

**Canadian Administrative Law
and
German *Verwaltungsrecht*:
Overview and 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 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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I. Overview

This article provides a brief overview of both the Canadian “administrative law” and the German “*Verwaltungsrecht*.” While both apply to the relations between citizen and state, the terms administrative law and *Verwaltungsrecht* are not synonymous. Each follows quite different principles and rules. Therefore, for the purposes of the discussion that follows, the original terms in both languages are retained.

Both the German *Verwaltungsrecht* and the Canadian administrative law are extensively particularized and thus extremely complex. In addition, both legal systems have been strongly influenced by court decisions handed down in their respective jurisdictions over recent decades.

The constitutional framework within which it is situated is fundamental to understanding administrative law and *Verwaltungsrecht*, respectively. Like Canada, Germany is a federal state. The nature of their respective federal political structures significantly influences Canada’s administrative law and Germany’s *Verwaltungsrecht*, as is outlined in section II, below. In section III, the sources of law and its principles are presented. The three subsequent sections provide insight into the conduct of administrative proceedings. Administrative proceedings *per se* (section IV), judicial review of administrative decisions (section V) and enforcement of decisions (section VI) are discussed. After a short conclusion (section VII), some selected references are provided as sources of more detailed information (section VIII).

II. The Federal Systems in Canada and Germany

Both Canada and Germany are federal states. The federal nature of their respective state structures has significant implications for administrative law in Canada and *Verwaltungsrecht* in Germany.

1. Canada

The concept of federalism is one of the three pillars of the Canadian constitutional order¹. A central feature of the Canadian federal system is the far-reaching self-governing power conferred to the provinces by the Canadian constitution. The Canadian provinces thus enjoy greater legislative powers than their German counterpart, the *Bundesländer*.

¹ The others are responsible government and the Canadian Charter of Rights and Freedoms.

a. The Canadian Constitution

The constitution is the most important source of law in Canada. The Canadian Constitution regulates both the fundamental organization of the Canadian state and the relationship of the federal government to the provinces. It delineates the legislative and executive powers and responsibilities of the federal Government, as well as election procedures and the fundamental rights of individual citizens.

The emergence of the Canadian constitution is closely related to Canada's heritage within the aegis of the former British Empire as well as its own internal political developments (such as the sovereignty movement within the province of Québec in the 1960s).

The modern constitutional history of Canada begins with the *British North America Act, 1867*. This act gave effect to the Canadian confederation, by uniting the provinces of Canada, Nova Scotia and New Brunswick, and laid the foundations upon which the organization of and powers accorded to the institutions within the Dominion of Canada were established. By the *Statute of Westminster, 1931*, which in effect repealed the colonial laws hitherto applicable to the British dominions, Canada became independent from the United Kingdom. However, the British Parliament retained some authority pertaining to constitutional amendments. Only with the enactment of the British Parliament's *Canada Act of 1982*, did Canada acquire full control over the constitutional amendments process. Schedule B of this act references the codified portion of the Canadian Constitution.

The Canadian Constitution of today is not a single statute; rather, the term "Canadian Constitution" refers to the entirety of Canadian constitutional law. Therefore, the exact mode of classifying the various parts of the constitution can be difficult to understand. The codified parts are enumerated in section 52 (2) of the *Constitution Act of, 1982*, as follows:

1. The *Canada Act, 1982*, which includes the *Constitution Act, 1982*;
2. The acts and orders referred to in the schedule of the *Constitution Act, 1982*. There are a total of 30 laws, the most important of which is the *British North America Act, 1867*. It, in turn, was renamed the *Constitution Act, 1867* in the *Constitution Act, 1982*;
3. Any amendment to any act or order referred to in items 1 or 2. This includes some laws creating new territories.

Furthermore, there exists non-codified constitutional law, which encompasses such important principles of government as that of democratic rule.

The Canadian provinces are the constituent units of the Canadian federal state. Except for the

province of British Columbia,² the Common Law provinces do not have their own written constitutions. Instead they have opted for the British model of an unwritten constitution. For provinces which do not have a written constitution, the *Constitution Act, 1867*, the respective laws of the individual provinces and the Common Law function, in effect, as their constitution. The unique organization of the Canadian legal system may be exemplified by the fact that some of the laws that determine how the provinces are governed do not have the rank of constitutional law.³ The *Legislative Assembly Act, R.S.O. 1990* of the province of Ontario is one example of this intrinsic feature of Canadian law.

b. Jurisdictions

The federal government does not enjoy the authority to make laws which impinge on the legislative authority of the provinces. The provinces have a high degree of autonomy, which, in accordance with the *Constitution Act, 1867*, is derived directly from the Crown and not from the Canadian federal government. In matters of provincial authority, Canadian constitutional law differs markedly from the German equivalent. In Canada, all matters fall within the legislative authority of the federal government, insofar as the Constitution does not explicitly provide for the authority of the provinces.⁴ But, through sections 91 and 92 of the *Constitution Act, 1867*, each province is endowed with such important powers as:

- Direct taxation within the province in order to raise revenue for provincial purposes (Section 92, No. 2);
- Jurisdiction over property and civil rights in the province (Section 92, No. 13);
- Administration of justice in the province, including the composition, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts (Section 92, No. 14).

In addition, section 92 of the *Constitution Act, 1867* provides that, in general, the provinces are responsible for provincial matters (No. 16: all matters of a merely local or private nature in the province). Within the context of this rather crude division of responsibilities, disputes frequently arise between the federal government and the provinces.

