CANADIAN COMPETITION LAW MOOT

Competition Tribunal of Canada

Reference: *The Commissioner of Competition v Jungle Inc.*

IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, as amended;

BETWEEN:

The Commissioner of Competition
(Applicant)

and

JUNGLE, INC.
(Respondent)

REASONS FOR ORDER DATED OCTOBER 15, 2018

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A. Executive Summary

[1] The Commissioner of Competition (the "Commissioner") has filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), seeking a divesture order to remedy the substantial lessening of competition that (s)he says is likely to occur as a result of Jungle, Inc.'s ("Jungle") acquisition of Streamworks Inc. ("Streamworks").

[2] Jungle is a corporation offering consumers, among other things, a subscription-based digital music streaming service (i.e., Jungle Music Unlimited) that, in turn, gives consumers on-demand ad-free access to millions of songs from artists all over the world. In addition to its streaming service, Jungle also offers through its online retail portal individual songs and albums that can be purchased and downloaded.

[3] Streamworks is a corporation providing, among other things, both free and subscription-based digital music streaming services. The free service offers consumers access to randomly selected music based on consumer preferences, while the subscription-based service is an on-demand and ad-free service that additionally allows customers to set up to 3,333 songs ("downloads") to be available to listen to offline. Access to this "offline" feature, however, ends when the subscription ends.

[4] The Commissioner submits that the merger is likely to result in a substantial lessening of competition ("SLC") in the market for streaming services ("streaming"), or, in the alternative, the market for providing consumers with paid access to digital music ("online retail"). In brief, the Commissioner contends that this SLC is established by virtue of the price and output effects identified in the work of the Commissioner's economic expert. In addition, the Commissioner contends that the removal of Streamworks from the market removes a particularly vigorous, effective and innovative competitor that was playing a uniquely disruptive role, and, moreover, that the reduction of industry research and development ("R & D") spending that has resulted from the merger serves to further exacerbate that SLC.

[5] For its part, Jungle submits that the merger has not resulted and will not result in an SLC. It argues that Jungle's post-merger market share for streaming and online retail of digital music in Canada does not exceed the Commissioner's safe-harbour threshold and as such, *prima facie*, the merger is not anti-competitive. When online retail and streaming is combined with bricks and mortar retail of music, Jungle notes that its market share drops to below the safe-harbour threshold. Jungle further argues that in any event, large companies that operate in online retail and streaming, notably Apricot and Lougle, amount to effective remaining competitors which have prevented and will continue to prevent any SLC from occurring.

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[6] The parties spent a great deal of time making submissions and tendering evidence on the issue of product market definition.[1] In fact, at times it seemed as though the parties were collectively of the view that this single issue would be dispositive of the matter. For the reasons set out in Part H, the Tribunal has decided it need not determine which party was correct with respect to market definition. Rather, the Tribunal is able to rely on the evidence before it and, independent of any conclusion as to market definition, determine that this merger is likely to result in an SLC.

[7] Pre-merger, the parties were of the view that they were each other's most significant competitors. Jungle itself recognized Streamworks as the leader in music streaming and Jungle often found itself on the reactive end of having to respond to Streamworks' aggressive price discounts and new product offerings. The price and output effects identified by the Commissioner's expert bear out this evidence on the ground and establish that an SLC is likely to result from the merger. Regardless, the removal of Streamworks as a uniquely vigorous competitor, given the absence of effective remaining competition, and the reduction in R & D expenditures resulting from the merger results in an SLC; simply put, the benefits of dynamic competition cannot be measured solely by recourse to traditional indicia such as output or (even) price effects.

[8] In terms of remedy, the Tribunal has considered the proposals submitted by the parties and determined that both proposals would be, in essence, equally effective. Given its remedial discretion, the Tribunal is of the view that it may consider so-called "public interest" factors in designing the appropriate remedy, indeed, that it must consider such factors for purposes of breaking the tie between equally effective remedy alternatives. In this particular case, the public interest benefits favour Jungle's remedy proposal – the divestiture of Jungle's streaming services unit in Toronto.

[9] Jungle did not plead an efficiencies defence pursuant to section 96 of the Act, nor did they make argument during the hearing or lead evidence in support of any such defence. As such, the Tribunal did not consider the application of section 96 of the Act.

B. Introduction

[10] Pursuant to an asset purchase agreement dated October 4, 2017, Jungle proposed to purchase all aspects of the Streamworks business. The parties filed their pre-notification forms with the Commissioner on November 1, 2017. The Commissioner issued a Supplementary Information Request to the parties on December 1, 2017. The parties certified their response to that Request on January 5, 2018 and closed the merger on February 5, 2018.

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[1] The parties agree, and the Tribunal accepts, that the relevant geographic market in question is national (i.e., Canada).

