A Survey of Canadian and German Contract Law

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

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Table of Contents

I. The Different Legal Systems of Germany and Canada:

It comes as no surprise that the legal systems of Germany and Canada differ significantly. These differences are due mainly to the fact that the Canadian legal system (with the exception of the province of Quebec) is based on the common law whereas that of Germany is based on the civil law, as are the legal systems of most member states of the European Union.

The common law was developed in England during the 12th and 13th centuries and is also known as the "traditional law." As a British colony, Canada became a common law jurisdiction, implementing decisions and developments as they occurred in the English law.

Common law is guided by the principle of *"stare decisis,"* more precisely known as *"stare decisis et non quieta movere"* ("stand by decisions and do not move that which is quiet"). Judges are the major decision makers who hold the power to create precedents by developing abstract rules in particular cases, which from the point in time of their ruling become binding for courts of the same jurisdiction. In other words, all decisions of a higher court have a binding effect within the jurisdiction of a province (CAN) or state (U.S.A.) on all lower courts of the same province or state (*binding authority*).

It is important to note, however, that a higher court's decision does not have any binding effects on a lower court of a different jurisdiction – although the decision holds persuasive authority.

Although precedents set guidelines for the future, they can also be overruled by new statutes passed by the appropriate authorities.

Civil law, on the other hand, has its origin in canonical and, particularly, in Roman law. In 534 AD, Roman law was codified in the *"Corpus Iuris Civilis"* at an order of the Byzantine emperor Justinian. Unlike the common law, civil legal systems such as that of Germany are created solely by legislators. Thus, the courts are not so strictly bound by earlier decisions, but rather by the specific applicable and just law. This basic principle is codified in Art.1 Abs. 3 of the German Constitution ("*Grundgesetz*"). Therefore, it is possible that two courts of the same jurisdiction decide differently in similar cases. Although two courts of the same jurisdiction may technically decide similar cases differently under the common law, it is highly unlikely since extraneous preconditions would apply.

It should be noted, however, that according to German law, lower courts are required to follow the decision of a higher court within the same jurisdiction if the facts of the case are the same. For example, a German municipal court ("*Amtsgericht*") is bound by the decision of the district court ("*Landgericht*") of the same jurisdiction. An aggrieved party in Germany has the right to appeal the decision through the remedies of *"Berufung"* and *"Revision."*

In addition to the Canadian common law and German civil law principles, the legal systems of both Canada and Germany are grounded in their respective Constitutions.

In Canada, the Constitution of Canada is the supreme law; the country's constitution is an amalgam of codified acts and non-codified traditions and conventions. Moreover, the Constitution of Canada outlines Canada's system of government, as well as the civil rights of all Canadian citizens.[1]

In Germany, the Constitution of the Federal Republic of Germany (FRG) is the supreme law ("Grundgesetz"). It first came into effect in 1949 as the de facto constitution of West Germany. It deals with Germany's system of government, the civil rights of all persons resident in Germany, the executive power, the legislative power and judicial power (principle of separation of powers).

II. The Law of Contract under Canada and Germany

The different origins of and distinctions between the Canadian and German legal systems are reflected accordingly in differences between their respective approaches to one of the most fundamental areas of law – the law of contract.

In Germany, contract law is basically codified in the "*Bürgerliches Gesetzbuch*" (*BGB, English: Civil Code"*). *Inter alia,* it contains rules about the conclusion of a contract, the rescission of a contract and particular standards on the form and content of a contract. The *BGB* also contains special standards for different types of contracts. *§§ 535 et seq. BGB,* for example, contain rules about lease or rental agreements, while *§§ 631 et seq. BGB* set out standards for contracts related to work and services. Furthermore, the *BGB* contains rules on Property Law, Family Law and Succession Law.

In Canada, the applicable law differs from province to province. A distinct federal law, such as that of Germany, does not exist in an equivalent form in Canada. Some of the few examples of Canadian federal law are Income Tax Law, Criminal Law and Immigration Law. However, many legal principles are similar in the different provinces and the following essay summarizes those principles as a guide to what may be loosely termed Canadian law. Particular examples provided throughout are based on the law of the province of Ontario.

The purpose of this essay is to provide insight into the differences between and similarities shared by Canadian and German contract law and, by means of various examples, to illustrate key differences between the common law and civil law legal systems.