If the federal government, or a provincial government, makes a law dealing with subjects that are

² There is the *British Columbia Constitution Act* of 1996 ([RSBC 1996] CHAPTER 66).

³ *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2: “The constitution of Ontario is not to be found in a comprehensive, written instrument called a constitution.”

⁴ See section 91 of *Constitution Act (1867)*: ...to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces....

outside its jurisdiction, the law is considered *ultra vires*. This means the law is invalid.

The three territories (Yukon, Northwest Territories and Nunavut) are distinct from the provinces and have fewer powers. They are more closely linked to the federal government. While the Constitution must be changed for the creation of new provinces, new territories can be established through the mere enactment of new federal law.

2. Germany

a. The *Grundgesetz* and the Constitutions of the *Bundesländer*

The Federal Republic of Germany encompasses the entire federation (called the *Bund*), as well as the 16 *Bundesländer* (also called *Länder*) as individual entities each of which is a distinct “state” within the federation and is somewhat analogous to a Canadian province or an American state. The constitution of Germany, which was ratified in 1949, is called the *Grundgesetz* (“fundamental law”). Article 20 Section 1 of the *Grundgesetz* provides that the Federal Republic of Germany is a social and democratic federal state.

Governmental authority emanates from legislation laid down by the various *Länder*, not exclusively from the central government. Each *Bundesland* has its own constitution and, accordingly, its own independent institutions within the three branches of government: the executive branch, the judiciary and the legislature. Article 28, paragraph 1 of the *Grundgesetz* provides the framework within which the constitutions of the *Bundesländer* are required to be developed: these constitutions are explicitly obliged to retain the main principles of the federal constitution. In the detailed elaboration of those federally sanctioned principles, the *Bundesländer* are then autonomous. The constitution of each *Bundesland* specifies the basic rights of citizenship as well as fundamental rules for the administrative organization of the *Bundesland*, including those which govern how the parliament is to be elected and laws created.

b. Jurisdiction

The principle governing attribution of jurisdiction between the federal government and the individual *Länder* is stated in Article 30 of the *Grundgesetz*. In many specific cases, the *Grundgesetz* applies special rules that assign jurisdiction to the federal government. Otherwise, the exercise of governmental powers is in the hands of the *Bundesländer* in so far as the *Grundgesetz* contains no other rule.

Concerning **legislative authority**, Article 70 of the *Grundgesetz* determines that jurisdiction also remains in the *Bundesländer* except in the specific areas for which the constitution explicitly gives powers to the federal government. There are extensive catalogs for these cases. Thus, criminal law and civil law fall under the jurisdiction of the federal Government. In fact, the

federal government has legislative power in so many areas that the general rule set forth by the text of the *Grundgesetz* can almost be considered reversed for practical purposes – in most cases, legislative authority in fact belongs to the federal government.

Administrative or executive authority relates to the question of who is responsible for the enforcement of laws. Here, Article 83 of the *Grundgesetz* determines that, basically, the *Bundesländer* create and enforce their own laws, but also enforce the federal laws. There are some exceptions to this rule, as is outlined below.

The *Grundgesetz* also regulates financial issues, particularly how to fund government expenditure and distribute government revenues (principally tax-based revenues). The principle operating here requires that the government which executes the laws must bear their costs. This means that, on the one hand, governmental costs must be borne for the most part by the *Bundesländer*, as in most cases the laws are executed under their jurisdiction. On the other hand, rules exist in the *Grundgesetz* to ensure that no single *Bundesland* is financially overwhelmed. The federal government and the *Bundesländer* can levy taxes in accordance with a particular mechanism that is established by Article 105 of the *Grundgesetz*. In addition, Articles 106 ff. of the *Grundgesetz* specify who is entitled to the tax revenues (this is called “revenue autonomy”). In principle, the various types of tax revenues are distributed, in accordance with the applicable rules, to the federal government, the *Bundesländer* and the municipalities.

III. Basics

1. Definitions of Administrative Law in Canada and *Verwaltungsrecht* in Germany

Administrative law is part of Canadian public law. It deals with the procedures by which executive institutions, such as tribunals, boards or commissions, are to make administrative decisions. Additionally, administrative law regulates the judicial review of such procedures. However, no precise definition of “administrative law” *per se* exists; the diversity of relationships between governments and citizens means that such a definition is not readily conceivable.⁵ Canadian administrative law is made up of the three following components: (1) The actual by-laws, rules and regulations or other forms of subordinate legislation made by administrative tribunals;⁶ (2) The principles of law governing the procedures and decisions of administrative tribunals; (3) The legal remedies available to those affected by unlawful

⁵ See *Régimbald*, Canadian administrative law, 2008, p.1 “Defining administrative law is a very risky business”.

⁶ See chapter III.2.a. (3) on subordinate legislation.

administrative action or improper decisions of administrative tribunals.

The German *Verwaltungsrecht* refers to all legal rules that apply to public administration. These rules govern such matters as the jurisdictional scope of the official duties of public employees, and the organization of public authorities. *Verwaltungsrecht* covers certain procedures that come into play in the relationship between the state and its citizens. Legal regulations concerning the relationships between individual citizens are no longer administrative law but rather private law.

