

PARLIAMENT GOT IT RIGHT: WHY REBUTTABLE STRUCTURAL PRESUMPTIONS MAKE SENSE IN MERGER REVIEW

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In 2024, rebuttable structural presumptions were incorporated into the merger provisions of the Competition Act. This means that a merger is now presumptively anti-competitive if the Competition Bureau can show that it would likely result in a significant increase in concentration or market share above prescribed levels. Merging parties can rebut such a presumption by showing that, contrary to the structural inference, the merger is unlikely to harm competition substantially. Failing that, however, the Competition Tribunal has discretion to prohibit or remedy the transaction to safeguard competition.

This new burden-shifting framework is consistent with the longstanding approach to mergers under U.S. antitrust law. It provides a clear and simple guidepost for merger analysis, while still allowing all relevant evidence bearing on a merger's likely competitive effects to be considered. Nevertheless, the change has been met with significant opposition by many in the business and practitioner community who view it as retrograde.

This paper provides historical context for this recent reform, arguing that it was part of a necessary set of corrections for a regime that had become unworkably complex. It then explains why rebuttable structural presumptions make sense for merger review, from both an economic and a practical perspective.

En 2024, des présomptions structurelles réfutables ont été intégrées aux dispositions relatives aux fusions dans la Loi sur la concurrence. Cela signifie qu'une fusion est désormais présumée anticoncurrentielle si le Bureau de la concurrence peut démontrer qu'elle entraînerait vraisemblablement une augmentation importante de l'indice de concentration ou de la part de marché au-delà des seuils prévus. Les parties à une fusion peuvent toutefois tenter de réfuter cette présomption, mais il leur incombe de démontrer que, contrairement à l'inférence structurelle, la fusion ne devrait pas nuire sensiblement à la concurrence. À défaut, le Tribunal de la concurrence dispose d'un pouvoir discrétionnaire d'interdire l'opération ou d'imposer des mesures correctives afin de préserver la concurrence.

Ce nouveau cadre de déplacement du fardeau s'inscrit dans la lignée de l'approche de longue date en matière de fusions adoptée par la loi antitrust

américaine. Il fournit un point de repère clair et simple pour l'analyse des fusions, tout en permettant de tenir compte de tous les éléments de preuve pertinents relatifs aux effets concurrentiels probables de l'opération. Néanmoins, cette réforme a sus-cité une opposition marquée au sein du milieu des affaires et parmi les praticiens du droit, plusieurs la considérant comme un retour en arrière.

L'auteur fournit un contexte historique à cette réforme récente, soutenant qu'elle s'inscrit dans un ensemble nécessaire de mesures correctives visant un régime devenu excessivement complexe et difficile à appliquer. Il explique ensuite les raisons pour lesquelles les présomptions structurelles réfutables sont justifiées dans l'examen des fusions, tant du point de vue économique que pratique.

1. The Preventative Goal of Merger Review and the Need for Workable Tests

The purpose of the *Competition Act* is to maintain and encourage competition in Canada in support of a broad range of economic aims.¹ Among the available tools, merger control serves as a key line of defence, with a distinctly preventative focus.² Other forms of anti-competitive conduct—such as abuse of dominance—typically involve firms that already hold substantial market power. Likewise, collusion is generally thought to be easier to sustain in tight oligopolies with a smaller number of competitors, and wasteful rent-seeking behaviours are more apt to occur when firms already have market power to protect or entrench.³

While the concentration of market power and its attendant economic risks can arise for many reasons other than mergers, preventing anti-competitive mergers is a critical safeguard. It helps ensure that markets evolve as much as possible through the dynamic process of competition on the merits—that is, based on individual firms striving to gain share by offering what people want in better, more efficient ways.⁴ This dynamism is essential for economic growth and innovation and, therefore, “[c]ountries must jealously guard and actively nurture the conditions that promote it.”⁵

Indeed, the economic risks posed by anti-competitive mergers are considered so great and so much better to stave off *ex ante*, that the largest mergers in Canada are subject to mandatory pre-merger notification requirements and waiting periods.⁶ This helps ensure that the Competition Bureau has an opportunity to review the most economically-significant transactions *before they close* and, if necessary, challenge them or secure consensual remedies to prevent anti-competitive harm.⁷

In recent years, less than 4% of notified mergers were found by the Bureau to raise substantive competition issues in Canada.⁸ While mergers not raising issues are generally triaged and cleared quickly, the fact that Canada's merger control system is comfortable subjecting some twenty-five mergers to pre-merger screening for every one that is ultimately revealed to be anti-competitive, demonstrates the strong policy preference for *ex ante* review. At the same time, however, it underscores the need for efficient heuristics to ensure timely and predictable merger review decisions. Upwards of 200 mergers are notified each year in Canada and thousands of others are reviewable in principle.⁹ Incomplete information, finite resources, and commercial realities dictate that these forward-looking reviews will never be perfect and cannot drag on forever. In order to be workable, the decision framework needs to be risk-based.

Historically, however, Canadian competition policy has struggled to produce workable, risk-based tests for identifying problematic mergers. From 1910 to 1986, anti-competitive mergers in Canada could only be prosecuted criminally, under a vague public interest test.¹⁰ Unsurprisingly, there was not a single successful conviction in a contested merger case over this entire 76-year timespan. The indeterminacy of the test, coupled with the strict criminal law burden of proof, rendered enforcement against anti-competitive mergers virtually impossible, even in the extreme case of merger to monopoly.¹¹

The search for a more workable, civil law-based alternative was a prolonged affair, beginning with the Economic Council of Canada's 1969 Interim Report on Competition Policy and culminating with the modern *Competition Act* adopted in 1986.¹² While there was general agreement that mergers demanded a case-by-case economic assessment, it was not obvious how best to operationalize such an assessment in a law enforcement framework. Should merger cases be decided by a specialized tribunal or by general courts? Should the competition test be relative or absolute? And what about Canada's relatively small, sparsely-populated and increasingly-open economy—should that require a more tolerant approach to anti-competitive mergers in the interest of scaling up large national champions that could succeed on the world stage? These and other considerations confounded policymakers in their search for an optimal merger policy.

