Date: 19971107
Docket: CA021277
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COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

COUNCIL OF HAIDA NATION and MILES RICHARDSON on their own behalf and on behalf of all members of the Haida Nation

APPELLANT
(PETITIONERS)

AND:

THE MINISTER OF FORESTS and THE ATTORNEY GENERAL OF BRITISH COLUMBIA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and MacMILLAN BLOEDEL LIMITED

RESPONDENTS
(RESPONDENTS)

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Southin
The Honourable Madam Justice Huddart

T.R. Berger, Q.C., D. Boyd	Counsel for the Appellant
B.L. Edwards, R.L. Reader	Counsel for the Respondents (Minister of Forests and A.G.B.C.)
J.L. Hunter, Q.C., S.P. Pike	Counsel for the Respondent (MacMillan Bloedel)
Place and Date of Hearing	Vancouver, British Columbia May 14 and 15, 1997
Place and Date of Judgment	Vancouver, British Columbia November 7, 1997

Written Reasons by:
The Honourable Mr. Justice Esson

Concurring Reasons by:
The Honourable Madam Justice Southin (p.27, para.43)

Concurring Reasons by:
The Honourable Madam Justice Huddart (p.28, para.45

Reasons for Judgment of the Honourable Mr. Justice Esson:

[1] The petitioners claim aboriginal title to a large area of British Columbia much of which is subject to tree farm licence no. 39 (T.F.L. 39) which was originally issued to the respondent MacMillan Bloedel in 1961 for a 25 year period. As provided for in s.29 of the *Forest Act*, R.S.B.C. 1979, c.140 (now 1996, c.157) the original licence was "replaced" for a further such period beginning in 1981 and again on 1 March 1995.

[2] This proceeding, which was launched a few days before 1 March 1995, is brought by way of judicial review seeking to set aside the decisions of the Minister of Forests to replace T.F.L. 39 in 1981 and in 1995. The appeal is by the petitioners against the decision of a chambers judge deciding a preliminary issue of law in favour of the respondents. That decision is now reported at (1995), 15 B.C.L.R. (3d) 154.

[3] The preliminary issue of law is:

> ... whether the interest claimed by the Petitioners, namely aboriginal title, including ownership, title and other aboriginal rights over all of Haida Gwaii (the Queen Charlotte Islands), including the land, water, flora and fauna and resources thereof, is capable of constituting an encumbrance within the meaning of section 28 of the *Forest Act*.

The relevant language of s.28 is:

> A tree farm licence entered into under this Act shall ... (*b*) subject to sections 27, 27.1, 33 and 33.1, describe a tree farm licence area composed of (i) an area of Crown land, *the timber on which is not otherwise encumbered*, determined by the minister.
>
> (emphasis added)

[4] It will be seen that the word "encumbrance", which appears in the question, does not appear in the section. It is, however, common ground that any interest which would "otherwise encumber" the timber would constitute an encumbrance.

[5] It is also common ground that the asserted aboriginal title, if it exists, would constitute an encumbrance on Crown title. As there is no issue on that point, it is unnecessary to make extensive reference to authorities. I will, however, note that it has long been recognized that aboriginal title to land can include an interest in the standing timber. For instance, in *St. Catherine's Milling & Lumber Company v. The Queen*, (1888) 14 A.C. 46 (J.C.P.C.), the issue which arose out of the cession by treaty of aboriginal right to land was whether the timber rights passed to the provincial or the federal government. The Privy Council accepted that, in the absence of a treaty, the rights to the timber created an encumbrance on the Crown title. Lord Watson said at p.59:

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these

> lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title. (emphasis added)

Many other cases were cited to illustrate that the aboriginal interest has been regarded as a burden or encumbrance upon the title of the Crown. One is of particular interest because it arose in this province and involved a contest between MacMillan Bloedel's logging rights and a claim to aboriginal title over the land. That is *MacMillan Bloedel Limited v. Mullin et al*, [1985] 2 W.W.R. 722 (B.C.S.C.); [1985] 3 W.W.R. 577 (C.A.) (the *Meares Island* case). Although the decision at first instance refusing an injunction against logging was reversed by this court, Mr. Berger adopts this sentence in the reasons of Gibbs J. (now J.A.) at p.742 as summing up the position of the claim of his clients:

> In my opinion, the disputed Meares Island lands, not being Indian reserves or land reserved for Indians, are to be regarded as provincial Crown lands subject to a burden or encumbrance in the form of Aboriginal title, if it exists.

