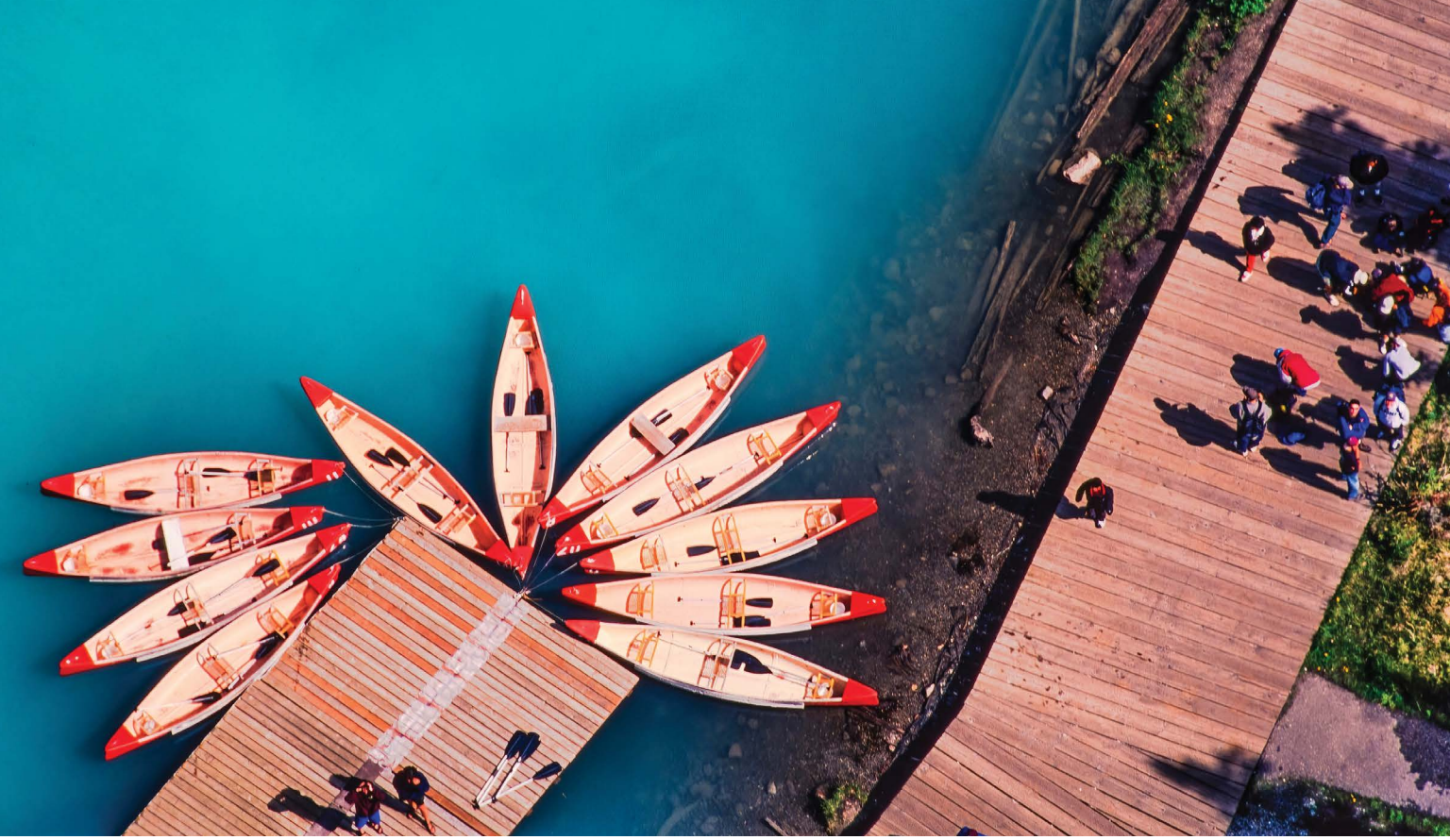


# PART 1

# *Legal Foundations*

CHAPTER 1

# Canada's Legal Landscape

## LEARNING OUTCOMES

After reading this chapter, you will understand:

- What the law is.
- The sources of Canadian law and their relationship.
- The organization of Canada's court and judicial system.
- How to answer a legal question.

## CHAPTER OUTLINE

## Introduction

The hospitality and tourism industry is vital to the Canadian economy. Participants include hotels, resorts, Airbnb rentals, casinos, restaurants, bars, nightclubs, fast food outlets, and tour operators, among others. According to Statistics Canada, in 2022 there were approximately 623,375 jobs and total employment was 1.9 million people in the tourism sector, with annual tourism spending of approximately $124.4 billion. Also, according to the Hotel Association of Canada, there are more than 8,200 hotels, motels, and resorts in Canada, employing more than 300,000 people and generating approximately $21.9 billion in annual revenue.

This book will address the distinct enforceable rights and obligations of customers and participants in the hospitality and tourism sector. These include liability to guests, customers, or other persons for personal injury, loss, or other damage; contractual rights and obligations; prohibitions against discrimination; the status of workers in the sector; and the extensive statutory and regulatory requirements governing hospitality and tourism.

The scope of this book is Canada-wide except for the province of Quebec, as Quebec has a distinctive legal system (civil code) from the rest of Canada (common law). This book will address both federal and provincial law.

We will begin with an overview and understanding of Canada's legal landscape. What are the essential components of Canada's legal system within which the laws governing the hospitality and tourism sector reside? But first, what is law?

## What Is Law?

**law**
the body of enforceable rules governing the relationships among and between individuals, organizations, and governments

Simply stated, **law** is the body of enforceable rules governing the relationships among and between individuals, organizations, and governments. And so, the scope of law is very broad. It intrudes upon or affects virtually every aspect of life—personal as well as commercial and professional. The distinctive feature of the rules that are "law" is their enforceability. They are rules enforced by the courts or some other administrative body or tribunal established by the state. If the rules fall within the realm of public law (e.g., criminal law), they are enforced directly by the state. If the rules fall within the realm of private law (e.g., contract law), they are enforceable by a private action initiated by the party (or parties) affected by their breach. Although judges or members of the empowered administrative body or tribunal are appointed by the government, their authority to act is independent of, and not subject to, the influence of government or politics.

*The House of Commons.*

It is enforceability that distinguishes law from moral or ethical precepts or standards. Although moral or ethical precepts or standards may instruct on what is right or wrong in human behaviour, they do not take on the attribute of law unless they are enforceable. For example, there may be a moral or ethical obligation to try to rescue a drowning person, but you cannot be prosecuted for failing to do so unless there is a law saying that you must.

## Categorizations of the Law

Canadian law can be categorized or "mapped" in many ways. This is useful in illustrating or highlighting certain objectives of the law or obstacles to its application. For example, laws passed by Parliament can be distinguished from laws passed by provincial legislatures. The illustrative purpose or value of this distinction is to note or emphasize that each is restricted in the subjects on which it can legislate and that only Parliament can pass laws for all of Canada.

For our purposes, two of the prime categorizations or distinctions are public law versus private law, and the three distinct sources of law: the Constitution, legislation, and common law.

There are numerous online law sources for the *Constitution Act, 1867*[1] and the *Constitution Act, 1982*.[2] One such source is the CanLII website at <https://www.canlii.org>.


*King Charles delivers the speech from the throne in the Senate in Ottawa on Tuesday, May 27, 2025.*

### *Public Law Versus Private Law*

**Public law** addresses the rights and obligations of Canadians to the state or government, whereas **private law** is concerned with the enforceable rules governing the interactive conduct of persons and organizations. Prime examples of public law include the *Criminal Code*[3] and the *Income Tax Act*.[4] They describe obligations owed by each person to the state, failing which the offending person can be prosecuted and, if found liable, punished by the state. Public law plays

**public law**
addresses the rights and obligations of Canadians to the state or government (e.g., criminal law, Constitutional law, administrative law)

**private law**
deals with the interactive conduct of persons and organizations (e.g., contracts, property ownership, damage caused by someone to another person or their property, duties of family members)

1 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

2 Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 RSC 1985, c C-46.

a significant role in the hospitality and tourism sector. Extensive federal and provincial statutory and regulatory requirements govern the products and services provided by participants in this sector. For example, the *Food and Drugs Act*[5] is a federal statute that, among other things, prohibits the sale of food unfit for human consumption, and the various provincial liquor licensing statutes (e.g., *Liquor Control and Licensing Act*[6]) regulate the sale and purchase of liquor in the applicable province.

