German and Canadian Real Property Law: A Comparison

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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 resides. 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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In this article, the German and Canadian systems of land registration and purchase are compared. Special attention is paid to the Province of Ontario.

1. The German Land Register (called "*Grundbuch*")

a. Preface about the Grundbuch

The *Grundbuch* fulfils the state-ensured guarantee of title to property and is included in Art. 14 (1) of the German Constitution, referred to as the "*Grundgesetz.*" It provides clarity about rights to real property and a framework for the assurance of those rights. It is a public register which serves to prove legal relations with respect to land. Because of this, every change to real property rights needs to be registered in the *Grundbuch* in order to become effective, e.g. a transfer or an act of state such as enforcement of a judgment. Without this registration, the real property is not marketable and is not usable in a legal sense.

The rules and regulations which guide the setup of the land registry offices, the *Grundbuch* itself and the registration process are governed by the Land Register Act, ("*Grundbuchordnung*") of March 24, 1897 (*GBO*), formally denoted as the law of land registration. The substantive law of land registration is articulated in the German Civil Code, called the "*Bürgerliches Gesetzbuch*" (*BGB*). It stipulates the requirements according to which rights to real property are regulated. Other statutory sources may be found in the Condominium Act ("*Wohnungseigentumsgesetz*"), the Hereditary Building Ordinance ("*Erbbaurechtsverordnung*") and the Land Register Decree ("*Grundbuchverfügung*"), as well as in an array of other state statutes.

The *Grundbuch* itself consists of a loose-leaf system and is administrated by the local courts. Responsibility for the administration is that of the local court where the real property in question is located. The section of the local court which is responsible is the real property registry, called the Land Registry Office ("*Grundbuchamt*"). The "*Rechtspfleger*," comparable to a registrar, is concerned with its management, in accordance with s. 4(1) (h) of the *Rechtspflegergesetz*. In a legal context, the property itself is understood as a cadastral part of the earth's surface which can consist of one or more land parcels. It is listed in the inventory of a land register folio as a specific parcel of land, called the cadastral land register

("*Liegenschaftskataster")*, section 2 *GBO*. Exceptions to these listings are outlined in special statutes.[1]

A land register folio ("*Grundbuchblatt*") is prepared for every property. This provides an index of the location, size and commercial type of the land property. Real property and equivalent rights are also included. The land register folio contains the name of the local court, the volume of the land register, and the number of the folio. The land register folio is additionally divided into three sections. The first section states the name of the owner and the basis for acquisition of ownership. The second section contains all other entries such as priority notices protecting a claim, easements, and restraints on disposal, while the third section contains all security interests in the property, such as mortgage loans and charges.

Documents pertaining to a registration, including registration approvals, governmental requests, judgments and certificates of inheritance, must be kept by the land registry office. The originals are kept with the file until replaced with a certified copy.[2]

In Germany, there is also a necessity of registration.[3] Only the real property of communities, the church, and the federal and state governments are exempt from this requirement. Nevertheless, they can be registered upon request. The exemption of these properties is related to the fact that they are generally unmarketable. Because of the compulsory nature of registration in Germany, less than 1% of land properties remain unregistered. If there is no register folio for a particular piece of real property when a *Grundbuch* is opened, a folio will be attached *ex officio*.[4]

b. Principles of the German land register

The *Grundbuch* fulfils the principle according to which entries in the land register should be open to inspection, known substantively as the disclosure principle, and is set in the "*BGB*," the German Civil Code. It functions to effect transfer (section 973 *BGB*), presumption (section 891 *BGB*), and good faith (section 892 *BGB*). The effect of transfer covers every change of legal positions, which means that every change has to be registered. The effect of presumption means that every registered right is presumed to be as that recorded in the

[1] e.g. responsibility for the provision of local public infrastructure or *Flurbereinigungsgesetz*
[2] section 10 *GBO* in combination with section 24 GBV
[3] section 3 *GBO*
[4] section 7 *AVO GVO*

register. If someone denies this presumption, he or she has to disprove it. The effect of good faith means that an individual can rely upon the registration when purchasing a real property, and upon being protected in his good faith if the registration turns out to be wrong.