The Canadian business community played an outsized role over this period of time, defeating and delaying various reform proposals, and shaping the ultimate law that would emerge.¹³ In 1981, for instance, after several failed attempts at reform, the then Minister of Consumer and

Corporate Affairs released a discussion paper setting out a “new and simplified approach” for merger review that he hoped would appease stakeholders seeking clarity and predictability from the merger control system.¹⁴ Among other things, the proposal dispensed with the “heavily criticized” approach taken in previous bills of having an “expert tribunal...weigh the expected efficiency gains from a merger against any damage to the competitive environment which might be expected.”¹⁵ Efficiency tests, the discussion paper noted, were “fine in theory but arguably impracticable” and “gave rise to great uncertainty as to when mergers would come under the law” because “neither the costs nor benefits were intuitively obvious.”¹⁶ Therefore, under the new proposal, merger cases would be decided by the regular courts, who would apply a basic significant lessening of competition test. To further increase predictability, the law would stipulate “that any merger which would result in the new enterprise accounting for more than a given percent of any market in Canada would lessen competition significantly.”¹⁷ On this aspect, the discussion paper explained:

“If a firm grows through acquisition of competitors to account for more than that percentage of the market, it would be inhibited from further acquisition in that market and would have to grow in the future by competing for a larger market share. It could also grow via diversification or entry into export markets. The advantage of this proposal is that it avoids the creation of uncertainty as to the application of the law in this area and leaves significant scope for firms to utilize the merger route in the process of growing and seeking to become more competitive while at the same time catching those mergers which are most destructive of competition.”¹⁸

This bore some resemblance to the structural presumption framework that applied (and still applies) to horizontal mergers under U.S. antitrust law. Specifically, in *Philadelphia National Bank*, the U.S. Supreme Court held that a merger which “produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”¹⁹ The court adopted this simplifying rule “in the interest of sound and practical judicial administration” and so that businesses could “assess the legal consequences of a merger with some confidence.”²⁰ While the court declined to specify the smallest post-merger market share that would trigger the presumption, it was “clear that 30% presents that threat.”²¹ Importantly, however, this presumption was rebuttable, whereas the Minister’s 1981 discussion paper seemed to be proposing something closer to a bright-line rule.

Regardless, this ‘new and simplified’ approach provoked strenuous opposition within the Canadian business community who subsequently organized and lobbied for an alternative. Journalist and business historian, Peter Newman, wrote that “[d]uring the next three years”, the Business Council on National Issues (now known as the Business Council of Canada) “spent \$1 million on the project”, “hired its own team of twenty-five lawyers” and “produced a 236-page master plan” that would eventually become the *Competition Act*.²² Newman mused, dramatically perhaps, that it “was the only time in the history of capitalism that any country allowed its antimonopoly legislation to be written by the very people it was meant to restrain.”²³

In stark contrast to the 1981 proposals, under the new *Competition Act*, merger cases would be decided by a specialized Competition Tribunal after all, subject to a standalone efficiency defence (previously dismissed as impractical). Additionally, there would be a new provision—eventually found in subsection 92(2)—expressly providing that the Tribunal “shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.” This stipulation, the government noted, was “designed to ensure that the Tribunal’s consideration is more than a mere mechanistic process and focusses on both the qualitative and quantitative [sic] aspects of competition, thereby avoiding an overly structuralist approach to the law.”²⁴ It added that, “[c]ompetition is a dynamic process, and merely adding up market share, after the merger, in some circumstances may tell little about the effect of a merger on competition.”²⁵ It is unclear whether U.S.-style *rebuttable* presumptions were ever seriously considered by policymakers as a less “overly structuralist” alternative to the 1981 proposals.

Nevertheless, the 1986 reforms clearly represented a significant improvement over the inoperative criminal law system that existed before. Whereas the prior system had produced no convictions for anti-competitive mergers in the previous 76 years, there were at least three partially successful merger challenges in half that amount of time between 1986 and 2024, and many other anti-competitive mergers remedied consensually outside of contested proceedings.²⁶

2. The Increasing Complexity of Merger Tests Under the *Competition Act*

Notwithstanding the guardrails against mechanistic decision-making noted above, in the early years of litigation under the *Competition Act*, the Competition Tribunal embraced basic structural rules of thumb to guide its analysis.

That pragmatism can be seen in early cases, such as the consent order proceedings in *Imperial Oil*, where the Tribunal accepted a divestiture rule preventing Imperial from acquiring more than 30% market share in various retail gasoline markets.²⁷ In *Laidlaw*, an early abuse of dominance case, the Tribunal found that high market share constituted a *prima facie* indication of market power.²⁸ In *Hillsdown*, the first decision in a contested merger case, the Tribunal suggested that market share data combined with “some evidence regarding barriers to entry” was sufficient to establish that a merger was *prima facie* anti-competitive.²⁹ In that case, the Tribunal cited evidence from the Bureau’s expert on the post-merger level and change in concentration measured by the Herfindahl-Hirschman Index (HHI),³⁰ as well as the expert’s view that a post-merger HHI of more than 1,800 coupled with an increase of more than 100 should be sufficient to establish that a merger is *prima facie* anticompetitive.³¹ Regarding price tests, the Tribunal noted that it did “not find it useful to apply rigid numerical criteria” to determine whether a lessening of competition was substantial.³² Likewise, in *Tele-Direct*, another early abuse case, the Tribunal found that a large market share could support an initial determination of market power “absent other extenuating circumstances, in general, ease of entry.”³³ That decision further endorsed a sliding scale approach, whereby smaller impacts on competition would be deemed substantial, the less competitive the market was to begin with.³⁴ Notably, the Tribunal pointed to the consistency of that approach with the then U.S. merger guidelines insofar as “any numerical increase in concentration [is treated] more severely the higher the initial market share of the acquiring firm.”³⁵

While there are nuances in the various characterizations above, it is apparent from a review of these early decisions that structural evidence served as a useful guidepost in the Tribunal’s analysis without detracting from the overall analytical rigour of its decisions. At a minimum, the Tribunal seemed prepared to apply a skeptical eye to mergers that would significantly increase market share or concentration, particularly in an already concentrated market.

Over time, however, this pragmatism gave way to a more complex mode of analysis. In *Superior Propane*, for instance, the Tribunal found that the merger would result in a monopoly or near-monopoly in numerous retail propane markets across Canada.³⁶ However, in considering the relevant anti-competitive effects applicable under the efficiency defence, it pointed to the aforementioned stipulation in subsection 92(2) barring it from finding a merger anti-competitive based solely on market share and concentration evidence. The Tribunal posited that this provision was “a reaction to the incipency doctrine adopted by the [US] Supreme Court in *Brown Shoe* and to the structuralist presumption arising from *Philadelphia National Bank*.”³⁷ It noted, albeit without citation, that the drafters of the *Competition Act* “sought to take advantage of the more recent scholarship and research literature that placed the market power-market share relationship in considerable doubt.”³⁸ This meant that even an “extreme case [involving] a merger to monopoly cannot automatically be found to lessen competition substantially” in Canada.³⁹ While literally true, in the sense that market share and concentration evidence could not be determinative by itself, the Tribunal went further, concluding “that the creation of monopoly is *irrelevant* to its task under the merger provisions of the Act.”⁴⁰ More important in its view, given the statutory scheme, was the effect of such a merger on resource allocation and welfare, which would be taken into account as part of the statutory efficiency defence with no special allowance for the creation or preservation of monopoly *per se*. Indeed, this was consistent with the position advanced in the Bureau’s own merger guidelines at the time the merger was challenged.⁴¹ Ultimately, the Tribunal found that the proven efficiencies brought about by the merger outweighed the proven anti-competitive effects. Unfortunately, economic experts would later point out that the Bureau had under-estimated the anti-competitive effects of the merger by failing to take into account pre-merger market power in its deadweight loss calculations, and this mistake had been decisive.⁴² Put differently, a miscalculation had led to the authorization of a propane monopoly under the *Competition Act*.