The creation and enforcement of contracts under which the parties to the contract agree on the terms governing the delivery of goods and services and tort law, the body of law developed by the courts governing personal conduct, are prime examples of private law. A breach of private law does not involve or concern the state. It is of concern only to those who are parties to the contract or have suffered a loss, damage, or injury by the person who committed the tort.

The consequence of a breach of public law is a failure to meet a duty to the state for which the consequence may be a prosecution by the state. The primary objective of the prosecution is to punish the offending party, not to compensate anyone who may have been harmed by the actions of the offending party. By contrast, the consequence of a breach of private law is a failure to meet an obligation, or loss, damage, or injury to another party, for which the consequence may be a private action for compensation by the affected party for any resultant loss, damage, or injury.

## Sources of Law

### *Overview*

Canadian law can also be categorized as to its source. The three distinct sources are the Constitution, legislation, and common law. An illustration of where hospitality and the law intersect on the three levels of government is provided in Box 1.1.

### BOX 1.1 WHERE HOSPITALITY AND THE LAW INTERSECT: THREE EXAMPLES

Each of the three levels of government plays a role in enacting laws that govern various aspects of the hospitality and tourism industries. Here are examples of the roles and responsibilities of each level of government.

#### *Municipal*

City by-laws and municipal public health guidelines govern restaurants, cafés, and bars. Many cities have publicly displayed rating systems so that customers know that public health staff have inspected an establishment and found it has met guidelines for sanitation, food safety, and working conditions, or not. The names of non-compliant businesses may be posted online, while in some cities, a colour-coded system is used: green for pass, yellow for


*Restaurants in some municipalities display a colour-coded poster showing they have been inspected.*

4 RSC 1985, c 1 (5th Supp).

5 RSC 1985, c F-27.

6 SBC 2015, c 19.

conditional pass, and red to show that a restaurant has been closed due to violations.

***Provincial***

Liquor control is perhaps the most high-profile area of provincial jurisdiction over hospitality. Liquor licences for bars and restaurants are strictly controlled. In some provinces, the primary point of distribution for the public sale of alcohol is a provincially run retail store, and the rules for consumption of alcohol in hospitality establishments and elsewhere may vary widely from province to province. Quebec, for example, has long had a more liberal policy on alcohol sale and consumption, with corner stores, or *dépanneurs*, permitted to sell wine and beer, and diners able to bring their own wine to many restaurants (these trends have slowly become more evident in other provinces in recent years). Alberta abruptly switched its alcohol retailing model in 1993 from a publicly run system to a privatized model, based on the rationale that it would allow better product selection and lower prices for customers. And in 2024, Ontario expanded the sale of beer, wine, and other prescribed alcoholic beverages to convenience stores and other retail outlets.[7]


*Ontario's new alcohol laws now allow for the sale of alcohol in convenience stores.*

***Federal***

As discussed later in this chapter, section 15 of the *Canadian Charter of Rights and Freedoms* dictates that Parliament, the provincial and territorial legislatures, and the courts, each exercising their authority to create laws, cannot make laws that are discriminatory. For the proprietor of a resort, restaurant, or hotel this means, for instance, that they will not have the legal right to refuse admittance to people with physical disabilities or to deny service to same-sex couples.

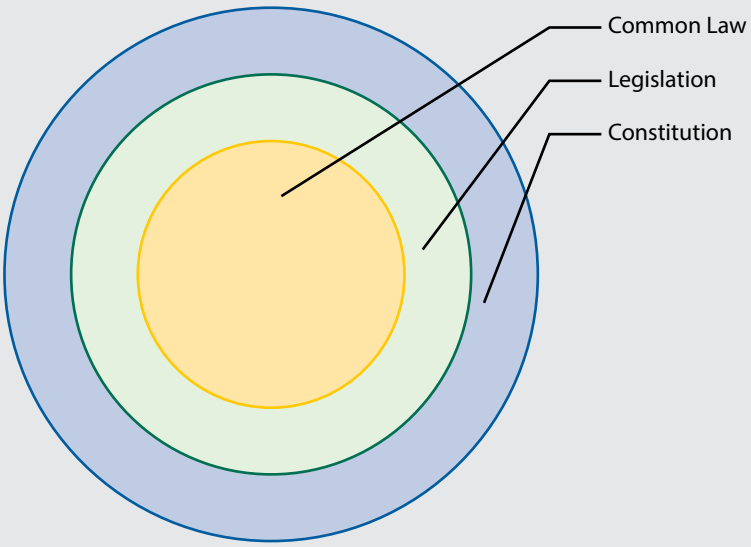
The Constitution is the supreme law of the land. It is "supreme" because all other laws must conform to the Constitution. In other words, all legislation passed by Parliament and the provincial legislatures, and all law and interpretations of the law arising out of court decisions (common law), cannot conflict with the Constitution. This is expressly stated in section 52(1) of the *Constitution Act, 1982*, which states: "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." The relationship among the Constitution, legislation, and the common law is graphically illustrated in Figure 1.1, where legislation and the common law must operate within the boundaries established by the Constitution. If any statutory provision or judicial decision or interpretation conflicts with the Constitution, it is not enforceable.

Legislation refers to the laws passed and proclaimed by the Parliament of Canada and the provincial and territorial legislatures. As discussed later, Parliament and the provincial legislatures each have certain matters called "classes of subject" over which they have jurisdiction under the Constitution. They can pass enforceable legislation only within their respective classes of subject and otherwise in compliance with the Constitution.

7 *Liquor Licence and Control Act, 2019*, SO 2019, c 15, Schedule 22, O Reg 746/21.

Common law is the third source of law. The term has two distinct meanings. It describes the legal system all Canadian jurisdictions inherited from England (except for Quebec), as well as the laws created, or their interpretation, arising out of court decisions. It is the latter meaning of the common law that is of relevance to us and will be discussed later.

**FIGURE 1.1 The Relationship Between the Three Sources of Law**




### *The Constitution*

Canada is perhaps unique in that it has two constitutional statutes, the *Constitution Act, 1867* and the *Constitution Act, 1982*. Canada's Constitution, however, is not restricted to these two documents, for, in accordance with section 52(2) of the *Constitution Act, 1982*, it includes "(b) the Acts and orders referred to in the schedule." This schedule describes 30 statutes and orders, including the *Constitution Act, 1867*; the *Parliament of Canada Act, 1875*;[8] and the *Statute of Westminster, 1931*.[9] As indicated by use of the word "includes," however, this list is not exhaustive, as the Supreme Court of Canada (SCC) has indicated that other statutes, judicial decisions interpreting the Constitution, and certain rules called "constitutional conventions" may have binding authority. An example of the relevance of the Constitution to the hospitality and tourism sector is described in the Box 1.2 Case Law Highlight.

**BOX 1.2 » Case Law Highlight**

An example of the relevance of the Constitution to laws governing the hospitality and tourism sector is evident in the decision of the Ontario Court of Appeal in *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)*.[10] In order to control "lap dancing," the municipality enacted a

8 RSC 1985, c P-1.

9 (UK), 22 & 23 Geo V, c 4.

10 1997 CanLII 14486 (ONCA).

by-law purporting to address the health and safety of the public and that of the women engaged in this activity. The by-law states in part:

> No owner or operator shall, in respect of any adult entertainment parlour owned or operated by him, knowingly permit any attendant, while providing services as an attendant, to touch, or be touched by, or have physical contact with, any other person in any manner whatsoever involving any part of that person's body. No attendant shall, while providing services as an attendant, touch or have physical contact with any other person in any manner whatsoever involving any part of that person's body.