[11] On February 2, 2018, the Commissioner applied for an order under section 92 of the Act, seeking a divestiture order. In his application, the Commissioner alleges that the merger is likely to give rise to an SLC in the market for digital streaming, or in the alternative, online retail of music. The Commissioner's position relies heavily on quantitative economic work performed by Dr. Lola Pearson, as well as evidence suggesting that the merger has resulted in the removal of a "maverick" and a reduction in R & D spend by the merged entity.

[12] By letter dated February 5, 2018, counsel to Jungle wrote the Commissioner and the Tribunal advising that, in light of the Tribunal establishing an expedited schedule for the application, Jungle would continue to operate its Streamworks and Jungle online music services in a (somewhat) independent manner, at least in terms of their employees and principal assets, pending the Tribunal's decision on this application.

[13] The hearing of this matter occurred over the first two weeks of September, 2018.

C. The Parties

[14] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

[15] Jungle.com, Inc. is a publicly traded Delaware corporation, which, among other things, operates as one of the largest electronic commerce, online retail and cloud computing companies in the world with its principal place of business in Seattle, Washington. Jungle, a Delaware corporation with its principal place of business in Tacoma, Washington, is a wholly owned subsidiary of Jungle.com, Inc., and is responsible for, among other things, online retail services within Canada. As part of these Canadian responsibilities, Jungle operates www.jungle.ca, through which Canadian consumers can purchase, among other things, on-demand streamed access to music via the Jungle Music Unlimited service and/or purchase online individual songs, albums or compilations for download. Jungle's Canadian offices are located in Toronto, Ontario and house approximately 200 employees whom primarily service the Canadian part of the business.

[16] Streamworks is a Swedish company that offers, among other things, digital music streaming services to Canadian consumers. Music can be streamed by way of the "Streamify" package which offers consumers the ability to stream curated playlists of music for free but which includes intermittent advertisements between songs, or it can be streamed by way of Streamworks' paid subscription service, "Streamium", which provides features such as on-demand streaming of music, improved streaming quality, and the ability to access songs offline. Streamworks' Canadian office, located in the new borough of Streamington, Ontario, houses approximately 800 employees (representing

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Streamworks' largest employment centre outside of Sweden) whom service all of Streamworks' business in the Americas.

D. Industry Overview

[17] Prior to the turn of the past century, the recorded music industry was relatively straightforward. Artists, with the help of record companies, recorded songs, (generally) bundled them together in physical media (e.g., vinyl, cassette, compact disc), and distributed those media to brick and mortar or mail order retailers across the world, who in turn sold these recordings to consumers.

[18] This model of music distribution remained more or less untouched until the late 1990s, when the industry underwent a technology-based disruption: consumers learned that it was possible to make digital copies of physical media and "share" individual songs over the Internet through file sharing applications. The music industry opposed these developments, mainly by attempting to use legal means to keep their business model intact, without (material) success.

[19] From this disruption, a new distribution model emerged. In 2003, Apricot launched aTunes Music, which enabled consumers to purchase individual songs for digital download from a wide library of artists and recordings. In the years that followed, a number of similar businesses developed, many of which continue to this day to retail individual songs for download. Currently, Apricot, Jungle and Lougle are the three largest online retail music providers. Each operates under a similar business model: consumers pay roughly $1 to purchase a song and download it to their computer and/or smartphone with some discounts available if the consumer choses to purchase an entire album or collection.

[20] In or around the same time, online streaming of music began to take hold. Pioneered by Streamworks, consumers were provided with the ability to listen to digital music online; namely, in much the same way as radio stations operate consumers were able to freely listen to randomly selected songs and curated playlists, at the cost of having to listen to advertisements. This business model remains prevalent today and is exemplified by Streamworks' Streamify service.

[21] In 2008, another new business model arose – subscription-based streaming. Once again pioneered by Streamworks, subscription-based streaming services invited consumers to pay monthly or otherwise intermittent subscription fees that, in turn, allowed them access to an extensive library of music. Unlike the free online streaming services, consumers subscribing to a paid streaming service have on-demand digital access to specific songs of their choosing rather than requiring the consumer to download and store songs on their computer or smartphone. Subscribers are also allowed to access offline selected (downloaded) songs on their device(s) while their subscription is in effect. Depending on

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the company, the number of selected songs available offline to a subscriber at a time could be upwards of 1,000. This business model is exemplified by Streamworks' Streamium service and Jungle's Jungle Music Unlimited service.