2. Sources of the Law

The sources of Canadian administrative law are the Constitution and Acts of Parliament, as well as Case Law. Unlike Canadian administrative law, the German *Verwaltungsrecht* is largely based on written statute, i.e. the constitution and other acts, and also features certain elements influenced by the laws of the European Union (EU).

a. Canada

(1) Constitution

The basic principles underlying the relationship between the federal government and the provinces are established in the Canadian Constitution. The provinces are accorded far-reaching self-governance rights, including extensive legislative powers.

(2) Federal Statutes and Provincial Statutes

Statutes are an important source of law in Canada, which has a total of eleven legislative bodies.⁷ The Canadian Parliament has the largest jurisdiction geographically, passing legislation to be enforced throughout Canada. Examples of important federal laws within the area of administrative law are the following: the *Access to Information Act* of 1985 (RS 1985, c. A-1); the *Immigration and Refugee Protection Act* (IRPA, 2001, C-11); the *Federal Court Act* (RS 1985 c. C-7), which sets out the procedure for judicial review of the actions and decisions of federal administrative tribunals.

Because the provinces have extensive legislative powers, there are many provincial laws. Significant local matters are regulated primarily by the local municipality. Included within the purview of municipal law are police law, construction law and other regulations pertaining to such matters as water supply, sewage treatment, waste collection, public transit, zoning, library services, emergency services, animal control, and local economic development. The Province of Ontario has the *Statutory Powers Procedure Act* (SPPA)(1990), a statute that sets out general

⁷ One is the federal parliament and the others are the 10 provincial parliaments.

rules for certain administrative tribunals. These rules govern the conduct of the proceedings and the procedural rights of the parties involved.⁸ Furthermore, the *Judicial Review Procedure Act* (1990) sets out the procedural requirements for a judicial review.

(3) Subordinate Legislation

There are other kinds of legislation in Canada that are referred to as “subordinate legislation”. Subordinate legislation concerns the rules and regulations of administrations which are subordinate to a legislature or Parliament. Subordinate legislation occurs in many different forms, such as by-laws, ordinances, orders in council, codes, rules or regulations. Parliament can delegate authority to enact these pieces of subordinate legislation to an administrative body. The content of these pieces of subordinate legislation concerns, for the most part, details which have not already been addressed by acts of Parliament and similar authorities. The purpose of such delegation is to make use of the specialized authority’s greater expertise in certain matters to ensure better lawmaking.

(4) Case Law

The fact must be emphasized that, in Canada, all major parts of administrative law are shaped by the courts’ leading cases. Common Law, also known as case law, is used by all of the Canadian provinces except Québec and by the federal government. Case law is based largely on legal traditions and precedents. The exact process by which case law is implemented is, in itself, not regulated by law. The principle of *stare decisis*, by which a precedent or decision of one court binds courts lower in the judicial hierarchy, is central. In decisions on cases characterized by similar fact situations, the relevant principles and grounds or reasons for deciding (called *ratio decidendi*) in earlier cases are applied to subsequent cases on the basis of the doctrine of *stare decisis*. Accordingly, the resulting decisions have binding force. The aim is the realization of equality of rights, legal efficiency, and legal certainty, as well as guarantee of checks and balances with respect to legal powers.⁹ In the *stare decisis* system, the judicial examination is conducted in two stages. First, the relevant standards and relevant legal principles are applied. Then, by being matched with similar decisions, the result is checked for consistency with previous similar cases.

For the most part, case law is the primary influence on Canadian law. Legislation overrides case law, but because in Canada there is much less legislation than in Germany, the interpretation of case law is crucial in determining how the law is to be applied. Case law is flexible. A court

⁸ Provinces that do not have such statutes governing their procedural rules follow the Common Law.

⁹ Cf. Summers, in: MacCormick/Summers, *Interpreting Precedents: A Comparative Study*, 1997.), S. 379 (*certainty, stability, judicial, even-handedness and the rule of law*).

decision does not always have to be linked to a previous decision. Such de-linking from prior decisions applies in any of the following circumstances: (1) the earlier court has made a mistake in the preliminary decision; (2) the social situation has changed; (3) the values of the court have changed. The third situation, change in the values of the court, is the most problematic. Because of the *stare decisis* function in ensuring equality of rights, legal certainty and the separation of powers, deviations are permitted only in exceptional cases.

b. Germany

(1) Constitution: *Grundgesetz*

The Constitution is the highest legal standard in Germany. Each individual *Bundesland* has its own constitution, as does the federal government of Germany, which has the *Grundgesetz*.

The *Grundgesetz* applies to all state power, which, of course, includes state administration. All three branches of government -- the legislative, judiciary and executive -- are bound to respect fundamental rights, as set out in Article 1 III of the *Grundgesetz*. The judiciary and the executive branches are bound to comply with all existing laws, including the *Grundgesetz*. The Legislature, however, is only committed to the “constitutional order” (Article 20 III of the *Grundgesetz*). Administrative law and constitutional law are different. They work on fundamentally different levels of the law. Where rules of administrative law are applicable, those who apply the law must follow them and not simply rely on the *Grundgesetz*. The administration itself must apply the law as well. In German terminology, the administration has no *Normverwerfungsrecht* (right to not apply standards) in legislation passed by parliament.