The association representing the adult entertainment business brought an application for judicial review of the by-law to court arguing, among other things, that (1) the by-law is, in substance, a criminal law, and therefore *ultra vires* the municipality, as jurisdiction over criminal law resides solely with Parliament under the *Constitution Act, 1867*; and (2) it infringes on section 2(b) of the Charter (freedom of expression).

The Court of Appeal decided that the by-law was not in substance criminal law. It regulates the form of entertainment used by the owners of adult entertainment establishments and falls within the province's constitutional authority over property and civil rights. As well, the Court concluded that the by-law did not violate freedom of expression under section 2(b) of the Charter. And if it did violate freedom of expression, the Court declared that the by-law would still be enforceable under section 1 of the Charter as a justifiable limit on a Charter-protected right.

*Her Majesty Queen Elizabeth II with Prime Minister The Rt Hon Pierre Elliott Trudeau signing the* Proclamation of the Constitution Act, 1982.

### The Constitution Act, 1867

The *Constitution Act, 1867* began life as the *British North America Act, 1867*.[11] It was an Act of the Parliament of the United Kingdom creating the Dominion of Canada, and was later renamed the *Constitution Act, 1867* as part of the *Canada Act 1982*,[12] discussed below. The *Constitution Act, 1867* marked the completion of a lengthy process of negotiation initiated by representatives from the English colonies of New Brunswick, Nova Scotia, Prince Edward Island, and the Province of Canada (present-day Ontario and Quebec). Famously, in meetings at Charlottetown, Prince Edward Island, and Quebec City, the delegates agreed upon the structure of Canada and its form of governance. The negotiation was finalized in meetings of the delegates and representatives of the Government of the United Kingdom in London, and the resulting *British North America Act, 1867* was passed by the Parliament of the United Kingdom and given royal assent on March 29, 1867. It proclaimed the creation of the Dominion of Canada out of the provinces of Canada, Nova Scotia, and New Brunswick effective July 1, 1867. (Although Prince Edward Island participated in the discussions resulting in the creation of the Dominion of Canada, it did not join Confederation until 1873.[13])

The *Constitution Act, 1867* did not confer complete independence from the United Kingdom. There were additional steps over time by which Canada attained increased autonomy. An important milestone on this journey to complete independence was the *Statute of Westminster, 1931*. This Act of the Parliament of the United Kingdom provided, among other things, that no law enacted by the Parliament of Canada, Australia, or New Zealand would be unenforceable because it was "repugnant" to a law of England; that the three Dominions had authority to make laws having extraterritorial effect; and that no Act of the Parliament of the United Kingdom from that date forward would extend to any of the Dominions without their consent. As well, the SCC, first established in 1875 by the *Supreme and Exchequer Court Act*,[14] became the court of last resort in Canada for criminal appeals only in 1933, and for all other appeals in 1949. Until those dates, judgments of the SCC could be appealed to the Judicial Committee of the Privy Council in the United Kingdom.

**bicameral**
consisting of two legislative assemblies

The *Constitution Act, 1867* established the Dominion of Canada as a federation with a national **bicameral** Parliament comprising an elected House of Commons and an appointed Senate, with provinces except for the province of Quebec having a single elected legislature. Until 1968, Quebec mirrored the federal bicameral structure with an appointed Legislative Council of 24 members, each member representing a prescribed geographical part of the province, in addition to an elected Legislative Assembly. Effective December 31, 1968, the Legislative Council was abolished and the Legislative Assembly was renamed the National Assembly.

As well as establishing the structure of the new country, the *Constitution Act, 1867* delegates to each level of government jurisdiction over certain "classes of subject." These are described in sections 91 to 95 and, with certain exceptions, confer exclusive jurisdiction over each class of subject on either Parliament or the provincial legislatures. This means that neither Parliament nor a provincial legislature can pass laws that fall within a class of subject of the other. If Parliament or a provincial legislature passes a law outside of its constitutional jurisdiction, the law is considered *ultra vires* (beyond the power) and is not enforceable.

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11 (UK), 30-31 Vict, c 3.

12 (UK), 1982, c 11.

13 By 1905, Canada had expanded to include the Arctic islands; the admission of Manitoba, British Columbia, Prince Edward Island, Alberta, and Saskatchewan as provinces; and the Northwest Territories and Yukon as territories. Newfoundland and Labrador was admitted as a province in 1949, and Nunavut was carved out of the Northwest Territories as a new territory in 1993.

14 SC 1875, c 11, s 4.

The sections of the *Constitution Act, 1867* conferring exclusive jurisdiction over prescribed classes of subject on Parliament are sections 91 and 94A, and those conferring exclusive jurisdiction over prescribed classes of subject on the provincial legislatures are sections 92, 92A, and 93. Section 95 confers concurrent parliamentary and provincial jurisdiction over agriculture and immigration.

In addition to the 29 classes of subject for which Parliament has been granted exclusive jurisdiction in section 91, the section also states that Parliament may "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." In other words, if there is, or may be at some future date, a class of subject not described in the *Constitution Act, 1867*, exclusive jurisdiction over that class of subject resides with Parliament. It is on this basis, for example, that exclusive jurisdiction over telecommunications resides with the Parliament of Canada.

