Prior to the 1986 legislation, merger provisions in Canada were part of criminal law and judicial interpretation required the strict standard of proof "beyond any reasonable doubt". Over a period of 50 years, therefore, the Crown prosecuted only nine cases, of which it won only three.[44]

In 1986, the provisions were changed from criminal to civil law, hence the burden of proof shifted to proof "on the balance of probabilities". The basic test in the Competition Act is whether the merger "lessens or prevents or is likely to lessen or prevent competition substantially". Canada's Merger Enforcement Guidelines make it clear that the Bureau of Competition Policy is concerned with horizontal mergers and their effects on market power as well as with the possible horizontal effects of certain vertical mergers. While the purpose clause of the Act refers to export objectives and equity objectives for small and medium-sized enterprises, the emphasis in the Guidelines is in protecting competition, not competitors. As well, the Competition Tribunal has stated on at least two occasions that it will not consider industrial or other policy considerations.

## United States

The United States has evolved a complicated set of procedural and substantive hurdles for any merger or acquisition raising antitrust questions. Enforcement of U.S. statutes is entrusted to two federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), although the statutory scheme also provides for private enforcement and enforcement by State Attorneys General.

Under the Hart-Scott-Rodino Premerger Notification Act, notification of an impending merger is required for most mergers above low dollar thresholds[45] and such notification must be made to both the FTC and the DOJ. They agree on which one will investigate any particular transaction before expiration of the initial phase of the waiting period.[46]

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[44] Under the previous criminal law provisions during the period 1910 to 1986, the test was whether a merger or proposed merger "is likely to lessen competition to the detriment or against the interest of the public, whether consumers, producers, or others". See W.T. Stanbury, "An Assessment of the Merger Review Process Under the Competition Act", Canadian Business Law Journal, Volume 20, No.1, March 1992, pp. 422-463.

[45] One party has total assets or net annuel sales of $100 million or more and the other party has total assets or net annual sales of $10 million or more and if, as a result of the proposed transaction, the acquiring party will hold more than $15 million worth of assets or voting securities of the acquired party. Under some circumstances, an acquisition of voting securities worth $15 million or less will be reportable if the buyer is acquiring 50 per cent or more of the issuer's voting securities.

[46] The waiting period required prior to the consummation of a merger is normally 30 days (15 days in the case of a cash tender offer), although the DOJ or the FTC can extend this period for up to a further 20 days. In the event of non-compliance with notification requirements, the waiting period can be extended further upon application to a U.S. district court.