LEGAL INTERPRETATION

Skills and Techniques for Making Sense of Law

Legal interpretation is the legal term used to describe the process of reading and giving meaning to law. Legal interpretation is called legislative interpretation, statutory interpretation, or sometimes statutory construction (from the verb “construe,” meaning to analyze or interpret) when it concerns legislation such as acts, regulations, and bylaws. Legal interpretation is also often required when reading private documents such as contracts and wills. In those cases, the generic term is more appropriate. In this chapter, the general term legal interpretation will be used throughout.

Unlike a poem, the meaning of which can be left indefinite or ambiguous, differences concerning the interpretation of law must be definitively resolved to allow it to be applied (or not) in a particular case. A judge performs this function, and the resulting judgment may become a precedent for the correct interpretation of a particular section of legislation or the wording of a rule. There are a number of accepted methods and approaches for deciding the proper meaning of laws that are described below. Legal literacy requires a basic understanding of some of these principles of legal interpretation that are used to resolve disputes over legal meaning.
When faced with a legal problem, we read judgments for the purpose of selecting those that reflect similar situations and may therefore be used as precedents to guide current decision-making. The careful reading and analysis of reported decisions to discover the principles of law they support is called legal case analysis.

Legal interpretation is one of the most complex tools of legal literacy, making it challenging to learn. Here are some of the reasons for the difficulty of legal interpretation:

- Law is stated in general terms because it is normally intended to apply to many people in a variety of situations; however, even general words have limits of meaning, thus requiring interpretation in particular cases.
- In an adversarial legal system, there is an incentive to challenge the meaning of a law if doing so might result in an advantage to a disputing party.
- Law exists within a dense context of interrelated ideas and concepts that allows legal terms to take on different meanings depending on the surrounding wording.
- Many legal terms have two or more different, legally accepted meanings, one of which must be chosen for the purpose of a particular case.

An individual can thus make several types of legal arguments about the proper interpretation of a written law, such as:

- This legislation doesn’t apply to me; its scope is limited to other people.
- I did not do what is prohibited by this law; my actions were not within the meaning of this rule.
- This law allows for an exception in my case, which is implied in its wording or stated elsewhere.
- I did not intend to harm anyone and therefore should not be found guilty of an offence; mens rea is required by this rule.
The principles of legal interpretation I discuss in this chapter help judges to decide whether these are good arguments about how a particular law should be interpreted.

The results of legal research will reveal many materials requiring legal interpretation. A preliminary evaluation of potential authorities can first be done using the indicators mentioned in the previous chapter. But before presenting any legal materials to a court or tribunal, they must be read carefully to gain a thorough understanding of what they mean in the legal context. Legal interpretation is the skill of bringing out or explaining the meaning of law. It is an essential link between legal research for the purpose of finding potential authorities, and legal communication for the purpose of persuading a decision-maker to accept them as such.

Here is what seems to be a rather simple example of law in the form of a rule:

Motor vehicles are not allowed in the park.

This prohibition seems straightforward in its meaning, until someone asks whether it applies to the following situations: a motorized lift (cherry-picker) used to trim trees; a police officer on a motorcycle chasing a suspect; or a fire truck called to extinguish a wildfire. In response to such questions, it might be decided that the rule needs to be amended to read:

Motor vehicles are not allowed in the park, but this does not apply to emergency and maintenance vehicles.

Then a group of veterans asks for permission to install a restored army truck in working condition from the Second World War on a pedestal in the park as a war memorial. Again, there might be a further amendment to the law:

Motor vehicles are not allowed to be operated in the park, but this does not apply to emergency and maintenance vehicles.

However, more questions continue to be raised, such as: can an elderly person use a motorized chair (scooter) to get around the park? What about a
bicycle with a motor assist? What’s the status of a motorized wheelchair used by a disabled person? How about a remote-controlled model airplane? Can I use my Segway?²

The questions could go on. Should we continue to amend the legislation every time someone thinks of a new possibility? This seems cumbersome and inefficient. A different approach is to allow a judge to decide whether particular situations are covered by the law as they arise and are brought before the court. Taking this approach, laws can be written in general terms, relying on judges and tribunals to decide whether each turn of events is lawful or not when and if it happens. In doing so, judges and tribunals give meaning to the general terms of a law. Legal interpretation thus helps to make written laws workable in practice—it is an effective response to the problem that laws are “incurably incomplete.”³