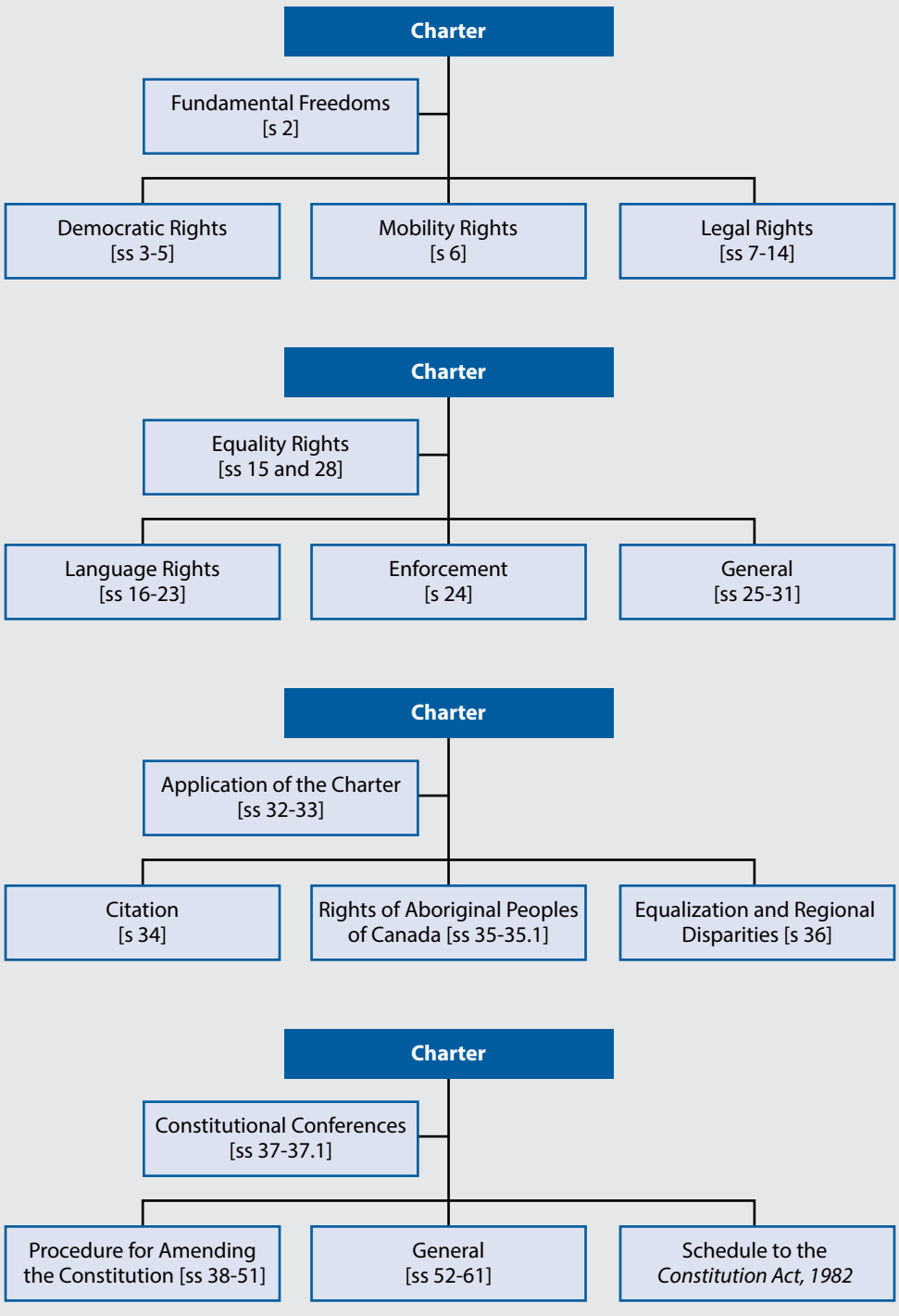
### The Constitution Act, 1982

The last vestiges of British legal authority were removed by the *Canada Act, 1982*. This statute of the Parliament of the United Kingdom was enacted at the request of Canada for certain constitutional objectives. First, it transferred control of ("patriated") the Canadian Constitution from the United Kingdom to Canada. Section 2 of the *Canada Act, 1982* declared that the Parliament of the United Kingdom no longer had legislative authority over Canada; that it no longer had authority to change the Constitution of Canada; and that the "request and consent" provisions of the *Statute of Westminster, 1931* under which the Parliament of the United Kingdom could enact laws for Canada at Canada's request no longer applied. The *Canada Act, 1982* also changed the name of the *British North America Act, 1867* to the *Constitution Act, 1867* and annexed the *Constitution Act, 1982* as Schedule B.

Part I of the *Constitution Act, 1982* is the *Canadian Charter of Rights and Freedoms*. Figure 1.2 and Box 1.3 provide a high-level overview of the Charter's structure and those who are entitled to protection for certain basic rights and freedoms, including religion, expression, assembly, mobility, equality, democratic rights, and freedom from arbitrary arrest and detention. It also acknowledges and provides constitutional protection for Canada's two founding languages, French and English. Part II of the *Constitution Act, 1982* is titled "Rights of the Aboriginal Peoples of Canada." Part II recognizes and affirms the existing Aboriginal treaty rights, including land claims, for the "Aboriginal" population of Canada, defined to include the "Indian, Inuit, and Métis peoples." Additional parts to the *Constitution Act, 1982* deal with such topics as regional disparities, procedures for amending Canada's Constitution, and other matters. Section 52 is particularly notable, as it declares the Constitution to be the supreme law of Canada and that any other law that is inconsistent with the Constitution is not enforceable.

Prior to the *Constitution Act, 1982*, the main ground for challenging the constitutionality of any federal or provincial legislation was that its subject matter was not within a class of subject over which Parliament or the provincial legislature had authority under the *Constitution Act, 1867*. In other words, the legislation was *ultra vires* Parliament or the provincial legislature and, therefore, not enforceable. The enactment of the *Constitution Act, 1982* provided an additional constitutional challenge, that the legislation violated the Charter.

**FIGURE 1.2 Charter of Rights and Freedoms: Schematic Overview**



## BOX 1.3 CHARTER OF RIGHTS AND FREEDOMS: SCOPE OF PROTECTION

The identity of the parties protected by Charter rights is variable. For example, whereas certain rights are extended to "all persons" or "everyone," others are restricted to Canadian citizens. The following table identifies the scope of protection for each Charter provision.

| Part I: Canadian Charter of Rights and Freedoms | Provision | Entitled or Affected Parties |
|---|---|---|
| Freedom of conscience and religion. | s 2(a) | Everyone |
| Freedom of thought, belief, opinion, and expression. | s 2(b) | Everyone |
| Freedom of peaceful assembly. | s 2(c) | Everyone |
| Freedom of association. | s 2(d) | Everyone |
| Democratic rights. | ss 3-5 | Canadian citizens |
| Mobility rights (to reside and work anywhere in Canada). | s 6(2) | Canadian citizens and those having permanent resident status |
| Mobility rights (qualifies rights granted in s 2 for those entitled to publicly provided social services). | s 6(3) | Canadian citizens and those having permanent resident status |
| Mobility rights (qualifies rights described in ss 2 and 3 for the right to enact affirmative action programs for those economically or socially disadvantaged). | s 6(4) | Canadian citizens and those having permanent resident status |
| Legal rights (rights against arbitrary arrest, search, seizure, and detention). | ss 7-10 | Everyone |
| Legal rights (right to trial within a reasonable time; presumption of innocence; entitlement to reasonable bail; if acquitted, not to be tried again for the same offence; not subject to cruel and unusual punishment). | ss 11 and 12 | Any person (s 11)<br>Everyone (s 12) |
| Legal rights (witnesses are to be free from self-incrimination; a party or witness to a proceeding is entitled to an interpreter). | ss 13 and 14 | Everyone |
| Equality rights (everyone is entitled to equal benefit and protection of the law without discrimination). | s 15 | Every individual |
| Aboriginal rights and freedoms are not affected by the Charter. | s 25 | Aboriginal peoples (Indian, Inuit, and Métis peoples of Canada) |
| Multicultural heritage (the Charter is to be interpreted in a manner consistent with Canada's multicultural heritage). | s 27 | Everyone |

(*Continued on next page.*)

| Part I: Canadian Charter of Rights and Freedoms | Provision | Entitled or Affected Parties |
|---|---|---|
| Charter rights and freedoms are guaranteed equally to male and female persons. | s 28 | Everyone |
| The Charter applies to Parliament and the Government of Canada, and to the legislature and government of each province (it does not apply to "private matters" (*RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 1986 CanLII 5). | s 32 | Everyone |
| "Notwithstanding clause" (Parliament or a provincial or territorial legislature can declare any Act, or part thereof, not bound by the Charter in regard to s 2 (the protection of fundamental freedoms), ss 7-14 (legal rights), or s 15 (equality rights). | s 33 | Everyone |
| **Part II: Rights of the Aboriginal Peoples of Canada** | **Provision** | **Entitled or Affected Parties** |
| Aboriginal rights (existing Aboriginal and treaty rights, including land claims, are recognized and affirmed). | s 35 | Aboriginal peoples. Defined to include "Indian, Inuit, and Métis peoples of Canada" |
| **Part III: Equalization and Regional Disparities** | **Provision** | **Entitled or Affected Parties** |
| Commitment by Parliament and provincial legislatures to the promotion of equal opportunity and the reduction of economic disparity. | s 36 | Canadian citizens |
| **Part V: Procedure for Amending Constitution of Canada** | **Provision** | **Entitled or Affected Parties** |
| Various formulas requiring the consent of Parliament or the provincial legislatures, depending on the subject matter of the proposed change. | ss 38-49 | |
| **Part VI: Amendment to the Constitution Act, 1867** | **Provision** | **Entitled or Affected Parties** |
| | ss 50 and 51 | |
| **Part VII: General** | **Provision** | **Entitled or Affected Parties** |
| The Constitution of Canada is the supreme law of Canada. | s 52 | |
| Additional miscellaneous provisions. | ss 53-61 | |

For the full text of the *Constitution Act, 1982*, see Appendix B.

The Charter was the result of a protracted and difficult process of negotiation between and among the federal government and the provinces. It was a prime objective of Prime Minister Pierre Trudeau as part of a broader constitutional reform initiative to patriate Canada's Constitution from the United Kingdom and provide constitutional protection for certain fundamental rights. At one point, exasperated with the difficulty in reaching agreement with the provinces, the federal government sought the approval of the SCC for Parliament alone to patriate the Constitution from the United Kingdom and enact the Charter. As described in Box 1.4, this initiative met with mixed success. Although the SCC determined that such a unilateral action by Parliament was strictly legal, they also declared that there was a constitutional convention requiring substantial provincial consent. This decision by the SCC spurred the parties to engage in a final round of negotiation, resulting in agreement (except for Quebec) on the Charter.