The *Bundesländer* have their own constitutions, as they are independent states. The state constitutions apply only to the actions of the authorities of the *Bundesländer*. The *Grundgesetz* not only governs the actions of federal agencies, but also the authorities of the *Bundesländer*. Under Article 28 I 1 and 2 of the *Grundgesetz*, *Bundesländer* must follow the *Grundgesetz* for certain basic decisions: for example, when deciding what kind of elections must be held. Nevertheless, *Bundesländer* can independently regulate questions of detail. Were a *Bundesland* to violate these regulations, its constitution would be rendered void under Article 28 I of the *Grundgesetz*. But the individual *Bundesländer* do have some constitutional rights of their own .

(2) Statutes

In addition to the *Grundgesetz* and the constitutions of the *Bundesländer*, several laws relate to the *Verwaltungsrecht* (federal or state administrative law). Laws that are enacted by Parliament in a form established by the Constitution are sometimes referred to as “laws in a formal sense” (*formelle Gesetze*). Even if they are not enacted by a parliament, written legal rules can be referred to as “laws in a material sense” (*materielle Gesetze*); this term covers all general rules

concerning the relationship between the individual citizen and the government, and sometimes even between individuals.

The *Grundgesetz* determines whether the individual *Bundesländer* may adopt laws for their area, or whether the German federal government has jurisdiction. Therefore, there are laws at both federal and state level.

The conduct of administrative proceedings, the various forms of administrative action, and other general questions are controlled by the *Verwaltungsverfahrensgesetz* (“Administrative Procedure Act,” abbreviated as *VwVfG*). This act exists in a form applicable to the federal government, and in a form applicable to each of the individual *Bundesländer*. With the exception of certain sections in which specific rules relevant to the individual *Bundesländer* are applied, the *Verwaltungsverfahrensgesetz* of the *Bundesländer* follows that of the federal government word for word. The *Verwaltungsgerichtsordnung* (“Code of Administrative Procedure,” abbreviated as *VwGO*), governs proceedings before the *Verwaltungsgerichte* (“administrative courts”). This law applies to the judicial review of administrative decisions and actions of both federal and state authorities.

There are a variety of special administrative laws, which regulate specific matters such as police law, construction law, and the right of assembly. For matters such as police law, which are within the jurisdiction of the *Bundesländer*, each state has separate laws.

(3) Further Sources

In addition to the constitutions and laws already discussed, there are some other sources of law. *Rechtsverordnungen* are legal standards that are set by the executive branch of government. They are not issued by parliament and therefore are not laws in the formal sense. If they explain rights and obligations of citizens, they are tantamount to laws in the material or practical sense.¹⁰ In some cases, however, these regulations only concern internal issues of government administration and, thus, do not directly concern the citizens.

Under public law, some legal entities may adopt *Satzungen* (special kinds of statutes) to regulate their own affairs. Thus, for example, communities are enabled to set their own fee schedules for their municipalities.

European regulations (European Union Law) also have considerable significance for the *Verwaltungsrecht*. The law of the European Union (EU) is an independent legal system that is binding for all member states. The primacy of EU law relative to national law is a result of decisions by the European Court of Justice (ECJ). According to this court, European Union law

¹⁰ See the distinction at III.2.b. (2) above.

must be applied equally across all member states. Therefore, when dealing with any matter in a particular member state of the European Union, the question whether relevant European regulations exist must always be considered. If an EU regulation conflicts with the national legislation of an EU member state, the EU law and not the national law must be applied. This also pertains to the courts, in principle. If the courts have doubts about the interpretation or the validity of directly applicable European Union laws, they may refer the matter to the European Court of Justice under Article 267 of the *Treaty on the Functioning of the European Union*.

3. Principles

a. Canada

Canadian administrative law differs from the German *Verwaltungsrecht* even in its basic principles. These fundamental differences stem from divergent understandings of the constitutional principle of separation of powers. In common law countries, codified law is based on developed case law. This basis for the generation of codified law continues in the present day. In principle, less entanglement exists among the different branches of government (legislative, judiciary and executive) within the system that regulates the separation of powers in Canada than exists in Germany. The different powers are more clearly delineated and are connected only by a system of checks and balances. In effect, once Parliament has conferred it, the executive has extensive decision-making power. No other authority — not even the judiciary — can fundamentally reverse decisions of Parliament.

The two main principles of procedure to be observed are those of "natural justice" and "procedural fairness." These principles apply when an administrative tribunal acts in a quasi-judicial capacity.¹¹ "Natural justice" means, in practice, that the essential participation rights of the parties involved must be respected by administrative tribunals. These include each party's right to be heard, as well as each party's right to the decision of an unbiased decision maker. Any decision made by an administrative tribunal should be based on the evidence and the submissions made by the parties who appear before it, and should not be influenced by outside or external factors. However, it sometimes can be very difficult to assess whether or not a decision is biased.¹²

Though less important than the principle of natural justice, the principle of procedural fairness

¹¹ See the assignment of this classification in IV.2.b. of this essay for details on this classification.