I accept that statement as being applicable to the lands involved here.

[6] I therefore see no reason to doubt that, as a matter of plain or grammatical meaning, the aboriginal title claimed by the Haida Nation, if it exists, constitutes an encumbrance on the Crown's title to the timber. The words "if it exists" do not appear in the question put before the court but are impli-

cit in the words "the interest claimed by the petitioners". As in the *Meares Island* case, the court must deal with a state of facts which is to some extent hypothetical in that the interest claimed has not been established. It was on that ground, amongst others, that the petitioners opposed the application to try a preliminary issue. Then sitting in the Supreme Court of British Columbia, I ruled against those objections. Now, having to struggle with the difficulties inherent in that course, I find the force of the objections to be more obvious now than it was then. However, on the hearing in this court, the petitioners joined the respondents in urging us to decide the question in spite of the difficulties.

[7] The position of the respondents is that, although the interest claimed by the petitioners is an encumbrance as a matter of plain or grammatical meaning, it is not an encumbrance "within the meaning of s.28". They say that, when all of the surrounding circumstances are considered, this is clearly a case where the plain meaning does not apply and that, as the learned chambers judge held, the interest claimed is not capable of being an encumbrance within the meaning of s.28 of the *Forest Act*.

[8] That outcome, they submit, is dictated by the "modern contextual approach" to statutory interpretation as laid down at p.131 of *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) by Ruth E. Sullivan:

> *The modern rule*. There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) is acceptability, that is, the outcome is reasonable and just.

[9] That passage replaces the following passage in the second edition of Mr. Driedger's work (Toronto: Butterworths, 1983) at p.87:

> THE MODERN PRINCIPLE
>
> Today there is only one principle or approach, namely, 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. This principle is expressed repeatedly by modern judges, as, for example, Lord Reid in *Westminster Bank Ltd. v. Zang*, and Culliton C.J. in *R. v. Mojelski*. Earlier expressions, though in different form, are to the same effect; Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, at p. 387, put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.
>
> The remaining chapters of this work seek to explain how an Act is to be so read and how problems that may be encountered on the way are to be solved.

[10] The latter passage has, since 1983, been widely accepted throughout Canada as defining the "only ... principle or approach". It has been cited time out of mind in briefs, factums and reasons for judgment as an authoritative summary of the law. As the substantive definition within the paragraph is in the extract from the judgment of Lord Atkinson, it is safe to assume that it is his language which has been generally accepted as stating the modern principle. To find what was said by Lord Reid and Chief Justice Culliton, the reader would have to consult the footnote and go to the library shelves. As the purpose of most lawyers and judges in consulting a text is to find a concise and authoritative statement of the rule established by cases, few would look beyond the paragraph. Some might notice that, on the facing page, the author quotes the relevant passage from the speech of Lord Reid in *Westminster Bank v. Zang*, [1966] A.C. 182; 1 All E.R. 114 (H.L.). That passage reads:

> But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous—if they are reasonably capable of more than one meaning—or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question. But beyond that we cannot go.

Any readers who took the trouble to seek out the words of Chief Justice Culliton would find them to be to the same effect as

those of Lord Reid and not significantly different from those of Lord Atkinson.