**BOX 1.4 » Case Law Highlight**

***Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25**

The federal government, with the support of the legislatures of Ontario and New Brunswick, published a draft resolution on October 2, 1980, containing an address to Her Majesty The Queen. The draft resolution included a statute, to which was appended another statute, for the patriation of the *British North America Act* and the addition of the Charter to the Constitution of Canada. The proposed resolution was adopted by the House of Commons and by the Senate on April 23 and 24, 1981.

The other provinces opposed the resolution and, under the legal authority of provincial governments to refer questions of law to the courts, the governments of Newfoundland and Labrador, Quebec, and Manitoba asked their respective provincial courts of appeal to rule on the constitutionality of the federal government's proposed resolution. The provincial courts of appeal differed as to the authority of the federal government, and their decisions were appealed to the SCC. The appeals were combined into a single reference to the SCC, and the federal government and all the provinces made submissions to the Court.

Although seven judges found that the federal government had the legal authority to unilaterally seek the amendment of the Constitution without consent of the provinces, a majority also found that there was a "constitutional convention" that a substantial degree of provincial consent was required. And in the words of the SCC, "constitutional conventions plus constitutional law equal the total constitution of the country" (at 884-85). This split decision fuelled a final round of negotiations between the federal and provincial governments, resulting in agreement (except for Quebec) on the Charter.

Notwithstanding the Charter's status as an integral part of Canada's Constitution, its application is restricted, or may be restricted, in three distinct ways.

### *The Charter, Section 1*

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Simply stated, section 1 provides that a law breaching the Charter may still be enforced if it is a reasonable restriction on a Charter-protected right in the interests of Canada as a free and democratic society. The SCC addressed the scope and meaning of section 1 in *R v Oakes*.[15] The Charter issue before the Court was section 8 of the *Narcotic Control Act*,[16] stating that on proof

15 [1986] 1 SCR 103, 1986 CanLII 46.

16 RSC 1970, c N-1.

of possession of a narcotic, an accused is presumed to have possession for the purposes of trafficking and, absent evidence to the contrary, must be convicted of trafficking. Oakes had been found to be in possession of a narcotic and, because of section 8 of the *Narcotic Control Act*, was convicted of trafficking. Counsel for Oakes argued that this statutory presumption of possession for the purposes of trafficking violated section 11(d) of the Charter: "Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The government argued, among other things, that even if section 8 of the *Narcotic Control Act* violated section 11(d) of the Charter, it should be enforced under section 1 as a reasonable restriction on the application of the Charter in the interests of Canada as a free and democratic society. In rejecting the government's position, the SCC established a test for the application of section 1 of the Charter. First, the party seeking to uphold legislation that breaches the Charter must show that the subject matter is of substantial societal importance, and, second, the particular means by which the Charter right has been infringed must be rationally connected to the objective of the legislation and impair the Charter-protected right as little as possible.

### *The Charter, Section 32(1)*

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The SCC in *RWDSU v Dolphin Delivery Ltd*[17] interpreted section 32 to mean that the scope of the Charter was limited to government or government-relied-upon matters. It did not apply to strictly private matters. The SCC elaborated by saying that the Charter would apply to legislation, including subordinate legislation such as regulations and municipal by-laws, including where a private litigant relies on legislation to cause an infringement of the Charter rights of another party, but would not apply to private litigation where no legislation or other government action is relied upon.

### *The Charter, Section 33(1)*

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Section 33 is, arguably, the most controversial provision of the Charter. It is the so-called "notwithstanding clause" whereby Parliament or a provincial legislature may pass enforceable legislation that breaches section 2 or sections 7 to 15 of the Charter simply by declaring in the legislation itself that it is enforceable notwithstanding that it breaches one or more of these sections of the Charter. Section 33 goes on to say that this enforceable breach of the Charter is in effect for five years, after which it may continue only if Parliament or the provincial legislature re-enacts the exemption. It must be noted that this right of Parliament and the provincial legislatures to infringe the Charter is limited to the protection granted to the four fundamental freedoms (s 2), the prescribed legal rights (ss 7-14), and the equality rights protection (s 15). The remaining sections of the Charter cannot be overridden or negated by the notwithstanding clause.

17 [1986] 2 SCR 573, 1986 CanLII 5.

Although Parliament and provincial legislatures, with the exception of Quebec, have historically been reluctant to use section 33, there are recent indications of a willingness to do so. For example, the Saskatchewan legislature in 2023 passed the *Education (Parents' Bill of Rights) Amendment Act*.[18] This amendment to the *Education Act, 1995*[19] requires parental notification and consent for students who wish to change their preferred names, nicknames, or identified pronouns at school in relation to gender expression. It also places restrictions on teaching sexual health at school and makes it easier for parents to refuse the teaching of sexual health to their children. To insulate this legislation from a challenge that it violated the Charter, the amendment included the notwithstanding clause.[20] The Quebec National Assembly has invoked section 33 to protect legislation limiting the use of English in signage and advertising from a Charter challenge that it infringed freedom of expression under section 2(b). And the Quebec legislature again used section 33 in *An Act respecting the laicity of the State*.[21] This Act, among other things, prohibits prescribed public servants in a position of authority from wearing religious symbols. To ensure that this prohibition against the wearing of religious symbols would withstand a Charter challenge that it violated freedom of religion under section 2(a), the Act declares that it applies "notwithstanding sections 2 and 7 to 15 of the *Constitution Act, 1982*."

Irrespective of the limitations on the reach of the Charter, it has had a profound effect on Canadian life. Illustrating this effect is the SCC decision in *M v H*.[22] M and H were two women who cohabited in a same-sex relationship for many years. They separated, and M brought a claim against H for spousal support under Ontario's *Family Law Act*.[23] Her claim was denied because the definition of "spouse" under the Act was restricted to those who were married and "either of a man and woman who are not married to each other and have cohabited … continuously for a period of not less than three years."[24] In other words, a "spouse" did not include a same-sex partner. The question before the Court was whether the definition of spouse violated section 15(1) of the Charter. As can be seen in Box 1.5, section 15(1) describes certain grounds on which laws are not to be discriminatory. And although sexual orientation is not expressly included in the enumerated grounds, the Court found that it was analogous to those stated and, therefore, covered by the section. In addition, the Court rejected the Ontario government's alternative argument that even if the definition of spouse violated the Charter, it should be enforced under section 1 as a reasonable limitation on a Charter-protected right.

### BOX 1.5 CHARTER OF RIGHTS AND FREEDOMS

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(*Continued on next page.*)

18 SS 2023, c 46.

19 SS 1995, c E-0.2.

20 The notwithstanding clause is inserted in s 197.4 of the amended *Education Act* as follows: "(3) Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this section is declared to operate notwithstanding sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*."

21 SQ 2019, c 12.

22 [1999] 2 SCR 3, 1999 CanLII 686.

23 RSO 1990, c F.3.

24 *Supra* note 22 at para 52.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The effect of the Court's decision in *M v H* was not confined to the meaning of spouse under Ontario's *Family Law Act*. It resulted in amendments to 58 federal statutes, 68 Ontario statutes, and similar legislation in other provinces granting equal rights and protection to same-sex couples. *M v H* and comparable decisions have been instrumental in the advancement of equal rights for LGBTQ+ people in Canada. Although critics argue that the Court in decisions like *M v H* exceeds its mandate by making social policy, a role that properly resides with the country's elected representatives in Parliament and the provincial legislatures, there can be no doubt about the profound impact that the Charter has had and undoubtedly will continue to have on Canadian life.