¹² The case of *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289. [1992] 1 S.C.R. 623, 95 Nfld. & P.E.I.R. 271 4 Admin. L.R. (2d) 121, 134 N.R. 241 is an example in which the courts have found that there was bias. A board member had created a reasonable apprehension of bias by publicly expressing strong opinions about a case that was before him.

must often be addressed. This is particularly so when an administrative tribunal is acting in a capacity that is not quasi-judicial. In such a situation, the parties are granted the opportunity to take part in an administrative proceeding. The participants are entitled to submit comments, and to be informed on the progress of the process. The principle of fairness may be variously applied. Assorted factors, such as the relative importance of the matter at hand for the respective parties, may influence the manner in which and the degree to which this principle is adhered to throughout the proceeding.¹³

From the perspective of substantive law (as opposed to procedural law), the guiding principles are “jurisdiction” and “discretion.” The principle of “jurisdiction” authorizes administrative tribunals to act only within the parameters of their jurisdiction. Several laws make this principle clear. It is the relevant court’s responsibility to review whether a particular tribunal has stayed within the proper parameters of its jurisdiction. Any decision of a tribunal found to have acted *ultra vires*, i.e. reached beyond its powers, is invalid. The principle of “discretion” is comparable to the concept of *Ermessen* found in German administrative law. In general, the relevant laws often use the word “may.” Discretion implies choice. Thus, an administrative tribunal may do what it deems appropriate in the circumstances. The correctness of the discretionary judgment exercised can be reviewed by the courts only in a limited manner.

b. Germany

Most important in German *Verwaltungsrecht* is the principle of legality. This principle involves two elements, namely, the primacy of law (*Vorrang des Gesetzes*) and the requirement of legal foundation (*Vorbehalt des Gesetzes*). The primacy of the law is first and foremost a deviation ban for the administration. This means that if, in the presence of certain conditions a law provides for a particular legal consequence, the acting administrative authority must impose or enact the legal consequence thus provided. If it fails to do so, it contravenes the law. Not only is deviation from the law prohibited, but execution of its consequences is enjoined. If a citizen files an application (such as an application for a building permit), the competent administrative authority) must decide on the request. The requirement of legal foundation means that the authorized administrator may take action only if authorized to do so by a formal law. Particularly, acts of the administration that affect fundamental rights (such as an order to demolish a building) require formal legal foundation.

Authorities must act within their jurisdiction. As in Canada, the parameter of such jurisdiction is

¹³ An instance of these factors in decisions of the Supreme Court of Canada can be found in *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193, [1999] 2 S.C.R. 814, 14 Admin. L.R. (3d) 173.

defined by law. Where an authority is not competent, i.e. does not have jurisdiction, an administrative act is void (§ 44 VwVfG).

IV. Administrative Procedure

1. Similarities

In both Canada and Germany, before an administrative decision is made, the relevant administrative authority checks the legal framework applicable to the decision. This process begins with an analysis of formal questions. The administrative authority can only take action if it is competent for that particular decision. Furthermore, the legal requirements applicable to the decision to be taken must also be assessed.

Example: In Germany, an application for a building permit must be made to the competent building authority. Each state has its own building regulations and these determine which authority has jurisdiction. In most cases, county governments are responsible. In Canada, construction law is a provincial matter. In Ontario, as in Germany, a building permit must be obtained before starting to construct a building (Permit to Construct or Demolish, section 8 *Building Code Act*, 1992). The authority with jurisdiction in Ontario is determined on the basis of the *Building Code Act*, 1992, and its amendments. In both jurisdictions, certain material conditions must be met before the relevant authority may issue the permit.

Another similarity shared by the two countries is that the respective legislatures, through the sectoral laws, often have specified which authority is responsible for which administrative decision. Nevertheless, in particular cases, it is sometimes not easy to determine which authority has jurisdiction.

2. Differences

a. Canada

The biggest difference between the German and Canadian systems is that in Canadian law, both federal and provincial, there are no general laws governing administrative proceedings. Rather, these proceedings are governed by relevant provisions of special laws and by relevant court decisions. There is no single identifiable authority structure. Different authorities govern different administrative areas. A tribunal, board, commission or agency may have jurisdiction. There is no general rule; rather, the situation is somewhat different in each case. Many matters are decided by administrative tribunals. They make their decisions as part of the executive branch of government, because they were authorized to perform this task by the provincial or federal legislature.

Tribunals are a special feature of Canadian law. Typically, tribunals are committees with several members who are legally responsible for decisions in the field of administrative law. Some tribunals are composed of only a single decision maker. Tribunals are not always obliged to make administrative decisions. In some cases, they only advise or provide opinions and recommendations to other executive bodies. Proceedings before tribunals may vary in form. Depending upon the nature of the matter in contention, formal proceedings may be conducted along with other types of decision-making processes, such as mediation or even negotiations between the government and the citizen.

There are many reasons why federal and provincial tribunals were created.¹⁴ The most significant is based on the supposition that a highly specialized tribunal would generate decisions of a commensurately high calibre. Furthermore, highly specialized tribunals are in theory supposed to result in quick, simple and inexpensive proceedings, and definitive decisions. The flexible composition of administrative tribunals enables them to accommodate the political direction of the government in power at any given time.

There are four different types of tribunal.¹⁵ They cover the entire spectrum of state powers. Their functions and powers are conferred by law.

1. Legislative

Legislative tribunals specialise in legal regulations and other pieces of “subordinate legislation.” To some degree these tribunals have a legislative function.

2. Executive I

Executive I tribunals make administrative decisions while maintaining the flexibility to maneuver around them. They deal with such matters as road planning. These tribunals can have a particularly political function. They enjoy substantial discretion to set policy within the decisions they hand down.

3. Executive II

Executive II tribunals are responsible solely for the application of laws. This includes, for example, all types of permits issued by the tribunal. This is just about the exercise of administrative laws. These tribunals do not set policy or create any kind of subordinate legislation. They can exercise legal discretion, but only in very rare cases.