[11] So what we have in the second edition is the author's opinion that the "only ... principle or approach" is the rule stated by Lord Atkinson in 1921. A very careful reader might notice shades of difference in the rule stated by Lord Atkinson and that stated by Lord Reid but I need not dwell on that. What I wish to emphasize is the radical difference in the treatment of the subject between the second and third editions.

[12] The equivalent passage in the third edition begins with language strikingly similar to that of Mr. Driedger. The words "only one principle or approach" are replaced by the equally dogmatic "only one rule" and "entire context" is replaced by "total context". There the similarity ends. Mr. Driedger's "modern" period would seem to go back at least to the mid 19th century – Lord Atkinson cited cases decided as early as 1857. Mr. Driedger's principle is directly based on leading case authorities. Professor Sullivan cites no authority for her "modern rule" and gives no indication as to when it came into force.

[13] The differences are not merely in style or form. The significant difference is in the substance of the "modern principle" stated in 1983 and the "modern rule" laid down in 1994. In the earlier version, "ordinary grammatical sense" is

of primary importance. In the later version, it is not mentioned at all except that it would seem that, under the somewhat mystifying rubric of "plausibility", the court can, not must, have regard to the "legislative text" in deciding whether its preferred interpretation is "justified". That is not a mere revision of Mr. Driedger's "only modern principle or approach". It turns it on its head by reducing the language of the enactment to a matter of minor importance.

[14] I will mention another aspect in which the editor's modern rule seems very much at odds with the law as generally understood. That is in the definition of "context". It has always been accepted that a court, in determining the meaning of words in a statute, must have regard to context, i.e, to the immediate context of the section in which the disputed words appear and the broader context of the statute as a whole. It is not easy to know exactly what it is that the editor embraces in the word "context" but clearly it is not confined to the language of the statute. It may be equated to the term "all relevant and admissible indicators of legislative meaning" which appear in the passage at p.131. From other passages in the third edition, it would appear that such matters may include conventions, values, cultural beliefs, and assorted other extrinsic aids to interpretation. I do not suggest that such matters may not, in an appropriate case, be relied on as aids to interpretation. I do suggest that there is great potential for confusion in referring to these matters as "context".

[15] The author sets out at p.3 of the third edition the view that the approach of looking at "all relevant context and sources of meaning" has become the "modern understanding of the literal meaning rule". The passage reads:

> *Evolution of the literal meaning rule.* The key to the literal meaning rule was judging whether the legislative text was "plain". If it was, the courts were bound to give effect to the plain meaning, however much they may have disliked it. In principle, then, the rule operated as a constraint. However, it is heard to imagine a more impressionable and malleable judgment than whether the meaning of a legislative text is plain. In practice, a court could resort to the second stage of interpretation whenever it cared to do so, simply by entertaining doubt. As the literal meaning rule evolved, it became normal for courts in every case to look to all relevant context and sources of meaning to determine the "true" or "intended" meaning of legislative words. The modern understanding of the literal meaning rule is described by Lord Greene in Re Bidie, Bidie v. General Accident, Fire & Life Assurance Corp.:
>
> > The first thing one has to do ... in construing words in a section of an Act of Parliament is not to take those words *in vacuo*, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of *prima facie* meaning which you may have to displace or modify .... The real question which we have to decide is: What does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy?
>
> This is the modern approach.

Lord Greene would, I suspect, be surprised to learn that his decision in *Re Bidie* (reported [1948] 2 All E.R. 995 at 998) he espoused what the editor calls the "modern understanding of the literal rule". His analysis seems unexceptionable but, in my view, lends no visible support to the editor's view as to the evolution of the literal meaning rule. Lord Greene was very clear about what he meant by "context". It is the immediate context of the subsection and the general context of the act. That is the traditional definition of "context" in relation to legislative interpretation, and it has always been accepted that words must be read in their context as so defined.