In common law systems, legal case analysis—an interpretive operation corresponding to legal interpretation of statutes—is carried out in relation to case decisions, but in a somewhat reverse fashion. Interpretation of legislation starts with general words, and then determines whether they fit or apply to specific situations. However, if there is no relevant legislation, the specific situation under dispute is the starting point from which legal case analysis proceeds in an effort to find precedents. Over the years in a common law system, it may be possible to observe like results in many similar cases; these consistencies in decision-making eventually come to be recognized as common law rules or principles. They are that part of the law found in reported decisions and discussed in the textbooks and journal articles. Common law rules and principles are created by drawing out from many particular instances a general statement that summarizes the typical judicial decision; thus the method is the reverse of statutory interpretation, which goes from the general to the particular.

One example of a common law rule is that in order to create a valid contract, all parties must provide consideration (something of value) to one another. Over a span of hundreds of years, judges have considered how this rule works in many different situations, and today it is generally accepted as part of the common law in Canada that the consideration given may be minimal in value and need not be proportionate to what is given by the other party. This common law rule for contracts derived from reported cases through legal case analysis may be concisely stated as: in order to form a contract, sufficient consideration (something valuable) must be given, but it need not be adequate (of
any particular value). As with most legal rules there is an exception to this one as well. A complementary rule states that a seal affixed to a contract will take the place of consideration required to be given.

Legal case analysis may result in several possible conclusions about the precedent value of a previous case: it is a binding precedent, and must be followed by the judge to reach the same result (the facts of the case are very similar, and it was decided in a higher court); it is an ordinary precedent, and may be followed by the judge if he or she is persuaded to do so (the facts are similar, and it was decided in a court at the same or lower level); it can be distinguished and thus should not be followed (the facts are significantly different, regardless of the level of court that decided it); it may be useful as an analogy (the facts are different, but the result is an appropriate guide for deciding the present case).

Legislative interpretation and common law case analysis introduce flexibility into the law and allow it to adapt to changes in society. Written laws can be interpreted to deal with novel events that legislators couldn’t imagine when a law was passed. Similarly, the common law can develop over time without requiring judges to foresee every possible variation of the specific case before them. One English lawyer who later became a famous judge, Lord Mansfield, argued in a case that the common law is able to “work itself pure” by constantly reconsidering and restating its rules and principles as the need arises.¹ However, the methods of statutory interpretation and case analysis also produce uncertainty. In an adversarial system, there is an incentive to promote favourable alternative meanings of legislation and to creatively distinguish unhelpful cases in aid of partisan argument. It is often hard to predict which argument on these issues will prevail. I will discuss the problem of uncertainty in legal outcomes created by legal interpretation later in this chapter and in the next.

The methods of legal interpretation and common law case analysis are taught to law students, but the basic principles of both may be learned by non-lawyers. These ways of working with the law are the foundations of legal argument, and we will examine them in the next chapter.

**Reading Legislation**

Judges read statutes and other forms of legislation in order to apply the law to disputes that come before them. The *application of law* is the process of trying
to match facts with legal rules. Sometimes parties will question whether statutory law applies to them, or what the law requires—they argue about its correct interpretation. When judges apply statute law, their judgments may become precedents for future cases decided under the same law. In this way, the meaning of statutes is clarified through legal interpretation. Therefore, precedents are not only useful in relation to common law rules and principles but also to issues of legislative interpretation as well.

Cases that involve the interpretation of legislation are often collected and published together. In Canada, one example of this type of publication is called *Words and Phrases*, which includes judicial interpretations of words found in particular statutes. It is available online through the LawSource commercial database and in law libraries. *Annotated statutes* are published versions of legislation that include *annotations*—citations to cases which have considered particular sections of the statute. The CanLII Canadian open database (and other similar open sources around the world) provides access to precedents for legal interpretation of legislation through links to cases presented alongside the text of the law. Although law dictionaries can be useful in understanding legal terminology, it is best to discover how words in legislation have been interpreted in their specific context by looking for precedents from the courts.