### Convention

**convention**
a customary practice, rule, or method

And finally, we need to appreciate the concept and role of **convention** in Canada's form of government. As previously noted, and described in Box 1.4, the SCC concluded that although Parliament had the legal authority to patriate the Constitution from the United Kingdom and enact the Charter, there was a constitutional "convention" that they do so only with substantial provincial consent. In other words, in certain situations there are rules or requirements founded in tradition or past practice that should be followed. Failure to do so would not necessarily be unlawful, but it may be politically unacceptable. Other notable conventions include the requirement under section 11 of the *Constitution Act, 1867* that "[t]here shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada." By convention, this refers only to those members of the Privy Council who are current members of the cabinet of the Government of Canada. Another example is the confidence convention that requires a government to resign if it loses a vote of no confidence in the House of Commons or a provincial legislature.[25]

## *Legislation*

**legislation**
the laws made by law-making bodies

**Legislation** is the second source of law. It is the product of the work performed by the Parliament of Canada and each of the provincial and territorial legislatures. As previously discussed, the *Constitution Act, 1867* grants exclusive jurisdiction to Parliament over certain classes of subject and exclusive jurisdiction to the provincial legislatures over other classes of subject.

25 The King–Byng Affair was a 1926 Canadian constitutional crisis pitting the powers of the Prime Minister against those of the Governor General. Prime Minister William Lyon Mackenzie King asked Governor General/Lord Byng of Vimy to dissolve Parliament and call an election. King was the leader of the Liberal Party, and it had fewer seats in the House of Commons than the opposition Conservative Party. The Liberal Party retained government by relying on the support of other smaller parties. The constitutional authority to dissolve Parliament and call for an election resides solely with the Governor General. Byng refused King's request and asked Arthur Meighen, leader of the Conservative Party, to try to form a government. The Conservatives formed a minority government for a brief period of time, but ultimately were defeated in the House on a vote of confidence. Meighen asked Byng to dissolve Parliament and call an election, which he did. King campaigned on the constitutional issue—essentially, the failure of Governor General Byng to follow a constitutional convention and accede to the advice of the Prime Minister. It was a successful campaign for Mackenzie King and the Liberals, as they won a majority government.

Provided that Parliament and the provincial legislatures confine their legislative activities to their respective classes of subject, and do not otherwise offend the Constitution, such as the Charter, they may pass laws enforceable within their respective jurisdictions. And so, whereas legislation passed by Parliament within one of its classes of subject—for example, a law creating a criminal offence—applies and is enforceable throughout Canada, legislation passed by a provincial legislature within one of its classes of subject—for example, a law dealing with education—applies and is enforceable only within that province.

Parliament, in contrast to the provincial legislatures, is a bicameral institution composed of an elected body, the House of Commons, and an appointed body, the Senate. A law is introduced in the form of a "bill." For a parliamentary bill to become law it requires three readings in each of the House of Commons and the Senate. The great majority of bills are introduced in the House of Commons. The first reading of the bill permits no debate, as its purpose is simply to introduce the legislation. The second reading allows for a general debate on its content, and if the bill passes the second reading it is usually referred to the relevant committee of the House of Commons for detailed study. The committee may recommend amendments to the bill for consideration on the third and final reading. Once approved by the House of Commons after the third reading, the bill is referred to the Senate, where the process is repeated. Once approved by the House of Commons and the Senate, the bill is submitted to the Governor General, who, as His Majesty's representative in Canada, gives the bill royal assent. A bill does not become law, and thereby enforceable, until it receives royal assent.

The process for a bill to become law in a provincial legislature, which is **unicameral**, is essentially the same as for Parliament, except that the bill requires only three readings by the legislature and royal assent by the provincial Lieutenant-Governor, His Majesty's representative in the province.

**unicameral**
law-making institution consisting of a single legislative assembly

Territorial statutes are enacted by the elected legislative bodies in each of the territories—Yukon, the Northwest Territories, and Nunavut. In contrast to Parliament and the provincial legislatures, the territories do not have independent constitutional status. Their legal authority is assigned to each of them by Parliament by means of a federal statute, specifically the *Yukon Act*,[26] the *Northwest Territories Devolution Act*,[27] and the *Nunavut Act*.[28]

### Subordinate Legislation

**Subordinate legislation** refers to the statutory authority granted to federal or provincial governments to delegate certain of their powers to subordinate bodies. The primary legislator cannot delegate all its legislative authority and can delegate powers only within its jurisdiction.

**subordinate legislation**
the statutory authority granted to federal or provincial governments to delegate some of their powers to subordinate bodies (e.g., municipalities are granted the authority to create by-laws)

Prime examples of subordinate legislation are regulations to statutes and municipal by-laws. Regulations are made under the authority of a statute and are intended to provide the necessary procedural rules and other requirements to implement the statute. For example, the *Food and Drug Regulations*[29] to the *Food and Drugs Act* "prescribe the standards of composition, strength, potency, purity, quality or other property of the article of food or drug to which the standards refer." This includes, among others, the meaning of such terms as "prescription drug" and the requirements for labelling a drug to be used in dosage form. And the *Liquor Control and Licensing Regulation*[30] to British Columbia's *Liquor Control and Licensing Act* describes, among other

26 SC 2002, c 7.

27 SC 2014, c 2, s 2.

28 SC 1993, c 28.

29 CRC, c 870, s A.01.002.

30 BC Reg 241/2016.

things, the classes and subclasses of licences for the production and sale of liquor in British Columbia.

Municipalities do not have separate constitutional status. They are one of the 15 classes of subject over which provincial legislatures have exclusive jurisdiction under the *Constitution Act, 1867*. For example, the *City of Toronto Act, 2006*[31] is a comprehensive statute of the province of Ontario establishing the city as a distinct corporate body and defining its legal structure, the positions and authority of its mayor and city council, and its various powers, including the power to impose fees, taxes, and other charges and to pass by-laws for such matters as business licensing, structures, and health and safety. These and other subjects over which municipalities are granted authority to make laws are relevant to the hospitality and tourism sector, as will be discussed later.

## Common Law

**common law**
law that is not written down as legislation but evolved into a system of rules based on precedent

The term "**common law**" has a dual meaning. It refers to the legal system inherited from England, the beginnings of which can be traced to the 13th century, and to a particular source of law: specifically, settled or accepted legal rights and obligations arising out of court decisions, as distinct from the laws created by Parliament or a provincial or territorial legislature.

Common law is also distinguishable from civil law. The latter is a codified system of law where the rules are in statute form rather than emanating from the decisions of judges. The province of Quebec, as distinct from the rest of Canada, operates under the civil law, founded on the civil law system of France from which it traces its roots.

***stare decisis***
Latin for "to stand by things decided"; the doctrine of precedents under which a court follows the principles, rules, or standards of its prior decisions or decisions of higher tribunals when deciding a case with arguably similar facts

The basic operational feature of the common law is legal precedence reflected in the doctrine of ***stare decisis*** (let the decision stand) operating within Canada's hierarchical court system. We will describe Canada's court hierarchy later in this chapter, but for now it means, for example, that any new law, or interpretation of an existing law, by a provincial court of appeal, as illustrated by the decision of the Ontario Court of Appeal in *Jones v Tsige*[32] (discussed in Box 1.6), binds all other courts in Ontario, since provincial courts of appeal are the highest court in that province. The decision in *Jones*, however, is not binding on any court outside of Ontario, because courts outside of Ontario do not fall under precedential authority of the Ontario Court of Appeal. This means, of course, that new laws, or interpretations of the law, by the SCC are binding on all courts in Canada, since the SCC is the highest court in the country. The purpose of the doctrine of *stare decisis* is predictability and consistency in the interpretation of the law. If not for *stare decisis*, there would be no basis for evaluating the merit of a particular legal controversy, a necessary feature of a properly functioning legal system.

As shown in Figure 1.1, any common law principle or standard must of course comply with the Constitution and cannot override or disagree with legislation. Parliament or any provincial legislature can change or negate any common law principle or standard, provided they do so within their constitutional authority.