In addition to the substantive principle of disclosure, there is a procedural principle of disclosure. The *Grundbuch* is a public register and contains important documents regarding legal relations, which can be inspected by anyone who can prove a legitimate interest.[5] There are only a few requirements for proving legitimate interest. The person claiming a legitimate interest has to furnish *prima facie* evidence for being in negotiations to purchase the land or for having an economic interest in it, e.g. an inheritance. For domestic authorities, the principle of administrative cooperation applies such that *prima facie* evidence is not required in the case of a legitimate interest. The owner of the real property has no right to raise an objection against the granting of a legitimate inspection. Data protection law in Germany is not applicable since the registered data is not seen as personal data. If the inspection is denied by the land registry office, the requesting person has the right to file a notice of appeal with the competent district court, called the "*Landgericht.*"[6]

In order to register a legal position in the land register, the person seeking such a legal position has to make a request, in accordance with the principle of request or consensus principle.[7] The request can be made by one party or both parties involved. It always requires the authorization of the person whose legal position will be affected by the new registration. This authorization is also sufficient even if, in order to change a registered legal position, more would be required than a one-page declaration (compare with section 873 *BGB*), and is known procedurally as the consensus principle. The hereditary building right (*Erbbaurecht*)[8] and the conveyance of land in section 925 *BGB* present exceptions to the usually applicable procedural consensus principle. In these cases, the necessary registration of both parties' agreement for transferring the land has to be proven, in accordance with the substantive consensus principle. All documents for registration have to be formally correct in order to be valid (section 29 *GBO*). It is necessary that the registration is proved in a public deed or in a certified copy of the deed. This also includes powers of attorney for filing a petition of

[5] section 12 *GBO*
[6] section 71 (1) *GBO*
[7] sections 13 ff.
[8] The *Erbbaurecht* is an encumbrance upon real property consisting of a transportable and heritable right to build or develop the land above or below the surface. When the hereditary building right expires, ownership of the construction passes automatically to the owner of the land. The holder of the hereditary building right is entitled to compensation.

registration. Any registration to the land register is to show the date on which it was made. An official of the real property registry must sign the registration (section 44 *GBO*). Registrations which are no longer valid, e.g. because of a change of legal or other positions, will not be deleted. They will be underlined in red (sections 13, 14, 16 *GBO*). If there is no room for new entries, the folio will be rewritten by the land registry office (sections 23, 28 *GBO*).

The registrar, to whom all the duties and responsibilities of a judge with respect to the registration have been assigned, does not check the substantive entitlement of the authorizing person. It is sufficient that the authorizing person is registered in the *Grundbuch* because the principle of presumption, outlined above, is also applicable for the land registry office itself. A mistake in the form of or caused by a wrongful entry entitles the person concerned to compensation for damages due to state liability.[9] The person concerned bears the burden of proof,

c. The acquisition of a title to land

Below is a short introduction to the process of acquiring a title to land.

The German civil law is predicated on the principle of abstraction between a legal transaction *in rem* and a legal transaction *in personam*. A mistake on the level of a legal transaction *in personam* generally has no effect on the contract *in rem*. A requirement for a legal transaction *in rem* regarding the transfer of real property is to always be in compliance with the mandatory form requirement of section 311 b (1) sentence 1 *BGB* in combination with section 125 sentence 1 *BGB*. The wording of this rule only mentions legal transactions *in personam*. According to section 398 *BGB*, an assignment of a claim for the transfer of a property is not covered by the mandatory form requirement of section 311 b (1) sentence 1 *BGB*, due to its nature as a transaction *in rem*.

The mandatory form requirement also applies to a power of attorney if it is irrevocable or if it imposes on its grantor a legal or factual obligation regarding the purchase or sale of real property. The mandatory form requirement also applies to amendments to a contract for the sale or transfer of real property. However, the German court rulings allow exceptions for the three situations which follow:

[9] section 839 (1) *BGB* in combination with Art. 34 *GG*

- contracts which do not restrict or extend the obligations of a sale or purchase either directly or indirectly, e.g. the extension of a time period regarding a revocation of a contract;
- rectification of problems with transactions; and
- amendments after the conveyance of land.