The principles of legal interpretation have evolved over time. At one time, judges followed fixed rules such as the one stating that the literal meaning of legislation, which is grasped solely by looking at the words that have been used, must be accepted and applied even if it leads to an absurd result in the particular case. This *literal meaning rule* and other similar rules of interpretation are sometimes called the *canons of construction*. Many have criticized the rule-based approach to legal interpretation by pointing out that rules are often contradictory and therefore of little assistance in interpretation. To make this point, Karl Llewellyn gave these examples:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Counter Rule or Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apply the literal meaning</td>
<td>But not if it is contrary to the intent of the statute</td>
</tr>
<tr>
<td>Give effect to every word</td>
<td>But not if it is a mistake or inconsistent with the rest of the statute</td>
</tr>
<tr>
<td>Follow a grammatical</td>
<td>But not if it would frustrate the purpose of the law</td>
</tr>
<tr>
<td>interpretation</td>
<td></td>
</tr>
</tbody>
</table>
Recently, Canadian courts have moved away from the rule-based approach to legal interpretation, taking a more flexible one which in Canada has been called the *modern principle (or method) of interpretation*. This method requires judges to pay equal attention to the exact words of the legislative text, their contextual relation to the law as a whole, the intent of the legislators, and the overall purpose of the legislation. In the case *Alberta Union of Provincial Employees v. Lethbridge Community College*[^1], the Supreme Court of Canada adopted and approved a method of statutory interpretation described by Elmer Driedger, a law professor at the University of Ottawa, as follows:

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (para. 25)

In this description of the modern method of interpretation, the word *scheme* refers to how the act is organized and designed, *object* refers to the results the act seeks to bring about, and *intention* refers to the social problem the legislators wanted to solve. This approach provides courts with more flexibility when interpreting legislation, including the power to reject the literal meaning of the words used if a different meaning would better carry out the object and intent of the law.

The modern method of interpretation requires specific words to be read in context, which includes the whole of the statute in question and may extend to other legislation as well. Failing to pay attention to the surrounding context of specific words in legislation is one of the mistakes a novice reader of the law can make. It is natural to pay the closest attention to the wording of a particular section of legislation that seems most relevant to the current situation, but the modern method of legal interpretation requires us to expand our reading horizons in order to understand the section in its entire legislative context. Therefore, legislation should be read “from the inside out,” starting with the wording of a particular section and working out from there to the rest of the statute, and sometimes to other legislation as well.
A good way to visualize the process of reading statutes is to think of it as the reverse of peeling an onion. Reading should start at the core (the specific words in question) and extend outward to the next larger part of the legislation (the next layer) where the particular section is found, and on to the next layer over that, until reaching the outer “skin” of the legislation as a whole (including the title, and perhaps an introductory section about its purpose). The reader will find the structural components (layers) of a statute, going from the smallest to the largest are: subclause, clause, subsection, section, division, and part. Figure 8.1 provides an example of the internal structure of one section of an Act.

![Figure 8.1 Structure of a section of an Act.](image)

This section may be one of many sections within a division of a statute, which along with others may be in a part together with other parts that makes up the whole of the act in question.

Another mistake that those unfamiliar with the law can make when reading legislation is to overlook the existence of statutory (or legislative) definitions contained within it. These are specific sections of legislation that provide definitions of words or phrases found in a statute, regulation, or bylaw. Definitions are often included within legislation to assist with its interpretation; they prescribe the meaning to be used by judges and others when reading it. Statutory definitions have three main purposes: to narrow the meaning of words (e.g., “in
this act, ‘motor vehicle’ means a passenger car”), to expand the meaning (e.g., “in this act, ‘motor vehicle’ means any vehicle operated by mechanical means capable of transporting a person”), or to give a word a particular and unique meaning (e.g., “in this act, ‘motor vehicle’ means a commercial vehicle used for the transportation of goods”). Judges must respect such definitions when applying the law, but some interpretation may still be needed—for instance, is a skateboard a vehicle operated by mechanical means?

Statutory definitions may apply throughout a single piece of legislation, or only some parts of it, and some definitions can apply to other statutes. When reading legislation from the inside out, you may encounter definitions that apply only to a certain level of the legislation, such as a section that states “In this part, the word person means. . . .” Many acts have definition sections at the beginning for words or phrases that are used often throughout the legislation. Most jurisdictions also have a separate statute containing definitions for words that are found in many different acts, like “day,” “month,” and “he.” In Alberta, this statute is called the Interpretation Act. Here, for example, is the section of that act that explains how definitions in all Alberta legislation are to be read and used when they are included:

Definitions and interpretation provisions

13. Definitions and other interpretation provisions in an enactment [which includes a statute]

(a) are applicable to the whole enactment, including the section containing the definitions or interpretation provisions, except to the extent that a contrary intention appears in the enactment, and

(b) apply to regulations made under the enactment except to the extent that a contrary intention appears in the enactment or in the regulations.