Over time, quantitative evidence took on greater prominence in Tribunal decision-making in merger cases. While case law had long equated a substantial lessening or prevention of competition with an enhanced ability to exercise market power, decisions began to emphasize the need to forecast and quantify the adverse effects of that enhanced market power with particularized evidence to prove that it was *substantial*. This explicit metering of anti-competitive harm was arguably required by the Supreme Court of Canada’s decision in *Southam*, which held 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.”⁴³ In principle, this minimally intrusive remedial standard required the Tribunal to identify the specific threshold level of anti-competitive effects that would be tolerable in any particular case, a complexity that did not exist in other jurisdictions.⁴⁴

In *CCS*, another merger to monopoly case, the Tribunal adopted what might be termed a ‘volumetric’ approach.⁴⁵ Under this approach, the substantiality of any lessening or prevention of competition would be assessed with reference to the “magnitude”, “duration” and “scope” of adverse effects on price or non-price indicators of competition stemming from enhanced post-merger market power.⁴⁶ In this particular case, the Tribunal found that the estimated average price effect of the merger was approximately 10%, that it would likely extend throughout a material part of the relevant market, that there would be no possibility of new entry for at least 30 months and that there would be minimal cognizable efficiencies from the merger.⁴⁷ However, on appeal, the Supreme Court of Canada held that the efficiency defence required that the forecasted market power effects of the merger be further translated into economic welfare and efficiency losses so that they could be compared on a like-to-like basis against the (negligible) estimated resource savings brought about by the merger.⁴⁸ Indeed, to minimize subjective judgement in the analysis, all quantifiable anti-competitive effects had to be quantified by the Bureau in this manner or else they could not be considered, and remaining effects that could only be assessed qualitatively would generally assume “lesser importance” in the trade-off.⁴⁹ Justice Karakatsanis dissented on these points, seeing no justification for such a categorical prioritization of quantitative over qualitative evidence.⁵⁰ Leading competition policy scholars also questioned this new “hierarchical superiority” of quantitative evidence.⁵¹ Nevertheless, this became the second merger to monopoly authorized under the *Competition Act*, again based on insufficiently quantified anti-competitive effects.⁵²

As if peering deeper into a fractal, cases became even more complex as the Bureau and merging parties wrestled with the practicalities of a full-blown, forward-looking, quantification-driven, welfare analysis for mergers. Instead of focusing on the proximate effects of a merger on competition and the potential enhancement of market power, the analysis required a detailed assessment of the likely effects-of-those-effects (on prices or other indicators), and then an assessment of the likely effects-of-the-effects-of-those-effects (on measures of economic welfare). Efficiency claims had to be assessed through a series of complex cognizability screens.⁵³ Time

differences in the realization of efficiencies and anti-competitive effects had to be taken into account by projecting out a time series and then discounting to present value at some to-be-determined discount rate. Effects inuring to the benefit or detriment of foreign shareholders were to be scrubbed out, where possible, to permit a Canadian welfare analysis. Wealth transfers could be neutral in the trade-off or could count against a merger depending on whether they were “socially adverse.”⁵⁴ These were just some of the complexities.

Moreover, as demonstrated in *P&H*, even where all of the practical difficulties could be overcome, and the proven anti-competitive effects outweighed the proven efficiencies, it was no guarantee that there would be a remedial order, because the merger might not meet the predicate criterion of lessening or preventing competition *substantially*.⁵⁵ In other words, even where all of the economic debits and credits supposedly meant to be given primacy in the analysis were tallied up, and favoured intervention, intervention was not assured. Notably, that case involved a single relevant market and took over 20 months of deliberation and 800 paragraphs of legal and economic analysis to decide, illustrating just how complex merger analysis had become.

As a final example, in *Secure Energy Services*, the Bureau challenged a merger of two rival suppliers of oilfield waste services and sought an interim injunction to prevent it from closing pending a decision on the merits.⁵⁶ Although the Tribunal accepted the Bureau’s evidence that the transaction would be a merger to monopoly for thousands of customers (and a 3-to-2 for tens of thousands of others) and that irreparable harm in the form of adverse price and non-price effects would occur,⁵⁷ it declined to order injunctive relief because of the lack of “deadweight loss” estimates from the Bureau to weigh against the financial harm that would be suffered by the acquiror if closing were delayed.⁵⁸ In its eventual decision on the merits, the Tribunal found that the transaction had in fact substantially lessened competition in 136 of the 143 markets alleged by the Bureau, noting that it was “difficult to conceive of a more anti-competitive merger.”⁵⁹ It ordered post-closing divestitures, but only after confirming, through roughly 230 paragraphs of analysis, that the efficiency defence did not apply.⁶⁰

While merger review under the *Competition Act* had been a significant improvement over the prior criminal legislation, and had humble beginnings, it had evidently morphed into something inordinately complex, confirming many of the fears set out in the 1981 discussion paper described above. As illustrated in Table 1 below, merger cases took longer to decide

and decisions themselves became longer. Moreover, despite all the trap-pings of the pre-merger notification system, cases like *Secure Energy Services* called into question whether the Bureau could actually prevent an anti-competitive merger from closing in practice if it had failed to prevent one of the most anti-competitive mergers conceivable for lack of sufficient quantitative evidence.

Table 1: Fully-contested Merger Cases Under the *Competition Act*⁶¹

Case	File No.	# Hearing Days	# Days from End of Hearing to Decision	Approx. Length of Decision (# Words)
Southam	CT-1990-001	40	130	60,000
Hillsdown	CT-1991-001	12	81	24,000
Superior Propane I	CT-1998-002	48	203	51,000
Canadian Waste	CT-2000-002	12	124	22,000
CCS	CT-2011-002	13	167	38,000
P&H	CT-2019-005	13	634	87,000
Secure Energy Services	CT-2021-002	19	274	84,000
Rogers/Shaw	CT-2022-002	20	17	36,000
Average first four cases		28	135	39,250
Average last four cases		16	273	61,250
% change		-42%	+103%	+56%

In the author's view, it strains credulity to think that this system was comprehensible to a business contemplating a merger in Canada. A merger to monopoly was not *prima facie* anti-competitive under a law whose nominal purpose was to maintain and encourage competition. And even if it was proven to be anti-competitive, it could still be saved by an efficiencies defence if, after a convoluted jumble of error-prone calculations, the numbers were favourable. This is not to suggest that merger control should be devoid of analytical rigour and expert analysis—it absolutely requires those things—however, like any regulatory system, it also has to be administrable at scale and generate reasonably intuitive results consistent with its objectives. Moreover, the undue emphasis on quantification likely did more to *undermine* the interests of economic efficiency in Canada (assuming that was the overriding goal) by downplaying the less quantifiable but more important harms arising from reduced dynamic competition.⁶²

Two additional clarifying points are worth making here. First, the discussion above is not meant to assign blame for the way that the system evolved. Policymakers adopted a merger control system that was prone to complexity, but likely did so out of necessity to appease influential stakeholders. The Tribunal adopted increasingly complex tests, but ones that at least partly reflected Supreme Court jurisprudence and the Bureau's own enforcement guidelines. The Bureau, for its part, lost some cases that it probably could have won, albeit with the benefit of hindsight. And merging parties forced litigation in some extreme cases, as is their right, and those extreme cases likely made for bad law.