The contract is null and void when the mandatory form is not adhered to (section 125 sentence 1 *BGB*). However, section 311 b (1), sentence 2 *BGB* allows a formal error to be remedied if the conveyance of land and the registration in the title register ensue. According to the wording of the rule ("…becomes valid…"), this does not lead to a curing of defects retrospectively. Such defects are only remedied from the moment after the agreement and registration have taken place. In particular, this has consequences when another legal transaction *in personam* has been concluded in the meantime and the right relating to it has been registered. The prime example to illustrate this effect is the priority notice, called the "*Vormerkung.*"[10] The priority notice secures the contractual or tortious claim to which it is accessorily connected from any disposal which could endanger it. The priority notice is to be understood as a means of security of unique character with quasi-*in rem* effect equated to the rights *in rem*. For the transaction *in personam,* the other rules of the general part of the *BGB* are applicable.

The transaction *in rem*, which is independent from the transaction *in personam*, has two requirements. For a change to the legal status *in rem* of a real property based on a legal transaction to be effective, two elements, namely, agreement and registration (sections 873, 877 *BGB*) are necessary. To this rule there are two exceptions in the *BGB* (sections 875, 876 *BGB*), if the change is based upon a disposition. However, a real property will not be transferred by mere agreement and registration; a conveyance is also needed.[11] The parties have to make a notarized statement during which both must be simultaneously present.

The agreement is an *in rem* contract. All requirements of the general part of the *BGB* apply. With the exception of the conveyance, the agreement is not based upon a certain form and may be subject to a condition. The agreement is even revocable until the registration has taken

[10] The "*Vormerkung*", section 883 *BGB,* is an entry in the *Grundbuch* to protect a claim to a registrable right in land property, making dispositions void which run contrary to the claim of the person in whose favour the "*Vormerkung*" has been registered as long as the conveyance has not been finalized.
[11] section 925 *BGB*

place.[12] As soon as the parties are bound by their statements, i.e., when the agreement has been recorded by a notary or declared at the registry office, a revocation is impossible.

In such a case it is debatable whether the purchaser is already entitled to what is referred to as an "expectant right." This is not defined by law; rather, it has been developed by the German court rulings. It is similar in nature to ownership and constitutes a limited form thereof. This vague definition means that the rights exist where such an amount of those steps of the accruing act has been fulfilled as to have the purchaser acquire a secured legal position which the other party cannot unilaterally destroy. It is seen as a preliminary stage of the full right. In German law, the question of precisely when a purchaser's legal position has grown so strong that an expectant right legitimately exists remains in dispute.

A binding agreement is no limitation to disposal. It only protects the purchaser against the one-sided revocation of the vendor as regards the purchaser. The vendor could still dispose of the real property to other purchasers in spite of previous agreements to the contrary. However, if the purchaser applies for registration with the registry office (section 13 *GBO*), an expectant right comes into effect. It is the obligation of the registry office (section 12 *GBO*) to attend to this application prior to all subsequent ones. If, on the other hand, the vendor applies for registration, he or she can retract the application and defeat the semblance of a purchase and, therefore, destroy the expectant right. Hence, it is relevant who applies for registration with the registration office. Only when the purchaser takes action can he or she acquire an expectant right. Additional protection can be acquired by the applicant through the registration of a priority notice (sections 883 (2), 888 *BGB*). An expectant right arises, as the position of the purchaser cannot then be destroyed through a unilateral action of the vendor. This can also be achieved through a prohibition of alienation imposed by court order.

As stated earlier, the disposal of ownership of real property consists of a dual act. The agreement has to be registered. Basically, the content of the agreement is registered in the land register. In the case of section 874 *BGB*, it is possible to make reference to an authorization because the facts to be registered are often so detailed that a word-for-word reproduction in the land register would only lead to confusion. The agreement and registration must, as a precondition to their effectiveness, correspond. An incorrect agreement leads to a false land register even if the right is nevertheless registered. The consequence of such

[12] This follows out of the reverse of section 878 (2) *BGB*.

incongruence between an agreement and registration is a claim for adjustment according to section 894 *BGB.*

A further requirement for transferring real property is that the vendor maintained the right of disposition at the time of the last act of purchase. If such right is missing, the purchaser can only acquire ownership if he or she was acting in good faith regarding the authorization of the vendor at the time of the purchase. In this case, a purchase pursuant to section 892 *BGB* takes place. If the limitation of the authorization occurs after the last act of purchase, this is not always fatal (section 878 *BGB*). In the case of a binding agreement and application for registration, the purchaser obtains ownership even if the right of disposition has been lost.

