



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 Gibson, who was 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! The male's name and details of a stolen bicycle, which resembled this one, had been shared with officers at the start of PC Gibson's shift.

Reasonable suspicion existed to detain the bicycle rider to investigate the possible possession of stolen property—specifically, the bicycle he was riding. PC Gibson 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 Gibson continued the detention and frisk search and found two mobile phones in the left-hand inside chest pocket of the coat—an Apple iPhone 6s and a Samsung Galaxy 7. He removed these briefly and then returned them to the suspect's pocket. From the front left pocket of Mr. 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 Gibson made his notes, with the suspect seated in the rear of the vehicle. He released Mr. Dykzon with no charges stemming from the detention for possible possession of stolen property, because he confirmed that the bicycle Mr. 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 Gibson noticed that Mr. Dykzon was attempting to retrieve the phones from his pocket, which were receiving messages. PC Gibson removed the phones from Mr. Dykzon's pocket and placed them on the front passenger seat of the police vehicle. In the meantime, PC Gibson could see text messages scrolling across the screen, and he read some of them as they were displayed. The messages contained comments that led PC Gibson to charge the suspect with possession for the purpose of trafficking.

PC Gibson 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.)

Mr. 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 phone? What's it 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, Mr. Dykzon became belligerent and thought he could rattle PC Gibson's nerves a bit. "Hey Officer Gibson, you're not very bright, are ya? Anyone with half a brain knows you just made an illegal detention. You took the drugs in an illegal search. So you can't use anything you found against me! I'm gonna walk on all of this!"

PC Gibson continued making notes and writing down everything the suspect said, but he did not take the bait and avoided getting into a power struggle. However, he was a relatively new officer who had just finished his probation period with the OPP, and he began to doubt himself. He wondered, “Did I make an illegal detention? There were grounds! I was told this morning! 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 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 am I 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 that.

What do you think—was PC Gibson acting lawfully? Where does his authority come from? What is the law regarding cellphone search?

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 now 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 travels 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 (that is, 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, written or unwritten, that establishes the character and conception of the nation’s government

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:

amendments

changes made to enacted legislation to improve it

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.

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." The officer in the opening scenario is doing just that.

legislate

to make or enact laws

parliamentary supremacy

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

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 would 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 marijuana.

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

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

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* [emphasis added] 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.

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.

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 means 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)
- 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 force, the provincial force, or a regional force. 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 force, such as the OPP, can investigate a complaint about another police service, such as a municipal police force. This provides reassurance 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. Where does this power come from?
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*.

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 his or her 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 which have been passed

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

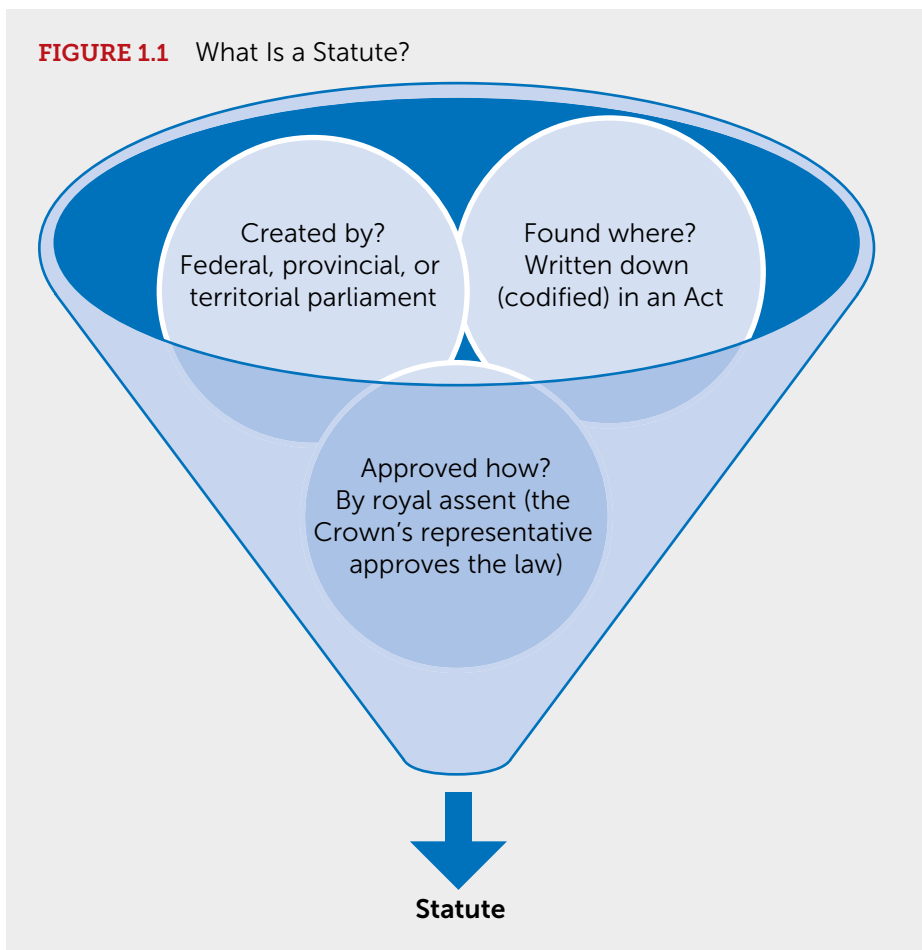
- written down, or **codified**;
- enacted by a legislative body (the Parliament of Canada or a provincial or territorial legislature); and
- given **royal assent**, which means that it has received the approval of the monarch through his or her representative (the **governor general** at the federal 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 Gibson 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. Figure 1.1 sets out the basics of statutes.

