1

SOURCES OF POLICE POWERS

LEARNING OUTCOMES

After completing this chapter, you should be able to:

- Identify the constitutional sources of police powers.
- Identify the legislative and judicial sources of law.
- Describe the limits to legislative and police powers.

ON SCENE

One mid-afternoon in October, traffic unit officer PC Bergeron, who is from an Ontario Provincial Police (OPP) detachment, was sitting at an intersection when he observed a male heading east on the other side of the intersection. He recognized the male as a suspect in a local theft ring, and, as it happened, the male appeared to be riding a possible stolen bike. Two days earlier, PC Bergeron had investigated a local break-and-enter. The thieves gained access to the dwelling by forcing open a side door into the garage and then forcing their way into the residence through an adjoining door. Many valuable items were taken, and among them was a new model bicycle. The owner was able to provide considerable details about the bicycle, including the receipt with serial numbers.

Reasonable suspicion existed to detain the bicycle rider and investigate the possible possession of stolen property—specifically, the bicycle he was riding. PC Bergeron motioned with his hands and used his siren to direct the male to stop and wait for him. They ended up in a parking lot, where the officer detained the male for an investigation of possession of stolen property, read him his rights, and frisk-searched him incident to the detention. The male verbally identified himself as Star Dykzon and said he had already been charged for bicycle theft two days earlier. He stated that this bicycle was his own property. PC Bergeron continued the detention and frisk search and found two mobile phones in the left-hand inside pocket of his coat—an Apple iPhone and a Samsung Galaxy. He removed these briefly and then returned them to the suspect's pocket. From the front left pocket of Dykzon's jeans, he felt and subsequently removed a small clear plastic bag containing what appeared to be a controlled substance, possibly crystal meth. The contents weighed 4.25 grams.

While in the car, PC Bergeron made his notes, with the suspect seated in the rear of the vehicle. He released Dykzon with no charges stemming from the detention for possible possession of stolen property, because he confirmed that the bicycle Dykzon was riding was in fact his own. His next step was to arrest him for possession of a controlled substance. At that time, PC Bergeron noticed that Dykzon retrieved the phones from his pocket and proceeded to respond to incoming messages. PC Bergeron removed the phones from Dykzon's possession and placed them on the front passenger seat of the police vehicle. In the meantime, PC Bergeron could see text messages scrolling across the screen of the iPhone, and he read some of them as they were displayed. The messages contained comments that led PC Bergeron to charge the suspect with possession for the purpose of trafficking.

PC Bergeron opened Facebook Messenger as well as answered three phone calls but looked no further into the contents of the phone. He later obtained a search warrant for the phone to have the technological crime officer (TCO) conduct a full analysis of the phone's contents. The TCO seized and analyzed many messages from the phones, including historical messages from previous time periods.

Dykzon was initially polite and cooperative, and he did not resist when the officer took his cellphones from him. He did say, "How can you take my phones? What have they got to do with anything? I already got charged the other day! I'm gonna talk to my lawyer before I get to court!"

After a while, Dykzon became belligerent and thought he could rattle PC Bergeron's nerves a bit. "Hey, officer, you're not too bright! Anyone with half a brain knows you can't just stop me and look through my pockets. You took my stuff in an illegal search, so you can't use anything you found against me! I'm gonna walk on all of this!"

PC Bergeron continued making notes and writing down everything the suspect said, but he did not take the bait and avoided getting into an argument. However, he was a relatively new officer who had just finished his probation period with the police service, and he began to doubt himself. He wondered, "Did I make an illegal detention? There were grounds! When I checked his story out, and it was true that he owned the bike, I released him and then arrested him for the drugs. I found those fairly and legally. Drugs certainly need to be off the street."

That led him to more critical questioning of this incident. "So, is my search lawful? If it's not, then the possession for the purpose of trafficking charge may be thrown out. No way I'm gonna let him get away with this. Those phones were bursting with drug deals waiting to happen!"

The officer began to mentally review his police powers. He had obtained excellent grades in his police college courses, and he had studied the Charter, search law, and the laws on arrest and detention. Was he up to date? Cellphones were a challenge. Did he have the right to even look at the messages—weren't they in plain view? He had based his trafficking charge on this source.

Do you think PC Bergeron acted lawfully? Where did his authority come from? What is the law regarding cellphone search? How confident are you about your answers?

INTRODUCTION

As a police officer, you will be entrusted with exceptional powers—in some ways, more power than almost anyone else in the country. You may find yourself in situations like the one in the scenario above, where you will feel like you are brazenly disregarding everyday rules that prohibit seizing people's things and trespassing upon their homes, properties, and even their persons. You will have the power to arrest and detain individuals, search and seize private property, and, in exceptional situations, use appropriate force. Where do these powers come from? Who decides that you will have these rights? On what authority is your power based?

Whether you work for a private security firm or a public law enforcement agency, it is essential to understand where your authority comes from and how to use it lawfully. In a world where YouTube is a "go-to" source for uploaded videos showing police deeds and misdeeds, the public ability to trust police depends on the knowledge and integrity of the officers in the field more than it ever has before. The lightning speed at which information and misinformation travel across the country and the world can impact the stability of a town, a city, or even a nation. The actions of police in another province or country can influence public perception of police all across Canada. That is why Canadian police have such a great obligation to know what their powers are, where their powers come from, and what rights and responsibilities go with those powers.

An exploration of this question of power reveals that it is the laws of Canada that give you the authority to do your job as a police officer. As a society, we have decided upon a set of laws that reflect our values, and we punish actions and activities that we believe violate them. Included in this set of laws are measures to ensure that police officers have the power to enforce our laws. Of course, a fuller answer to the question concerning the source of police powers must answer the question of where laws come from and who creates them—is it Canada's elected politicians or appointed judges? How does this system work? Where does their authority come from?