[22] Each new business model has had a significant effect on the last. In the early 2000s, as the online retail model flourished, bricks and mortar music retailers floundered. More recently, streaming has significantly displaced online retail. Recent Canadian Radio-television and Telecommunications ("CRTC") research shows that as many as 70% of all Canadians stream music on at least a weekly basis. This, according to the research, has translated into a $70 million (23.8%) decline in purchases by Canadians of online retail music from its peak in 2013. The CRTC has stated that online retail purchases are in a state of "decline" while streaming is said to be the "growth" segment of the industry.

[23] Since the launch of Streamworks' Streamium service in 2008, each of the significant traditional online retailers – Lougle, Apricot, and Jungle – have launched competing paid-subscription streaming services of their own: Lougle Play Music in 2011, Apricot Music in 2015, and Jungle Music Unlimited in 2016.

Review of "Market Shares"

[24] ULF's TuneScan service tracks sales of both single-song downloads and subscription services on a country-by-country basis. The parties agree that TuneScan is a reliable metric of sales in Canada for the purposes of this proceeding. This data does not include bricks and mortar or mail order sales of music in a physical format (e.g., CD or vinyl) but it is accepted that these sales represent less than $5 million in Canada on an annual basis. None of the online music providers identified in these tables participate in the bricks and mortar or mail order businesses. The Canadian data is reproduced below:

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Streaming Only

Company	Revenues	Share by Revenues
Streamworks	$40,000,000	40%
Jungle	$25,000,000	25%
Apricot	$20,000,000	20%
Lougle	$10,000,000	10%
Others (combined)	$5,000,000	5%
PARTIES' POST-MERGER SHARE		65%

Streaming + Online Retail

Company	Online Retail Revenues	Streaming Revenues	Total Revenues	Share by Total Revenues
Streamworks	$0	$40,000,000	$40,000,000	10%
Jungle	$75,000,000	$25,000,000	$100,000,000	25%
Apricot	$100,000,000	$20,000,000	$120,000,000	30%
Lougle	$70,000,000	$10,000,000	$80,000,000	20%
Others(combined)	$56,000,000	$5,000,000	$60,000,000	15%
PARTIES' POST-MERGER SHARE				35%

E. Positions of the Parties

The Commissioner

[25] The Commissioner alleges that both Streamworks and Jungle compete against each other in the same product market through their operations of streaming services, or, in the alternative, by providing consumers with paid access to digital music: post-merger, Jungle will have a market share in excess of 60% with respect to streaming services, and a market share at or above 35% with respect to the provision of paid access to digital music. This, the Commissioner submits, is a meaningful indicator that post-merger, Jungle will enjoy significant market power. The Commissioner argues that the effect of this market power will be to increase prices for streaming and online retail and/ or reduce output to a material degree, as quantified by the expert economic evidence proffered by the Commissioner.

[26] Furthermore, the Commissioner argues that Streamworks was a “maverick” competitor with a unique business model (only streaming) whose innovations forced incumbent online music providers to expand their offerings into streaming services and take certain price actions. The Commissioner contends that the primary remaining competitors, namely Apricot and Lougle, will not provide this kind of dynamic competition, certainly not to the extent necessary to mitigate the anti-competitive effects of the merger, and that the removal of such a competitor constitutes a distinct, and material, anti-competitive effect of the merger.

[27] The Commissioner also maintains that the merger will have a significant effect on innovation since the aggregate spend on R & D in the industry will be reduced materially. The Commissioner argues that prior to announcing the merger, both Jungle and Streamworks were each spending approximately $100 million annually ($200 million combined) on R & D relating to online music; however, post-merger, that number is

projected to be reduced to $120 million. This reduction in R & D spend, the Commissioner contends, will reduce innovation and also constitutes a distinct, and material, anti-competitive effect of the merger.

[28] In terms of the remedy sought, the Commissioner proposes the divesture of Streamworks' streaming services business in Streamington, Ontario, and all intellectual property and other rights necessary to allow for a new entrant to undertake a business (substantially) similar to that undertaken by Streamworks in Canada prior to the merger.

The Respondent

[29] Jungle argues that in order to reach any SLC conclusion (or indeed determine a proper remedy), the Tribunal is required to first determine the product market(s) and, in that regard, should conclude that the relevant antitrust market includes at least streaming and online retail ("all online music"). Indeed, Jungle submits that properly construed, the relevant product market for purposes of the Tribunal's consideration of the matter should include all music sold to consumers in any format. On that basis, Jungle argues that its combined post-merger market share is at or below the Commissioner's safe-harbour threshold and the merger must therefore be presumed not to result in an SLC.

[30] Jungle further argues that Streamworks was not unique amongst the industry participants and that companies such as Apricot and Lougle have not only demonstrated their ability to offer consumers streaming services but have, repeatedly, demonstrated their ability to innovate and to expend the resources necessary to do so. Jungle argues that Apricot, Lougle, and the other remaining competitors will act as strong constraints against any potential exercise of market power by Jungle, especially given the evidence that consumers can easily switch between online music service providers. As such, Jungle argues that any attempted price increase by Jungle (post-merger) would immediately result in a migration of customers to Apricot, Lougle, or others (the majority of whom offer substantially the same catalogue of music) to such an extent that any price increases could not be sustained.