TABLE 1.1 Examples of Statutes

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

FIGURE 1.1 What Is a Statute?



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

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

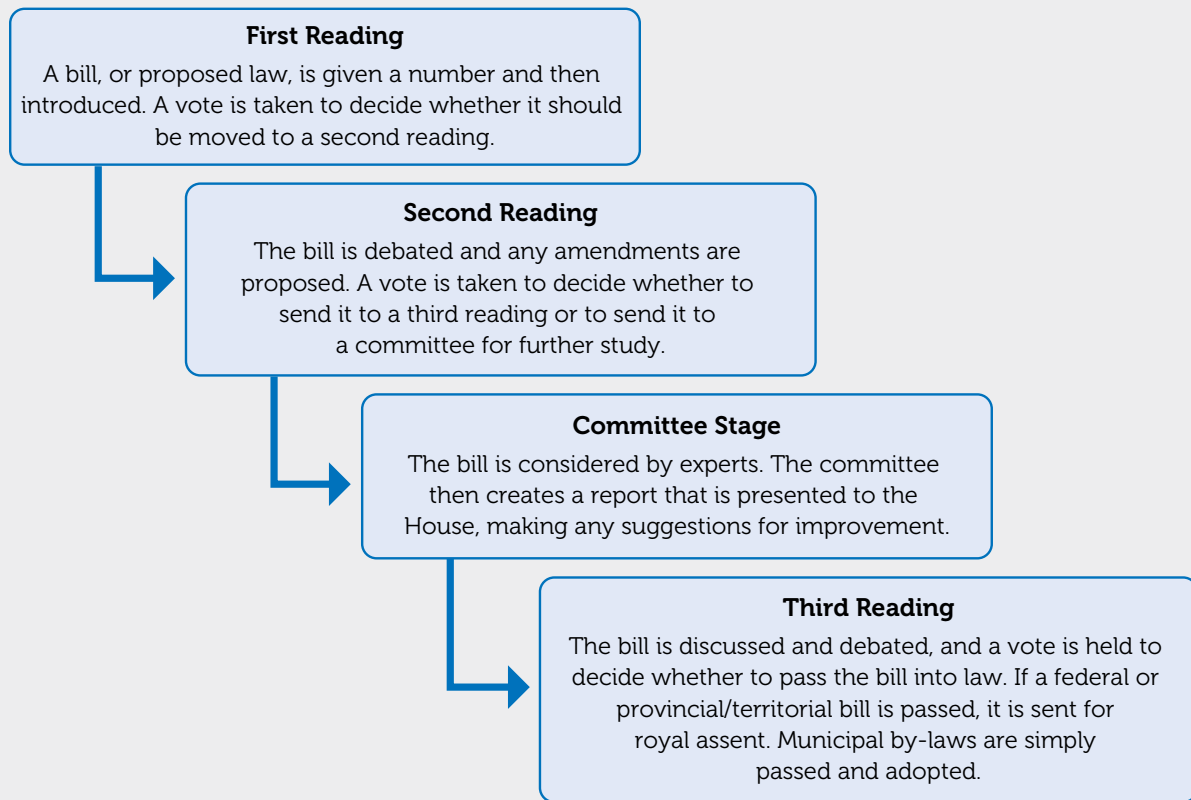
CREATING STATUTES

To understand how statute law or legislation is 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.

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 (the House, or legislature). 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

FIGURE 1.2 Legislative Process



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.)

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 where 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.

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 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.

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

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, and special constables, are responsible for enforcing these by-laws. No law is too insignificant for the attention of law enforcement.