Parliaments and legislatures in many jurisdictions provide online guides and explanations of how legislation is organized and structured, which can be consulted when reading their laws.
Reading a statute “from the inside out,” starting with the particular wording you are most concerned with, reveals the context a judge will take into account when considering those words according to the modern method of interpretation. You can also consult a publication like *Words and Phrases*, or an annotated copy of the legislation to discover if there are any precedents concerning the interpretation of the wording in question.

**READING CASES**

Understanding context is also important when reading a case report. As with legislation, it is easy for a novice reader of legal judgments to get lost in the details of particular cases. Because judges’ legal decisions are structured differently than statutes, they should be read “from the outside in” to better appreciate their context. Reading that way leads from the “skin” of a judgment to the “meat and bones” contained within it such as discussion of the parties’ arguments, descriptions of the evidence presented by them, and the judge’s conclusions regarding these matters. Thus the name of the case reflecting the parties involved in it is found at the beginning, and the ultimate conclusion or order of the court is usually found at the end. The heart of the judgment contains the detailed reasoning followed by the judge to arrive at the ultimate decision. Let’s examine the components of a case report in the order in which they should be read.

The name of a reported case is based on the names of the parties involved, and it is a good place to start reading carefully. At the beginning of the case is the *style of cause*, a heading containing the names of the parties involved in the litigation and a description of the roles they have played, such as plaintiff and defendant. If the decision was made by an appeal court, the description *appellant* will be added for the party who appealed the trial decision and *respondent* for the party opposing the appeal. Sometimes both parties appeal different parts of the trial judgment. Note that both a plaintiff and a defendant can usually appeal a decision they do not like. As an example of the structure of a typical reported decision, we will use an important case decided by the Supreme Court of Canada, *Alberta Union of Provincial Employees v. Lethbridge Community College* ("*AUPE*"). If we look at the report of the *AUPE* case as decided by the Supreme Court of Canada, we find this style of cause at the beginning:
Board of Governors of Lethbridge Community College, *Appellant*

v.

Alberta Union of Provincial Employees and Sylvia Babin, *Respondents*

and

Canadian Labour Congress, National Union of Public and General Employees and Provincial Health Authorities of Alberta *Interveners*

This tells us that the college appealed, and AUPE opposed the appeal. The *interveners* are parties who are not directly involved in an existing dispute, but who have a strong interest in the outcome of the case, perhaps because it may become a precedent they will have to follow. Interveners therefore may be permitted by the court to present arguments about the issues involved in the action.

The next major section of the report after the style of cause reads as follows:


Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, and Fish J.J.

on appeal from the Court of Appeal for Alberta

This tells us that the case was argued before the court on November 4, 2003 and that the decision was *reserved* (under consideration by the judges) until April 29, 2004, when the judgment was released and published by the court. Finally, we know from this section that the case originated in Alberta, and therefore it will be the law of that particular jurisdiction that will be considered in the judgment.
The next section down states the catchwords or keywords associated with the decision. These are legal terms describing the general areas of law (for example labor relations) and the main legal concepts (such as jurisdiction) which the judges considered when making the decision. These words often correspond to the subject headings found in legal encyclopedias. Here are the keywords of the AUPE decision:

Labour relations—Arbitration board—Scope of arbitration board’s remedial jurisdiction—Employee dismissed without just cause for non-culpable deficiency—Board awarding damages in lieu of reinstatement—Whether arbitration board could award damages in lieu of reinstatement for dismissal for non-culpable deficiency—Labour Relations Code, R.S.A. 2000, c. L-1, s. 142(2).

Judicial review—Labour relations—Standard of review—Arbitration board—Employee dismissed without just cause for non-culpable deficiency—Board awarding damages in lieu of reinstatement—Standard of review applicable to board’s interpretation of remedial provision and to board’s award—Labour Relations Code, R.S.A. 2000, c. L-1, s. 142(2).

If the case is a complex one, it may deal with several major areas of law such as “labour relations” and “judicial review” in the AUPE decision.