In this chapter, you will be introduced to the different sources of police powers. You will explore how laws are created and by whom, and on what authority law-making bodies operate. You will also see how the ultimate source of legal authority in Canada has evolved over time.

CONSTITUTIONAL SOURCES OF POLICE POWER

federation
a group of independent states, provinces, or territories that have agreed to unite under a central or federal government

Canada is a **federation**—in other words, a group of independent states (i.e., provinces and territories) that are united under a central, or federal, government. Each province and territory operates independently with regard to internal affairs, but any issue or service that affects all of the provinces and territories is handled by the federal government.

The relationship between the provinces/territories and the federal government was laid out in Canada's first Constitution, created in 1867. This was the *Act of Confederation*, which united the separate colonies of Quebec, Ontario, Nova Scotia, and New Brunswick to form the new country of Canada. This Act was originally called the ***British North America Act* (BNA Act)**, but in 1982 its name was changed to the *Constitution Act, 1867*.

British North America Act (BNA Act)
Canada's original Constitution, which united the separate colonies of Quebec, Ontario, Nova Scotia, and New Brunswick to form Canada

A **constitution** is the fundamental law of a nation or state. It provides the principles by which a country is governed. It has been described (Cheffins & Tucker, 1975, p. 4) as a "badge of nationhood" and "a mirror reflecting the national soul." Unlike other laws, those included in a constitution are considered to be a part of the social and national fabric. All other laws and decisions are measured against the principles of the constitution. Making changes, or **amendments**, to any part of a constitution is a long, involved process.

constitution
the fundamental law of a nation or state that establishes the character and conception of the nation's government

amendments
changes made to enacted legislation to improve it

LAW-MAKING POWERS UNDER THE CONSTITUTION

Canada's Constitution and its system of government were modelled on the British system. The *Constitution Act, 1867* begins with the following statement:

> WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

Under the British system, Parliament was considered an extension of the monarch (king or queen). As such, Parliament had supreme authority to enact laws, or **legislate**. This idea is called **parliamentary supremacy**. Today, the monarch's role in Canada's government is purely symbolic, yet it still shows up every day in our courtrooms. The official name of every criminal prosecution begins with "R," which refers to *Rex* or *Regina*—the king or queen.

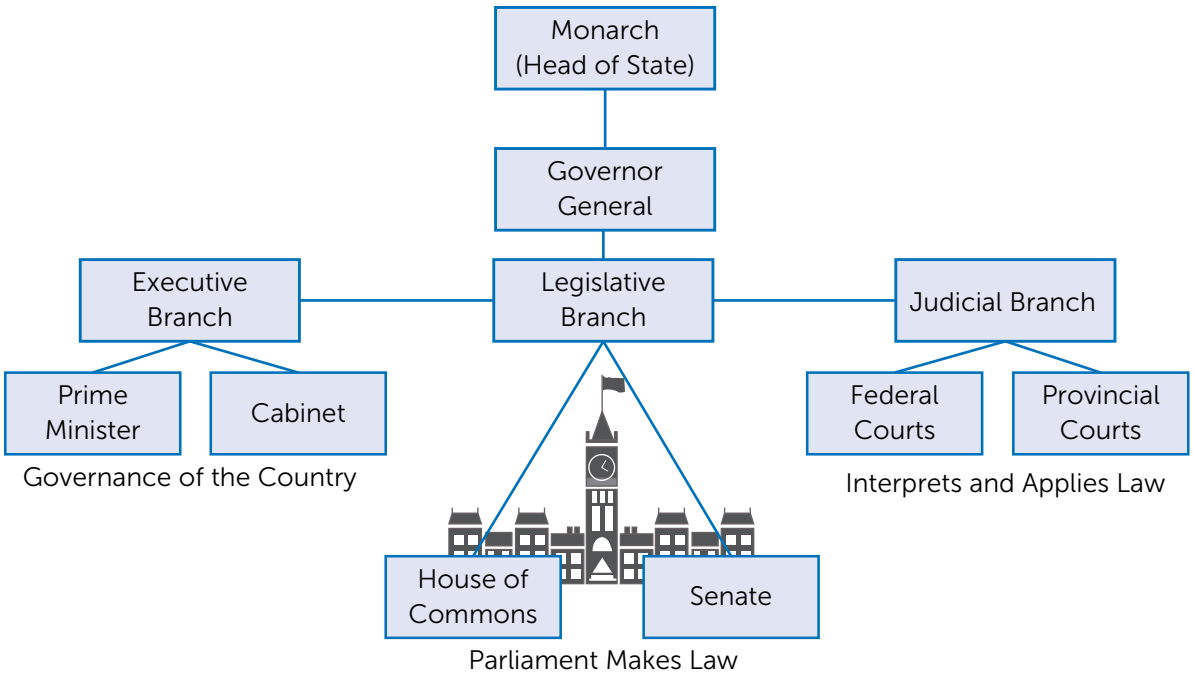
legislate
to make or enact laws

parliamentary supremacy
a doctrine that places final law-making power in the hands of the legislature

The Parliament of Canada, seated at Parliament Hill in Ottawa, is Canada's legislature: the federal institution with the power to make laws (statutes). The Parliament of Canada is composed of three parts: the monarch, the Senate, and the House of Commons. Members of the Senate and House of Commons propose, review, and pass bills, which become laws. You can examine the three branches of government and their roles in Figure 1.1.

Police officers enforce the laws of the country, which are developed through Parliament. By extension, these officers represent the Crown, or government. Police officers swear an oath of office in which they "will uphold the Constitution of Canada."