### BOX 1.6 » Case Law Highlight

***Jones v Tsige*, 2012 ONCA 32**

Winnie Tsige and Sandra Jones were employees of the Bank of Montreal. Although they were not personally acquainted, Sandra Jones had a bank account at the branch at which Winnie Tsige worked. Over a four-year period, Winnie Tsige accessed the bank account of Sandra Jones without her knowledge or consent at least 174 times. The account provided a record of transactions, as well as the

31 SO 2006, c 11, Schedule A.

32 2012 ONCA 32.

name, date of birth, and marital status of Sandra Jones. There was no evidence that Winnie Tsige attempted to access the funds, publish or distribute the information, or manipulate the account in any other manner. When Sandra Jones found out about Winnie Tsige accessing her account, she commenced a legal action for, among other things, invasion of privacy. Counsel for Winnie Tsige brought a motion dismissing the claim on the grounds that there was no recognized tort of invasion of privacy. The motion judge granted the motion, and Sandra Jones appealed the decision to the Ontario Court of Appeal. The Court of Appeal determined that a new tort concerning a breach of privacy of this nature was appropriate and adopted the approach and terminology of the American legal scholar William Prosser, calling it "intrusion upon seclusion." This new tort, introduced and defined by the Ontario Court of Appeal, applies to anyone who intentionally intrudes, physically or otherwise, upon the seclusion of another person or their private affairs without consent or lawful authority, and where the intrusion would be highly offensive to a reasonable person. The complainant does not have to have suffered any financial or other pecuniary loss. As the Ontario Court of Appeal is the highest court in Ontario, the concept of *stare decisis* requires all courts in the province of Ontario to recognize and apply the tort as described in this decision. However, as all other courts in Canada are not within the Ontario hierarchical court system, they are not required to recognize the tort of intrusion upon seclusion.

## The Court System and the Judiciary

### *Superior Courts*

Canada has a complex court system in which authority is divided between Parliament and the provincial legislatures. As noted in Box 1.7, although the provinces have the constitutional authority to establish the superior courts in their province under section 92(14) of the *Constitution Act, 1867*, the federal government has the exclusive authority for the appointment of all judges to the provincial superior courts under section 96 of the *Constitution Act, 1867*. Each province has trial-level superior courts and an appellate superior court, which is the highest court in the province. In addition to provincial superior courts, Parliament has established certain federal superior courts. Currently, these are the Federal Court (trial level), the Federal Court of Appeal, the Tax Court of Canada, and the Court Martial Appeal Court. The authority for their establishment is section 101 of the *Constitution Act, 1867*, which grants to Parliament the authority to create "additional Courts for the better Administration of the Laws of Canada." The statutes establishing these courts describe their jurisdiction, which, in all instances, is limited to federal legislation.

### BOX 1.7 THE CONSTITUTION ACT, 1867

Provincial authority for the appointment of judges and establishment of provincial courts is found in sections 92(4) and (14) of the *Constitution Act, 1867*:

> 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, …
>
> 4 The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers. …
>
> 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.

(*Continued on next page.*)

Federal authority for the appointment of judges and the establishment of superior courts and the SCC is found in sections 96 and 101 of the *Constitution Act, 1867*:

> 96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick. …
>
> 101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

### *Inferior Courts*

In addition to their constitutional authority to establish superior courts, provinces may establish inferior courts with provincially appointed judges under sections 92(4) and (14) of *The Constitution Act, 1867*. They are trial courts only and deal with lesser criminal offences, family law disputes (except for divorce), and small claims matters.

### *Tribunals*

Specialized tribunals are a standard feature of Canada's judicial system. They are judicial bodies established by Parliament and provincial legislatures to deal with certain types of legal disputes. A prime example is the federal and provincial human rights tribunals, which deal with claims of discrimination under federal and provincial human rights legislation. The complainant must bring their complaint of discrimination before the applicable provincial or federal human rights tribunal and not to court. The members of these tribunals are appointed by government and usually are not judges, but individuals with knowledge and expertise in the applicable area of law. Tribunal decisions are enforceable, subject to any right of appeal to court.

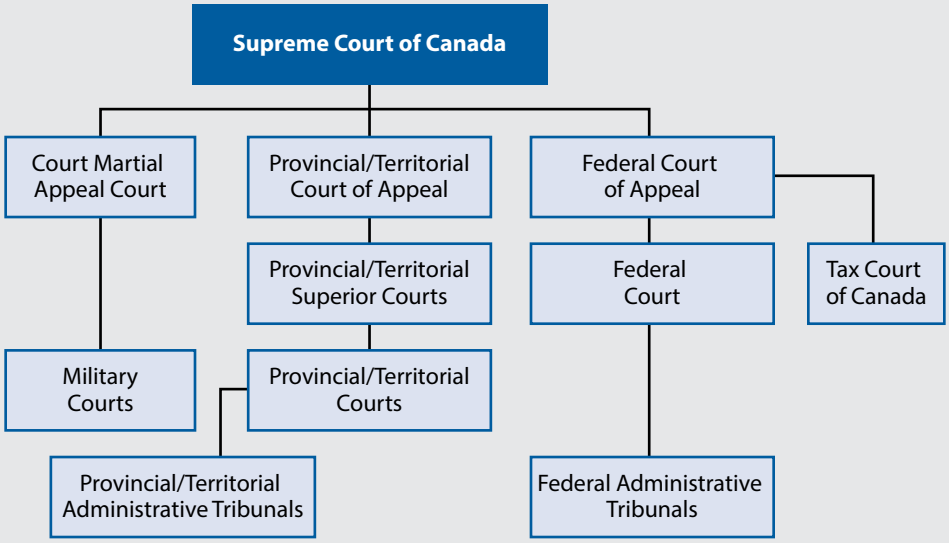
### *Court Structure*

#### Supreme Court and Courts of Appeal

As illustrated in Figure 1.3, Canada has a hierarchical court structure. At the summit of this structure is the SCC. It was formed in 1875 by passage of the *Supreme and Exchequer Court Act*, pursuant to the authority granted to Parliament under section 101 of the *Constitution Act, 1867* to establish additional courts. As previously noted, it has been Canada's highest court for criminal law appeals since 1933 and for all appeals since 1949. Prior to these dates, decisions of the SCC could be appealed to the Judicial Committee of the Privy Council in the United Kingdom. As an appellate court, the SCC does not conduct trials. Comprehensive legal briefs are submitted by the parties to the action, following which opposing counsel appear before the Court to make oral arguments and respond to any questions from the judges. The SCC comprises nine judges, all of whom are appointed by the federal government. The Chief Justice of the SCC is the Chief Justice of Canada. Three of the judges must be from Quebec, and by tradition three are from Ontario, two are from western Canada, and one is from Atlantic Canada.

With certain limited exceptions, appeals to the SCC from decisions of a court of appeal require permission ("leave") of the Court. The party desiring the appeal must submit a "leave to appeal application," asking the Court to hear their appeal. Most leave to appeal applications are denied and the decision of the applicable court of appeal is thereby the final decision. Appeals before the SCC are heard before panels of five, seven, or nine judges. The decision is that of the majority of the presiding judges.

**FIGURE 1.3 Outline of Canada's Court System**




Source: Government of Canada, "The Judicial Structure" (last modified 1 September 2021), online: <https://www.justice.gc.ca/eng/csj-sjc/just/07.html>.

Each province, territory, and the federal court has a court of appeal, the members of which are appointed by the federal government. The number of appellate court judges varies with the jurisdiction. Appeals are typically heard in panels of three, with the decision that of the majority of the judges who heard the appeal.

*The nine judges of the Supreme Court of Canada, including Chief Justice Richard Wagner (bottom row, centre).*

### Trial Courts

Each province and territory has a system of trial courts, the judges of which are appointed by the federal government. They are superior courts and go by various names. For example, in Ontario they are called the Ontario Superior Court of Justice and in Alberta the Court of King's Bench. In addition to the system of federal trial courts, the provinces, pursuant to their authority under sections 92(4) and (14) of the *Constitution Act, 1867*, are authorized to establish a system of inferior courts. The judges are appointed by the provincial government and their authority extends to most criminal matters, family law matters (except for divorce), and small claims disputes.