[31] In response to the Commissioner's argument regarding Jungle's reduced R & D spend and potential effect on innovation, Jungle justifies the reduction on the basis that, prior to the merger, the companies were effectively duplicating certain of their R & D efforts and that the reduction in R & D spend will not reduce the amount and/or quality of innovation in the industry. Jungle notes that the Commissioner has not adduced any evidence in the latter regard.

[32] In the event that the Tribunal determines a remedy is warranted, Jungle submits that it should be required to divest Jungle's streaming business, and all necessary intellectual and other property, in Toronto.

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F. Expert Economic Evidence

[33] Both the Respondent and the Commissioner offer expert economic evidence in support of their positions in this matter. The Commissioner proffers a report by Dr. Lola Pearson and Jungle a report by Dr. Chloe Johnson.

Commissioner's Expert Evidence – Report of Dr. Pearson

[34] Dr. Pearson's analysis focuses primarily on quantitative measures to assess any harm to consumers resulting from the merger. The first part of the analysis, purports to show that single-song sales, and even prices, dropped materially in Canada following the introduction of Streamworks' streaming services. Dr. Pearson suggests that this is unsurprising and posits that streaming services are likely to displace single-song sales almost entirely over a longer time horizon as higher-speed wireless networks become more ubiquitous. Ultimately, Dr. Pearson concludes that a hypothetical monopolist providing streaming music services could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). Indeed, Dr. Pearson's quantitative analysis posits that the merger will result in a 9% increase in the price of streaming services and a 7% increase in the price of online retail music to Canadians, along with reduced output (including with respect to the quality and/or variety of the available music).

[35] Dr. Pearson also notes that following the entry of streaming services, online retailers, including Jungle, resorted to significant discounting activity in an effort to offset decreases in sales. Dr. Pearson points to the fact that Streamworks, the market leader in streaming services, has a unique incentive to price streaming services aggressively as they do not operate an online retail business and, as such, do not risk cannibalizing sales of music, unlike Apricot, Jungle, and Lougle. In Dr. Pearson's view, Streamworks is a maverick who has played a key role in lowering consumer prices for online retail (and even streaming services) and has, at minimum, capped the ability of businesses to impose price increases in the online retail of music.

[36] Dr. Pearson gave no opinions with respect to the reduction in R & D expenditures, save to state that the removal of a significant competing innovator was likely to affect dynamic competition, reducing overall innovation in the industry.

Respondent's Expert Evidence – Report of Dr. Johnson

[37] Dr. Johnson's report offers an analysis principally focused on competitive effects related to what she argues to be the relevant antitrust market. In Dr. Johnson's view, at a minimum, online retail and streamed music must be included in the relevant antitrust market owing to the fact that they are functionally interchangeable – she sees these two business models as simply constituting different ways to the same end product, namely, the digital delivery of a song to a consumer's device. In her view, a hypothetical monopolist controlling both streaming and online retail could profitably impose a SSNIP,

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but that would not be the case for a hypothetical monopoly of "online retail" or "streaming services". In essence, Dr. Johnson advocates for a market definition best characterized as "digital songs are digital songs".

[38] Based on this songs are songs market definition, Dr. Johnson notes that the combined market share of the parties remains low following the merger, indicating that the merger is unlikely to create or enhance market power. Dr. Johnson also notes that the merged entity continues to face significant competition from Apricot, Lougle, and others.

[39] With respect to Dr. Pearson's report, Dr. Johnson provides a detailed critique of the methodology employed by Dr. Pearson and, using various econometric analyses that have been considered and accepted by this Tribunal in the past (e.g., merger simulation), concludes that no (anti)competitive effects, such as price increases, have resulted or are likely to result from the merger.

[40] Dr. Johnson echoes Jungle's submissions that Streamworks did not play a "maverick" role and states that absent output effects (e.g., the introduction of new products or services of value to consumers) no conclusions could be drawn from the reduction in R & D spend, noting that even Streamworks documents called into question the (lack of) innovative output generated from Streamworks' annual $100m spend.

G. The Issues

[41] At their foundation, the parties' submissions raise the following, principally legal, issues relating to the SLC test in section 92 of the Act and the scope of the Tribunal's discretion with respect to remedies.