Next in the case report is the headnote, a brief description of the main legal issues presented to the court and the decisions reached on them, with a summary of some of the reasons given by the judges. The headnote may be prepared by the court, or by a publisher in the case of privately printed case reports. Here is a portion of the headnote in the AUPE case:

The appellant employer had hired the respondent grievor as a scheduling coordinator but dismissed her on the grounds that her work performance was unsatisfactory. The grievor and the respondent union grieved the dismissal, alleging dismissal
without just cause in contravention of the collective agreement. The arbitration board found that, while the grievor was dismissed for non-culpable incompetence, just cause for discharge had not been shown because the employer had failed to comply with the Re Edith Cavell criteria setting out the requirements for dismissal of an employee on grounds of non-culpable deficiency. In fashioning the remedy, the majority of the board concluded that it could substitute a financial award under s. 142(2) of the Alberta Labour Relations Code and awarded her damages in lieu of reinstatement since reinstatement was inappropriate in the circumstances. The Court of Queen’s Bench dismissed the respondents’ application for judicial review. The Court of Appeal set that decision aside, ordered that the grievor be reinstated and referred the quantum of back pay to the board for determination. The court found that s. 142(2) did not apply to non-culpable dismissals and that, absent compliance with the Re Edith Cavell criteria, the usual and expected remedy was reinstatement.

**Held:** The appeal should be allowed.

When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the arbitration board’s interpretation of s. 142(2) of the Labour Relations Code and to the board’s award is that of reasonableness.

This headnote also gives us some insight into the facts of the case and its history. As stated, this dispute started before an arbitration board, whose decision was appealed first to the Court of Queen’s Bench of Alberta and then to the Alberta Court of Appeal, whose decision was in turn appealed to the Supreme Court. We also know from this information that the case involves application of legislation known as the Alberta Labour Relations Code, and the legal process of judicial review involving the arbitration. However, the conclusion (the holding) that “The appeal should be allowed” does not tell us much about what the decision actually means for the parties, other than that the appellant succeeded. The body of the judgment must be read to discover that. Note its beginning words:
The judgment of the Court was delivered by Iacobucci J.—

This statement indicates that all of the judges who heard this appeal were in agreement because only one judgment was issued by the court, and that one of them, Justice Iacobucci, was designated to write the judgment the other judges concurred in (agreed with). If one or more of the judges who heard the case did not agree with the majority, they would prepare a dissenting judgment, giving reasons for their view. In a case with a dissent, the decision of the majority would appear first (giving their names) before the dissent. A dissenting judgment can never be used as a precedent. Therefore, it is necessary not to confuse the reasons of the majority of judges with those of the minority. The majority (or unanimous) judgment contains the ratio decidendi (or just ratio), the reasons for a decision that may be used as precedent in subsequent cases. If the majority comments on a legal issue but does not come to any conclusion about it to reach the final decision, such statements are called obiter dicta (or just obiter or dicta). Obiter dicta is not precedent-setting.

What, then, is the actual outcome for the parties in the AUPE case? To find that, look at the end of the judgment where you will find this statement:

VI. Disposition

58. I would allow the appeal with costs throughout, set aside the decision of the Court of Appeal, and restore the award of the majority of the arbitration board.

This statement tells us that after all of the appeals in this case, the original decision of the majority of the arbitrators was judged to be correct. It thus becomes clearer that one of the fundamental issues in this dispute was whether the arbitrators correctly interpreted legislation (the Labour Relations Code) in reaching their decision. This information helps to explain why the AUPE case is considered an important precedent regarding legal interpretation in Canada.
the “skin” of the text that should be noted. After the headnote there are lists of the cases, legislation, and scholarly writings the court used in reaching its decision. This part of the report provides sources for further research into the issues. Also at the beginning is a brief history of the case, with citations to the decisions of the lower courts that heard it.

The judgment may now be read in detail, but not from beginning to end like a story. The decision of a court is a justification, not a narrative. It attempts to present a comprehensive, persuasive explanation of the result. The reasoning of the court about the core legal issues is the part to pay most attention to when reading a case to determine its value as a precedent. Therefore, a good place to start reading is the section of the judgment that describes the issues:

IV. Issues

This appeal raises two basic issues. The first concerns the scope of the board’s jurisdiction under s. 142(2) of the Code, and the second concerns the exercise of the board’s remedial power in light of that jurisdiction. In the reasons that follow, I briefly set out the standard of review against which the board’s decision on each issue must be assessed, before turning to analyze the issues themselves.