[16] I note that Lord Greene went on to say that that should be done "having regard to the declared intention of the act and the obvious evil that it is designed to remedy". That accords with the legislative rule for interpretation laid down in both the federal and provincial *Interpretation Acts*. Both s.12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 and s.8 of the *Interpretation Act*, R.S.B.C. 1996, c.238 read:

> **Enactment remedial**
> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Those sections were enacted in that form several decades ago and have, in a less concise but substantially similar form, been part of our law for well over a century. The words of those sections provide the one source of guidance which, in

relation to statutory interpretation, is unarguably binding on the courts. I raise, without attempting to answer, the question why so little notice seems to be paid to those sections. They are seldom referred to in decisions considering the principles to be applied in statutory interpretation. It is, or course, not always possible to determine what evil was sought to be remedied or what other object was sought to be achieved. For that reason, the sections cannot be applied in all cases. But, where any question arises as to the proper construction, regard should be had to them.

[17] Since the publication of the third edition in 1994, the views set out therein have encountered a mixed reception in the Supreme Court of Canada. In a number of cases, the majority have cited the second edition, made no reference to the third edition, and have expressed agreement with Mr. Driedger's "modern rule" while the majority cites the third edition without reference to the second and expresses a preference for Professor Sullivan's "modern rule" or variations thereof. This division of opinion is demonstrated clearly in *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 in which the words "exclusively entitled to vote" in s.143(1) of the *Bank Act* were in issue. The majority judgment is that of Iacobucci J. for himself and three other members of the court. Finding nothing in the context of the sections to contradict what he called the plain meaning of those words, he held that effect should be given to that meaning. In so doing, he referred to and quoted

the passage from p.87 of the second edition, including the quotation from the speech of Lord Atkinson, and said he was applying that principle to the case at hand. L'Heureux-Dubé J. concurred in the result but, in separate reasons joined in by McLachlin J., said at p.554 that the "appropriate methodological reference would be" (the third edition at p.131) and stated "This methodology was indeed the one followed by my colleague." That refers to the majority's approach of considering the arguments put forward against what it saw as the plain meaning before holding that none of those arguments could justify departing from it. L'Heureux-Dubé J. took a similar point in concurring with the dissent of Iacobucci J. in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, a case which involved the construction of contractual documents rather than a statute.

[18] The earliest case which shows evidence of a division amongst members of the court on the question of "second edition or third edition" appears to be *R. v. McIntosh*, [1995] 1 S.C.R. 686. In giving the majority judgment for himself and four others, Lamer C.J.C. dealt at pp.697-99 with the principles to be applied in interpreting statutes. In para.18 he said that he took as his starting point:

> ... the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect.

He referred to that as the "golden rule" of literal construction and, in support of that proposition, cited *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 29 as well as the "Modern Principle" set out in the second edition of *Driedger*. The Chief Justice made no reference to the third edition. It obviously was available to the court before it gave judgment — McLachlin J., who delivered the dissenting judgment for herself and three others, cited it in her reasons. It is interesting to compare the Chief Justice's affirmation of the "golden rule" with the editor's treatment of it at pp.4-5 of the third edition under the headings "Courts still invoke the plain meaning rule" and "Rhetorical use of the plain meaning rule". After referring to and quoting from several recent decisions, including the judgment of the Chief Justice in *R. v. Multiform*, [1990] 2 S.C.R. 624 stating the same principle as he stated in *R. v. McIntosh*, *supra*, the editor goes on to say:

> It is important to realize that these modern appeals to the plain meaning rule are entirely rhetorical in character. When a modern court labels its preferred interpretation "plain" and suggests that consideration should not be given to the purpose of the legislation or to other interpretative aids, its point is rhetorical rather than legal.

[19] Other decisions which touch upon the principles to be applied in statutory interpretation and which reveal a difference of opinion amongst members of the court as to the validity of the opinions expressed in the third edition of *Driedger* are: *Canada v. Antosko*, [1994] 2 S.C.R. 312;

Ontario v. C.P. Ltd., [1995] 2 S.C.R. 1031;
2747 -3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919;
The Opetchesaht Indian Band v. Canada, [1997] 2 S.C.R. 119.