[1] http://en.wikipedia.org/wiki/Constitution_of_Canada

III. How does a Contract come into Existence?

Pacta sunt servanda – this principle of Roman law means that contracts, once they are closed, are binding. German contract law refers to this principle; there is no equivalent in Canada.

Practically speaking, the relevant questions to ask are these: (1) What are the key differences between the common law and civil law in their approach to contract law? (2) What are the formalities of contract law? (3) Which claims can be based on contract, or how can damages be claimed in case of a breach of contract? Lack of knowledge in these areas inevitably leads to avoidable misunderstandings and problems in practice.

In general, such questions can only be answered in light of the legal action to be taken because, amongst other factors, different forms of contracts and different contents can lead to differing preconditions for the conclusion of a contract. To understand which differences are basic and important for practical purposes, it is important to analyze the basic principles underlying German and Canadian contract law. After such analysis, the practical application of those principles will be outlined.

IV. The conclusion of a contract according to German law

1. Offer and acceptance

In German law, a contract comes into effect through two corresponding declarations of intent: (i) offer and (ii) acceptance. The offer has to be distinguished from the so called *invitatio ad offerendum (invitation to treat)*, which is actually not in and of itself an offer, but calls upon a person to make an offer. For example, a shop window advertisement itself is not a valid offer, but addresses a variety of potential customers and invites them to make a self-contained offer. This offer can be accepted subsequently.

Through offer and acceptance, the parties to a contract agree that certain legal consequences become effective between them. In this respect, two or more declarations of intent are required according to German law, both of which address one mutual result. For a contract to come into effect, not only must there be an offer and acceptance, but both parties must also have legal capacity to contract. The declarations of intent can be delivered explicitly or implicitly.

2. The principle of freedom of contract

In Germany, the principle of freedom of contract is applicable. This principle states that every natural and legal person can choose the other contracting party and the subject matter of the

contract independently, as long as no rights of third parties or other statutory provisions are affected by the contract. The rule of freedom of contract is rooted in *Art. 2 Abs.1* of the German Constitution, which guaranties freedom of action ("*Allgemeine Handlungsfreiheit*"). The rules applicable to German contracts are generally contained in acts passed by the German legislature. Therefore, in reference to the Civil Code, a contract can be valid even though the contract itself does not explicitly articulate further rules. For example, if a lease or rental agreement contains no clauses on cancellation deadlines, the Civil Code will provide basic rules concerning that issue. Thus, the missing agreement on a deadline does not invalidate the contract. However, every contract needs to contain the so called *essentialia negotii* – the necessary (essential) agreements to close a contract – which means that the contract needs to contain all substantial details. For example, in a sales contract, the subject matter of the contract and the sale price have to be specified, or else such contract is void.

Despite these rules, many provisions of the *BGB* are non-binding law, and can be altered by the parties. Generally, the parties' agreements prevail over the rules set forth in the Civil Code, unless those rules are mandatory law.

The "Trennungsprinzip" and the "Abstraktionsprinzip"

German civil law, particularly contract law, is greatly influenced by two basic principles: The "*Trennungsprinzip"* and the "*Abstraktionsprinzip."*

The "*Trennungsprinzip*" indicates that an act within the law of obligations ("*Verpflichtungsgeschäft,*" e.g. a sales contract according to *§ 433 BGB*) always needs to be distinguished from an act of actual property law ("*Verfügungsgeschäft,*" e.g. the transfer of the ownership of an object according to *§ 929 BGB*). A sales contract, for example, only imposes an obligation to transfer ownership; the actual transfer of ownership of the object sold is subject to an adequate "*Verfügungsgeschäft.*" Thus, the purchase of an object or item contains three legal actions: (1) The sales contract between the parties, (2) the transfer of particular goods and (3) the transfer of money.

The second important basic principle is the "*Abstraktionsprinzip,*" which is based on the "*Trennungsprinzip.*" The "*Abstraktionsprinzip"* indicates that, basically, the validity of an obligation ("*Verpflichtungsgeschäft*") and the fulfilling of that obligation ("*Verfügungsgeschäft*") are not interdependent. This means that the invalidity of a contractual obligation ("*Verpflichtungsgeschäft*") generally does not cause the invalidity of the later fulfilling of that obligation ("*Verfügungsgeschäft,*" e.g. transfer of the ownership of an object). That is to say the "*Verfügungsgeschäft"* is abstract, i.e. its legal existence is independent from the previous "*Verpflichtungsgeschäft.*" The "*Abstraktionsprinzip"* protects all kinds of legal relations. The buyer of an object can rest assured that he has gained the ownership of the relevant object after a

legal transfer according to *§ 929 BGB*, even if the underlying contract turns out to be invalid later on. Nevertheless**,** the seller in such a case can possibly demand the return of the goods from the buyer according to the rules of Unjustified Enrichment (*§§ 812 et seq BGB.*).

