviews were the product of an in-house campaign initiated by the Respondent, Universal Music Canada Inc. (“Universal Canada”), to convince Walmart to remove the Stargrove CDs from its shelves and to thereby protect Universal’s market share.

[12] Stargrove then made efforts to negotiate with CMRRA and with some of the Respondents, (Sony/ATV Music Publishing Canada Co., Sony Canada, ABKCO Music & Records, Inc. (“ABKCO”), Casablanca), to obtain the required mechanical licenses. The CMRRA did obtain authorizations for a few of the songs in issue but not for most of them. Stargrove has been unable to pursue its intended line of business in connection with the protected song titles and Mr. Perusini estimates an immediate loss of \$150,000 in wholesale sales through Walmart.

[13] Mr. Perusini characterizes the overall impact of the Respondents’ conduct in the following way:

Stargrove’s business model relies heavily on producing CD compilations of sound recordings that are in the public domain. The Respondents’ refusal to license Stargrove under usual licensing terms has caused losses to Stargrove and has cut off any future growth of the business.

I estimate that, if Stargrove’s business is able to continue and we are able to sell a mix of licensed sound recordings, our own sound recordings, and public domain sound recordings, we will achieve sales of \$3 to \$5 million per year in Canada.

Under our current business model, without being able to obtain mechanical licences on ordinary terms through CMRRA, Stargrove will go out of business.

[14] The affidavit of Mario Bouchard filed on behalf of Stargrove describes the typical business arrangements that apply to the issuance of mechanical licenses in Canada. Mr. Bouchard is a former general counsel to the Copyright Board. He acknowledges that compulsory licensing to record a musical work ended in 1988 and “in law, a record label [eg. Stargrove] should obtain the necessary mechanical licenses before pressing a CD, let alone releasing it” (see para 29). Nevertheless, according to Mr. Bouchard – and verified by David Basskin in a 2009 affidavit sworn in an unrelated Ontario legal proceeding – in practice record producers routinely release new recordings without first obtaining the requisite mechanical licenses from copyright holders or the CMRRA. When a mechanical license is issued by the CMRRA on behalf of the holder of the copyright, the necessary royalties are paid by the licensee on generally applicable business terms. It is of some additional note that Mr. Basskin’s affidavit also stated that “a given copyright owner is entitled to refuse a license request and might well do so...” (see Application Record at p 381, para 51). On the other hand, music publishers will often be motivated to obtain appropriate royalties for the reproduction of their songs.

[15] The general background to Stargrove’s claim to relief is captured in the first four paragraphs of its Proposed Notice of Application:

1. Stargrove is a record label that manufactures CD compilations of sound recordings of The Beatles, The Rolling Stones, and other artists for sale at low prices (\$5.00) at Walmart stores. It can offer such low prices because the sound recordings it uses are no longer protected by copyright; they are in the public domain. As such, Stargrove does not require a “master sound recording licence” to use the recordings.
2. Although the sound recordings are in the public domain, the musical works (songs) on the recordings continue to be copyright protected. Stargrove requires what are known as “mechanical licences” for each song it seeks to use. In Canada, there are standard industry practices and terms that govern the issuance of mechanical licences; for the songs relevant to this application, these are administered by the Canadian Musical Reproduction Rights Agency. Stargrove is willing to abide by those terms and practices. The Respondents, however, have banded together to shut Stargrove out, having CMRRA deny Stargrove any mechanical licences (not just for the titles in question).
3. Stargrove is being targeted for its low pricing model, but the real victims are consumers; instead of being able to buy popular titles for just \$5.00 per CD, they pay much more.
4. The Respondents have campaigned to block Stargrove by pressuring Stargrove’s distributor, concocting false negative reviews of Stargrove’s CDs, and having CMRRA refuse to deal with Stargrove on standard terms. They have violated sections 75,

76, and 77 of the Competition Act, depriving consumers of competitive prices and artificially extending copyright over public domain recordings. This has negatively affected competition. Stargrove seeks to be treated fairly, in accordance with standard industry terms. Since the Respondents are unwilling to engage with Stargrove, Stargrove asks this Tribunal to order them to do so.

[16] The Respondents oppose the granting of leave on various grounds discussed below.

The Test for Leave

[17] Subsection 103.1(1) of the *Competition Act*, RSC, 1985, c C-34 as amended (the “Act”) gives any person the right to apply to the Tribunal for leave to make an application under sections 75, 76 or 77 – the three provisions under which Stargrove seeks relief.

[18] Subsection 103.1(7) provides that leave may be granted under section 75 or section 77 if the Tribunal “has reason to believe that the applicant is directly and substantially affected in the applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section”.

[19] Subsection 103.1(7.1) authorizes the Tribunal to grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order. For this provision, the words “substantially affected” are not present.

[20] The general approach to the granting of leave for relief under section 75 was set out by Justice Marshall Rothstein in *Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339, [2005] 2 FCR 254:

[16] In *National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term “reasonable grounds to believe” she stated at paragraph 14 of her reasons:

“Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.”