FIGURE 1.1 Canadian Branches of Government



POWER SPLITTING BETWEEN THE FEDERAL AND PROVINCIAL GOVERNMENTS

One of the main objectives of the *Constitution Act, 1867* was to describe the **division of powers** between the provinces and the federal government. It laid out which level of government would have law-making authority over each different area of social concern. While there is a clear division of responsibilities between the federal and provincial/territorial governments, there is often overlap in how these responsibilities are carried out. The sharing of responsibility for criminal justice is a good example of this. According to the *Constitution Act*, criminal law is under the **jurisdiction** of both federal and provincial governments. The *Constitution Act* says that both levels of government will have parliaments of their own to watch over and administer their areas of responsibility and to make laws within their jurisdictions. In other words, provinces make their own laws for areas that fall within their responsibilities. Liquor laws are a good example of this. Each province manages its own liquor laws. The contemporary extension of this is that each province now manages its own laws around the sale, purchase, and distribution of recreational cannabis.

The responsibilities of each level of government were defined and limited in sections 91 and 92 of the Act.

division of powers refers to the specific powers granted to the federal and provincial levels of government, respectively, by sections 91 and 92 of the *Constitution Act, 1867*

jurisdiction a body's sphere of authority to do a particular act—for example, the authority of a court to hear and determine a judicial proceeding

SECTION 91: WHAT THE FEDERAL GOVERNMENT DOES

Section 91 of the *Constitution Act, 1867* says:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, *to make Laws* for the Peace, Order, and good Government of Canada,

> in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [Emphasis added]

Further, according to section 91(27), the Parliament of Canada has exclusive legislative authority over "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

This means that the federal government, through the debates and discussions of the Senate and House of Commons, has the exclusive power to create criminal laws for all of Canada. That is why there is a single criminal code that is enforceable across the country. All persons who work in criminal justice use the same set of laws. The powers given to police officers and civilians are the same across the country, from British Columbia to Newfoundland and Labrador. The *Criminal Code* outlines the scope of law enforcement power with respect to arrest and detention and police procedures in search, seizure, and surveillance related to criminal law. Indigenous police services in some regions draw additional powers from the Constitution and treaties.

Additionally, section 91(27) granted the federal government the power to create judicial procedures, establish levels and types of courts, and appoint judges. The federal government was also given the power to create a federal police force, and the result was the Royal Canadian Mounted Police (RCMP), which has a broad, nationwide law enforcement mandate.

Another important aspect of section 91 was that federal powers were limited; the federal Parliament did not have the right to pass laws in areas where the provinces had already been given that authority. Neither the federal nor provincial governments were permitted to step on each other's legislative toes.

SECTION 92: WHAT THE PROVINCIAL GOVERNMENTS DO

Section 92 of the *Constitution Act, 1867* outlined the legislative powers of the provinces. Subsections 14 and 15 are of particular interest:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, …
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
>
> 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

These subsections granted the provincial governments power over the enforcement of criminal law—namely, laying charges and prosecuting offenders. It also gave the provinces the authority to make their own laws governing such things as driving rules, liquor possession and consumption, and trespassing on private property. Provinces, which create and oversee municipalities, also had the power to establish and maintain municipal police forces through the municipal councils. This meant that police forces created by the provinces enforced the *Criminal Code* and dealt with all provincial and municipal offences. Section 92(14) also established that criminal trials took place in provincial courts, even though the rules of evidence and criminal procedure were initially created federally.

It is interesting to note that the legislative powers of the territories are different from those of the provinces and that, since their creation, the territories have been controlled by the federal government. To this day, the territories have a different relationship with the federal government than the provinces do; they have fewer powers over lands and resources, and less say in constitutional matters. There are also some differences with regard to policing and the court systems. The territories' powers and relationships with the federal government continue to evolve.

ADMINISTRATION OF POLICING

One of the consequences of sharing responsibility for policing across federal, provincial, and municipal jurisdictions is that policing in Canada is highly complex.

As you have already seen, the federal government established a federal police force, the RCMP, which has jurisdiction over all federal laws throughout all Canadian provinces and territories (e.g., the *Criminal Code*, the *Controlled Drugs and Substances Act*, and the *Canada Transportation Act*). Each province has the power to establish its own provincial police force, even though only three provinces have done so. Quebec, Ontario, and Newfoundland and Labrador have created the following:

- the Sûreté du Québec (SQ),
- the Ontario Provincial Police (OPP), and
- the Royal Newfoundland Constabulary (RNC).

The rest of the provinces and territories contract the services of the RCMP to enforce the *Criminal Code*, provincial statutes, and, in many cases, municipal by-laws. In the case of the RNC, policing is conducted side by side with the RCMP, with each of the two services being responsible for certain areas within the province.

The agreements made between the provinces/territories and federal government do not necessarily cover municipalities. Each municipality has the right to establish its own police force under provincial law. For example, Moncton, New Brunswick has its own police service, while the RCMP polices much of the rest of the province. In most large municipalities, policing is provided by either a municipal service, the provincial service, or a regional service. However, even where the provinces have opted for a provincial force and numerous municipal police forces, the RCMP still maintains a significant presence to enforce federal mandates, such as the *Controlled Drugs and Substances Act*, and in doing so, RCMP officers frequently work directly with local law enforcement.

While the different jurisdictions and levels of police create complexity and administrative challenges, they also provide some room for checks and balances. For example, one police service, such as the OPP, can investigate a complaint about another police service, such as a municipal police force. This provides a measure of objectivity and fairness in the review process.

CHECK YOUR UNDERSTANDING

1. Provincial governments have the power to establish provincial and municipal police services, lay charges, and prosecute offenders. What act outlines these powers?
2. Explain what is meant by the doctrine of parliamentary supremacy.
3. Describe the powers that reside in sections 91 and 92 of the *Constitution Act, 1867*.