However, again, the parties' individual agreements prevail. As such, the "*Abstraktionsprinzip"* can also be abrogated by means of an accordant legal agreement. Furthermore, there are cases in which the "*Abstraktionsprinzip"* does not have to be applied, as in the case of identical mistakes, i.e. when the same mistake or the same reason for invalidity affects both the obligation ("*Verfügungsgeschäft"*) and its fulfillment ("*Verpflichtungsgeschäft*"). Examples of identical mistakes are avoidance on the ground of willful deceit or duress according to *§ 123 BGB*, missing legal capacity according to *§§ 104 et seq. BGB*, usury and unconscionability according to *§ 138 BGB*, and legal prohibition according to *§ 134 BGB*. An example of the latter would be illegal trade in drugs, where the underlying contract as well as all related transactions would be null and void.

3. Representation in German contract law

In Germany, *§§ 164 et seq. BGB* allow each contracting party to be represented by an agent provided certain preconditions are fulfilled. These preconditions are (1) acting as a representative on behalf of another person, (2) the principle of obviousness ("*Offenkundigkeitsgrundsatz*") and (3) having power of representation, i.e. authority to act as a representative. In very personal legal matters, such as a marriage ceremony or the creation of a last will and testament, representation by an agent is not allowed.

With respect to the first precondition, the representing agent must act on behalf of another person. This precondition is not fulfilled when a person signs with somebody else's name while the other party to the contract is indifferent to the name used in that signature as he or she only wants to contract with the person actually acting[2]. This constellation would be described as acting under a wrong name. In the case of a person who acts and announces a wrong name, the person actually acting will incur the legal obligation accruing to the action. The bearer of the name which was announced will not incur legal obligation. A common example is that of somebody who rents a hotel room under another person's name.

Secondly, valid representation by a representing agent requires compliance with the principle of obviousness according to *§ 164 Abs.2 BGB*. The intention to act in another person's name must be expressed clearly and identifiably. The purpose of the principle of obviousness is that of protecting the contract partner of the person to be represented. The contract partner needs to be

[2] Medicus, Dieter: Bürgerliches Recht, § 5, Rn.82.

informed that he or she is concluding a contract with the person represented, not with his or her agent. There are, however, several exceptions to the principle of obviousness, such as daily cash transactions for which the seller usually does not have an interest in knowing with whom he actually is contracting. In the case of such a contract, ownership of the particular goods in question is transferred not to the person actually acting (i.e. the representing agent), but to the person for whom the agent is acting[3] (even if the principle of obviousness was not adhered to). Moreover, as far as circumstances allow it under *§ 164 Abs.1 S.2 BGB*, in cases of so-called corporate affairs, employees do not have to make explicitly clear that they are representing their company's owner when they are concluding a contract with a customer. If it is not clear that the transaction at hand is a corporate matter, the employee him- or herself becomes the contracting party. However, it is possible for the company owner to subsequently authorize the transaction according to *§ 177 Abs.1 BGB*.

A third precondition for valid representation by an agent is the power, or authority, of representation. Such authority is either statutory or can be issued by a legal act (Power of Attorney, legal definition in *§ 166 Abs.2 S.1 BGB*). Powers of Attorney validating a legal act can be issued either as an internal authorization ("*Innenvollmacht*", *§ 167 Abs.1 Var.1 BGB*) or as an external authorization ("*Außenvollmacht*", *§ 167 Abs.1 Var.2 BGB*). The Power of Attorney for Internal Use is issued by the principal, i.e. the donor of the power, through an appropriate authorization to the donee of the power, i.e. the agent on whom authority to represent is bestowed. The Power of Attorney for External Use is issued through a declaration addressed to the other contracting party. The Power of Attorney can be issued by declaration or by delivery of a certificate of authorization according to *§ 170 ff. BGB*. Under certain circumstances – and to protect the possible contract party – the Power of Attorney can be replaced by a Power of Attorney by Estoppel, called either "*Duldungsvollmacht*" or "*Anscheinsvollmacht."* In such cases, representation is valid even though a power of attorney never has been explicitly issued. In the case of a "*Duldungsvollmacht,"* the principal knowingly accepts another person acting on his behalf, without that person being an authorized agent. In the case of an "*Anscheinsvollmacht*," the situation is slightly different: The principal has in fact no knowledge of another person's wrongful behavior, but would have been able to gain such knowledge, had he paid the necessary attention. In that case a possible contract party has to be protected if it was indeed unaware of the lack of authorization; therefore authorization is assumed and the principal is treated accordingly.