Since the dispute concerns the correct interpretation of the Labour Code, this statement provides further information that the words to be interpreted relate to the jurisdiction of the arbitrators and the powers they are given by the law. If one looks up the term standard of review in a legal dictionary, he will discover it means the criteria courts use to decide whether they will overturn the decision of a quasi-judicial decision-making body. From this background, it appears that the Supreme Court had to decide whether the arbitrators’ interpretation of the code was faulty. In making that decision, the Supreme Court set a precedent for Canada regarding the correct method of statutory interpretation.

Reading a case report “from the outside in” with a questioning mind yields an appreciation of its impact on the parties involved, the significance it has for the development of the law, and its value as a precedent that may support or detract from a particular legal argument. Once the context of the case is
understood—the parties, the legal issues, and the result, it is also possible to read the reasons for the decision from a critical perspective. Do they persuade the reader of the correctness of the result? Are there legal issues that might have been raised, but were not? What impact does the decision have on society generally? These are some of the questions that scholars of critical legal studies may raise when reading cases.

READING CONTRACTS

Judges read contracts to decide whether the parties intended to create mutual legal obligations, and if so, what those require the parties to do. When they are commercial contracts, judges assume agreements are intended to result in some benefit to each party, such as obtaining goods, services, or money. One presumption courts usually follow is that if you sign a document, you agree to everything contained in it, and you know you are assuming legal obligations by doing so.

Therefore when reading contracts:

• Read before you sign, seal, open, or click on something, including the proverbial “fine print”
• Read even what you don’t sign (judges assume you have read what you have been given, such as tickets and receipts)
• Read everything (judges assume you have read everything mentioned in a contract, even if it is found in another document or place—this is known as wording incorporated by reference in the contract)
• Ask questions in writing (oral discussions do not count—this is known as the parol evidence rule, which excludes from the contract what is said but not written down); many contracts expressly state they contain all the terms of the agreement, ruling out anything else
• Get answers in writing (oral discussions do not count)
• Get everything in writing (oral discussions do not count)

Written contracts can suffer from vagueness or ambiguity and “gaps” like legislation. To address these problems, courts have used principles of legal interpretation for contracts in order to identify the intent of the parties at the time of contracting using only the words of the document; to avoid an
interpretation that defeats the purpose of the contract even if the words are not ambiguous; to seek an interpretation that makes commercial sense; and to interpret the contract as a whole.

The ideal contract document is the product of a *meeting of minds* with a common intention arrived at through diligent negotiation and careful joint drafting. Very few contracts actually come about that way. Most are *standard forms* written by one party and accepted without scrutiny or objection by another. Some examples of this type of contract are purchase agreements for new vehicles, or leases of houses or apartments. In some jurisdictions, such agreements are called *contracts of adhesion*, meaning that you agree to be bound (adhere) with no possibility of any changes. Standard terms that are used routinely in many contracts of a certain type are called *boilerplate*, meaning traditional wording adopted long ago that is recycled for the sake of convenience and conservatism. Boilerplate is often prevalent in legalese.

Standard form contracts are frequently used in consumer transactions. In some commercial matters, laws have been passed to limit the effect of boilerplate wording, or to incorporate specific wording in contracts to protect the consumer. One example of this intervention by the law is automobile insurance, where definitions and contract terms have been standardized in many jurisdictions for all insurance companies. Another example is airline tickets that include wording and limitations provided in legislation. Critics suggest that boilerplate wording serves commercial interests well because it standardizes transactions, thus making legal rights and responsibilities predictable. From such a perspective, interference by legislators and courts in contract wording and interpretation is inefficient and costly to business.

Judges have always paid close attention to wording in a standard form contract that protects the party who wrote it against claims by the party on the other side of the bargain. This part of an agreement sometimes takes the form of an *exclusion or exemption clause*. The usual approach of judges when considering the meaning of such wording is to interpret the protection narrowly. Another principle of contractual interpretation that is sometimes applied by judges in these circumstances is to interpret contracts *contra proferentem*. According to this rule, the party who wrote the contract must bear the consequences of any ambiguity. Judges have also been criticized by business owners for interpreting contracts using this principle.
Special problems of interpretation can arise in contracts that extend over many years, when the circumstances of the parties change considerably from the time of original contracting. In many cases, the parties alter their dealings with each other over time without amending the contract document, or orally agree to amendments that are not put in writing. Long-term agreements are sometimes called *relational contracts* because they generate expectations between the parties based on a sense of relationship that is not merely contractual. Employment contracts of this sort are sometimes interpreted by the courts with more regard for the reasonable expectations of a party than the literal wording of the document. However, some long-term agreements such as treaties with Aboriginal peoples have not been dealt with in this special way.