LEGISLATIVE AND JUDICIAL SOURCES OF POWER

We will now explore three other sources of police powers:

1. statutes,
2. regulations and by-laws, and
3. common law and case law.

statutes
codified legal provisions developed and adopted through the parliamentary and legal process

codified
written down

royal assent
approval of the British monarch through their representative

governor general
the monarch's representative in the federal legislature

lieutenant governor in council
the monarch's representative in the provincial legislature; the role involves carrying out the constitutional duties of the monarch, such as providing royal assent to bills that have been passed

legislative process
process by which the elected representatives of government make laws

STATUTES

The laws that we have been discussing to this point, including those in the Constitution and the *Criminal Code*, are called **statutes**. A statute is a law that has been:

- written down, or **codified**;
- enacted by a legislative body (the Parliament of Canada or a provincial or territorial legislature); and
- given **royal assent**, which means that the statute has received the approval of the monarch through their representative (the **governor general** at the federal level, the **lieutenant governor in council** at the provincial level, or the commissioner at the territorial level).

Federal, provincial, and territorial governments each enact hundreds of statutes. These statutes are posted on the Internet and updated continually. Every day, police officers (like PC Bergeron in the opening scenario) enforce these laws, so they need to know which level of government is the authority for the statute(s) they are enforcing (see Table 1.1 for examples). Officers also need to stay current with changes in legislation, whether the change is in the form of an amendment to the law or a case that provides a significant interpretation of a law that affects day-to-day policing.

CREATING STATUTES

To understand how statute law and legislation are made, we will look at a simplified model of the **legislative process** in the provincial and federal governments. Municipal by-laws often go through a similar process, also described below, but without the requirement of receiving royal assent.

TABLE 1.1 Examples of Statutes

STATUTE	PASSED BY	ENFORCEABLE	EXAMPLES
Federal	Canadian Parliament	Across Canada	Income tax International trade Controlled drugs and substances Criminal records Fisheries Border control
Provincial/ territorial	The provincial/ territorial legislatures	In the province or territory in which the statute was enacted	Police acts Residential tenancy laws Labour laws Conservation laws Highway traffic laws

All federal, provincial, and territorial laws are made by members of the federal Parliament or of provincial or territorial legislatures. These government officials act as representatives of the people.

Every statute begins its life as a **bill**. At the federal level, a bill is introduced by being read out in the House of Commons. This is called the first reading and is the first of three readings that the bill must pass through. At each reading, a majority of the members in the House must vote to send the bill to the next stage. Usually, between the second and third reading, the bill is sent to various House committees for closer consideration. The committee(s) reports back to the House, making any recommendations for improvement. The House considers the recommendations of the committee, making any changes it feels are necessary. The bill then goes through a third reading. If the legislature votes in favour of the bill at third reading, the bill is said to have passed. The bill is then sent to the Senate, which repeats this process, but the Senate may send the bill back to the legislature with recommended changes. Once both houses have passed the bill, it is to be signed by the monarch's representative and become an Act of Parliament. This final stage is called royal assent. (See Figure 1.2.)

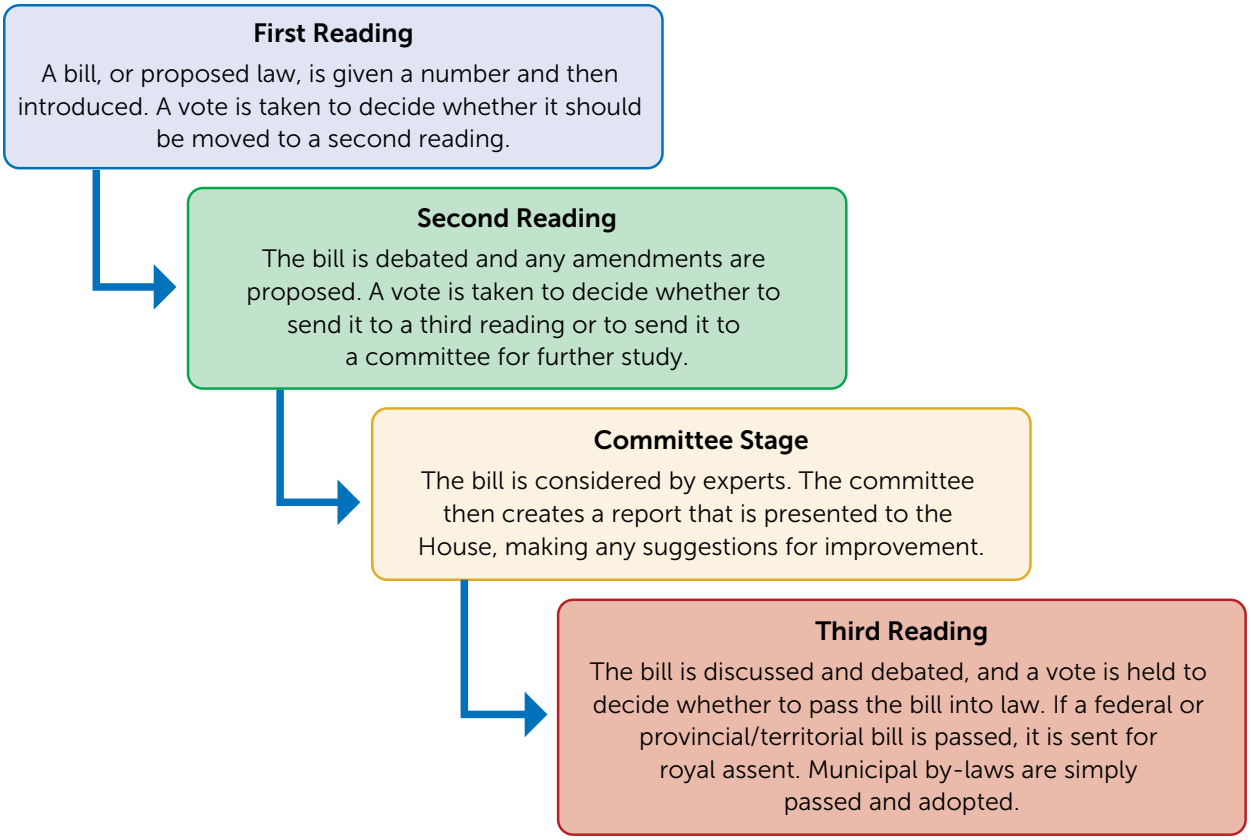
bill
a proposed new or amended law in the provincial/territorial or federal legislative process

Once the bill has received royal assent, it still needs to come into force. It may be proclaimed into force on the date it passes, on a date specified in the law, or on a date determined by the governor general.