In the case of a valid representation, the representing agent delivers his or her own declaration of intent. This means that the principal is incurring obligations even though he or she does not act in person at all; see *§ 164 Abs.1 S.1 BGB*. For the representing agent, the transaction is a neutral

[3] Medicus, Dieter: Bürgerliches Recht, § 5, Rn.90.

legal act and, so, even restricted legal capacity is sufficient in such cases according to *§ 165 BGB*. The fact that the representing agent delivers his own declaration of intent distinguishes him from a messenger, who only delivers or receives another individual's exact declaration of intent.

4. Absence of intention, defects and avoidance

Under German law, the absence of intention on the part of one of the parties at the time the contract is concluded can enable that party to declare the contract null and void. A reason for such avoidance can be a mistake at the time of the conclusion of the contract, such as a mistake involving the content of a declaration (*§ 119 Abs.1 Var.1 BGB*), a mistake of expression (*§ 119 Abs.1 Var.2 BGB*) or a mistake as to important characteristics or qualities of the subject matter (*§ 119 Abs.2 BGB*). Moreover, a contract can be voided because of a threat or deceit at the time of the conclusion of the contract (*§ 123 BGB*). The intended avoidance has to be expressly declared to the other party (*§ 143 Abs.1 BGB*). Depending on the reason for the avoidance, a particular deadline has to be kept in mind (*§§ 121, 124 BGB*). In the case of a successful avoidance, the contract has to be treated as null and void from the very beginning onwards ("*ex tunc*"; *§ 142 Abs.1 BGB*). After a valid avoidance, the contract has to be treated as if it never had existed.

5. Under-age contract law

The German law also requires that both contracting parties be of legal capacity before a valid contract can come into existence. Legal capacity, according to *§ 104 Nr.1 BGB*, refers to a person aged seven years or older. It is important to note that there can also be a condition affecting the free exercise of will which can conflict with legal capacity. *§ 104 Nr.2 BGB* rules legally incapacitated a person who is in a state of mental disturbance which prevents him or her from the free exercise of will. According to *§ 105 Abs.2 BGB*, a declaration of intent, delivered in a condition of unconsciousness (as in the case of intoxication) or in a temporary state of mental disturbance, is void. *§ 105 Abs.1 BGB* stipulates that a legally incapable person's declaration of intent is void.

After attaining the age of seven years, a minor has limited legal capacity according to *§ 106 BGB*. Therefore, all minors between the ages of seven and eighteen years have limited legal capacity. The legal representative can later approve a contract which was concluded by a minor, aged seven years or older, without the required prior consent (*§ 108 BGB*). An exception to this principle is that minors need no consent from their legal representative if they deliver a declaration of intent which results only in a legal advantage for them (*§107 BGB*).

A further exception is set forth in rule *§ 110 BGB*, which is called the "*Taschengeldparagraph*" ("pocket money section"). It states that a contract concluded by a minor without the consent of

his legal representative is immediately valid if the minor fully pays for the goods acquired or services received with money given to him or her by the legal representative, or by a third party with the legal representative's consent, expressly for that very purpose – or alternatively for his or her free disposal. For example, if a minor receives € 30 of pocket money each month from his or her parents, he or she indeed receives it for free disposal. Therefore, legal actions performed with this money are instantly valid and do not require the consent of the legal representative.[4]

Damages, claims for quasi agreements and the principle of good faith ("*Treu und Glauben*")

In the case of a breach of contract, the party who suffered loss can demand damages and/or withdraw from the contract. For example, according to Sales Law, in a situation in which services were not performed in conformity with the contract, the wronged party can choose to require supplementary services to be performed, to reduce the purchase price or to withdraw from the contract.