Second, the system evidently *did* function in spite of these complexities. As noted above, the vast majority of transactions do not raise substantive issues under the *Competition Act* and are cleared quickly, while the ones that do raise issues tend to be resolved consensually, outside of fully-contested proceedings.⁶³ It may be tempting to conclude from that that the stringent standards developed through case law do not matter that much or only impact a small number of mergers.⁶⁴ However, this ignores the fact that in Canada's prosecutorial system merger decisions are made in the shadow of litigation. This necessarily impacts how the Bureau triages and prioritizes cases, the amount and type of information it gathers, and the remedies it accepts. If standards are such that it is unlikely for a merger to monopoly to be prevented or blocked in the event that it is challenged, that likely impact the types of mergers that get proposed in the first place. It also presumably impacts the willingness of complainants to come forward and cooperate with Bureau reviews, at least at the margin. In other words, one should expect that the legal framework affects the distribution of merger cases, their outcomes, as well as the review process itself.

3. Recent Amendments to Strengthen and Simplify Merger Review

Over the past four years, policymakers took note of the infirmities above, and enacted a series of reforms that significantly improve the merger control framework in Canada, along with other parts of the *Competition Act*.⁶⁵

These reforms were introduced incrementally following a consultation led by former Senator Howard Wetston, a comprehensive review carried out by the department of Innovation, Science and Economic Development, and various Parliamentary committee studies.⁶⁶ Among other things, pre-merger notification rules were tightened, new rebuttable structural presumptions were adopted, the remedial standard for anti-competitive

mergers was strengthened so that remedies preserve or restore the level of competition that would have existed without the merger, and the stand-alone efficiencies defence was repealed.

In the author's view, all of these changes reinforce the preventative goal of merger review in service of maintaining and encouraging competition in Canada. They also simplify administration and enforcement of the law. The repeal of the standalone efficiencies defence notably addresses the welfare quantification-related complexities described above. The new remedial standard will mean less hairsplitting over where the substantiality threshold lies in a particular case. While each of these changes is significant in its own right, the balance of this paper will focus on the new rebuttable structural presumption framework. For ease of reference, the relevant new provisions spanning subsections 92(2) to 92(5) of the *Competition Act* are copied below.

Evidence

(2) For the purpose of this section, if the Tribunal finds, on a balance of probabilities, that a merger or proposed merger results or is likely to result in a significant increase in concentration or market share, the Tribunal shall also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, unless the contrary is proved on a balance of probabilities by the parties to the merger or proposed merger.

Significant increase in concentration or market share

(3) A merger or proposed merger results or is likely to result in a significant increase in concentration or market share if, in any relevant market, as a result of the merger or proposed merger,

(a) the concentration index increases or is likely to increase by more than 100; and

(b) either

(i) the concentration index is or is likely to be more than 1,800, or

(ii) the market share of the parties to the merger or proposed merger is or is likely to be more than 30%.

Definition of concentration index

(4) In subsection (3), **concentration index** means, in any relevant market, the sum of the squares of the market shares of the suppliers or customers.

Regulations—different values

(5) The Governor in Council may by regulation prescribe different values than those provided in subsection (3).

Effectively, these changes replaced the previous bar on the Tribunal finding a merger anti-competitive based solely on market share or concentration with a rebuttable presumption that a merger is anti-competitive if it significantly increases market share or concentration (ss.92(2)). That presumption is deemed to be triggered if the Bureau can show that a merger would increase the level of concentration as measured by the HHI by more than 100 and either: 1) the merging parties would hold a combined share greater than 30%; or, 2) the post-merger HHI would exceed 1,800 (ss.92(4)). These thresholds mirror the ones currently set out in the U.S. merger guidelines, and can be updated by regulation (ss.92(5)).⁶⁷ Incidentally, they also align with the benchmarks cited in *Imperial Oil* and *Hillsdown* above.⁶⁸

A useful mental shortcut can be derived by recognizing that the change in HHI of a merger involving two firms A and B is simply twice the product of their respective market shares.⁶⁹ A change in HHI exceeding 100 therefore requires the product of A and B's market shares to exceed 50. In addition, any market with 5 or fewer competitors necessarily has an HHI of at least 2,000.⁷⁰ Therefore, while there are other combinations that could trigger the presumption, any merger that reduces the number of competitors from 6-to-5 or worse, where the product of the merging firms' shares is greater than 50, is presumptively anti-competitive. Likewise any acquisition by a firm with more than 28% share of a competing firm with more than 2% share is presumptively anti-competitive. As discussed further below, this means that disputes over whether or not the presumption applies will tend to be limited to cases where a market is quite fragmented or where one or both of the merging parties are small players. In the author's experience, these would not normally be cases that a competition authority would challenge.⁷¹

The Bureau specifically advocated for these new presumptions, arguing that:

"Structural presumptions make sense for a risk-based analysis like merger review. They provide a guidepost for the analysis and more efficiently allocate burdens of proof while still allowing for a full assessment of relevant factors. They can also provide a useful signal to firms and their advisors about transactions that are likely to raise significant concerns and may not be worth pursuing, saving time and resources for everyone."⁷²

Other stakeholders advocated for structural presumptions during the reform process as well, including public interest advocacy groups,⁷³ consumer groups,⁷⁴ and farmers associations.⁷⁵ The House standing committee on Agriculture and Agri-Food also recommended enacting structural presumptions consistent with the Bureau's recommendations.⁷⁶ A private members bill, C-352, unanimously supported by opposition parties at second reading would have codified a stricter set of market share presumptions (including a total prescription against mergers that would lead to a combined market share exceeding 60%), but was eventually voted down after the above system of rebuttable structural presumptions was incorporated into the government's bill C-59.⁷⁷

Notably, the government's bill had initially only proposed repealing subsection 92(2), but not replacing it with a structural presumption framework or specifying particular presumptive thresholds. This would have left the door open for some type of burden-shifting framework to potentially emerge through case law, as it had in the United States.⁷⁸ Assuming things would have unfolded in that manner, there would have been advantages to such a framework from a flexibility standpoint. However, given that fully-litigated merger cases are rare (there have been just 8 cases in the past 40 years), it may have taken years or perhaps decades for such a framework to crystallize, and there would have been considerable uncertainty for the Bureau and business community in the interim, including over basic issues like what level and change in market share or concentration thresholds would be sufficient to trigger a presumption.

Moreover, there is reason to doubt that such a framework would have actually emerged at all in the absence of clear legislative direction. Had Parliament intended the Tribunal to adopt structural presumptions, so the argument would go, they could have codified a framework as the Commissioner had recommended and as the above-noted private members bill would have done. At best the mere repeal of subsection 92(2) would have been a legislative nudge, and could have been ignored. Arguably stronger legislative directions went unheeded in the past. For example, when the competitive effects test was removed from section 100 to make it less onerous for the Bureau to obtain an extension of time to complete a merger inquiry, the Tribunal found that there was still "some vestige of SLC considerations" under a different prong of the test, and that because the time period for merger reviews had been ratcheted up from 21 to 42 days, there was "a heightened expectation that 42 days should be sufficient to complete a merger review."⁷⁹ Analogously, the Tribunal may have viewed the other amendments strengthening the merger provisions as reason to impose a

heightened evidentiary standard on the Bureau under section 92, rather than adopt structural presumptions.