The process for passing a provincial or territorial statute is the same as the federal process up to the point at which the bill passes third reading in the legislature. However, the provincial and territorial governments do not include a senate, so once a bill passes in the legislature, it may receive royal assent.

Once a law is enacted, it is necessary to keep it current and workable in the face of societal changes. This is done through an amending process. Police officers have to keep up to date not only with new laws but also with amendments to existing laws and regulations. The officer in the introductory scenario had to be aware of current laws of search and seizure, as well as those of arrest and detention. We will see some of these powers in action as we study legislation and regulations throughout this text.

FIGURE 1.2 Legislative Process



regulations
a type of subordinate legislation that carries out the intent of the statute under which it is made; generally concerned with the detail and technical aspects of the law

by-laws
regulations and rules adopted by local or municipal governments

delegated legislation
legislation (e.g., regulations and by-laws) created by subordinate governmental bodies (e.g., branches and agencies) rather than the legislature

REGULATIONS AND BY-LAWS

Regulations are usually an extension to a statute, while **by-laws** are laws, rules, and/or regulations passed by an organization or a smaller government structure such as a municipality or county. When a legislature passes a law, it often includes a section at the end of the statute that describes the power that a subordinate body has to modify the statute. This is usually done through passing regulations, which provide further details about a particular subject in a statute. Because the power to create regulations and by-laws is delegated to a subordinate body, these types of legislation are called **delegated legislation**. Regulations and statutes function hand in hand.

Here are two examples of regulations that have been created to clarify particular statutes:

- Section 106 of Ontario's *Highway Traffic Act* (HTA) outlines offences regarding the proper use of seatbelts: when, where, and how they are to be worn. Regulation 613 of this Act (*Seat Belt Assemblies*) provides further information, describing the design and location of a restraint system.
- Section 214.1 of the HTA provides that the council of a municipality may designate a part of a provincial highway under its jurisdiction as a

community safety zone. Ontario Regulation 510, passed in 1999 (O Reg 510/99), provides details about the locations of these community safety zones in some Ontario municipalities.

Similarly, the provincial/territorial legislature gives local councils the responsibility of making by-laws for their communities. By-laws regulate the day-to-day affairs of businesses and residents within a municipality. For example, a by-law might restrict the hours that construction equipment can be operated, or it might legislate the minimum temperatures in rental housing. Various law enforcement agents, including police, by-law enforcement officers (municipal law enforcement officers), and special constables, are responsible for enforcing these by-laws. No law is too insignificant for the attention of law enforcement personnel.

The process for creating regulations and by-laws can be similar to creating statutes; it may involve several readings and a committee stage, even though regulations and by-laws do not require royal assent. However, regulations and by-laws are often passed much more rapidly than statutes are; for example, consider COVID-19 pandemic regulations that were quickly enacted across regions. The creation of a statute is a very formal, careful, and rigorous process, and the time for implementation can be lengthy, sometimes as long as a year. Regulations and by-laws, by contrast, can be proposed, passed, and implemented very rapidly, often within weeks or even less. Sometimes these pieces of legislation can be proposed, passed, and adopted in a single meeting.

IT'S YOUR MOVE, OFFICER!

SCENARIO 1.1

You are a new officer. You receive a call to respond to a noise complaint in the university district of your city, and the racket is being caused by a group of university students having a party. After listening to the complainant, you and your partner attend at an old Victorian house that has been converted to apartments to speak with the tenants, a group of third-year students. You have not heard any noise or partying, but the complainant told you that there had been lots of noisy shouting and drinking outside and inside just before your arrival. A new by-law is in place where any noise complaints from the student district result in a summons to court being issued, not only a fine. The students are concerned. They tell you that they have not been partying, and, in fact, you observe no evidence of a party at their apartment. They are even more worried because the landlord has expressly stated she has no tolerance for her tenants disrupting their neighbours. The lease allows her to evict tenants who are subject to noise complaints. The complainant is adamant. She is willing to go to court to testify against the students.

1. In what source would you find a law against excessive noise?
2. Find your local noise by-law using the Internet. Considering this by-law, describe the authorized actions a police officer might take to address a noise disturbance with the area residents.

SOURCES OF INDIGENOUS POLICE POWERS IN CANADA

In Canada, sources of Indigenous police powers are primarily rooted in constitutional rights and modern treaties emphasizing self-governance, in addition to sources of police powers already described. Section 35 of the *Constitution Act* (1982) recognizes and affirms existing Aboriginal and treaty rights of Indigenous Peoples in Canada. It provides a constitutional basis for Indigenous self-governance, including the authority to establish and enforce laws. While law enforcement responsibilities were at times addressed in historical treaties, present-day Indigenous communities have negotiated modern treaties or self-government agreements with the Canadian government, many with explicit provisions related to Indigenous policing powers, including the establishment and operation of police services. For example, the Nisga'a Treaty in British Columbia authorizes the Nisga'a to enact laws and enforce public safety. The Nishnawbe Aski Nation Policing Agreement in Ontario involves a partnership between 49 First Nations in Northern Ontario and the OPP, and acknowledges the unique needs of First Nations communities and the value of First Nations policing in addressing the lasting impacts of colonialism, segregation, and oppression. Overall, it is important to keep in mind that the legal framework regarding Indigenous police powers continues to evolve, and the specific structure may vary among diverse Indigenous communities and nations.

An officer with the Tsuut'ina Nation Police Service on patrol on the Tsuut'ina Nation, near Calgary, in December 2023.