¹⁴ At least 15 may be found in Macaulay and Sprague (Practice and Procedure Before Administrative Tribunals, 2000, p. 2-30 - 2-31).

¹⁵ The various tribunals may be classified in other ways. See Macaulay and Sprague (Practice and Procedure Before Administrative Tribunals, 2000, p. 2-7 - 2-11). They distinguish the different types based on whether a tribunal determines facts or decides on the basis of a predetermined and certain set of facts. There are several other possibilities for classification.

4. Judiciary

Judicial tribunals have a supervisory role. They have a quasi-judicial function. Their decisions must be based solely on previous decisions, and they may examine an appeal of a previous judgment. These tribunals have very limited legal discretion, because they must render their decisions in accordance with the pre-existing governing statutes.

Some tribunals cover more than one of these four functions, depending on the subject matter assigned them. Certain tribunals fulfill all four functions simultaneously.

Unlike German law, Canadian law does not distinguish between *Verwaltungsakt* (an administrative act) and other administrative actions. The operative term is “legal decision.” The legal decision encompasses either (1) what the administrative tribunal has determined to be true, or (2) its ruling in response to an investigation or in response to any other proceeding that has been brought before it. A decision may deal with a wide spectrum of subject matter, ranging from responding to a request, to stating a dictum, to imposing a fine or a penalty. All decisions must have explicit reasons, regardless of whether they are final or interim, oral or written. Only in rare cases is it permissible for an administrative tribunal to make a decision without providing a reason.¹⁶ The decision-making process in such rare cases usually follows the principle of natural justice, or sometimes follows special laws.¹⁷ The absence of justification has implications for the validity of the decision. Just as laws exist which mandate the provision of reasons for decisions, so also laws are in place which specify what remedies may be sought if reasons are not presented. Usually, these require that reasons be given at a later date. In other instances, common law is applied based on the principles of natural justice and procedural fairness. Each case must be considered individually, as universal legal consequences appropriately applicable to specific situations do not necessarily exist.

b. Germany

In Germany, general rules govern the conduct of administrative proceedings, as set out in § 9 *VwVfG*. Under this act, administrative proceedings are defined as the activity led by relevant authorities aimed at examining the conditions, preparation and adoption of an administrative act or the conclusion of an agreement under public law, including the issue of an administrative act or conclusion of a public law contract. Administrative proceedings have two essential features. Firstly, the decisions made by relevant authorities must be relevant to bodies other than

¹⁶ See again the case *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193, [1999] 2 S.C.R. 814, 14 Admin. L.R. (3d) 173, where many of the purposes of providing reasons are described.

¹⁷ See s. 17 (1) SPPA: A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party. There are many other examples, such as s. 54 of *Regulated Health Professions Act*, 1991 (S.O. 1991 c. 18, schedule 2).

themselves; for example, internal instructions would be excluded. Secondly, activities of the relevant authorities must be directed toward the issue of a *Verwaltungsakt* (administrative act) or the conclusion of a public law contract.

The *Verwaltungsakt* is the most important form of administrative decision. It has very special consequences. Only the two most important are mentioned here. Firstly, the authority must meet special procedural requirements. Secondly, citizens may seek specific legal remedies against a *Verwaltungsakt*. Examples of administrative acts include regulatory decisions (such as the granting of building, demolition or disposal permits, and the erection of road signs). The administrative act is legally defined (for example in § 35 *VwVfG*) as any direction, decision or other official act taken by a regulatory authority for any individual case in the field of public law and with legal effect for an entity outside of the issuing authority itself. It must meet certain legal requirements for effectiveness and legitimacy. And it has legal consequences as well: the government may enforce the orders of a *Verwaltungsakt* without the aid of the court.

In administrative proceedings, the parties involved have certain procedural rights that come into effect while an administrative decision is under consideration. For example, the parties involved have a right to make submissions to the authorities (§ 28 *VwVfG*) and to have access to relevant information (§ 29 *VwVfG*).

3. Advice by Counsel

A law firm can provide assistance in identifying the proper jurisdiction of a government authority. It may not be easy to determine the authority with jurisdiction quickly, particularly in major cases which may involve an assortment of decisions by different authorities. Furthermore, continuous contact with a professional and cooperation with all authorities is important to ensure arrival at a proper decision, one that serves the interests of all parties and conforms to the requirements of all jurisdictions involved.

Proceedings before Canadian tribunals are very different from administrative proceedings in Germany or other countries. Particularly for clients who lack experience in dealing with such matters, legal counsel is advisable.

V. Judicial Review

1. Similarities

In both Canada and Germany, administrative decisions can be reviewed by judicial authorities. In both legal systems, a decision by the executive branch of government is not the ultimate one; rather, the citizen can appeal or grieve in several different ways.

2. Differences

The the two legal systems differ considerably in certain details. Because proceedings under Canadian and German law are derived from and follow different principles, the conditions under which administrative decisions may be appealed vary in accordance with the institutions involved.

a. Canada

(1) Administrative Tribunals and Courts

Because in Canada the separation of powers is generally more clearly specified, the system of separation of powers is weighted differently from that in Germany. Once the legislature has delegated decision-making powers to an authority, the potential influences of other sources of power on the decision are very low. Consequently, there are no separate administrative courts.