Regardless, this was evidently a reform that had garnered wide popular and political support, and Parliament opted to put in place a definitive framework. However, this reform was not supported by all. The Canadian Bar Association,⁸⁰ the Canadian Chamber of Commerce⁸¹ and various think tanks and academics pushed back to varying degrees.⁸² The next section explains why this reform made sense and responds to some of the concerns raised by critics.

4. Why Rebuttable Structural Presumptions for Mergers Make Sense

4.1 Economic rationale

Market share and concentration are economic indicators of market power in properly defined markets, and changes in these metrics brought about by a merger are a gauge on the risk that a merger will enhance market power. This is precisely why competition agencies define relevant markets using the hypothetical monopolist test, to determine the relevant products and areas over which market power could be exercised.⁸³ This does not mean that market share and concentration metrics provide *conclusive* evidence of anti-competitive harm from a merger. But that is not the goal of *rebuttable* presumptions. The goal is to identify mergers that raise *prima facie* risk of such harm, while keeping an open mind to other countervailing evidence that disproves or rebuts the presumption, like ease of entry.⁸⁴ Some commentators seemed to mistakenly conflate recent reforms with the adoption of a bright-line rule, or a complete disavowal of effects-based analysis.⁸⁵

Leading antitrust scholars and economists support the use of structural presumptions. In 2018, Herbert Hovenkamp, one of the most cited antitrust scholars in the world, co-authored a paper with Carl Shapiro, a leading antitrust economist, affirming the use of structural presumptions in contemporary merger analysis, concluding that presumptions are “strongly supported by economic theory and evidence, as well as the experience gained in merger enforcement over the past fifty years.”⁸⁶ In 2022, a group of 26 economic experts wrote, “as economists, we support the established legal presumption that a merger that significantly increases market concentration in an already concentrated market is likely to result in adverse competitive effects.”⁸⁷ Another paper, in 2023, co-authored by 12 economists and lawyers with substantial experience in antitrust enforcement, supported rebuttable presumptions, writing that the “general approach of

employing presumptions while allowing rebuttal on a sliding scale can reasonably be expected to strengthen merger enforcement while preserving a focus on market power.”⁸⁸

Critics of structural presumptions sometimes point to the economic consensus that developed in the 1970s and 1980s that market structure does not determine performance.⁸⁹ However, this critique is not particularly relevant to the use of presumptions in merger review. It is true that markets can become concentrated due to economies of scale and the normal process of competition on the merits, yielding lower prices and greater efficiency. An important insight from that work is that blind efforts to deconcentrate markets by breaking-up firms can be economically counterproductive, and that competition law should seek to promote competition not competitors.⁹⁰ However, this does not say anything about the effect of increased concentration *induced by mergers*. Mergers are a particular way in which markets can become more concentrated and can be studied as a distinct phenomena.

Indeed, a large number of merger retrospective studies find anti-competitive effects from mergers that significantly increase concentration.⁹¹ One recent study found that a merger-induced increase in the HHI of more than 100 is, by itself, a good predictor of anti-competitive effects (i.e. irrespective of the baseline).⁹² Professor Hovenkamp has suggested that the available evidence may justify an even lower set of presumptive thresholds than the ones set out in the current U.S. merger guidelines (which mirror the ones set out in the *Competition Act*).⁹³

Of course, many of these merger retrospective studies are based on U.S. markets. One potentially legitimate critique of the new presumptions under the *Competition Act* is that the U.S. thresholds may not be suitable for the Canadian context. However, this would only be the case under certain conditions. For one, it could be the case that a given level and change in market share or concentration induced by a merger produces less market power in Canada than it does in the United States, all else being equal. That might be plausible if markets in Canada were generally characterized by lower barriers to entry or other constraints on market power, however, that seems hard to argue (if anything, the opposite could be true, which would militate in favour of *lower* thresholds). Another possibility is that the thresholds are accurate predictors of merger-induced market power in Canada but we should simply *tolerate* more market power in Canada for social or economic reasons, like fostering ‘efficient’ national champions. However, that was the logic underpinning the prior efficiency defence for anti-competitive mergers under the *Competition Act*, which was severely repudiated in the context

of recent reforms. There is no evidence that anti-competitive mergers in Canada have made our economy more productive or have produced internationally competitive firms. Another possibility is that the *composition* of mergers in Canada differs on average from the composition of mergers in the U.S. (or from the mergers that have been studied). However, again, it is not obvious *a priori* whether that would militate in favour of higher or lower thresholds in Canada. Moreover, there is evidence to suggest that the new presumptions are consistent with the Bureau's enforcement practices in in-depth merger reviews, suggesting that they are reasonably calibrated.⁹⁴

In any event, there certainly should be more independent merger retrospective studies in Canada. Notably, if emerging evidence shows that the Canadian thresholds are inapt, the thresholds can be updated through regulation. And, of course, in all cases, the new presumptions are rebuttable, meaning that context-specific factors can always enter the analysis through that route.

4.2 Practical rationale

The introductory sections of this paper explained at length the impracticalities of the previous system and the need for more workable, risk-based tests for identifying potentially problematic mergers in Canada. The preceding subsection explained why merger-induced changes in market share and concentration are useful (if imperfect) predictors of anti-competitive harm. But are they practical?

One critique about presumptions is that they rely on market definition and defining relevant markets is not always straightforward. However, it is important to recognize that defining markets was already a *de facto* required step in contested merger cases.⁹⁵ Not a single litigated merger case has been decided in Canada without defining markets. There are well-established methodologies for defining markets and calculating market shares, and sometimes the Tribunal has preferred the merging parties' evidence, demonstrating that the Bureau has no unique advantage. While the new structural presumption framework arguably increases the stakes on market definition in litigation, it is hard to imagine this aspect of the analysis being more contentious than it already has been.⁹⁶ In other words, while there are bound to be cases where market definition is complex, presumptions do not make merger analysis more complex, and in many cases they will make it simpler.

As explained above, the thresholds are set at levels that make it unlikely that disputes over the precise boundaries of the relevant market will matter

for purposes of establishing whether the presumption applies. And in cases where other more direct evidence is more probative of a merger's competitive effects, there is nothing to prevent the Bureau and parties from focusing on that evidence instead, inside or outside contested proceedings, since it will inevitably be relevant. For mergers that would clearly exceed the threshold under any plausible market definition, and where there are no obvious mitigating factors like low entry barriers, the risk analysis should be much simpler for all involved. Some of the most egregiously anti-competitive transactions may not get proposed in the first place, saving time and redirecting business energy to other, more productive avenues for growth.