[42] As regards section 92, the principal issues presented by this application are:

a) does the Tribunal have to make a determination with respect to relevant product (or geographic) markets to make an SLC determination or can it make such a determination on evidence of competitive effects alone?; and

b) does the Tribunal have to rely on quantitative evidence for purposes of making an SLC determination or can it conclude an SLC will occur based on qualitative evidence, specifically, can the Tribunal rely solely on the removal of a "maverick" and/or the reduction in R & D post-merger as its basis for concluding an SLC?

[43] As regards any remedial order the Tribunal may make, the principal issues presented by this application are:

a) what types of factors can the Tribunal consider when making a remedial order, specifically, can the Tribunal consider so-called "public interest" factors; and,

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b) if it can consider public interest factors, are there any limitations on those factors and if so what types of public interest factors can be taken into account, for example can they include the effect of the merger on employment or creative output in Canada?

H. Tribunal's Analysis

Market Definition

[44] Traditionally, the Tribunal has commenced its merger analysis by defining the relevant product (and geographic) market(s) and then proceeded with a consideration of factors enumerated under section 93 of the Act to assess whether a merger has resulted or is likely to result in a substantial lessening or prevention of competition. *Competition Law of Canada*, edited by Calvin S. Goldman and John D. Bodrug, at page 10-27, states: "the starting point of any assessment of whether a transaction is likely to give rise to a substantial prevention or lessening of competition is to identify the product and geographic markets that may be affected by the merger"(emphasis added).

[45] This approach to merger analysis was recently employed by the Tribunal in *Commissioner of Competition v CCS Corporation*, 2012 Comp. Trib. 14 ("CCS") at paragraph 58:

> In defining relevant markets, the Tribunal generally follows the hypothetical monopolist approach. As noted in *Commissioner of Competition v. Superior Propane*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (Comp. Trib.) ("Propane 1"), at para. 57, the Tribunal embraces the description of that approach set forth at paragraph 4.3 in the Commissioner's Merger Enforcement Guidelines ("MEGs"), which state:
>
> *Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.*

[46] That said, and notwithstanding the approach taken in *CCS*, the Tribunal is of the view that in this case it is not necessary for the Tribunal to arrive at a decision on relevant market definition. Rather, having regard to the evidence before it, the Tribunal is able to reach a conclusion on SLC given the evidence demonstrating that the merger is likely to lead to anti-competitive effects.

[47] Even though the Tribunal has gone through the exercise of defining relevant markets in the past, its past decisions do not require it to do so before proceeding further with its analysis under section 92.[2] *CCS* refers to a general practice that is not set out in statute, but rather is summarized in competition law literature and applied at the discretion of the Commissioner in his reviews and the Tribunal in its determination, in each case based on the facts of the matter at hand.

[48] The Act does not, explicitly or implicitly, require the Tribunal to define relevant markets in order to meet the test set out in section 92, a test which only involves determining whether or not a merger prevents or lessens competition substantially, or is likely to do so. If the Tribunal finds that the Commissioner demonstrates on a balance of probabilities that there is evidence of an actual or likely substantial lessening or prevention of competition then it is open to this Tribunal to issue an order, regardless of a finding on market definition. This is all the more so the case where the evidence in respect of SLC is persuasive regardless of which market definition is adopted.

SLC

[49] In assessing whether the merger has resulted in an SLC, the Tribunal will start by considering the economic evidence adduced by the Commissioner and then proceed to consider the relevant factors listed under section 93 of the Act.

[50] In this case, the relevant factors of greatest import are (1) whether the merger has removed a vigorous and effective competitor; (2) whether the merger has impeded or will impede change and innovation; (3) whether the remaining competition is sufficiently effective to constrain an exercise of market power by the merged-entity; and (4) barriers to entry.

Assessment of the economic evidence adduced by the Commissioner's expert

[51] The Tribunal has concluded that the evidence presented by Dr. Pearson (as summarized in paragraphs 34-36 above) is compelling, and to be preferred over that proffered by Dr. Johnson. That said, the Tribunal is of the view that it need not rely on either Dr. Pearson's or Dr. Johnson's evidence in arriving at its conclusion. Rather, the qualitative evidence (discussed below) is sufficient to allow the Tribunal to conclude that the merger is likely to result in an SLC. Therefore, to the extent the Tribunal has relied on Dr. Pearson's evidence, it has done so solely for the purpose of supporting the Tribunal's finding of an SLC arising from its review of the relevant qualitative evidence.

Parties' documents

[52] A high volume of documents were put before the Tribunal, many of which set out the parties' own internal thinking on who their competitors are and what actions each of the

[2] *Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15

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parties should take in light of an actual and prospective action taken by these competitors. The Tribunal finds these documents to be particularly germane to its assessment of the merger, particularly where there is strong disagreement as between the Commissioner and Jungle as to the proper market definition, and by extension, the proper scope of competitive overlap as between Streamworks and Jungle.