As with administrative procedures, there is also no uniform system of control. Again, in each instance, it depends largely on the nature of the subject matter under deliberation. In many cases, the concerned citizen has to proceed against an administrative decision before an administrative tribunal. The tribunal is not a court, but is part of the executive branch of government. The tribunal makes a separate decision which replaces the challenged original decision. In some exceptional cases, it may be that the relevant special statute requires that the concerned citizen challenge an administrative decision. If so, the concerned individual has to apply to the competent court to conduct a hearing and deliver the administrative decision. No uniform rules stipulate which court has jurisdiction; rather, the subject matter and nature of the case at hand dictate this.

Example: If a building permit is not granted in the province of Ontario, the applicant can appeal to the Building Code Commission (*section 24 (3.1) Building Code Act, 1992*). The chief building official may review the decision (*section 22 (1) Building Code Act, 1992*).

This complex system is also characterized by differences between the supervisory powers of tribunals and courts. Compared to the powers of German administrative courts, which are empowered to annul decisions based on errors in law, Canadian courts (courts of the provinces) may exert only modest checks and balances. Again, these differences are attributable to the somewhat divergent respective understandings of the separation of powers underlying the Canadian and German legal systems.

(2) Judicial Review

In Canada, there are both federal and provincial courts. Although the names given to equivalent courts may differ, the structure of the court system in each of the provinces is very similar. Each province has a Court of Appeal, which decides on appeals. Each also has a Supreme Court,

which is the highest provincial court and has full jurisdiction over all provincial matters. The provinces set up these courts, but all the judges are appointed by the federal government. In addition, there are Lower Courts, which serve as courts of first instance. Smaller provinces may have only one Lower Court, which is then divided into different departments. The judges of these courts are selected by the provinces. The Supreme Court of Canada in Ottawa is the court of appeal both for decisions of *provincial* Courts of Appeal and the *Federal* Court of Appeal. Finally, there are courts with specific jurisdiction.

Judicial review deals with the right of an individual to apply to a court to review the actions and decisions of administrative tribunals. Some provinces, such as Ontario,¹⁸ have statutes which set out the procedure of judicial review. Not every individual can seek judicial review. In order to have standing to seek judicial review, an individual must be either a party to or directly affected by the actions or decisions of the administrative tribunal in question. It is not enough to be indirectly affected by the actions or decisions. Depending on the basis on which the administrative tribunal has acted (as a legislative, executive or judicial branch of government), the court has a different standard of review. This differs greatly in various areas and can not be explained in detail within the confines of this essay. The powers of the courts also differ greatly with respect to their authority to decide on the consequences of erroneous administrative decisions. Only very rarely can the courts make their own independent administrative decisions.

Overall, the courts have only very limited authority to exercise control. They can check the procedural and substantive aspects of a decision. With respect to procedural aspects of a decision already handed down, they can check whether the principles of natural justice (in instances of quasi-judicial decisions of administrative tribunals) and of fairness (in instances of decisions not delivered by quasi-judicial administrative tribunals) were upheld. With respect to the substantive aspects of a decision, they can review the application of the relevant law.

In the decision on “*Dunsmuir v. New Brunswick*,” an important recent case, the Supreme Court of Canada laid down the two sets of guidelines for judicial review of an administrative decision.¹⁹ The court may review, on the one hand, the adequacy (reasonableness) of a decision and, on the other, its legality (correctness); the issue of whether the administrative tribunal was acting within its jurisdiction or *ultra vires* is to be incorporated into the review process.

(3) Appeals

In some cases, the law grants permission to appeal particular judicial decisions. An appeal is a special remedy, which is not equivalent to the German *Berufung* or *Revision* (even though these

¹⁸ *Judicial Review Procedure Act*, R.S.O. 1990, c. J. 1.

¹⁹ Supreme Court of Canada (1 SCR 190; 2008 SCC 9).

terms are often translated as “appeal” and “appeal on a point of law”, respectively). Rather, in some cases a separate statutory provision accords an individual a right to an appeal. On appeal, the relevant court can review the administrative decision not only in accordance with the standards of judicial review, but in accordance with the court’s own criteria. The law that regulates the criteria governing the permissibility of an appeal also regulates the appeal procedure and the powers of the court with respect to the contested administrative decision. The legislation provides exact specifications. This can sometimes even extend to the court making its own decision independently of the administrative tribunal. If an appeal is available, the person concerned must initiate such an action before resorting to any other remedy.

b. Germany

If a *Verwaltungsakt* imposes a duty on a citizen, the citizen can either object to the administration (the objection is called *Widerspruch*) or request judicial review. The same applies if he or she has applied for a permit and the government refuses to grant it. Even though federal law generally prescribes the administrative objection procedure, the *Länder* may vary this rule. In many *Länder*, the objection procedure nowadays has become somewhat exceptional. In most cases, the citizen is permitted and required to directly bring the case before the administrative court for judicial review.

In the objection proceedings, the acting authority itself re-examines its decision and either grants the requested relief or refers the matter to a higher reviewing authority (but not a court) to decide again on the issue or non-issue of the relevant administrative act (see §§ 68 ff *VwGO*). The objection procedure is designed to relieve the courts and also ensure that the government has the opportunity to reconsider its own decision and, if necessary, to amend it. The majority of administrative decisions contain a *Rechtsbehelfsbelehrung* (information on legal remedies), in which individuals are provided with information on procedures for objecting to the decision.