Another specific characteristic of German law is the provision that preliminary claims can arise out of a quasi-contractual relationship. Arguably, the most important claim is the one for "*culpa in contrahendo*" (short: *CIC*), which is regulated in *§ 311 BGB*. Such a claim accrues if one party at the time a contract was initiated culpably violates the other party's rights, and is thus in breach of its preliminary obligations. In certain cases, claims for "*culpa in contrahendo*" can be asserted whether a contract was indeed concluded later or not. Also, there are cases in which a claim with respect to a breach of post-contractual obligations can be asserted even after the performance of the original contractual obligations. According to *§ 280 BGB* remedies can be claimed in case of a Violation of Contractual Duty ("*Positive Vertragsverletzung*"). This includes remedies for the violation of collateral duties, or of the obligation to provide protection to third parties.

§ 242 BGB codifies the principle of good faith ("*Grundsatz von Treu und Glauben*"), which serves as a blanket clause in German Civil Law and applies to performance of any and all contractual obligations. According to *§ 242 BGB*, the obliged party has to perform his or her contractual obligations in compliance with good faith and in accordance with the accepted standards and prevailing practices.

6. Modifications applicable to merchants

Exceptions and special regulations in contract law apply to commercial transactions, such as the actions of merchants. *§§ 1 et seq. HGB* ("*Handelsgesetzbuch,*" German Commercial Code)

[4] Palandt/Ellenberger § 110 Rn. 2: The question whether a minor is allowed to conclude further valid contracts with means acquired as a result of the first contract ("surrogates") has to be answered on a case-by-case basis (e.g. winning a lottery by means of a valid ticket purchase, then spending the money won on buying further goods).

codify the criteria according to which a person is classified as a merchant. According to *§ 1 Abs.1 HGB*, a merchant is someone who is engaged in trade. According to *§ 1 Abs.2 HGB*, a trade is every business enterprise, unless the enterprise in question by virtue of its character and size does not need to be commercially organized. Furthermore, according to *§ 6 Abs. 2 HGB* there are entities that are considered merchants by law:

- *GmbH* (German equivalent to a limited liability company, according to *§ 3 Abs. 3 GmbHG*)
- *Aktiengesellschaft* (Stock corporation, according to *§ 3 AktG*)
- *Eingetragene Genossenschaft* (Registered cooperative society, according to *§ 17 Abs. 2 GenG*)

Being engaged in a trade causes a merchant to deal with a variety of legal actions and to conclude contracts day-to-day. Therefore a merchant is deemed to be in need of legal protection much less than an average private person. For this reason some of the rules originally set forth in the *BGB* are modified as follows: Contrary to the provision of *§ 766 Abs.1 S.1 BGB*, which requires a surety to be in written form, a merchant's oral declaration of surety is valid (*§ 350 HGB*). If the provision of the surety is a commercial transaction for a merchant, that merchant can be subject to a claim based on the provided surety, without the claimant being forced to first sue the original debtor (*§ 349 S.1 HGB*).

In accordance with prevailing practice between merchants, silence can establish contractual obligations. After a contract between merchants has been concluded by offer and acceptance, it is common practice to confirm the conclusion of the oral contract and its content by letter at a later date. If the merchant does not object to such a letter of confirmation (e.g. regarding lack of clarity, missing power of representation or content differing from the oral agreement), his or her non-response is deemed to be an acceptance of the confirmation's written content.

7. Form

Generally, German law does not stipulate formal requirements for the conclusion of a contract, which allows parties to close binding contracts orally. However, there are certain legal actions which require a particular form, and if the requisite form is not adhered to, the legal action generally becomes void (*§ 125 S.1 BGB*). In that context, the nature of the legal action determines the form necessary. For example, a valid sales contract (*§ 433 BGB*) involving moveable property can be concluded orally, whereas the closing of a sales contract involving real estate is required to be notarized in order to be valid (*§ 311b Abs.1 S.1 BGB*). Lease agreements can be concluded without any formal requirements as well (*§ 535 BGB*), but if a lease agreement

that has lasted for a period of at least one year has not been concluded in written form, it will be deemed to have been closed for an unlimited period of time (*§ 550 S.1 BGB*). It is also possible to conclude contracts via means of telecommunication (*§ 312b et seq. BGB*; e.g. an agreement closed using the internet), but – according to *§ 312d Abs.1 S.1 BGB* – in such cases, the consumer is allowed to revoke his or her former declaration within two weeks and thus avoid the contract (*§ 355 BGB*).