[53] The documents internal to both parties unequivocally recognize each other as their ‘closest competitors’. Moreover, there are countless e-mails, reports, and presentations, generating from and circulated to all levels of management within both companies that evidence a particular competitive rivalry as between the parties. This includes, for example, historical documents that evidence operational responses by Jungle to Streamworks’ entry into the market and to pricing decisions being made by Streamworks. Similarly, the Commissioner has presented the Tribunal with internal Streamworks documents that evidence operational responses to (and monitoring of) pricing decisions being made by Jungle with respect to both its subscription streaming services and online retail price points.

[54] In one of the most telling pieces of evidence, the Tribunal was shown a sampling of weekly reports that are generated by mid-level Jungle employees and provided to Jungle’s CEO titled “Competitor Watch List”. This watch list, in essence, set out Jungle’s price points for various benchmark products as against the competitors thought to be the market leaders and/or closest competitors with respect to the product at issue. “[D]igital streaming services” was one of the benchmark products that is tracked in these reports, and for the several quarters pre-merger the “market leader” against which Jungle’s price points were being tracked for its Jungle Music Unlimited service offering was Streamworks.

[55] The Tribunal’s attention was also drawn to an internal 2017 Streamworks report titled “The Way Ahead: pricing to win”. In this report, Streamworks retrospectively assessed its market growth over the preceding three years with a view to identifying opportunities on a go forward basis. In each instance the assessment referenced other competitors or market participants and Jungle was frequently mentioned. In fact, on a slide referencing some of the challenges Streamworks may face in the near future, the following statement appeared: “aggressive pricing by Jungle”. Free from the contemplation of regulatory scrutiny, the parties’ own employees and management were collectively of the view that Streamworks and Jungle were direct (indeed vigorous) competitors.

[56] On this basis, the Tribunal has concluded that the merger is likely to result, if it has not already, in an SLC.

Removal of a vigorous and effective competitor

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[57] Pursuant to subsection 93(f) of the Act, in determining whether a merger is likely to lessen competition substantially, the Tribunal may have regard to "any likelihood that the merger … will or would result in the removal of a vigorous and effective competitor". Paragraph 6.5 of the Competition Bureau's *Merger Enforcement Guidelines* ("MEGs") provides:

> 6.5 The Bureau assesses the competitive attributes of the target business to determine whether the merger will likely result in the removal of a vigorous and effective competitor. In addition to the forms of rivalry discussed above, the Bureau's assessment includes consideration of whether one of the merging parties:
>
> - has a history of not following price increases or market stabilizing initiatives by competitors or of leading price reductions;
> - provides unique service, warranty or other terms to the market;
> - has recently expanded capacity or has plans to do so;
> - has recently made gains in market share or is in a position to do so; or
> - has recently acquired intellectual property rights or other inputs, or has developed product features that enhance its ability to compete in the market, or will soon do so.

[58] Footnote 33 of the MEGs also states the following in this regard:

> See section 93(f) of the Act. A firm that is a vigorous and effective competitor often plays an important role in pressuring other firms to compete more intensely with respect to existing products or in the development of new products. A firm does not have to be among the larger competitors in a market in order to be a vigorous and effective competitor. Small firms can exercise an influence on competition that is disproportionate to their size. Mavericks (described in "Coordinated Effects," in Part 6, below) are one type of vigorous and effective competitor.

[59] The evidence proffered by the Commissioner demonstrates that Streamworks is a maverick who has played a key role in both lowering prices for streaming services and, in doing so, has, at minimum, capped the ability of retailers to impose price increases in respect of online retail. Based on this evidence, the Tribunal determines that the merger has resulted in the removal of a vigorous and effective competitor, and that this effect is not limited to that identified in Dr. Pearson's quantitative analysis discussed above.

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[60] Indeed, in a sector with few competitors, Streamworks, with its unique business model, has exercised competitive discipline on its rivals in a way that is arguably disproportionate to its relative size. Accordingly, the loss of Streamworks is likely to have significant anti-competitive effects that cannot reasonably be estimated using quantitative methods, including those effects that may flow from this sector becoming even more concentrated.

Impeding Innovation

[61] Pursuant to subsection 93(g) of the Act, in determining whether a merger is likely to lessen competition substantially, the Tribunal may have regard to “the nature and extent of change and innovation in a relevant market”. Paragraph 6.9 of the MEGs states:

> A merger may facilitate the exercise of market power by impeding the process of change and innovation. For example, when a merger eliminates an innovative firm that presents a serious threat to incumbents, the merger may hinder or delay the introduction of new products, processes, marketing approaches, and aggressive research and development initiatives or business methods.