As already stated, the purchase may be completed in good faith even when the right of disposition is absent. In such a situation, the requirements of sections 892, 893 *BGB* must be fulfilled. The requirement for the application of sections 892, 893 *BGB* is a disposition to a right to a real property. If there is an act of the state such as the fall of the hammer at an auction or the devolution of an estate, these sections are not applicable. Other requirements for the applicability of the good faith rules are a valid registration, an incorrect land register and the good faith of the purchaser. The registration is only valid when it is registered with legal effect. Only in the rarest of cases is it void. The incorrectness of the land register must be related to a right. There can be various causes. Thus, even though a substantive agreement may be incomplete, or even null and void, the land registry office will not review such a situation because of the registry's subordination to the overriding authority of the consensus principle. Another reason for incorrectness can be a mistake by the land registry office, e.g. the land registry office has registered something the parties have not agreed upon, or registered rights, such as a mortgage, have been lost or passed over. The decisive factor is, in particular, the purchaser's good faith.

Contrary to section 932 (2) *BGB*, only the purchaser's positive knowledge of the incorrectness has negative effects on the good faith, from which it follows that even gross negligence, as for example the failure to look into the land register, does no damage. The incorrectness of the land register can have severe consequences because of the effect of presumption and good faith, as a third party can – in good faith – acquire full legal ownership from an unauthorized person. The owner, however, is protected by the possibility of an objection (section 899 *BGB*), or, as the case may be, a claim for correction of the register (section 894 *BGB*). An

objection only excludes a purchase in good faith. The objection does not preclude further sale. The acquisition is not hindered if the objection turns out to be incorrect and the land register entry to be correct. Registration of an objection requires the authorization of the registered person or an interlocutory injunction (section 935 *ZPO*). In order to register an objection, the requirements of section 894 *BGB* regarding the claim of correction of the land register have to be established by *prima facie* evidence. An incorrect objection will be lifted by way of court order following complaint.[13]

In addition to the substantive authorization, a claim for correction of the land register requires a formal authorization of the claimant (section 19 *GBO*). This claim directs itself to the delivery of an authorization legally consistent with the land register, section 29 *GBO*. If the obligor does not agree with the correction voluntarily, the claimant has to file an action for restitution of the declaration which is presumed to be given at the moment the judgment comes into force (section 894 *ZPO*).

If there is no correction, the incorrectly registered person can acquire ownership once the title has been registered for 30 years, provided no objection is registered, a process referred to as "adverse possession." This was important, however, only when the land registers were established. Nowadays this rule has become basically obsolete and meaningless.

These days, the land register is maintained electronically in most German states.

2. The Canadian System

a. Generally

Unlike that of Germany, the law of property of Ontario is based on the common law. Created in England, the common law spread during the English colonial period throughout what became the Commonwealth. As a branch of the common law, the law of property developed very slowly. Two categories within the law of property emerged: real property law and personal property law. Real property law deals with immovable property, including land and all rights and interests attached to it. Personal property law deals with moveable property and

[13] section 71 (1) *GBO*.

encompasses all property other than land, and an interest in land and/or anything attached to it.

Throughout the different jurisdictions that comprise the Commonwealth, the law of property has many features in common. However, real property law is an exception, based as it is on a system of registration. Under common law, traditionally, the vendor proved ownership by showing that the person(s) from whom he had acquired the land had owned that land for a certain period of time. Since transfers of land and other dealings were recorded in written documents, ownership could be traced and current ownership partly proven through such documents. Over time, this system turned out to be complicated and cumbersome, especially when the real property was old. Theoretically, the owner had to prove ownership of the real property back to the earliest grant of land by the Crown to its first owner. Since it had become almost impossible to prove such a long chain of ownership, the law tried to limit the period required to be covered by proof of clear title to the last 60 years. On the basis of this system the current Canadian system was established, and seeks to improve.

Two systems for registration of real property, each based upon the system outlined above, operate in Canada. Which system is applicable in a particular case depends upon the location of the real property in question. In Northern Ontario and in the Western Provinces of Canada the title registration system is used, while in Southern Ontario and in the Atlantic Provinces the document registration system is employed.

b. Document Registration

The document registration system, also called the deeds registration system, is a system of registering real property under the common law, which has been replaced by the Torrens system in many common law countries, and is in effect a title registration system, of which Ontario was one of the pioneers.