COMMON LAW AND CASE LAW

common law
the body of judge-made law not found in statute

stare decisis
a common law doctrine stating that the decision of a higher court in a particular jurisdiction acts as a binding authority on a lower court in the same jurisdiction

All of Canada, except for Quebec, follows the British tradition of **common law**, which is also referred to as *case law*. This tradition decides criminal and civil cases based on previous court decisions and long-standing principles. In the common law in Canada, judges must follow the principle of ***stare decisis***, which is Latin for "to stand by things decided," requiring judges to follow the previous rulings of other judges in higher courts in their province or territory and the Supreme Court of Canada on similar cases or issues. This rule of precedent is based on the belief that it is unfair to deliver different rulings or impose different punishments for crimes that have similar circumstances.

The implication is that statute law is shaped by case law decisions. The courts, through the judges, must interpret both the intention and the language of statutes. In doing so, they shape how that statute is applied in future cases. For this reason, common law is sometimes referred to as "judge-made law." The implication for police officers is that they must be aware of court decisions so that they are able to better determine whether a crime has been committed.

Police officers must be aware of changes in case law. An example of an everyday police practice that is authorized by common law rather than legislation is the police officer's right to search a person upon their arrest. Based on safety considerations, the right to search is a "common law power" given to police officers; it is accepted and practised without being in statute. The Supreme Court of Canada confirmed this common law authority in *R v Golden* (2001, para. 84) when it said that search incident to arrest is "an established exception to the general rule that warrantless searches are *prima facie* unreasonable." Entering a home in emergency situations to assist or check on the well-being of the occupants is also understood to be a common law police power. *R v Godoy* (1999, para. 22) observes that "the public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest." These statements have not been written into legislation, but, because they are judge-made law, they are as powerful as legislation. Common law is the original source of the authority and continues to evolve through case law in court decisions. It is the responsibility of all law enforcement officers to remain up to date on changing laws that impact their jurisdiction.

IT'S YOUR MOVE, OFFICER!

SCENARIO 1.2

It's Friday night and you and your partner, both relatively new recruits, have just been dispatched to a 911 call. The caller stated that he was in his house and that he heard his next-door neighbour, a 73-year-old male, calling for help. The caller said that his neighbour, George Macklin, sounded as if he was in the basement. The complainant could hear Macklin yelling, "She's locked me in again!"

When you arrive at the home, you notice an elderly woman sitting on the front porch, drinking tea, working on a crossword puzzle, and talking to

(*Continued on next page.*)

something or someone. You greet her with "Good evening, ma'am. I'm Khalid, and this is my partner, Megan, with the Hamilton Police Service. May we ask you some questions?"

Macklin eyes you suspiciously and asks what brings you to her house. You reply that you received a 911 call concerning the well-being of her husband and suggest that he may be in the basement.

Macklin laughs, stating that her husband died three years ago. She then proceeds to "feed her dog" while talking to it, although you can see there is clearly no dog present. She tells you that you have been the victim of "that crazy old creep next door." You are a little unsure now of your facts. You are also quite concerned that Macklin may, in fact, be experiencing a mental health problem and require an assessment under mental health legislation. She may be a danger to herself or others.

1. Based on your reading so far, does an officer have the right to enter the home in these circumstances?
2. What is the basis in case law for your decision?
3. If you decide to enter the house, how would you explain your decision to a justice?

CHECK YOUR UNDERSTANDING

1. What is a statute, and how is it different from a regulation and a by-law?
2. What is a bill, and what steps are required for it to pass into law?
3. Describe the common law concept of *stare decisis* and its relationship to the development of law.

LIMITING LEGISLATIVE AND POLICE POWERS

As discussed above, the *Constitution Act, 1867* gave Parliament supremacy over law-making, which meant that Parliament was one of the main sources of police powers (the other being common law). The problem with parliamentary supremacy was that even though Parliament was responsible for protecting individual rights, it could enact any law, however restrictive, as long as that law was within its jurisdiction. There was no concept of an unconstitutional law, since Parliament had supreme law-making powers and was the source of the Constitution.

THE CANADIAN BILL OF RIGHTS

In 1960, Prime Minister John Diefenbaker proposed the *Canadian Bill of Rights*. Diefenbaker had seen discrimination against different religious and cultural groups, and he believed that the rights of individuals needed to be protected under federal

laws. On the night before he introduced the Bill of Rights to Parliament, Diefenbaker (1960) explained the following:

> What will a Canadian Bill of Rights do? It will declare that the following rights and freedoms are in existence and that no Act of the Parliament of Canada in the past or in the future (subject to the security demands of war) shall be permitted to interfere with them:
>
> - The right of the individual to life, liberty, security of person and enjoyment of property and the right not to be deprived thereof except by due process of law;
> - The right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex;
> - Freedom of religion;
> - Freedom of speech;
> - Freedom of the press.

In this speech, Diefenbaker expressed a hope that no act of Parliament would interfere with these rights, but he also acknowledged that the effectiveness of the statute was limited because it was not part of the Constitution. His hope, he said, was that the Bill would at least make Parliament more "freedom-conscious." Unfortunately, Diefenbaker was correct about the limited effectiveness of the statute. Because these rights were not **entrenched** in the Constitution, the Bill of Rights had little effect on legal decisions and procedures.

entrenched
firmly established

POLICING UNDER THE CONSTITUTION ACT, 1982

Twenty years after John Diefenbaker introduced the *Canadian Bill of Rights*, Prime Minister Pierre Elliott Trudeau took up the cause of protecting the rights of Canadians.