[62] Consistent with the approach enunciated in the MEGs, the Commissioner has argued that the merger has impeded and will impede future innovation in the online music industry (as noted above, the development of the technology necessary for Streamworks to provide its streaming services has spurred other players in the online music industry to innovate as well as to compete on price in their pre-existing online retail business). As the Commissioner noted, the evidence is that Jungle and Streamworks were each spending approximately $100 million dollars annually on post-merger R & D in respect of their online music services, but Jungle has reduced the aggregate post-merger R & D spend to $120 million annually. The Commissioner asks the Tribunal to consider this reduction as a (stand-alone) anti-competitive effect of the merger on the grounds that it impedes innovation with respect to online music services.

[63] Not only does Jungle argue that this reduction in R & D should not be classified by the Tribunal as an anti-competitive effect, it urges the Tribunal to consider it to be an efficiency directly attributable to the merger that promotes the principal objective of the Act. Moreover, Jungle contends that the R & D reduction reflects an elimination of R & D duplication by Jungle and Streamworks without any reduction in innovative or other output, and notes that the Commissioner has proffered no evidence to suggest any output effect will result from the expenditure reductions.

[64] Considering all the evidence, the Tribunal finds that while it is possible that some of the R & D initiatives that have been eliminated were duplicative, it is without question that

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not all was duplicative. Regardless, the Tribunal is of the view that such a significant reduction in R & D expenditure – and the enhanced rivalry brought about by separate companies each expending considerable and comparable sums on R & D – will have an anti-competitive effect. The Tribunal notes that Jungle has not pleaded the "efficiency defence" available in section 96 of the Act, and Jungle's efficiency enhancement claims were too general, and unsupported by any expert testimony, to undermine the Tribunal's conclusion.

[65] Since the Commissioner did not proffer any economic evidence on the output effect of the reduced R & D investment, the Tribunal must assess the Commissioner's assertion that a reduction of R & D spending has impeded or is likely to impede innovation, and thereby result in an SLC, at a theoretical level. The Tribunal agrees with the Commissioner's position that, for certain technology driven industries like online music, common sense leads to the conclusion that a high level of R & D spending is imperative for competition to be maintained or enhanced. Thus, consistent with the Tribunal's discussion of whether the merger resulted in the removal of a vigorous competitor, the Tribunal has determined that the reduction in the overall R & D spend by the merged entity will likely materially and negatively affect innovation (competition) in the online music industry, thereby resulting in a substantial lessening of competition.

Remaining Competition Does Not Constrain the Exercise of Market Power

[66] Following the conclusion of the merger, the only significant competitors for the merged entity are Apricot and Lougle. Jungle has proffered no evidence that convinces the Tribunal that those parties will effectively constrain the exercise of market power by the merged entity. Indeed, given the evidence of the maverick role played by Streamworks and the otherwise parallel behaviour of Apricot, Lougle and Jungle in the online retail marketplace, the Tribunal is of the view that the merger materially enhances the risk that (additional) anti-competitive effects will result from the merger as a consequence of coordinated conduct by the merged entity, Apricot and Lougle.

Barriers to entry

[67] There is no dispute amongst the parties that the barriers to entry for the provision of online music are very high. Acquiring, developing, maintaining and upgrading the required intellectual property and technology (software and hardware) is costly and time consuming, and given the maturity of the marketplace and the importance to users of 'always on' access to online music, significant reputational barriers exist for any new entrant. In short, consistent with the position of the parties, the Tribunal concludes that barriers to entry are substantial.

Conclusion re SLC

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[68] For the reasons cited above, the Tribunal determines that the merger is likely to result in an SLC.

I. Remedy

Overview of jurisprudence

[69] Having concluded the merger is likely to result in an SLC, the Tribunal must consider the appropriate remedy. The Supreme Court of Canada set out the relevant test in *Director of Investigation and Research v. Southam Inc.*, [1997] 71 C.P.R. (3d) 417 at 445-446:

> The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition. See *Competition Act*, s. 92(1). <u>It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger</u>...
>
> (…)
>
> (. . .) If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective ... [Emphasis added]

[70] The Tribunal sought and received separate submissions from the parties with respect to the appropriate remedy, following its SLC finding, and was presented with a request by the Commissioner that the Tribunal order the divesture of Streamworks' streaming services business in Streamington, Ontario and a request by Jungle that the Tribunal order a divestiture of Jungle's streaming services business in Toronto, Ontario.

[71] Subsection 92(1) of the Act sets out the Tribunal's jurisdiction to order a remedy upon finding that a merger prevents or lessens or is likely to prevent or lessen competition substantially:

> Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially … the Tribunal may, subject to sections 94 to 96,

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(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action …

[72] As both remedies proposed by the parties amount to a disposal of "assets" under subparagraph 92(1)(e)(ii), the Tribunal has concluded that the remedies are within its powers and focused its assessment on the effectiveness of each proposed remedy, as well as other issues related to the exercise of its remedial discretion.