The document registration system entails registration of all important titles and documents related to real property. In order to achieve the power of disposal of real property for the purpose of sale or transfer, the purchaser, that is to say, often through his or her lawyer, has to ascertain the following:

- that all title documents are properly executed;

- that a chain of title and duly authorized transfers can be proven; and
- that no encumbrances on the land that might compromise the title to it exist.

In a transaction involving the sale and purchase of land under this system, the vendor has to assure a "good title" to the purchaser. To ensure that a good title gets passed on, the vendor has to prove a chain of proper transfers which means that the chain of title must not show any gaps or inconsistencies regarding the land.

Problems may arise when a vendor has to prove his or her title, particularly when the land is old or involves multiple encumbrances, or when dozens of changes in the ownership of the land have taken place. The collection of deeds relating to transactions involving the land is therefore not necessarily conclusive. Even an exhaustive search of the chain of title would not give the purchaser complete security, largely because of the principle "*nemo dat quod non habet*" - which means "no one gives what he does not have." Additionally, there is always the possibility of undetected outstanding debts encumbering the land. In the case of *Pilcher v. Rawlins (1872)*, for example, the vendor conveyed the fee simple (the most extensive form of freehold estate possible) to purchaser 1, but retained the title deeds and subsequently fraudulently conveyed the fee simple to purchaser 2. The latter could only receive the title retained by the vendor, that is, in the end he acquired nothing.

This elaborate and uncertain procedure for document registration would often lead to litigation when the parties could not agree on whether a good title had been shown. The register itself often became large and increasingly unclear as in the course of time more transfers and divestures were carried out. Therefore, the legislature reduced to 40 the number of years required for a provable chain of title. Documents which are older than that are no longer usable, even when they show content which calls into question the proper transference of a chain of good title.

c. Title Registration

The "document registration system" stands in contrast to the "title registration system," also broadly referred to as the "Torrens' System," after its Australian founder Sir Robert Torrens. This system establishes a provincial register that is administered by Land Registry Offices[14] and that provides a state-guaranteed non-appealable title. The difference between the

[14] A list of offices may be found at http://www.gov.on.ca/MGS/en/FAQ/STEL02_047246.html

document registration system and the title registration system lies in the mode of registration. While the document registration system operates on the principle of document registration, the title registration system operates on the principle of title by registration. The title registration system was created to end the insecurity, complexity and exorbitant costs accruing to the document registration system's requirement of proof of a chain of good title.

An unbroken chain of title is no longer required. Each parcel of land is given a separate folio in the register and is identified by reference to a registered plan. The folio records the dimensions of the land, its boundaries, the names of all registered owners and any legal interests which may have an effect upon the land. The state guarantees the title. In case of a lost title for which the state is at fault, a compensation scheme is in place. It is noteworthy that, because of the lack of registration enforcement, there are parcels of land which remain unregistered. As a result, there are still properties in Canada which receive their initial registration.

The land register constitutes the core of the title registration system. It used to be a bound paper record, but today it is largely computer based. When a property is registered for the first time, it is given a number or "folio." This number identifies the land by reference to a registered plan, comparable to the German "*Grundbuchauszug*." If a person wants to change the register, e.g. the boundaries of a parcel of land, a revised plan must be prepared and registered. Once the plan has been registered, the property can no longer be removed from the register, and only amendments to the boundaries can be subsequently made.

If the owner sells the land, an amendment to the register has to be arranged. The amendment can be initiated either by the purchaser or the vendor. The registrar, comparable to the German "*Rechtspfleger*," has the duty to ensure that only legally valid amendments are made in the register. He or she will indicate which legal documents are required to ensure that a proper change of ownership takes place. The most common reasons for making an amendment to the register are the sale of the real property, the death of a registered owner, or a court order.

The criteria governing applications for amendments to the register are not standardized, since there is no standardized law governing the process. The application process depends mostly upon the content of the documents to be filed. The same applies to the process of recording

any interest which affects or limits rights to the registered property, e.g. security interests; however, although it is not obligatory to do so, such interests may be registered as well. There are legal rules which regulate the rights and rankings of each of these single interests in relation to each other and to third parties. Since the state guarantees the accuracy of the register, it has developed a compensation system for damages. However, claims for compensation are very rare.

In contrast to the common law document registration system, a title based on the title registration system can be relied upon when the person relying upon it acts in good faith. Actions taken on the basis of the registered information are legally effective. A purchaser incurs no obligation to look beyond the records. Only the registered facts are determinative.