Although German law generally does not require a written form, concluding contracts in writing is helpful as evidence in case of a later dispute. If required, the notarization of a contract serves different purposes: It is a means of security and a warning to the contracting parties, which ensures that both parties become aware of the consequences of the contractual obligations. Agreements involving the sale of real estate, for example, always require the contract to be notarized.

V. The conclusion of a contract according to Canadian law

Consensus ad idem and offer and acceptance

Canadian contract law is primarily affected by the principle of "*Consensus ad idem.*" This basic rule signifies that every contracting party must have the will to come to a mutual agreement. An agreement needs to be expressed either explicitly or implicitly. Similar to German law, a contract can only be valid in Canada if there is an offer and acceptance. Furthermore, a contract can be concluded only if the "*animus contrahendi"* exists between the parties, i.e. the will to close the contract. An "*invitatio ad offerendum"* (*invitation to treat*) is not a valid offer in Canada.[5]

1. Consideration

Besides offer and acceptance, the common law in Canada requires each party to provide consideration for the valid conclusion of a contract. The term consideration refers to an exchange of value provided by each party which serves as a guarantee that the contract will be concluded in the future. In the words of a Canadian judge: "*The principal requisite and that which is the essence of every consideration, is that it should create some benefit to the party promising or some trouble, prejudice or inconvenience to the party to whom the promise is made.*"[6] However, it is possible that the service or value provided devolves on a third party.

Consideration is an example of a legal principle that distinguishes Canadian from German

[5] See discussion of "Offer and acceptance" in the German section, p. 6.
[6] Lord Campbell, C. J., in Gerhard v. Bates, 2 El. & B. 476 J 20 Eng. Law & Eq. 135.

contract law. German contract law contains no legal concept of consideration. According to German law, after the parties have validly concluded a contract, all contracting parties are obliged to fulfill the contract through performances, i.e. execution of the terms of the contract, as agreed in advance.

2. Capacity

As is the case in Germany, Canadian law mandates that all contracting parties be of legal capacity. The provisions in Canadian common law are quite similar to the provisions in German law, in that legal incapacity includes those with a mental disability and those under the age of eighteen. In Canada, as in Germany, inebriated people cannot legally contract. Under the common law, special rules apply to minors with respect to contracts. For example, a contract which involves at least one minor party can be avoided by the minor, but if the minor received a benefit because of the contract, he would have to fulfill the contractual obligations, unless the benefit received was of no quantifiable value.

In the Canadian legal system, it is frequently the case that a minor is not bound by a contract and is granted the option of avoiding the contract. Exceptions, however, are contracts pertaining to necessaries, i.e. goods suitable to the condition in life of the minor and to his or her actual requirements at the time of the sale and delivery, or contracts because of which a minor receives a benefit.

Limited legal capacity, as articulated in German law, does not exist in Canadian common law. Thus, the later approval of a contract concluded by a minor is not provided for under Canadian law. Legally incapacitated persons are protected by law, especially if they are acting against their own potential interest or cannot take care of themselves. Therefore, any such contract could be declared void. In addition, a contract closed under the influence of alcohol or drugs could also be declared void, if all relevant requirements were met.

3. Privity

Privity is another basic principle of contract law and refers to the contractual relationship between the contracting parties. More specifically, privity defines the parties involved in a concluded agreement and prevents persons not party to the contract from being affected by it. The signatures of the contracting parties in this context serve as evidence for the conclusion of the contract. An agreement between A and B therefore only contains A and B as parties to the contract. If there is another person (C) named in the contract in the sense that this person incurs

an encumbrance or is benefited by rights because of that contract, this does not necessarily mean that this person becomes party to the contract.[7]

A person, such as a lawyer, who influenced the conclusion of the contract, but was not personally involved, cannot sue or get sued by the parties to such a contract. Because of the principle of privity, only the parties who actually concluded the contract can be plaintiff and/or defendant.[8] In this context, congruency with the German law is apparent. However, the rights of the contracting parties can be transferred to a third party in the form of a legal assignment. Within such an assignment the particular rights are transferred from one party to another. In such an instance, therefore, a party not initially involved in the contract could sue or be sued with regard to the contract.