[20] I have seen only one case in which the third edition has been relied on in a majority judgment of the court. In *R. v. Lewis*, [1996] 1 S.C.R. 921, Iacobucci J. cited a passage in the third edition at p.193 for the proposition that "the words of the text must be read in context". From the discussion which follows, it is clear that he was referring to "context" in the conventional sense of the immediate context of the sentence in which the words appear and the broader context of the statute as a whole. In any event, there clearly is no endorsement in those reasons of the editor's views on the matter of the significance of "plain meaning" and the definition of "context".

[21] Not all of the editor's views with respect to those matters are inconsistent with established law. Indeed, some views expressed in the third edition seem quite inconsistent with the "modern rule" at p.131 and the condemnation of "plain meaning" at pp.4-5. I refer particularly to the section beginning at p.26 under the heading "When Ordinary Meaning is Binding", the first paragraph of which says:

WHEN ORDINARY MEANING IS BINDING

> *Absence of reason to depart from ordinary meaning.* It is presumed that the ordinary meaning of legislation is the most appropriate or "intended" meaning. In the absence of a reason to reject it, this meaning is binding on the courts.

The editor at p.8 defines "ordinary meaning" of a text as "the meaning that is understood by a competent user of language upon reading the words in their immediate context". I therefore take it as equivalent to "plain meaning" or "ordinary grammatical sense" or the various other phrases employed to describe the same concept.

[22] Once one concedes that, in the absence of a reason to reject the "ordinary" or "plain meaning" of the words, that meaning is binding, one is surely saying the same thing that was said by Lord Atkinson and the other judges relied on by Mr. Driedger at p.87 of the second edition, and the same thing that has been said by countless judges and legal scholars for centuries. In each case, the "plain" or "ordinary" or "grammatical" meaning is recognized as the primary source to which the court must have regard in determining what meaning was intended by Parliament. It may be that the editor's point is that this virtually universal rule should not be stated in terms that employ the word "ambiguous" as in this statement by Cory J. in *R. v. McCraw*, [1991] 3 S.C.R. 72 at 80:

> It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into

> play where the words sought to be defined are ambiguous.

[23] That is one of the statements which at p.5 are condemned by the editor as being "entirely rhetorical in character". She seems to regard such statements as holding that the court should reach the conclusion that there is no ambiguity without having regard to context, to the purpose of the enactment or the evil sought to be remedied. In fact, as a matter of course, courts consider such questions whenever an arguable issue is raised as to the interpretation to be given to the words. I see no inconsistency between the statements at pp.4-5 which are condemned as rhetorical and the enunciation of the presumption of "ordinary meaning" at p.27. In each instance, the plain or ordinary meaning is primary. I do see serious inconsistency between the editor's definition of the presumption of ordinary meaning and her modern rule at p.131 which deprives the ordinary or plain meaning of the words of any particular significance.

[24] For those of us whose role is to apply the law as laid down by the Supreme Court, the practical significance of all this is that the court has not, in any majority judgment, endorsed the views expressed in the third edition but, rather, has rejected them although without mentioning the work.

[25] This rather confusing debate as to which academic pronouncement should be taken as stating the law may illustrate the wisdom of the rule, enforced with few exceptions in our courts until 20 or so years ago but now largely forgotten, that no reference is to be made to the works of living authors. By discouraging counsel from relying on textbooks and articles, the court may on occasion have deprived itself of an illuminating opinion or analysis. But the rule did bring home to all concerned that the law is to be found in the statute or in the cases – not in the opinions of authors or editors of textbooks or articles.

[26] The former rule was discussed by R.E. Megarry, Q.C. (as he then was) in *Miscellany -at- Law* (London: Stevens & Sons Limited, 1955) at 326-329. He noted at p.327 that, in 1947, Lord Denning (then Denning J.) had proclaimed that the rule "... has long been exploded. Indeed, the more recent the work, the more persuasive it is". Mr. Megarry went on to observe that some judges "remain unaware of the date of the explosion and unconvinced of its occurrence". Although there may never have been an explosion, Lord Denning's view, for better or worse, came to prevail some time during the 1970's.