If, on the other hand, a vendor's title which is based on the common law document registration system is found to be incorrect, the purchaser's title will be correspondingly incorrect. Accordingly, whenever a title is based on the document registration system, it is incumbent on the purchaser to ensure through an examination and investigation that the title of the vendor is correct and free of any contradiction, inconsistency or encumbrance.

The title registration is based on three principles which more or less reflect the *Land Titles Act*, namely, the mirror principle, the curtain principle and the insurance principle.

1. Mirror Principle

The "mirror principle" is comparable to the principle of publicity in German property law. It ensures that the register reflects the ownership position of the owner accurately and completely. A certificate confirming the right of ownership, in which all relevant facts regarding the title of the actual owner are summarized, is issued and recorded. This means that if a person sells the land, the new title regarding the ownership position has to be identical to the old one in terms of the description of the land and its boundaries. Only the name of the owner is allowed to differ from the prior one.

Theoretically, the register should show everything about the owner at any given time. But the law permits certain exceptions. In accordance with the legislators' intent, claims against the owner which concern the property, that is to say the ownership therein, may not be registered,

e.g. a claim for property tax or a tort arising from a danger caused by the land. This is also in the interest of the owner. Other claims may be registered.

Furthermore, there are rights which can be obtained but which are not to be registered, e.g. a judgment against an owner or a spouse of an owner. Also, some rights are difficult to register, e.g. an easement. There are some general and recognized rights, which are worth having registered, e.g. a mortgage. On the other hand, there are some rights which are not worth having registered, e.g. rights under a trust.

Even though it is possible to receive compensation for damages caused by an incorrect registration, it is recognized that there must be a possibility to correct errors. It is a question of fairness to correct a mistake, even though a claim for compensation for damages has been allowed and compensation paid to the purchaser. On the other hand, costs are also a reason for allowing a correction to be made, e.g. in a case in which the owner has allowed construction of a valuable building.

There are older laws which state that a registered assignment of a claim or a charge on the land does not affect a transfer if the content of the document indicates that it is not legally valid, e.g. the content of the document already shows that it is falsified. These deferred indefeasibility documents are not transferrable and do not affect a later transfer of land or registration. Even though deferred indefeasibility documents are no longer used in most countries adhering to the English system of title registration, they are still effective in parts of Ontario.

2. Curtain Principle

The second principle upon which the title registration system is based is called the "curtain principle." According to this principle, the register is supposed to conceal information which a purchaser does not have to review prior to acquiring a right to or transferring a property. It means that one need no longer know what constitutes the certificate of title. A series of documents which properly proves a correct chain of title is no longer necessary. The vendor can also withhold documents such as a private conveyance or an unregistered disposal of rights to the property (called an unregistered conveyance), because all information relevant to the ownership position which is necessary for the registered transfer of the land is determined in the certificate. This principle is applied differently by law. Provincial administration is to

update the land register continuously, in order to avoid rechecking previous entries and the legality of former transactions before transferring the land. When a previous guarantee is superseded by an update, the former entry can be removed from the register, e.g. the formerly registered owner can be deleted when a new owner is registered. The same applies when the register does not imply a guarantee to a right, e.g. in the case of a lease.

3. Insurance Principle

The third and last principle of the title registration system is called the "insurance principle". It gives a person who has suffered damage due to an incorrect registration by the registrar the right to a claim for compensation, as an error can occur now and again. For this reason, the insurance principle is considered the key principle of the title registration system. Without this principle, the buyer and/or other parties could not rely upon the entry; their rights would not be fully protected.

The insurance principle is closely connected with other aspects of the property and title registration. Not every type of right is protected, however, e.g. mining rights. The insurance principle only covers damages when the state has given a guarantee on the ownership position. As previously mentioned, a claim for compensation depends upon whether the mistake alleged to have been made is subject to being corrected or not. The principle is applied differently in the different common law countries. Ontario was a pioneer of this principle, having already allowed compensation in 1885. In England, this principle was first enforced by law in 1897.

d. The purchase of land under Ontario Law

The purchase and sale of land in Ontario is, for the most part, less formal, less complicated and less stringent than in Germany. Apart from the amendment to the register, the contractual requirements are also more modest. In Ontario, a notarized agreement is not required. No rule comparable to section 311b (1) *BGB* exists in Ontario. It is sufficient for a real estate agent to draft an agreement which the vendor and purchaser sign.