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. 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 this new by-law includes a clause that permits the university full access to the police report, so the university can add academic penalties to any allegations of violation of a by-law. The complainant is adamant. She is willing to go to court to testify against the students.

1. Where would you find a law against excessive noise?
2. Locate an example of this offence using the Internet and describe the powers a police officer might have to minimize the disturbance to the area residents.

COMMON LAW AND CASE LAW

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. It is founded on the concept of *stare decisis*, which is Latin for “to stand by things decided.” (This concept is also referred to as the **doctrine of precedent** or **rule of precedent**.) It 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 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 make better decisions about whether a crime has been committed.

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

doctrine of precedent or rule of precedent

a doctrine that requires a judge, in resolving a particular case, to follow the decision in a previous case where the facts in the two cases are similar



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 were in the basement. The complainant could hear Mr. 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 someone. You greet her with “Good evening, ma’am, I’m Officer Kalid and this is my partner, Officer McNulty. May we ask you some questions?”

Mrs. 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.

Mrs. 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 Mrs. Macklin may, in fact, be suffering from a mental health problem and require an assessment under mental health legislation. She may be a danger to herself or others.

1. Do you have a right to enter the home?
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?

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 his or her 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." That statement has not been written into legislation, but, because it is judge-made law, it is as powerful as legislation. Common law is the original source of the authority, and it has now been confirmed through case law in court decisions.



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 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, so 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) said

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 is 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



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

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.

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 concept of constitutional supremacy and the concept of 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. In the case of abortion, however, the law has been left in the *Criminal Code* but is not enforceable.

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 rape shield provisions, which prohibited defence lawyers from asking rape 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** 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 earlier sentences with the three-year mandatory sentence and found the gap to be disproportional. 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 LIMITS

The introduction of the *Canadian Charter of Rights and Freedoms* 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." It is this part of the Constitution that enables laws against hate speech and child pornography.

fundamental justice

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

CANADIAN CHARTER OF RIGHTS AND FREEDOMS: 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.

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.



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	delegated legislation, 11	legislative process, 10
bill, 10	division of powers, 5	lieutenant governor in council, 8
<i>British North America Act</i> (BNA Act), 4	doctrine of precedent or rule of precedent, 13	parliamentary supremacy, 5
by-laws, 11	entrenched, 15	patriation, 15
<i>Canadian Charter of Rights and Freedoms</i> , 15	federation, 4	regulations, 11
codified, 8	fundamental justice, 17	royal assent, 8
common law, 13	governor general, 8	<i>stare decisis</i> , 13
constitution, 4	jurisdiction, 5	statutes, 8
constitutional supremacy, 16	legislate, 5	

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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

- In the interests of protecting society, police have the power to
 - arrest and detain
 - search and seize
 - use force
 - all of the above
- The principle of *stare decisis* refers to
 - the principle according to which the courts use similar precedent cases to decide new cases
 - the principle according to which the courts use dissimilar cases to decide new cases
 - the police practice of applying the same law to everyone
 - the police practice of applying the same investigative processes to everyone
- Which of the following provinces have provincial police forces?
 - Saskatchewan, Quebec, and Alberta
 - Ontario, Prince Edward Island, and Manitoba
 - Nova Scotia, New Brunswick, and Ontario
 - Ontario, Newfoundland and Labrador, and Quebec
- A provision of a statute may be “struck down” by a judge if he or she finds it to be
 - unethical
 - unconstitutional
 - an abuse of power
 - in violation of the *Criminal Code*
- Criminal trials take place in
 - provincial courts
 - special criminal courts
 - federal criminal courts
 - all of the above

TRUE OR FALSE

- The Constitution provides that specific responsibilities for different types of laws belong to either the provincial or the federal government.
- The duty to enforce the criminal justice laws is the sole responsibility of the federal government.
- Section 91(27) of the *Constitution Act, 1867* governs the provincial government in its power to enact criminal law and procedure.
- The *Canadian Charter of Rights and Freedoms* was enacted in 1987.
- Stare decisis* is a doctrine that requires judges to follow precedents.
- The Canadian Constitution is the supreme law of the land, as stated in section 52(1) of the *Constitution Act, 1982*.
- 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. What is the main function of Canada's Constitution with respect to the division of powers?
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?

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 RIDE team on a lonely stretch of road at the edge of town, stopping 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 marijuana, and there is an empty liquor bottle on the floor of the

front passenger seat. There is no other evidence relating to the possible marijuana 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. Would you continue to wait for the tow truck? Explain.
3. Do you think that waiting would mean the breath test results might not be admitted? Explain.