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

[17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

[18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

[19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[21] The above discussion also informs the granting of leave under sections 76 and 77 (see also: *Safa Enterprises Inc. v Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19, at para 15).

III. ANALYSIS

[22] I am not satisfied that Stargrove has met its burden for leave to apply for relief under either section 75 or section 77. I am, however, satisfied that it has made a case for leave to seek relief under section 76.

[23] There are two fundamental weaknesses to Stargrove's claim to pursue relief under sections 75 and 77. Standing squarely in the way of a claim to section 75 relief is a decision of the Tribunal in *Canada (Competition Act, Director of Investigation and Research) v Warner Music Canada Ltd*, [1997] CCTD No 53, 78 CPR (3d) 321 ("*Warner Music*"). I do not agree with Stargrove's assertion that this decision can be distinguished or, alternatively, that it should be ignored.

[24] In *Warner Music*, the Commissioner brought an application alleging that the Respondents' (collectively "Warner Music") refusal to grant copyright licenses to a competitor on usual trade terms allowing it to make sound recordings from master recordings contravened section 75 of the Act.

[25] Warner Music successfully moved to strike the application. In striking out the Commissioner's application, the Tribunal said the following:

30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.

31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.

32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Director of Investigation and*

Research v. Tele-Direct (Publications) Inc., we are of the view that its statement is very compelling in the circumstances of the motion before us:

The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

The *Copyright Act* is similar to the *Trade-marks Act*, in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license. [Footnotes omitted]

[26] This analysis fully applies to the section 75 relief sought by Stargrove. Relief is simply not available under this provision where the impugned conduct involves the refusal to grant a license over copyrighted material. The ratio in *Warner Music* is further strengthened by the exception found in subsection 76(3) making price maintenance relief available notwithstanding the existence of exclusive intellectual property rights. If Parliament intended that relief under sections 75 or 77 could be had in the face of such an exclusive right, presumably it would have said so just as it did in section 76.

[27] The general concerns expressed by the Tribunal in *Warner Music* also apply to the availability of relief under section 77. There is simply no reasonable interpretation of section 77 that would make it applicable to the factual allegations advanced by Stargrove. Put simply, the conduct Stargrove complains about is not a form of exclusive dealing or tied selling as those terms are defined in the Act.

[28] The second fundamental deficiency in Stargrove's application for leave under sections 75 and 77 arises from its evidence concerning the impact of the alleged conduct on its business. Subsection 103.1(7) requires evidence of a direct and substantial affect. The evidence presented by Stargrove is manifestly insufficient to meet the burden it carries to show a "substantial" affect. Despite Mr. Perusini's acknowledgement that Stargrove's business model includes the sale of musical works it controls or which are now fully within the public domain, he has provided no evidence about the size of that part of its overall business relative to the market for the disputed musical works.

[29] I have no doubt that the copyrighted CDs Stargrove seeks to produce and sell represent a potentially lucrative market but I cannot tell on this record whether access to those products is possibly existential or simply profitable in some largely unsubstantiated

measure. To be substantial there must be an effect that is “important or significant”; it need not be such that the affected party will be unable to carry on: see *Nadeau Poultry Farm Limited v Group Westco Inc. et al*, 2009 Comp. Trib. 6. Mr. Perusini offers the bare conclusion that Stargrove will fail without access to these products but he provides no credible data in support of that opinion or to support his estimates of potential sales going forward. On the whole, this evidence is insufficient to give rise to a *bona fide* belief by the Tribunal that the denial of access to the musical works in issue could substantially affect Stargrove’s business and the application under sections 75 and 77 fails on that basis as well.

[30] I am satisfied that Stargrove has, however, met the threshold for leave under section 76 of the Act. As noted above, subsection 103.1(7.1) only requires that a party has been “directly affected” by the alleged reviewable conduct. For purposes of leave, that requirement is clearly met.

[31] In light of the limited scope of *Warner Music* it remains an open question whether a copyright is, for some statutory purposes, a “product”. In *Warner Music* at para 30 the Tribunal recognized that possibility: also see *Cinemas Guzzo Inc. v Canada*, 2005 FC 691 at para 56 aff’d, 2006 FCA 160.

[32] Perhaps of more significance is the recognition in subparagraph 76(1)(a)(ii) that reviewable price maintenance includes direct or indirect discriminatory conduct motivated by the low-pricing policy of another person.

[33] If Stargrove is able to establish that some or all of the Respondents, singularly or in concert, discriminated against it by refusing to issue mechanical licenses motivated by Stargrove’s low-pricing practices, an argument for section 76 relief could be available. The case for relief could be enhanced by credible evidence that mechanical licenses are routinely granted by music publishers to record labels on standard business terms and that Stargrove was treated differently.