At the beginning of the 1980s, Trudeau's government was involved in amending the Constitution so that Canada's Parliament would control Canadian legislation, thus eliminating the traditional role of the British Parliament in Canadian affairs. This process was called the **patriation** of the Constitution. Trudeau took this opportunity to introduce other amendments into the Constitution, including the addition of the ***Canadian Charter of Rights and Freedoms*** (the Charter). This part of the Constitution enshrines the individual rights of Canadians. The Charter is of particular interest to law enforcement because it defines the limits of police powers. Another amendment to the *Constitution Act, 1982* was the recognition and affirmation of Aboriginal rights. This amendment has had significant implications for legislation and policing with respect to traditional Indigenous lands and traditional First Nations activities, such as fishing, hunting, and logging.

patriation
the process of changing the Canadian Constitution so that control of legislation was moved from the British Parliament to the Canadian Parliament

Canadian Charter of Rights and Freedoms
a constitutional document that sets out the rights and freedoms of all people in Canada

The Charter expresses and entrenches basic civil liberties, which are highly valued in a free and democratic country. These rights and freedoms include:

- equality under the law;
- protection of the individual from the intrusion of the state; and
- the freedoms of religion, the press, speech, assembly, and association.

Prime Minister Pierre Trudeau and Queen Elizabeth are shown at the signing of Canada's *Constitution Act, 1982*.

These changes redefined and limited the powers of police and legislators. The implication of these constitutional changes was deepened by section 52(1), which says, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This phrase marks a shift away from the idea of parliamentary supremacy to a concept of **constitutional supremacy**.

constitutional supremacy
a doctrine that places final decision-making power in legal matters in the hands of the judiciary

CONSTITUTIONAL CHALLENGES TO LAWS

With the introduction of the Charter, there arose a uniquely Canadian tension between the concepts of constitutional supremacy and parliamentary supremacy. Acts of Parliament were now weighed against constitutional guarantees, and the phrase "of no force or effect" has been heard again and again as laws are challenged and found to be unconstitutional. Examples of this in Canada's *Criminal Code* include laws pertaining to abortion, minimum sentencing, and prostitution. These laws, created by Parliament, have been challenged, found wanting, and struck down as unconstitutional. This process has often forced the amendment of legislation or the creation of new legislation.

The Charter provides protections to all Canadians and, in the case of criminal prosecutions, to both the public (victims, witnesses) and the accused. This attention to the rights of the accused has been one of the Charter's more controversial byproducts. For example, in the 1991 case *R v Seaboyer*, the Supreme Court of Canada reviewed, and ultimately invalidated, so-called "rape shield" provisions, which prohibited defence lawyers from asking sexual assault victims about their sexual history. The Supreme Court decided that these limitations violated the defendant's Charter rights, stating that the provisions infringed the principles of **fundamental justice**

fundamental justice
rights that belong to everyone and originate either in the express terms of the Constitution or, by implication, in common law

by depriving the accused of the right to full answer and defence. In this way, the Constitution was used to set express limits against rape shield provisions. In consequence, a new set of principles had to be enacted to protect the rights of the accused.

Another example of this tension between the rights of the accused and the rights of the public comes from the Ontario Court of Appeal. In the case of *R v Nur* (2013), the Court was called upon to consider the fairness of section 95(1) of the *Criminal Code*, which said that the possession of a prohibited or restricted firearm, either loaded or with accessible ammunition, would result in a mandatory minimum sentence of three years' imprisonment. This penalty was applied regardless of the purpose or use of the firearm.

Five justices in the Court of Appeal looked at sentences that had been handed down in similar cases prior to the introduction of the mandatory minimum sentence. They compared the shorter lengths of the earlier sentences with the three-year mandatory sentence and found the difference to be disproportionate. As a result, the Court determined that the mandatory three-year sentence was a "cruel and unusual punishment," which is prohibited by section 12 of the Charter. The law was struck down as unconstitutional—of no force or effect.

CHARTER RIGHTS HAVE REASONABLE LIMITS

The introduction of the Charter was not without some controversy. Many people were concerned that the Charter and the move to constitutional supremacy reduced the ability of Canadian governments to legislate effectively and, in some cases, limited the powers of police to effectively enforce the law. Police were not used to having their activities judged according to a law that provided rights to all and that could result in the dismissal of cases.

Partly in response to these concerns, the government introduced into the Constitution the concept of "reasonable limits" to individual rights and freedoms. What this means is that legislatures are able to place limits on Charter rights as long as these limits can be shown to be "justified to protect a free and democratic society" (s. 1, Charter). It is this part of the Constitution that enables laws against hate speech and child pornography.

One of the main roles of Canadian criminal courts is to interpret the Charter. A defendant may choose to complain, for example, that a Charter right was violated by the police in their pursuit of the investigation. Rosenberg (2009) has noted that much case law has developed in answer to constitutional questions concerning sections 7 through 10 of the Charter. After a case has exhausted the lower courts, it is these questions that most often form the basis of an appeal to the Supreme Court. The Court, for its part, refers to these Charter provisions when making decisions that limit or confirm law enforcement practices. The Court's interpretations have generated a large body of case law that has become an important part of police training.

Reading and understanding case law decisions that affirm or deny police powers is a routine academic exercise in police training. These cases are a source of police power as they provide the police with an indirect, external set of guidelines regarding their own power in relation to the rights of ordinary citizens, and they help the police avoid exercising their power in a way that interferes with these rights.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS: ENSHRINED LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

CHECK YOUR UNDERSTANDING

1. Describe the doctrine of constitutional supremacy and its relationship to the development of law.
2. Describe the role of the Charter in limiting police powers.
3. What is the role of case law as a source of law enforcement power?

CHAPTER SUMMARY

Reread the introductory scenario. What do you think now? As you have learned, police derive their powers from several sources within the Canadian system. One source is statutes, regulations, and by-laws, created by different levels of government. Another is common law and case law. One of the functions of our court system is to determine that laws are appropriately used by police and that the *Charter of Rights and Freedoms* protects Canadian society from misuse of power by police. The man who was arrested by the officer in the opening vignette is as well protected as any Canadian citizen by this intricate system of checks and balances on police power. In order to be an effective police officer, you need to study and understand the appropriate use of police powers. This book will help you do this.