If the parties clearly express all of their intentions in writing, contracts will be less subject to dispute. However, the courts retain the power to interpret what is written in the public interest. Contracts support the economic life of society, but they may also lead to abuse and unfairness. A critical legal studies perspective can be applied to contract drafting and interpretation to highlight needed reforms.

**Critical Perspectives on Legal Interpretation**

Legal interpretation presents a puzzle or paradox for the non-lawyer. When someone becomes involved in a legal dispute, she may expect the law to be clear and straightforward, although she knows that her particular situation is complex and unique. However, when a judge finally hands down the decision that resolves their claim, she finds that the law is described as complex and unclear, and her case is straightforward and routine. What has caused this bewilderment?

Part of the answer lies in the nature of legal decision-making that requires bringing together facts and law. As we saw when discussing framing, the complexities and idiosyncrasies of each case have to be fitted into the conceptual framework of the law. After a judge decides the proper legal categories and characterizations of peoples’ actions, he or she may describe the resulting consequences in a judgment as necessary and inevitable. The complexity of life has been refined to yield the clarity of legal facts and lawful results that we call justice. This form of interpretation is more like translation, in which the messy
details of concrete reality are repackaged in neat legal concepts, but that is not the focus of this chapter.

The uncertainty of litigation arises from several causes, and a major one is the role played by legal interpretation. The scope of a statute and the strength of a precedent are decided within a judge’s wide field of discretion, and the principles of legal interpretation rarely prescribe a single, acceptable result. Critical legal studies scholars may ask why society accepts such a system.

Two types of response have been offered to explain why we accept legal interpretation as part of a legitimate legal order despite the uncertainty that it seems to bring. The first type can be described as apologetic, and the other, critical. An apologetic explanation of legal uncertainty argues that it is to be expected and is therefore normal, given the task of law. A critical explanation attempts to show that uncertainty in interpretation reveals uncomfortable truths about the place of law in society.

The apologetic approach begins by asserting that there is always a generally accepted clear meaning of legal words. The problem is how far words can be “stretched” to fit new situations. This view of interpretation falls within the hermeneutic tradition of scholarship that seeks to discover the true meaning of authoritative texts in order to apply them to current circumstances. One legal philosopher, H.L.A. Hart, explained the task of legal interpretation as sorting out the core meaning of legal terms that are well accepted from their penumbra or surrounding shadow region, where the meaning is uncertain. Ronald Dworkin suggests it is the task of members of the legal community (lawyers, judges, and officials) to make sense of law in areas of uncertainty so as to preserve and extend the integrity (coherence and unity) of law and the legal system. Integrity can make up for uncertainty and thus preserve the legitimacy of the legal system. Another way law may be legitimately uncertain is where unforeseen circumstances arise for which no existing law was expressly intended. These are known as gaps in law, and must be filled through interpretation using analogy and other methods to reach a decision.

Here is an example of interpretation, understood as finding a core meaning that can be affirmed as correct by most members of the legal community and accepted as just by society. The Supreme Court of Canada, in the case Irwin Toy Ltd. v. Québec (Attorney General), was required to interpret the word “everyone” found in Section 7 of the Charter of Rights and Freedoms. That section reads,
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.

The issue for the court was to decide whether a corporation (Irwin Toy) could claim this right. Although corporations have been recognized in law for a long time, and in many cases have been given the rights and powers of individuals, can “everyone” in this legal context include such artificial persons? The court said “no”:

. . . it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty, or security of the person, and include only human beings.

The judges are relying on their understanding of what Canadian society considers to be the proper meaning of “everyone” in this particular context. The true meaning is therefore said to be clear (“plain” and “common sense”). Problems can arise with this approach to interpretation, however, in several situations: if there is disagreement on the “plain” meaning within the legal community; if the rest of society does not share the “common sense” of judges or lawyers; or, if society is so diverse that a consensus regarding meaning is elusive.

Two other methods of interpretation that seek the “true meaning” of legislation are known as originalism and textualism. Originalism in interpretation requires a judge to discover the original intent of the legislators who passed the law, and to follow that despite any subsequent changes in social conditions.
The approach of textualism demands that a judge rely solely on the explicit words of the statute (the “literal meaning”) and refuse to consider any matters of policy that might enlarge its scope. Critics have described these hermeneutical styles of interpretation as inherently conservative, and therefore not appropriate in a rapidly changing world.