Only if the *Widerspruchsverfahren* (objection proceedings) does not lead to a repeal of the onerous *Verwaltungsakt* or grant of the desired *Verwaltungsakt* (as applicable), the concerned person can appeal to the *Verwaltungsgericht* (Administrative Court). The administrative courts in Germany are a separate judicial branch. They exist in addition to the ordinary courts, which decide civil and criminal proceedings, and the other specialized court organisations, which are labor courts, social security courts and tax courts.

Against an onerous administrative act, the citizen can bring an action for annulment (*Anfechtungsklage*) under § 42 I Alt. 1 *VwGO*. It allows the citizens, to apply to the court to repeal the onerous *Verwaltungsakt*. With the *Verpflichtungsklage* (commitment proceedings) under § 42 I Alt. 2 *VwGO*, the citizen may request that the government be sentenced to the issue

of the desired *Verwaltungsakt*. These two types of action exist only for administrative acts.

Other forms of administrative decisions are controlled by other types of action. Examples are *Leistungsklage* (action for performance) and *Feststellungsklage* (declaratory action). Such actions are the responsibility of the administrative courts, and are only taken with the benefit of hindsight. An administrative court can decide only in instances in which an earlier lawsuit has been filed. If a measure taken by the administration is not challenged in the courts, it remains effective. This is so even though it is possibly incorrect. The advantage of this system is that it can be assumed that the government complies carefully with the laws when its officials know that their decisions are controlled by a court.

Two important provisions underpin the entire system of judicial review in Germany. An administrative decision may not be nullified on the basis of objective errors alone; a court must determine that decision has deprived the person concerned of his or her rights. An action is not possible if it is based solely on the assertion that a decision infringes upon a third party's rights. Second, judicial review of an administrative decision only determines whether the decision is legal; it can not decide whether an administrative decision is the most appropriate or suitable solution. If there are several equally legitimate options to deal with a given situation, the government can decide for itself which one it wants to take.

3. Advice by Counsel

By the establishment of special appeal bodies, namely administrative tribunals, the supervisory power of the common law courts in the field of administrative law came to be narrowed significantly and largely restricted to questions of competence. In proceedings involving such bodies, legal services can help those affected to find the right venue (tribunal or court) to defend themselves against an administrative decision. Furthermore, the Canadian system is complex and is likely to be confusing for an inexperienced person to navigate.

VI. Enforcement of decisions

1. Germany

Verwaltungsvollstreckung (administrative enforcement) means the compulsory enforcement of *Verwaltungsakte* by the appropriate authority. It takes place through a special administrative procedure, which follows the rules for administrative procedures or objection proceedings. *Verwaltungsvollstreckung* is intended to enforce the law, as ordered by a *Verwaltungsakt*. The authority carrying out the enforcement is not obliged to obtain a judicial decision; it can independently bring about even the legal consequences.

Example: If the citizen does not fulfill an order for the demolition of a house, the authority may itself carry out the demolition.

The conditions are specified in the *Verwaltungsvollstreckungsgesetz* (Federal Administrative Enforcement Act) or similar acts in the *Bundesländer*. There are many different administrative procedures which have very different requirements. For example, *Verwaltungsakte* that impose a cash payment (such as the payment of a fine) are to be executed quite differently from *Verwaltungsakte* that order an action (such as the demolition of a house).

An administrative enforcement procedure, like the administrative process, is an orderly process consisting of different stages. Even at a time when the administration is already threatening enforcement measures, there is still time to negotiate and reach an understanding with the relevant authority. Any judicial review of an enforcement action will take place after the event, and then only if the citizen initiates a remedial procedure concerning the enforcement action. Again, the courts will not act on their own initiative. These processes can be very complicated and can have serious consequences. Therefore, it is advisable to engage a lawyer who is familiar with the matter in question.

2. Canada

In Canada, there is not the differentiated system based on different types of decisions. In particular, there are no *Verwaltungsakte* that can be the basis for administrative enforcement. Other means of ensuring the enforcement of administrative decisions are employed.

Example: A person receives a penalty notice for a traffic offense. He does not pay the fixed sum. The motor vehicle licensing authority may refuse to renew the individual's driving license until the sum is paid.

VII. Conclusion

1. The aim of this short essay was to point to some similarities shared by and differences between Canadian administrative law and the German *Verwaltungsrecht*. While both deal with similar matters, namely the relationship of citizens to the state, they differ considerably in their respective underlying principles, structures and practices.
2. One feature common to both countries is the federal system of government. However, the provinces in Canada have greater legislative and other forms of authority than the *Bundesländer* in Germany.
3. It is important to understand that the Canadian system of administrative law and its lines of authority differ markedly from those of the German *Verwaltungsrecht*. Canadian

administrative tribunals cover the whole spectrum of state powers, including the legislative, judicial and executive branches; their respective functions and powers are conferred by law.

4. The administrative decision-making practices and procedures of both countries also differ. While Germany has a differentiated system for various administrative actions (with the *Verwaltungsakt* as the center), Canadian administrative law only recognizes the decision.
5. These differences have consequences for the legal protection of citizens. In Germany, the legal system is codified in the *Verwaltungsgerichtsordnung* (Code of Administrative Procedure) generally. In Canada, there is no single legal remedy. Instead, the issue of which of the many administrative authorities is responsible depends on the nature of each specific case. The responsible authority may be an administrative tribunal or court, at a federal or provincial level.
6. In your specific case, a law firm can provide reliable advice. It can help you identify which body is authorized to address your particular concerns and advise you on what actions you may take to rectify an unjust administrative decision.

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