[34] In *The Queen v Royal LePage Real Estate Services Ltd*, [1994] AJ No 823, 27 WCB (2d) 428, the Alberta Court of Queen’s Bench held that discrimination under the earlier equivalent criminal provision meant “treating a person differently than another without proper justification” (see para 25). Similarly, in the text *Competition Law of Canada* (Huntington, New York: Juris Publishing, 2003) (loose-leaf revision 22-2009) (Davies, Ward and Beck), the authors state:

The Background Papers also note with regard to the prohibition on refusing to supply “or otherwise discriminating” in now repealed paragraph 61(1)(b) (currently paragraph 76(1)(a)(ii)) that discrimination may “encompass certain unfair pressures that do not amount to a direct refusal to supply but that have the effect of disturbing the retailer’s suppliers, e.g., line breaking, lost or delayed orders.” [Footnotes omitted]

[35] By virtue of paragraph 76(3)(c), the fact that the impugned conduct is carried out by a party with an exclusive intellectual property right is not a bar to relief. Presumably,

by enacting this provision, Parliament recognized that some forms of anti-competitive conduct should be the subject of relief notwithstanding the existence of intellectual property rights. In the face of this provision, I do not agree that it is clear the authority to order a compulsory license resides only in section 32 of the Act. It also strikes me that discriminatory conduct falling under section 76 may not be “the mere exercise of an intellectual property right” as described in *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 28 and 34.

[36] I also agree with Stargrove that it is still an open question whether, in every instance, section 76 requires product resale or that a product input could never be the subject of relief. These are issues worthy of further consideration.

[37] There is also an argument to be made that relief for reviewable conduct under section 76 is not effectively the equivalent of a compulsory licensing regime. If, in a particular case, a breach of section 76 is proven, it is arguably open to the Tribunal to order an appropriate remedy under that provision. This presumably would not open the door to anyone to obtain a copyright license regardless of the basis for its refusal. Where the owner of an exclusive intellectual property right lawfully refuses a license, no compulsory remedy would be available to the party affected.

[38] I am also satisfied that sufficient credible evidence has been produced to support a *bona fide* belief that holding Stargrove out of the market could have an adverse effect on competition in a market. In an email exhibited to the affidavit of Ms. Anna Kusmider, a representative from Universal Canada noted one-week CD sales of Universal content through Walmart of 4,172 units. The author expressed concern about maintaining market share. Other evidence presented by Mr. Perusini speaks to Stargrove’s initial success in the retail market and to Walmart’s continuing interest in Stargrove’s CDs. The Respondents’ alleged denials of meaningful access to the market could also be an indication of their concern about damage to the existing higher-priced market for this music.

[39] I acknowledge that the evidence bearing on each Respondent’s motives is not particularly strong. This is, however, evidence that lies exclusively within the knowledge of the Respondents and they have not produced any evidence in rebuttal. In the face of the unanswered evidence submitted by Stargrove, I am satisfied that it has met the relatively low evidentiary threshold on this point.

[40] Sony Canada argues that Stargrove’s application for leave should be dismissed against it because it is not a music publisher and holds no copyright interests in any of the musical works in issue. Casablanca makes a similar argument. It says that Stargrove has mistakenly attributed to Casablanca copyright over three songs that, until September 30, 2015, was owned or controlled by a third party (Red Brick songs).

[41] In an affidavit sworn by Ms. Jennifer Mitchell – who is the President of both Red Brick Songs and Casablanca – it is asserted that “the Three Songs were never administered by Casablanca”. She also stated that Casablanca “does not have the ability to grant licenses to Red Brick songs”.

[42] This evidence is seemingly contradicted by an email from the CMRRA to Stargrove stating that Casablanca represents the three songs in issue and had instructed CMRRA not to issue any licenses to Stargrove. This apparent contradiction cannot be resolved on the record before me and, until it is, there is no basis for dismissing this application against Casablanca.

[43] I am similarly not persuaded that it is appropriate at this early stage to dismiss the application for leave against Sony Canada. It may well be correct that Sony Canada does not own or control copyright in any musical works. But that fact may not be sufficient on its own to exempt it from any form of section 76 relief. There is evidence in the record that some of the Respondents may have acted in concert to exclude Stargrove. That is an issue deserving of further evidentiary exploration. The same concern arises in connection with the involvement of the CMRRA. It was presumably acting throughout as an agent but its joinder as a Respondent may be necessary to give practical effect to any order that might ultimately be made in favour of Stargrove.

[44] ABKCO argues that this application should be dismissed against it because the Tribunal lacks jurisdiction where service was carried out *ex juris*. Most of ABKCO's arguments, however, go directly to the merits of the application. I agree with Stargrove that the appropriate approach to this issue required a separate motion challenging the Tribunal's jurisdiction. By challenging this application on the merits, ABKCO has consented to the Tribunal's jurisdiction; see *Van Damme v Gelber*, 2013 ONCA 388 at para 22, 363 DLR (4th) 250.

[45] For the foregoing reasons, this application is allowed in part with costs payable to Stargrove at the mid-point of Column IV.

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[46] The application for leave seeking relief under section 76 of the Act is allowed;

[47] The application for leave seeking leave for relief under sections 75 and 77 of the Act is dismissed; and

[48] The Applicant is awarded costs against the Respondents, jointly and severally, at the mid-point of Column IV.

DATED at Ottawa, this 14th day of December, 2015.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) R.L. Barnes

COUNSEL:

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