## *The Judiciary*

The decision by a trial judge in court determines the outcome of the dispute. Subject to any appeal to a higher court, the decision is enforceable and the parties to the dispute are required to accept and implement the decision. In deciding the dispute, the judge must first determine the facts based on the evidence presented by the parties. Having determined the facts (what happened), the judge must then apply the law to the facts. The applicable law may be a statute; a common law standard, such as negligence or some other tort; or, on occasion, whether the law violates the Constitution and, therefore, is not enforceable. The judge's decision is not simply their opinion. Rather, the judge is required to apply the applicable legal standard under the doctrine of *stare decisis*. For example, if the claim is for the tort of negligence, the judge must follow legal precedence and apply the established three-part test for negligence:

1. Did the offending party owe the aggrieved party a duty of care?
2. If the answer is yes, did the offending party by their action breach a reasonable standard of care?
3. If the answer is again yes, did the breach of a reasonable standard of care by the offending party cause the aggrieved party reasonably foreseeable loss, damage, or injury?

The three questions must be answered in the affirmative for the judge to find negligence. Judges cannot substitute their own test for negligence. They are bound by precedence under the doctrine of *stare decisis* to apply the three-part negligence test.

## How to Answer a Legal Question

How do you answer a legal question? First, you must clearly understand the facts. What has happened? Once you clearly understand what has happened, what potential legal question(s) or issue(s) arise from what has happened? For example, has a restaurant served a customer bad food, causing the customer to become ill? Depending on the facts, this may give rise to a possible prosecution by the government against the restaurant under the *Food and Drugs Act* or some other applicable statute, and the customer may have a sustainable personal claim against the restaurant under the tort of negligence.

Having identified the possible legal question(s) or issue(s) arising from what has happened, what is the applicable legal test or standard for determining liability? With reference to our example, what provision(s) in the *Food and Drugs Act*, or other applicable statute, has the restaurant arguably violated? What is the test for violation? And in regard to the customer's negligence claim, does the claim satisfy the obligatory three-part test for negligence?

## RECURRING FACT SCENARIO

The Lake Cambrian Mountain Resort (known by visitors and locals as the Cambrian Resort) is an upscale Canadian resort destination. It is set alongside Lake Cambrian to the south and the Cambrian mountain range to the north, notable for its large expanse of pine trees. The site features the Cambrian Hotel, together with 25 individual chalets on 50 hectares of manicured grounds.

The hotel offers a wide range of accommodations, from single bedrooms to two- and three-bedroom suites. Each chalet has two or three bedrooms with complete kitchen and dining facilities. The resort also offers state-of-the-art conference facilities and boasts The Pines, a Michelin-starred restaurant. Nibblers Café & Pub provides a more casual dining experience.

The Cambrian Resort offers activities year-round, making it the perfect destination for summer and winter vacations as well as corporate events. All-season amenities include luxurious spa facilities for rejuvenation of the mind, body, and spirit; a casino with live entertainment; and indoor/outdoor swimming pools and tennis courts. Summer activities include hiking and biking on the resort's network of trails, access to a private beach, boating on Lake Cambrian, and an exceptional golf experience on the resort's private nine-hole course. In winter guests can enjoy skiing on the Cambrian mountain range, along with skating, snowmobiling, and snowshoeing.

Visitors can book accommodations and vacation packages either by phone or online at the Lake Cambrian Mountain Resort website.

***Questions***

1. The Cambrian Resort is located within the municipal district of Cambrian. The governing body for the Cambrian district is an elected mayor and council of seven. In response to complaints from residents of the district about excessive noise overnight from the casino on the resort, the council passed a by-law making it a criminal offence for the casino to continue to operate after midnight.

   Identify the legal problem with the by-law and explain your answer.

2. Nibblers Café & Pub had a job opening for a waitress. Anika, who moved to the municipal district of Cambrian from another province three months ago, submitted her application for the position. She was contacted by Simon, the manager of Nibblers, who said that although her qualifications were excellent he could not offer her the job because the province had recently passed a law prohibiting employers from employing any person who had moved into the province within the last six months.

   Identify the legal problem that exists and briefly explain your answer.

## KEY TERMS

bicameral, 10
common law, 20
convention, 18
law, 4
legislation, 18
private law, 5
public law, 5
*stare decisis*, 20
subordinate legislation, 19
unicameral, 19

## APPLY YOUR KNOWLEDGE

### Scenario 1

An Ontario municipality passed a by-law stating that if a food premises had a problem with the quality of the food it served to customers posing a minimal health risk, the premises had to post a green notice at the entrance. If the food premises had a problem with the quality of the food it served to customers that could pose a more significant health risk, the premises had to post a yellow notice at the entrance and had up to 48 hours to correct the problem.

The Ontario Restaurant Hotel & Motel Association challenged the jurisdictional and constitutional validity of the by-law requiring the posting of inspection notices. Among the constitutional arguments was that the requirement of the premises to post either a green or yellow notice violated their freedom of expression under section 2(b) of the Charter. It did so by requiring them to make statements they did not want to make.

**Question:** Does freedom of expression under the Charter include the right not to say something you do not want to say?

### Scenario 2

The Government of Canada is very concerned about domestic terrorism. There have been terrorist incidents in Canada. The Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) have an extensive list of individuals who have been radicalized, and who they believe are planning or may be planning to commit terrorist acts. Since these individuals have not yet committed a criminal act, there is no legal basis for their arrest and detention, and neither CSIS nor the RCMP have the resources necessary to maintain effective surveillance of these individuals. With that in mind, the Government has drafted a bill to be presented in Parliament, authorizing the police to arrest and detain any individual they have reason to believe may commit a terrorist act. The Bill states that the individual may be detained in custody indefinitely, without the right to legal counsel, and without the requirement for their detention to be justified before a judge or other judicial authority.

**Question 1:** What is the legal problem that this draft legislation may present?

**Question 2:** Identify and describe two means by which the legal problem posed by this legislation may be resolved in favour of the Government.

### Scenario 3

Doreen was employed as a waitress in a restaurant in Niagara Falls, Ontario. Doreen had rotating, irregular, and unpredictable shifts. When she returned from maternity leave, she asked to have regular static shifts on three adjacent days per week with enough hours to maintain her full-time status. This would allow her to arrange for child care but not affect her income and benefits. The restaurant refused her request.

She filed a complaint with the Ontario Human Rights Tribunal that her employer had discriminated against her on the ground of family status under the Ontario *Human Rights Code*[33] by failing to accommodate her childcare obligations. Family status is defined under section 10(1) of the Code as "the status of being in a parent and child relationship."

At the Tribunal hearing, counsel for the restaurant stated that the legal test for discrimination on the ground of family status was established by the 2004 decision of the British Columbia Court of Appeal in *Health Sciences Assoc of BC v Campbell River and North Island Transition Society*.[34] In denying a claim of discrimination on the basis of family status under the British Columbia *Human Rights*

33 RSO 1990, c H.19.

34 2004 BCCA 260.

35 RSBC 1996, c 210.

*Code*,[35] the Court of Appeal in *Campbell River* declared that discrimination on this ground is to be found "when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee."[36] Counsel for the restaurant argued that since the problem encountered by the employee in obtaining childcare support was not caused by her employer, the restaurant did not discriminate against her in accordance with the test for discrimination on the basis of family status under *Campbell River*.

**Question:** Is the Ontario Human Rights Tribunal legally obligated to apply the test for discrimination on the ground of family status established by the British Columbia Court of Appeal in *Campbell River*?

## Scenario 4

V was employed by a college in Alberta. He received positive evaluations throughout his employment. In response to an inquiry by the college he acknowledged that he was gay. As a consequence, his employment was terminated and he filed a complaint of discrimination in employment with the Alberta Human Rights Commission under the *Individual's Rights Protection Act*,[37] on the ground of sexual orientation. His complaint was denied by the Commission on the basis that sexual orientation was not included in the Act as a prohibited ground of discrimination in employment.

**Question 1:** What is the legal basis for an appeal by V from the decision of the Alberta Human Rights Commission?

**Question 2:** What are the arguments for and against the appeal?

36 *Supra* note 34 at para 39.

37 RSA 1980, c I-2 (repealed or spent) [IRPA].