Another reason to believe that structural presumptions will be more practical than the prior system is the fact that they have been used in the U.S. for over 60 years, in a regime where merger cases are decided by general courts. As noted above, burden-shifting presumptions were adopted by the U.S. Supreme Court in *Philadelphia National Bank* for the precise purpose of simplifying decision-making - it seems unlikely that they would have persisted for as long as they have if they were unhelpful or impractical. In 2024 alone, there were at least four contested merger cases in which three different U.S. district courts relied on structural presumptions, applying the 30% threshold from *Philadelphia National Bank* and/or the HHI thresholds set out in the 2023 U.S. merger guidelines.⁹⁷ Moreover, it is the author's understanding that merging parties can and do rebut the presumption in practice, and U.S. antitrust agencies do not challenge every merger that exceeds the thresholds. There is no reason why it should be any different in Canada. Indeed, the same is true in Germany where rebuttable presumptions are written directly into their law and "play an important role in accelerating and facilitating proceedings without removing the authority's duty to investigate or the party's rights to supply evidence."⁹⁸ Likewise, the European Commission is currently consulting on whether to adopt rebuttable presumptions "to identify more easily mergers that are likely to result in a significant impediment to effective competition" while allowing merging parties to provide "evidence showing that the transaction in question does not lead to anticompetitive effects."⁹⁹

Conclusion

In the author's view, the incorporation of rebuttable structural presumptions into the merger provisions of the *Competition Act* was a positive development. It was a necessary correction for a regime that had become unworkably complex. Properly implemented, these new presumptions should simplify and streamline merger decisions and provide greater clarity

to all involved, without unduly compromising analytical rigour. All of this should better serve the goal of maintaining and encouraging competition in Canada.

ENDNOTES

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¹ *Competition Act*, RSC 1985, c. C-34, s 1.1 [*Competition Act*].

² Innovation, Science and Economic Development Canada, *Future of Canada's Competition Policy Consultation – What We Heard Report* (20 September 2023) at s IV (describing merger review as “the first line of defence against market concentration”); International Competition Network, *Recommended Practices for Merger Analysis* at 3 (“Merger analysis requires an agency to predict a merger’s competitive impact to prevent any competitive problems before they materialize.”).

³ Jonathan B Baker & Joseph Farrell, “[Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement](#)” 2020) 168 *U Pa L Rev* 1985 at 1991; Gordon Tullock, “The Welfare Costs of Tariffs, Monopolies, and Theft” in *40 Years of Research on Rent Seeking*, vol 1 (Springer, 2008) 45.

⁴ See *CCS*, *infra* note 45 at para 372 (“Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy’s international competitiveness and the average standard of living of people in the economy.” [emphasis in original]).

⁵ Mark Carney, *Value(s): Building a Better World for All* (Signal, 2021) at 504–06 (adding “[i]t is a gentle slope towards cosy oligopolies. The costs of this quiet life are not immediately apparent, but they grow with time through lost innovation, stilted ideas and growing rent seeking. Eternal vigilance in the name of competition is essential.”).

⁶ *Competition Act*, *supra* note 1, Part IX.

⁷ The Bureau can also review and challenge mergers that do not meet the notification thresholds, or that have already been consummated, subject to a limitation period. See *Competition Act*, *supra* note 1, s 97.

⁸ Competition Bureau, *Performance Measurement and Statistics Report 2023-2024* at s 3. From 2018-2019 to 2023-24 there were reportedly 1,234 merger filings and 42 reviews concluded with issues (i.e., abandoned, remedied or challenged on the basis of competition concerns).

⁹ *Ibid*; IMAA Institute, “[Canada – M&A Statistics](#)” (accessed 13 April 2024).

- ¹⁰ John S Tyhurst, *Canadian Competition Law and Policy, Updated First Edition* (Irwin UTP, 2025) (Essentials of Canadian Law) at 191–96.
- ¹¹ *Ibid*; See also GB Reschenthaler & WT Stanbury, “Benign Monopoly: Canadian Merger Policy and the KC Irving Case” (1977) 2:2 *Can Bus LJ* 135.
- ¹² Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969). For a historical overview see Tyhurst, *supra* note 10 at ch 2.
- ¹³ WT Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971-1975* (Toronto: 1977); Roy Vogt, “Corporate Power and the Development of New Competition Policies in Canada” (1985) 19:2 *J Econ Issues* 551-558; and Peter C Newman, *Mavericks: Canadian Rebels, Renegades and Anti-Heroes* (Toronto: 2010) at 259–60.
- ¹⁴ Minister of Consumer and Corporate Affairs, *Proposals for Amending the Combines Investigation Act, A Framework for Discussion* (Ottawa: April 1981) at 6.
- ¹⁵ *Ibid*.
- ¹⁶ *Ibid*; Although not cited in the 1981 discussion paper, this view on the impracticality of case-by-case efficiency tests for mergers aligned with the view of leading U.S. scholars at the time, including those otherwise sympathetic to economic efficiency as a goal of antitrust enforcement. See e.g. Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* (8 February 2022) at s 2.1.
- ¹⁷ The discussion paper did not specify the threshold, but indicated that it “would have to be set reasonably high.” It also noted that an above-threshold merger need not be prohibited entirely, it could still be allowed if a “conditional order were feasible which would ensure that the merger did not result in a dominant position in any particular market.” *Ibid*.
- ¹⁸ A speech by the Minister previewing the 1981 discussion paper noted that “Inevitably, some will find [the eventual threshold] too high, others too low. It seems to us that we must specify an exact share of the market that will allow businesses considerable expansion through acquisitions, and that will eliminate the few cases where competition is most seriously threatened.” Speech by the Honourable André Ouellet to the Montreal Chamber of Commerce (31 March 1981). *Ibid* at 7.
- ¹⁹ *United States v Philadelphia National Bank*, 374 U.S. 321 (1963) [*Philadelphia National Bank*].
- ²⁰ *Ibid*.
- ²¹ *Ibid*.
- ²² Newman, *supra* note 13 at 260.
- ²³ *Ibid*.
- ²⁴ Department of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide*, (Ottawa: December 1985) at 17.
- ²⁵ *Ibid*.
- ²⁶ See remedial orders made in *Southam* ([CT-1990-001](#)), *Canadian Waste* ([CT-2000-002](#)) and *Secure Energy Services* ([CT-2021-002](#)). In addition, there are at least 96 merger cases involving registered consent agreements [listed](#) on the

Competition Tribunal website as of the time of writing. This does not include additional cases resolved by way of undertakings, or cases that were abandoned on the basis of competition concerns, of which there would likely be dozens.

²⁷ *Canada (Director of Investigation and Research) v Imperial Oil Ltd*, (26 January 1990), CT8903/390 at 26–27 [*Imperial Oil*]. At 16, the Tribunal embraced a sliding scale approach, whereby it would show less tolerance for anti-competitive harm from a merger if the pre-merger situation was already highly uncompetitive.

²⁸ *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, 1992 CanLII 15378 (CT) at 325 and 330 [*Laidlaw*]. At 345, the Tribunal also opined that an acquisition practice that leads to a monopoly “by itself constitutes at least a prima facie lessening of competition which is substantial.

²⁹ *Canada (Director of Investigation and Research) v Hillsgdown Holdings Ltd*, 1992 CanLII 2092 (CT) at 46 [*Hillsgdown*].

³⁰ The HHI is a standard measure of market concentration deriving from oligopoly theory. It is calculated by summing the squares of the market shares of all the firms competing in the market. See George J Stigler, “A Theory of Oligopoly” (1964) 72:1 *Journal of Political Economy* 44–61.