A critical explanation of the practices of legal interpretation is that, simply put, it is politics by other means—shaped by a judge’s interest in securing the result that she considers fair and just. Interpretation is thus guided by the need to provide an acceptable justification for the desired outcome. One problem with this approach is that ideas of justice differ, even among judges. This perspective on legal interpretation has links to the rhetorical tradition of scholarship that seeks to justify action by providing persuasive reasons for it. Judging becomes controversial (and sometimes contested) when constitutions or other highly visible statutes (such as criminal laws) are being interpreted. In these cases, judges are sometimes accused of being “activists” and of stepping outside their proper role despite all the good reasons they provide. When disputes involve political questions, the legitimacy of the court as an institution is in danger if judges are suspected of following their own political agendas. Judges can then be criticized for illegitimately making law rather than merely interpreting and applying it. But the question remains of how best to describe the process of legal interpretation—is it the creation or discovery of meaning?

The critical view of interpretation accepts that judges bring their own perspectives, including their attitudes toward public policies, to the task of deciding the meaning of laws. Rather than just expressing a perceived consensus in the community, judges are allowed, and even required to act on their own judgment of what society needs. Judicial decisions should therefore help to persuade the public of the justness of a particular result. The legitimacy of courts can be preserved by effective judicial rhetoric in the form of persuasive reasons for judgment.

One decision of the Supreme Court of Canada provides an example of rhetorical construction of legislation. In what has been colloquially called the Famous Five case, the court was asked to decide if the word *person* in sections of the Canadian Constitution concerning the Senate included women within its meaning:
23. The Qualification of a Senator shall be as follows:
   (1) He shall be of the full age of Thirty Years;
   (2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain. . . .

24. The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

The Supreme Court of Canada stated in its decision:

   in considering this matter we are, of course, in no wise [way] concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the BNA Act, 1867, and upon that construction to base our answer. . . .

The court went on to consider another statute that stated the word “he” in legislation should be interpreted to also mean “she.” Here, the court quoted from and agreed with an earlier judgment:

   It is sufficient to say that the Legislature, in dealing with this matter, cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House.

   In other words, the centuries’-old policy of excluding women from political life should not be disturbed by “loose and ambiguous” words such as “he includes she.” Such a revolution was beyond the imagination of these judges.
However, this decision was appealed to the House of Lords in Britain, which at the time could still overrule the Supreme Court of Canada. In *Edwards v. A.G. of Canada*¹², the Law Lords (judges of the House of Lords) reversed the judgment, and allowed women to become senators, stating:

> The word “person” as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not. [and having regard to]

1. To the object of the Act, viz., to provide a constitution for Canada, a responsible and developing state;

2. that the word “person” is ambiguous and may include members of either sex. . . . women are eligible to be summoned to and become members of the Senate of Canada.

The policy perspectives of the English judges and their desire to see a result that the Supreme Court of Canada did not criticize, but would not sanction, led to a watershed decision in Canadian law. Indeed, this British decision described the Canadian Constitution as a “living tree,” capable of growth and development—a view that clearly departs from originalist and textualist approaches to interpretation. The critical view of interpretation poses a further question, however, whether we are happy to accept results we do not agree with as well as those we do.

Some have criticized the policy-oriented style of interpretation as being *judicial law-making, judicial activism, or judicial interference* with the wishes of the democratic majority as expressed in legislation. It is considered a liberal approach to interpretation in contrast to the conservative approaches of originalism and textualism. The modern method of interpretation in Canada seems to have combined aspects of several of these and other approaches, but it is clear that Canada’s judges pay close attention to the policy and purpose of legislation.
Understanding and skill in using the techniques of legal interpretation equips both students of legal studies and litigants to better understand judges’ reasoning and to present critical and persuasive arguments.

CHAPTER REVIEW

After reading this chapter you should be able to:

• explain what is meant by a conservative and a liberal approach to legal interpretation by judges
• describe a method for reading legislation and explain the legal context in which specific legislation operates
• explain what is meant by the modern method of interpretation
• describe a method for reading cases and explain the legal context in which a specific case may be considered a precedent
• explain the concepts of reasons for decision, *obiter dicta*, and dissent
• describe a method for reading contracts and explain the legal rights and obligations in a specific contract
• explain the parol evidence rule and the principle of *contra proferentem* in relation to contract interpretation