Commissioner's Remedy Submission

[73] The Commissioner submitted that the divestiture of Streamworks' business in Streamington, Ontario, including all related intellectual and other property, to a purchaser (a new entrant) would provide the purchaser with an immediate and leading position in the market, and thus would be effective at eliminating the SLC and certain to do so. The evidence adduced during the Tribunal's hearing supported these contentions. The Commissioner also submitted that because Streamworks is the market leader, was the entity acquired by Jungle, and is only partially integrated into Jungle's business, divesting Streamworks would be easier and timelier; however, the evidence was inconclusive in this respect.

Respondent's Remedy Submission

[74] Jungle submitted that the divesture of Jungle's streaming services business in Toronto, Ontario, including all related intellectual property and other necessary assets, would allow the purchaser (a new entrant) to establish itself as a competitive rival and create a disciplinary effect on the remaining participants in the marketplace that would eliminate the SLC. Jungle claimed that its Toronto streaming services business was operated by a stand-alone unit of Jungle and could quickly (and easily) be divested. It also indicated that it intended to maintain Streamworks' streaming services business in Streamington, Ontario should such a divestiture be ordered. The evidence adduced during the Tribunal's hearing supported these contentions.

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Remedy Analysis

[75] Based on a review of the evidence, the Tribunal has concluded that both remedies would be equally effective at eliminating the anti-competitive effects created by the merger. The Tribunal must, however, choose a remedy.

[76] The Tribunal has noted the recent (and numerous) competition policy discussions in Canada and elsewhere regarding the potential role antitrust enforcement may play in addressing not just traditional economic policy concerns but other socio-political concerns grounded in the public interest, generally. Some of those concerns include such matters as employment, income distribution, privacy, and even artistic or other forms of creativity (innovation). The Tribunal has also noted that, as expressed in section 1.1 of the Act, Parliament's objectives for the Act include the promotion of the efficiency and adaptability of the Canadian economy and the expansion of opportunities for Canadian participation in the global economy.

[77] While the Tribunal recognizes that it does not have a public interest mandate *per se*, the Act does provide the Tribunal with discretion in respect of remedies and it has concluded that such discretion may be exercised by taking into account public interest factors, such as those noted above. Certainly where, as in this case, the Tribunal has to choose between two remedies that are equally effective, the Tribunal is of the view that it may take into consideration public interest factors.

[78] In this regard, the Tribunal notes that Jungle's proposed remedy would require a divesture of a business that is currently located in Toronto, which the evidence establishes is a thriving metropolis with substantial creative (specifically, music) and technology communities. On the basis of the evidence put before this Tribunal, if a purchaser was to purchase this business, the Tribunal finds that it is likely to remain in Toronto. Consequently, there would be no material effect on these creative or technology communities, and there would be no effect on the Canadian economy or even its participation in the global economy.

[79] The Tribunal further notes that the Commissioner's remedy would require the divesture of a business located in the borough of Streamington, Ontario, a new community located about one hour from Detroit, Michigan. Prior to Streamworks setting up its headquarters for its Americas business in Streamington, the evidence establishes that this area had no notable creative or technology communities; however, since Streamworks opened in Streamington, burgeoning creative and technology communities have arisen in southwest Ontario. On the basis of the evidence put before it, the Tribunal finds that if it chooses the Commissioner's proposed remedy, it is likely that Streamworks jobs in Streamington would be transplanted to a larger hub-city outside of Canada (likely nearby Detroit, given that community's financial and other efforts to attract new industry in its downtown core). The Tribunal finds that this would not only be disastrous to the current employees

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and the Streamington area, but would reduce employment in Canada (perhaps even undermine creative and/or technology communities in Canada) and would limit Canadians' participation in the global (here Americas) economy. As noted, Jungle's uncontroverted evidence is that if its remedy proposal is adopted, it will maintain its presence in Streamington without making any material change to those operations.

[80] In light of the above, the Tribunal has concluded that Jungle's proposed divesture of Jungle's streaming business in Toronto is the more appropriate remedy since it eliminates the SLC created by the merger and is most likely to limit any negative effects of the remedy in Canada, hopefully keeping both of these creative and technology hubs in the country and maintaining Canada's participation in the global economy.

J. Order

[81] For these reasons, the Tribunal will order that Jungle divest Jungle's streaming services business in Toronto by March 31, 2019**,** and to hold separate that business until such time as the divestiture is completed, as set out in the (detailed) Order issued contemporaneously with this decision.

DATED at Ottawa, this 15 day of October 2018.

SIGNED on behalf of the Tribunal by the Panel Members.

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