³¹ While not expressly embracing such a presumption, the Tribunal suggested at footnote 47 that this was a higher test than the one that applied in the United States and thus “an approach that will likely be more appropriate for Canadian industries which will often already be highly concentrated.” *Ibid* at 47–48.

³² *Ibid* at 71.

³³ *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc*, CCTD No 8 at para 227 [*Tele-Direct*].

³⁴ *Ibid* at para 758. See also *Imperial Oil*, *supra* note 27.

³⁵ *Ibid*, n 291.

³⁶ *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 [CACT 16](#) (CanLII) [*Superior Propane*].

³⁷ *Ibid* at para 121.

³⁸ *Ibid* at para 133.

³⁹ *Ibid* at para 133.

⁴⁰ *Ibid* at para 272 [emphasis added].

⁴¹ Competition Bureau, *Merger Enforcement Guidelines* (March 1991). Those guidelines noted that “[n]o inferences regarding the likely effects of a merger on competition are drawn from evidence that relates solely to market share or concentration.” It also noted that under the efficiency defence, the relevant anti-competitive effects of the merger were limited to deadweight loss to the Canadian economy.

⁴² Frank Mathewson & Ralph Winter, “The analysis of efficiencies in Superior Propane: Correct Criterion Incorrectly Applied” (2000) 20:2 *Canadian Competition Record* 88–97.

⁴³ *Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385 (SCC), 1 SCR 748 at paras 83–85 [*Southam*]. The author thanks an anonymous reviewer of this paper for suggesting this point.

- ⁴⁴ See discussion of international remedial standards in Competition Bureau (2022), *supra* note 16 at s 2.4.
- ⁴⁵ *Canada (Commissioner of Competition) v CCS Corporation et al*, 2012 [CACT 14](#) (CanLII).
- ⁴⁶ *Ibid* at paras 375–86.
- ⁴⁷ *Ibid* at paras 2, 4, 222 and 289–90.
- ⁴⁸ *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), 1 SCR 161 [*Tervita*].
- ⁴⁹ *Ibid* at paras 100, 137–39, 151, 164, and 166.
- ⁵⁰ *Ibid* at para 181–200.
- ⁵¹ Michael Trebilcock & Francesco Ducci, “The Evolution of Canadian Competition Policy: A Retrospective” (2017) 60 *Can Bus LJ* 171 at 195. See also Ralph Winter, “Tervita and the Efficiency Defense in Canadian Merger Law” (2015) 28 *Can Competition L Rev* 133.
- ⁵² As an aside, it is possible that this decision was a purely idiosyncratic result. Justice Rothstein wrote the decision for the majority in *Tervita* in his final months on the court. In a tribute article, one set of observers noted that *Tervita* represented a “keystone of his legacy” and the “culmination of a lifetime of work committed to promoting economic efficiency as a virtue that benefits all Canadians.” Notably, Justice Rothstein “insisted on Parliament’s intention to put economic efficiency at the heart of Canadian competition law even at the expense of other stated purposes of the Competition Act, including consumer protection and providing opportunities for small and medium enterprises.” He was able to do so, apparently, by relying on a “textualist leaning”, given the express wording of the efficiencies defence, and ignoring the policy considerations that Parliament had in mind in creating the defence. Joshua Krane et al, “Marshalling the Efficiencies Defence” (2016) 74 *SCLR* (2d) 451 at paras 1, 3 and n 52.
- ⁵³ *CCS*, *supra* note 45 at paras 261–65.
- ⁵⁴ *Superior Propane*, *supra* note 36 at para 333.
- ⁵⁵ *Canada (Commissioner of Competition) v Parrish & Heimbecker, Ltd*, 2022 Comp Trib 18, [CanLII 106878](#) (CT) at paras 638, 698–702, and 762–63 [*P&H*]. In particular, the Tribunal noted at paras 700–01 that the consumer surplus loss was \$540,000 per crop year in wheat, that the deadweight loss was at least \$30,000, and that the cognizable efficiencies were \$0. The Tribunal also noted at para 540 that it did not have sufficient evidence to determine whether a loss of \$2000 per farm “could be material or not to farmers.”
- ⁵⁶ *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7, [CanLII 76988](#) (CT) [*Secure Energy Services*].
- ⁵⁷ *Ibid* at paras 23–24 and 107.
- ⁵⁸ *Ibid* at paras 108–25.
- ⁵⁹ *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 02, [CanLII 27447](#) (CT) at para 5.
- ⁶⁰ *Ibid* at paras 484–716.
- ⁶¹ Author’s calculations using case data from Competition Tribunal website.

Note that *Superior Propane I* only counts the first decision in that case, not the subsequent hearing and redetermination decision.

⁶² Matthew Chiasson & Paul Johnson, “[Canada’s \(In\)Efficiency Defence: Why Section 96 May Do More Harm than Good for Economic Efficiency and Innovation](#)” (2019) 32 *Can Competition L Rev* 1. This could be particularly relevant in industries where dynamic competition is important. See Carney, *supra* note 5 at 504–05 (“In technology ... a series of acquisitions have been waved through because there is no discernible price impact. But there is a detrimental impact on experimentation and another one on the concentration of economic power. And with them, on dynamism.”).

⁶³ *Supra* notes 8 and 26.

⁶⁴ See e.g. Michael Kilby & Lawson Hunter, “[In Getting Mergers Done, the Infamous Efficiencies Defence is Way Overrated](#)” *The Globe and Mail* (21 December 2022).

⁶⁵ For a general overview of the changes and what led to them, see Matthew Chiasson & Matthew Boswell, “[From Fiction and Fantasy to Reality: How a New Era of Competition Law in Canada Came to Be](#)” (2025) 24:4 *The Antitrust Source*.

⁶⁶ *Ibid.*

⁶⁷ U.S. Department of Justice and Federal Trade Commission, *2023 Merger Guidelines* (18 December 2023) at 6. Footnote 15 of the guidelines explains that these thresholds are consistent with ones used in previous iterations of the guidelines and routinely relied upon by the courts from 1982 to 2010. The agencies raised the thresholds in the 2010 guidelines to better reflect enforcement practices, but decided to revert back to the historical levels in 2023 based on experience and evidence that had developed. Courts have found this explanation persuasive and are citing the current thresholds, see cases *infra* note 97.

⁶⁸ *Imperial Oil*, *supra* note 27, and *Hillsdown*, *supra* note 31.

⁶⁹ $DHHI = (A + B)^2 - (A^2 + B^2) = 2 * A * B$. This holds regardless of the number of other firms in the market.

⁷⁰ Since the smallest HHI in a five-firm market would occur if each firm held 20% share and $20^2 + 20^2 + 20^2 + 20^2 + 20^2 = 2,000$.

⁷¹ An exception might be a merger involving particularly close competitors in a highly differentiated industry where relevant markets could potentially be drawn narrowly or widely. However, even those situations would be readily apparent to the merging parties as raising potential competition risks as firms generally know who their closest competitors are.

⁷² Competition Bureau, *Submission to the House of Commons Standing Committee on Finance and Senate Standing Committee on National Finance in Respect of Bill C-59* (1 March 2024), online: <<https://www.ourcommons.ca/Content/Committee/441/FINA/Brief/BR12944851/br-external/CompetitionBureauCanada-e.pdf>>.