KEY TERMS

amendments, 4
bill, 9
British North America Act (BNA Act), 4
by-laws, 10
Canadian Charter of Rights and Freedoms, 15
codified, 8
common law, 13
constitution, 4
constitutional supremacy, 16
delegated legislation, 10
division of powers, 5
entrenched, 15
federation, 4
fundamental justice, 16
governor general, 8
jurisdiction, 5
legislate, 4
legislative process, 8
lieutenant governor in council, 8
parliamentary supremacy, 4
patriation, 15
regulations, 10
royal assent, 8
stare decisis, 13
statutes, 8

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FURTHER READING

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Federal Parliament of Canada: http://www.parl.gc.ca/

Ontario e-Laws: http://www.ontario.ca/laws

Ontario Legislative Assembly, Bills & Lawmaking: http://www.ola.org/en/node/2166/

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REVIEW QUESTIONS

MULTIPLE CHOICE

1. According to the *Criminal Code* and common law decisions, police have the power to:
   - **a.** arrest and detain
   - **b.** search and seize
   - **c.** use force
   - **d.** all of the above
2. The principle of *stare decisis* refers to:
   - **a.** the principle according to which the courts use similar precedent cases to decide new cases
   - **b.** the principle according to which the courts use dissimilar cases to decide new cases
   - **c.** the police practice of applying the same law to everyone
   - **d.** the police practice of applying the same investigative processes to everyone
3. Which of the following provinces have provincial police forces?
   - **a.** Saskatchewan, Quebec, and Alberta
   - **b.** Ontario, Prince Edward Island, and Manitoba
   - **c.** Nova Scotia, New Brunswick, and Ontario
   - **d.** Ontario, Newfoundland and Labrador, and Quebec
4. A provision of a statute may be "struck down" by a judge if they find it to be:
   - **a.** unethical
   - **b.** unconstitutional
   - **c.** an abuse of power
   - **d.** in violation of the *Criminal Code*
5. Which of the following is not a legal right according to the Charter?
   - **a.** right to not be subject to unwanted laws
   - **b.** right to life, liberty, and security of the person
   - **c.** right to be presumed innocent until proven guilty
   - **d.** right to not be arbitrarily detained

TRUE OR FALSE

____ **1.** The Constitution provides that specific responsibilities for different types of laws belong to either the provincial or the federal government.

____ **2.** The duty to enforce the criminal justice laws is the sole responsibility of the federal government.

____ **3.** Section 91(27) of the *Constitution Act, 1867* governs the provincial government in its power to enact criminal law and procedure.

____ **4.** The *Canadian Charter of Rights and Freedoms* was enacted in 1987.

____ **5.** *Stare decisis* is a doctrine that requires judges to follow precedents.

____ **6.** The Canadian Constitution is the supreme law of the land, as stated in section 52(1) of the *Constitution Act, 1982*.

____ **7.** A regulation must go through three readings in the legislature.

____ **8.** The federal and provincial governments rarely have any disputes over the jurisdiction of each level of government.

____ **9.** The provinces are permitted to establish their own police forces or may contract with the RCMP to provide police services on their behalf.

____ **10.** The *Criminal Code* applies to all provinces and territories in Canada.

SHORT ANSWER

1. **a.** How do judicial decisions affect the activities of the police?
   b. When will a judge strike down a law?
   c. Give an example of a law that would be unconstitutional.
2. How does Canada's Constitution divide criminal justice–related powers between the provinces and the federal government?
3. **a.** How does the enactment of a statute differ from the making of a regulation?
   b. Is a regulation law?
4. Take a look at the legal rights from the Charter. Consider how the concept of reasonable limits redefines how these rights may be applied. How might the wording of some of these rights affect how you perform your job as a police officer?
5. What are the distinctive sources of Indigenous police powers? Why is it important that unique considerations be made for the policing of First Nations communities?

IT'S YOUR MOVE, OFFICER!

A. It is your first day in court to testify at a trial. While you are on the witness stand, under oath, the Crown attorney asks you to explain how the accused came to your attention. You explain that you had reasonable grounds to arrest him because he had committed an indictable offence—theft over $5,000. You then explain your next steps, including that you searched the accused after handcuffing him. When you are questioned by the defence attorney, she asks why you went to the trouble of searching her client, since the search did not turn up any incriminating evidence. She claims your search was unreasonable.

1. How would you respond to the defence attorney?
2. Did you have a lawful power of search? From where did this power come?
3. What were you searching for?

B. It is Saturday night at 3 a.m. You are part of a Reduce Impaired Driving Everywhere (RIDE) team on a lonely stretch of road at the edge of town, stopping random vehicles to check for impaired drivers. A vehicle approaches you, and you ask the driver if he has consumed any alcoholic beverages. He replies "no," but you can clearly smell alcohol on his breath. The car also smells strongly of liquor and cannabis, and there is an empty liquor bottle on the floor of the front passenger seat. There is no other evidence relating to the possible cannabis odour.

You ask the driver to step out of the car, then turn him over to the officer who is conducting the roadside screening tests. The driver fails the test and is arrested by the officer conducting the test. The officer demands a breath sample, pursuant to section 254(3)(a)(i) of the *Criminal Code*. Because the location of your RIDE program is very isolated, you decide to wait with the arresting officer for a tow truck to tow the driver's car. This means that your suspect is waiting with you, thus likely delaying the first breathalyzer test. In addition to this, the weather turns to freezing rain, and you learn that the tow truck will be delayed by 30 minutes. You know that the law in section 254(3) regarding impaired driving requires that an officer demand a breath sample "as soon as practicable." Section 258(1)(c) requires that the first breath sample be taken not later than two hours after the offence.

1. What would you do?
2. Do you think that stopping the driver in this scenario is an arbitrary detention? Explain.
3. If stops such as these are arbitrary, should they be allowed? Are they not a Charter violation? Explain.