[27] As evidence that the old rule was consistent with an attitude of mutual respect between the bench and legal scholars, I cite this passage from *Miscellany -at-Law* at p.328:

> In one case, Lord Wright M.R. made use of this rule to pay a neat compliment to Sir Frederick Pollock, then a vigorous octogenarian. "The matter is very clearly stated in a work, fortunately not a work of authority, but to which we are all as lawyers indebted, Sir Frederick Pollock's Law of Torts." Sir Frederick was charmed by this reference to him, but the "fortunately" was beyond those responsible for the *Law Journal* and *Law Times* reports of the case; insensitively, they turned it into "unfortunately."

[28] I would not wish my somewhat critical treatment of Professor Sullivan's work to be understood as suggesting that it is not a valuable contribution to the literature. It is clearly a work of scholarship – one which can be of benefit to any of us who must struggle with the difficulties of statutory construction. As such, it is much more a work of opinion and is much more controversial than we have been accustomed to in this area. I am conscious that I have taken passages out of context and thus have not done justice to the work as a whole. I have done that to explain why I think that counsel and judges should not take passages such as that at p.131 on "the modern rule" out of its context and treat it as a statement of the accepted wisdom, as was often done with the equivalent paragraph in the second edition. On the other hand, we could all benefit from reading the work in its entirety.

[29] I turn now to consider whether in this case there is any basis for rejecting the plain meaning of "otherwise encumbered".

[30] In the language of Lord Atkinson, is there anything in the context or in the object of the Act or in the circumstances with reference to which the words were used to show that those words were used in a special sense which would exclude aboriginal title from being an encumbrance on Crown title?

[31] Section 8 of the *British Columbia Interpretation Act* requires every enactment to be construed as being remedial. In this case there is nothing before us which throws any light on the question of what evil, if any, was sought to be remedied by the adoption, in 1978, of the present wording of s.28. The *Interpretation Act* also requires that the enactment be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. What is the object or purpose of s.28 or of the *Forest Act* as a whole?

[32] The learned chambers judge in para.20 of his reasons expressed the view that "encumbered" in s.28(1)(*b*)(i) was "intended to refer more narrowly to forest tenure concepts". I see no basis for that conclusion in the language of the Act which includes no definition, either express or implied, of "encumbered" as being limited to forest tenures. The reasons stated by the learned chambers judge are these:

> ... the nature of aboriginal rights being *sui generis*, makes it highly unlikely that the legislature intended to include aboriginal rights ...
> ... it would be too broad a reading of s.28(1)(*b*)(i) to conclude that, when it was enacted, the legislature intended to include aboriginal rights in the

> restrictive words of the section without being more explicit.

[33] Those reasons appear to accept the submission of the respondent Crown to the effect that the court must attempt to ascertain what was in the minds of the members of the legislature when the present section was enacted in 1978. In fact, it may well be that none of the honourable members had any clear intention in relation to s.28; it may well have been seen as a rather technical provision designed to improve in some way the workings of the Act.

[34] The argument in favour of having regard to subjective intention is not based on identifying the evil sought to be remedied by the 1978 amendment but rather on what we know about the attitude of the government of British Columbia in 1978 regarding aboriginal rights, i.e. that such rights, if they ever existed in British Columbia, had long since been extinguished. The government of that time, notwithstanding that six of the seven judges who gave judgment in *Calder v. Attorney General of B.C.*, [1973] S.C.R. 313, held that aboriginal rights did exist, seemed to prefer the view that they had never existed Because the six judges divided evenly on the question whether those rights had been extinguished, and because the appeal was dismissed, the government took the position that everything decided by them could be disregarded and that the governing authority was the decision of this court which had

held that there never had been aboriginal title. This Court in *MacMillan Bloedel v. Mullin, supra*, held that view to be untenable but it continued to be advanced until expressly laid to rest in the judgment of this Court in *R. v. Sparrow* (1986), 9 B.C.L.R. (2d) 300 (C.A.). See particularly the passage headed "*What was decided by Calder v. A.G.B.C.?*" commencing at p.315.