If the vendor resides abroad, the following applies: before proceeding to change the register, an application for a clearance certificate, along with all relevant documents pertaining to the purchase and sale, such as, the agreement of purchase and sale and the property valuation, have to be submitted to Revenue Canada, the federal tax authority in Canada. Once the

clearance certificate has been obtained, the applicant can arrange to have the transaction registered as a new entry at the land registry office. In those parts of Ontario where an online registration system has been established, the transfer may be registered online. Documents which are not in English do not necessarily have to be translated by a professional translator. According to s. 84 of the *Land Titles Act* (1990), it is sufficient that they be translated by a person who certifies that he or she understands both languages and has translated the document correctly and in good faith.

The transfer of land is governed by ss. 86 - 90 of the *Land Titles Act*. The transfer of land rules also apply, according to s. 90 of that Act, to a transfer of land made without consideration. If a transfer is based upon a gift or upon a sale for the symbolic purchase price of $1.00 CAD, the tax based on the transfer, called the Land Transfer Tax (1990),[15] cannot be avoided. In such a case, the value of the land will be estimated by a government-appointed appraiser.

In response to technological progress, Ontario has adapted the whole system of registration to today's circumstances. It has developed a database with all information regarding owners and allows users to file documents online. A computer system can analyze these documents and register transfers or charges which are important, so that the registrar no longer has to check them.

3. The conclusion of the comparison

When comparing the German and the Canadian systems of property law, they seem to share several similarities. But there are also striking differences between them.

Germany has one system of land registration only, while the common law provinces of Canada have two systems. Which system is used in Canada depends on where the land in question is located.

The "document registration system" differs markedly from the German land register. As part of an old common law system that is complicated and expensive, it does not give the purchaser full guarantee of ownership of the land in question. Whether the purchaser achieves

[15] The Land Transfer Tax Act, 1990 governs the land transfer tax. The amount of tax is set out in s. 2 (1) of that Act and is dependent upon the value of the land.

ownership or not depends upon whether someone objects to the chain of good title. In contrast to this principle, the authorization to transfer land in Germany can only be based upon a proper entry in the land register. In general, there is a principle of presumption of the accuracy of the land register. The person concerned has the right to enter an objection to the registered entry, which can stand in the way of a transfer. Even when the registry office retains the documents or a certified copy of them, a registration of land based merely upon documents alone is still precluded.

Given that it is based on a system adapted in Australia by Sir Robert Torrens, whose thinking had been influenced by that of a German immigrant named Ulrich Hubbe, the "title registration system" has similarities to the German land register. Its German roots are evident. Both the German land register and the Canadian title registration system are administrated by the government. But the German system does not provide an indefeasible guarantee. There is only a presumption of accuracy which can be disproved. The ways and means of administering the register are, in principle, common to the two systems. Both systems maintain a register that describes the land and its boundaries. They differ in their specific requirements for registration of charges. In Germany, a mortgage must be registered to be legally valid. The title registration system in Canada has no such requirement; registration of a mortgage is optional. No rule equivalent to section 13 *GBO*, which regulates the procedure for requesting an amendment to the register, exists in the Canadian system.

A further relevant difference is that there is no private conveyance in the German legal system. Property conveyance is governed by section 925 (1) *BGB* and is part of a multi-phased legal transaction process that leads to ownership. Furthermore, old entries are not deleted but are marked in red and, when the register becomes unclear a new folio is compiled.

While a system of compensation also exists in German property law, its requirements differ from those of the Canadian system. The German law does not codify claims for compensation in property law, but, since government officials are involved and damages are at issue, the law of tort comes into play and government liability, according to section *839* BGB in combination with Art. 34 *GG*, becomes applicable.

The foregoing comparison shows that the German land register combines both the document registration and the title registration systems but that mere registration of documents is not

sufficient to transfer ownership in Germany. The title registration system used in Canada shows its Germanic roots even though the "*Grundbuchordnung*" had not been codified when the system was first developed. Through emigration, branches of law from various countries throughout the world were spread abroad; in part they were assumed, in part they were not. The document registration system is an old system based on English common law which has been largely replaced already by the title registration system. It seems just a matter of time until Ontario submits exclusively to the title registration system.