4. Invalidity of a contract

In Canadian law defects which can lead to the invalidity of a contract include a mistake, misrepresentation, duress, undue influence and unconscionability. Furthermore, the contract can be invalid due to illegality (the same principle applies in German law, *§ 134 BGB*).

It is important to note that Canadian law does not distinguish between validity of the contract and validity of the performance, but rather focuses on the question whether the performance is unlawful and thus invalid. Should the performance be invalid due to unlawfulness or illegality, generally the contract will be invalid as well. This applies even if the party did not know about the unlawfulness or illegality of the performance. However, there are exceptions. If the performance violates a statutory provision, this provision can be engaged to penalize only the unlawful act, but not to influence the validity of the underlying contract. This is a question of interpretation of the relevant circumstances. This interpretation usually lies within the discretion of the court. The court considers the seriousness of the infringement and then decides about the validity of the contract.[9]

Under common law, as a general rule, invalidity of the performance of the terms of a contract will result in invalidity of the contract. Contract and performance in common law legal systems are closely interconnected and are not treated as independent contracts, as in German law.

5. Representation in Canadian contract law

The rules concerning representation in legal matters cannot be found in a single regulation. The

[7] Fridman, G.H.L., The Law of Contract in Canada, p.187-188.
[8] Fridman, G.H.L., The Law of Contract in Canada, p.197.
[9] Fridman, G.H.L., The Law of Contract in Canada, p.378.

preconditions for a valid representation arise from two different sources: (i) statutes and (ii) the common law. Statutory provisions only apply within the particular province in question. Thus, an Ontario statute cannot be the basis for the decision of a court in the province of Alberta.

6. Breach of contract

Non-performance of a contractual obligation causes a breach of that contract, regardless of whether the breach was intentional, purely accidental or due to negligence. However, the relevant party cannot be held liable if the breach of contract was excused, justified or in any other way legally allowed. Depending on the nature of the breach of contract, this will result in different consequences.[10]

A fundamental breach of contract is a breach so serious in nature that it relieves the other contracting party of the duty of performance and gives it the right to sue. Also, minor breaches and material breaches might occur, which would result in less significant consequences.

Damages and equitable remedies

A breach of a contract usually warrants a remedy for damages which is applied on a strict liability basis. This means that the aggrieved party does not have to show that the contract has been breached intentionally or negligently to file for damages. In so far as no excuse, justification or other exception for the breach of contract applies, the party breaching the contract will be liable and ordered to pay damages.[11]

Depending on the nature of the breach of contract, the aggrieved party has an option of alternative remedies. If a contract is breached by fraud or negligence, for example, an action under tort law can be filed instead of an action under the law of contracts.[12]

It is also possible to file an action under both tort and contract. This is important because, at the time an action is filed, it is often not possible to state exactly which legal claims actually can be asserted. As soon as the question of damages occurs, the plaintiff has to choose either the enforcement of a claim for damages under tort law or contract law. Moreover, instead of damages, a plain sum which represents the value of the particular goods or services to which the contract applies can be claimed. In the case of the sale of goods this is called *"quantum valeban,"* in the case of services *"quantum meruit."*[13]

Depending on the court's decision, and besides claims for damages, so called equitable remedies

[10] Fridman, G.H.L., The Law of Contract in Canada, p.593-594.
[11] Fridman, G.H.L., The Law of Contract in Canada, p.734.
[12] Fridman, G.H.L., The Law of Contract in Canada, p.735.
[13] Fridman, G.H.L., The Law of Contract in Canada, p.741.

can be applied. These are remedies which re-establish justice between the parties, and they can be applied in addition to the other possible remedies in common law. *Inter alia*, such remedies may be specific performances, injunctions, rescission and/or rectification.

7. Form

While it is always advisable to have a contract in writing, oral contracts are valid as well. Whether an oral contract is sufficient depends on the nature and content of the contract according to Canadian law. For example, Purchase and Sale Agreements need to be in written form.

VI. Summary and future prospects

Although there are vast differences between the laws of Canada and those of Germany, both legal systems are structured in accordance with similar basic principles. It might be asserted that the common law and civil law legal systems have tended toward increasing similarity over time. Court decisions were important within German jurisdiction from the very beginning, but are becoming even more relevant nowadays. In contrast, especially in North America, more and more statutory provisions are being developed in addition to common law. Ongoing globalization and internationalization of trade and economies suggest that this trend can be expected to persist in the future.