[35] It is therefore likely that those who drafted and those who voted for the 1978 amendment, had they considered at all the question whether timber could be "otherwise encumbered" by aboriginal title, would have said no – because no such interest could exist. On the other hand, had they been properly advised of the law as set out in cases such as *St. Catherine's Milling*, and *Calder v. A.G.B.C., supra*, they would have understood that there was a live issue as to whether aboriginal title still existed and would have understood that, if it did, it was capable of encumbering standing timber on Crown lands. So, while it is reasonable to assume that the legislature had no positive intention to include aboriginal rights in "otherwise encumbered", I see no basis for concluding that there was a positive intention to exclude such rights. Only if such an intention could be established could the subjective intention of the legislators lend any support to the case for the respondents. If that could be established, it would be necessary to decide whether a subjective intention of that kind is a proper

guide to construction. But that question does not arise in this case.

[36] What then of the object of the Act? The learned chambers judge held in para.21 that the interpretation urged by the petitioners (the grammatical sense) would "defeat the purpose of Pt. 3 of the *Forest Act*, which deals with the disposition of timber by the Crown and authorizes the Minister to enter into tree farm licences". While it is true that the Act deals with the disposition of timber by the Crown and authorizes the Minister to enter into T.F.L.'s, the object of the Act is clearly not to authorize the Minister to do so without regard to third party interests. Indeed, it seems clear that the object of s.28, the immediate context in which the disputed language occurs, is to prevent that from occurring.

[37] I do not find outside s.28 any indication of the purpose of the Act which assists in resolving the issue before us. Reading the Act as a whole, I incline to the view that its broad object is to provide for forest management which will allow a number of competing interests to be met in a balanced way. The competing interests identified in the Act seem to be those referred to in sections 3 and 4:

> **Assessment of potential**
> **3.** The chief forester shall assess the land in the Province for its potential for
> (a) growing trees continuously;
> (b) providing forest or wilderness oriented recreation;

(c) producing forage for livestock and wild-life;
(d) conservation of wilderness, and
(e) accommodating other forest uses.

Forest land

4. The chief forester shall classify land as forest land if he considers that it will provide the greatest contribution to the social and economic welfare of the Province if predominantly maintained in successive crops of trees or forage, or both, or maintained as wilderness.

[38] In para.20 of his reasons the chambers judge quoted a passage from *Maxwell*, *supra*, and said:

> In this case, I am persuaded that the respondents' position on the interpretation of section 28(1)(b)(i) is the apt one, because, first and foremost, I accept their position that the nature of aboriginal rights being *sui generis*, makes it highly unlikely that the legislature intended to include aboriginal rights when it used the word "encumbered" in section 28(1)(b)(i) of the Act.

[39] The principle stated in *Maxwell* at p.199 is that "the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one." Again, as *Maxwell* indicated, that canon of construction can be resorted to only in "cases of doubtful significance" which I take to have essentially the same meaning as "ambiguity".

[40] In any event, it is not clear to me in what respect the exclusion of aboriginal rights from "otherwise encumbered" is most in accord with convenience, reason, justice and legal principles. It is, of course, true that aboriginal title is

sui generis and that claims to aboriginal title are "fact and site specific". But it must be remembered that the question placed before the court is based on the hypothesis that the broad claim of the petitioners has been established. Thus, the question must be answered on the assumption that the petitioners have ownership, title and other aboriginal rights over all of Haida Gwaii including the land, water, flora and fauna and resources thereof. The existence of such an interest has not been established. But if, before the most recent replacement of the T.F.L. in 1995, that interest had been established by court decision, treaty, statute or otherwise, the Minister would have had no difficulty in recognizing it as an encumbrance.