⁷³ See e.g. Public Interest Advocacy Centre, “[Submission re: Consultation on the Future of Competition Policy in Canada](#)” (31 March 2023) at paras 61–62; Canadian Anti-Monopoly Project, “[Written Submission for the Study of Bill C-59](#)” (March 2024) at 4–5.

⁷⁴ See e.g. Consumers Council of Canada, “[Submission re: Consultation on the Future of Competition Policy in Canada](#)” (February 2023); Consumers Union des consommateurs, “[Brief to the Standing Committee on Finance re: Bill C-59](#)”, (20 March 2024) at 5; Option consommateurs, “[Comments to the Finance Committee re: Bill C-59](#)” (5 April 2024) at 8–9.

⁷⁵ See e.g. National Farmers Union, “[Submission re: Consultation on the Future of Competition Policy in Canada](#)” (March 2023) at 4; L’Union des producteurs agricoles, “[Mémoire re: Consultations Sur L’avenir de la Politique de la Concurrence au Canada](#)” (29 March 2023) at 16.

⁷⁶ Standing Committee on Agriculture and Agri-Food, *A Call to Action: How Government and Industry Can Fight Back Against Food Price Volatility* (May 2024), 1st session, 44th Parliament, at Recommendation 9.

⁷⁷ [C-352, An Act to amend the Competition Act and the Competition Tribunal Act](#), 1st session, 44th Parliament, 2023.

⁷⁸ Officials explained that the repeal of section 92(2) would allow the Tribunal to “make intuitive presumptions if market share has become very high” while at the same time “allowing the courts and jurisprudence to evolve.” See testimony of Martin Simard, Senior Director, Corporate, Insolvency and Competition Directorate, Department of Industry to the House of Commons Standing Committee on Finance in respect of Bill C-59 (19 March 2024), online: <<https://www.ourcommons.ca/documentviewer/en/44-1/FINA/meeting-132/evidence>>.

⁷⁹ *The Commissioner of Competition v Labatt Brewing Co. Ltd. et al*, 2007 [CACT 9](#) (CanLII) at paras 24–28.

⁸⁰ See e.g. Submissions of the Competition Law and Foreign Investment Review section of the Canadian Bar Association re: Bill C-59, dated [April 29, 2024](#) and [June 5, 2024](#).

⁸¹ See e.g. Canadian Chamber of Commerce, “[Written submission for the study of Bill C-59](#)” (February 2024) at 8.

⁸² See e.g. CD Howe Institute Competition Policy Council, “[A Step Too Far: Enshrining Structural Presumptions Governing Mergers in the Competition Act is Not Good for Canada’s Competitiveness](#)” (5 March 2024); Macdonald Laurier Institute, “[Proposed changes to Canada’s Competition Act could kneecap our already faltering economy](#)” (9 May 2024); Information Technology & Innovation Foundation, “[Comments to the Parliament of Canada Regarding Proposed Amendments to Canadian Competition Law](#)” (23 February 2024); International Centre for Law & Economics, “[Bill C-59 and the Use of Structural Merger Presumptions in Canada](#)” (15 March 2024).

⁸³ ICN Recommended Practices, *supra* note 2 at 5.

⁸⁴ Herbert Hovenkamp & Carl Shapiro, “[Horizontal mergers, market structure, and burdens of proof](#)” (2018) 127 *Yale LJ* 1996-2025; Steven Salop, “[The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach](#)” (2015) *Georgetown Law Faculty Publications and Other Works* 1304.

⁸⁵ Chamber of Commerce, *supra* note 81 (“Judging a merger solely based on its effects on market share is misguided...” and “...while concentration may generally be associated with a lack of competition in a market, this is not

universally the case.”); ITIF, *supra* note 82 (“... Under U.S. law, mergers that result in certain levels of market concentration or a high combined market share can under certain circumstances be treated as presumptively anticompetitive. However, this presumption is rebuttable...”).

⁸⁶ Hovenkamp & Shapiro, *supra* note 84.

⁸⁷ Nathan Miller et al, “[On the misuse of regressions of price on the HHI in merger review](#)” (2022) 10:2 *Journal of Antitrust Enforcement* 248–59. The paper, however, cautioned against using HHI in more sophisticated regression analyses.

⁸⁸ Jonathan B Baker et al, “[Comments of Economists and Lawyers on the Draft Merger Guidelines](#)” (18 September 2023), *U of Penn, Inst for Law & Econ Research Paper* No. 23-45. The paper, however, cautioned against *irrebuttable* presumptions or presumptions de-coupled from market power that would treat increased concentration as intrinsically harmful.

⁸⁹ Michael Kades, Deputy Assistant Attorney General, US DOJ Antitrust Division, “[Remarks at GCR Live: Law Leaders Global 2024](#)” (1 February 2024). It appears this was the critique the Tribunal had in mind in its commentary on subsection 92(2) in *Superior Propane*, *supra* note 38.

⁹⁰ Hovenkamp & Shapiro, *supra* note 84 at 2005–2006.

⁹¹ Hovenkamp & Shapiro, *supra* note 84 at 2007 (“evidence from merger retrospectives strongly supports the structural presumption by finding links between concentration and post-merger price increases”); Kades, *supra* note 89 at n 20 (citing a large number of merger retrospective studies).

⁹² Volker Nocke & Michael D Whinston, “[Concentration thresholds for horizontal mergers](#)” (2022) 112:6 *American Economic Review* 1915–48.

⁹³ Herbert Hovenkamp, “[The 2023 Merger Guidelines: Law, Fact, and Method](#)” (2024) 65:1 *Review of Industrial Organization* 39–77 at 52–53.

⁹⁴ Nikiforos Iatrou et al, “[Contagious Presumptions: Will U.S. Antitrust Transform Canadian Merger Review?](#)” (3 September 2024) (examining previous mergers and finding that “being over or under the structural presumption is a reasonable indicator for the risk that a deal may require a remedy”).

⁹⁵ *Southam*, *supra* note 43 at para 79 (“Definition of the relevant market is indeed a necessary step in the inquiry...”).

⁹⁶ See e.g. *P&H*, *supra* note 55. That decision devoted some 270 paragraphs to market definition with the acronym SSNIP (small but significant non-transitory increase in price) being used over 100 times.

⁹⁷ See *Federal Trade Commission v IQVIA Holdings Inc*, [1:23-cv-06188v](#), (SDNY 8 January 2024); *Federal Trade Commission v Novant Health, Inc et al*, [5:2024cv00028](#) (WDNC 5 June 2024); *Federal Trade Commission v Tapestry, Inc*, [1:24-cv-03109](#), (SDNY 24 October 2024); and *Federal Trade Commission v Kroger Company*, [3:24-cv-00347](#), (D. Or., 10 December 2024).

⁹⁸ Germany, *Submission to OECD Roundtable on The Use of Structural Presumptions in Antitrust* (4 December 2024).

⁹⁹ European Commission, “[Topic B: Assessing Market Power Using Structural Features and Other Market Indicators](#)” *Review of the EU Merger Guidelines* (8 May 2025).