[41] That also applies to the conclusion expressed by the chambers judge in para. 21 that "it is implausible to suggest that the Minister can determine whether the timber ... is encumbered by aboriginal rights before deciding whether to issue a (T.F.L.)". On the assumption that the interest claimed actually exists as a matter of law, there is no difficulty in determining whether the timber is encumbered by aboriginal rights.

[42] It is, of course, possible, perhaps even likely, that if and when the petitioners establish aboriginal rights, the rights will in some respects be more limited, perhaps more "site specific", than the very broad claim which is now put

forward. The underlying difficulty which concerns the respondents and which concerned the chambers judge is the existing state of uncertainty. It is not for us to say what might be done to alleviate that problem. What is before the court is a question as to the meaning to be given to existing legislation based upon a hypothetical but adequately defined set of facts. As I find no basis for rejecting the plain meaning of "otherwise encumbered" as applying to that set of facts, I would answer the question in the affirmative and would allow the appeal accordingly.

"THE HONOURABLE MR. JUSTICE ESSON"

Reasons for Judgment of the Honourable Madam Justice Southin:

[43] I have had the privilege of reading in draft the reasons for judgment of Mr. Justice Esson and would dispose of the appeal in the manner proposed by him.

[44] I too am of the school that where the meaning of words in a statute is plain the court is to apply that meaning. The word "encumbrance" is a word of wide import. If the appellant has an interest in land cognizable at law that interest is an encumbrance and there is no reason to conclude that what would generally be called an encumbrance is not an encumbrance within the meaning of s.28 of the *Forest Act*, R.S.B.C. 1996, c.157.

"THE HONOURABLE MADAM JUSTICE SOUTHIN"

Reasons For Judgment of the Honourable Madam Justice Huddart:

[45] I, too, have had the privilege of reading in draft the reasons for judgment of Mr. Justice Esson and would dispose of the appeal in the manner proposed by him. I would do so because I agree with his analysis of the meaning of encumbrance and thus of "encumber" in s. 28 of the *Forest Act*.

[46] I am not however of the plain meaning school. I am concerned that the "golden rule" of literal construction, as expressed by *Maxwell on the Interpretation of Statutes* (12th ed. 1969) and the contextual approaches expressed in the second edition of *Driedger on the Construction of Statutes* permit the interpretator of a statute to avoid the work of interpretation by giving primacy of place to plain or ordinary grammatical meaning. The work of interpretation must include the analysis of all potential meanings in context to avoid a reading derived from judicial intuition with hidden assumptions. I prefer Professor Sullivan's formulation of the rule she derives from the thought processes of working judges as they are evidenced in reasons for judgment.

[47] In the Forward to the first edition, Mr. Driedger wrote this:

> The term "construction" is used in this work rather than the term "interpretation". All statutes must be "construed", and only where there is some

> ambiguity, obscurity or inconsistency in a statute is the term "interpret" fitting.

[48] In the second edition, Mr. Dreidger wrote in the Forward:

> My view has always been that the *literal* meaning of a word or phrase in a statute is simply the meaning transmitted by those words when read in their context, whether that meaning turns out to be the primary, secondary, or a technical meaning; the restricted or unrestricted meaning; or the ordinary or unordinary meaning. In this edition I have attempted to reflect my understanding of the term *literal* more clearly or consistently than perhaps I did in the first.

[49] Professor Sullivan's view that the work of interpreting begins when one is called upon to construe a statute is, in my view, the natural evolution of the thinking of Mr. Driedger.

[50] Nevertheless, this is one of those situations where the plain meaning method is justified. I agree with Madam Justice Southin that the meaning of encumbrance is so well fixed, when used with regard to an interest in land that the accepted meaning must be applied.

"THE HONOURABLE MADAM JUSTICE HUDDART"