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WINTERS V. LEGAL SERVICES SOCIETY

Court File No. 26180

IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

BETWEEN:

ARTHUR ROBERT WINTERS

APPELLANT (APPLICANT)

AND:

LEGAL SERVICES SOCIETY
ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS (RESPONDENTS)

FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF BRITISH COLUMBIA

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PART 1

STATEMENT OF FACTS

Introduction

1. The issue raised in this appeal is whether the scarce source of legal aid must be made available to people in prison facing a disciplinary hearing. The Attorney General of British Columbia submits the proper interpretation of the *Legal Services Society Act*, R.S.B.C. 1979, c. 227, now R.S.B.C. 1996, c. 256 (the "*Act*") does not entitle the Appellant to require the public to pay for a lawyer to represent him at a disciplinary hearing conducted pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

2. The Attorney General of British Columbia was added as a Respondent to this Appeal by Order dated February 5, 1998.

Attorney General's Position with Respect to the Appellant's Statement of Facts

3. The Attorney General objects to the last sentence in paragraph 10, page 3 of the Appellant's Factum because it contains argument not facts. The Attorney General also objects to paragraph 60 of the Appellant's Factum which contains facts not put in evidence.

4. The Attorney General of British Columbia accepts the accuracy of the rest of the facts set out in the Statement of Facts contained in the Appellant's Factum but submits the following additional facts are also relevant.

The British Columbia Judgments in this Case Reject the Provision of Legal Aid to Prisoners Facing Disciplinary Hearings

5. The Appellant meets the financial criteria for obtaining legal services under the *Act* but was refused on the basis that he does not fall within the category of those eligible as set out in section 3 of the *Act*.

6. The provision of the *Act* setting out the criteria for eligibility is section 3 which states:

> Section 3 - Objects
>
> 3. (1) The objects of the society are to ensure that
>
> (a) services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons; and
>
> (b) education, advice and information about law are provided for the people of British Columbia.

(2) The society shall ensure, for the purposes of subsection (1) (a), that legal services are available for a qualifying individual who

(a) is a defendant in criminal proceedings that could lead to his imprisonment;

(b) may be imprisoned or confined through civil proceedings;

(c) is or may be a party to a proceeding respecting a domestic dispute that affects his physical or mental safety or health or that of his children; or

(d) has a legal problem that threatens

(i) his family's physical or mental safety or health;

(ii) his ability to feed, clothe and provide shelter for himself and his dependants; or

(iii) his livelihood.

(emphasis added)

7. The Appellant applied for judicial review seeking mandamus to require the Respondent Legal Services Society (the "Society") to fund legal representation for a hearing he faces involving his alleged contravention of subsection 40(h) of the *Corrections and Conditional Release Act*. Relying on *Landry v. Legal Services Society* (1986), 3 B.C.L.R. (2d) 98; 28 C.C.C. (3d) 138 (B.C.C.A.) (Appellant's Book of Authorities, Tab 5 - "*Landry*"), the Chambers Judge dismissed the Petition.

8. The British Columbia Court of Appeal upheld the Chambers Judgment in Reasons for Judgment pronounced May 8, 1997. In dismissing the appeal, Mr. Justice Esson

stated for the unanimous Court the following (Appellant's Record, p. 101 and Appellant's Book of Authorities, Tab 19, p. 2):

> The appeal can only succeed if this Court can distinguish its decision in *Landry* [cites omitted]. [Appellant's counsel] has sought to persuade us that there is a distinction to be made in that Mr. Justice Macfarlane, when giving the judgment of the Court and in discussing the question whether the proceedings should be classified as criminal, observed at page 104 (B.C.L.R.) that the charges were brought under a Commissioner's directive and that such directives did not have the force of law. There has been a subsequent amendment to the *Act* and *Regulations* and, as a result, the matters that were covered by the Commissioner's directive are now covered by statute.
>
> That factor, however, does not appear to me to have been in any way an integral part of the Court's decision, and I therefore cannot regard it as a ground of distinction.

9. In concurring with Justice Esson, the Honourable Chief Justice of British Columbia noted (Appellant's Record, p. 102 and Appellant's Book of Authorities, p. 3):

> I agree. Perhaps I should add, just for completeness, that [Appellant's counsel] did raise with us the possibility of having this appeal heard by a Court of five judges.
>
> I would not be in favour of making an order in that behalf [sic] now, so as to reconsider *Landry*, because for the reasons given by Justice Esson, I think the law is settled....

The Society's Expenditures Are Significant

10. Funding for the Society is almost exclusively provided by the Attorney General of British Columbia by way of annual grants. In the fiscal year 1997-1998 it is expected the Attorney General will provide approximately $83.4 million to the Society. Although financially the Society depends upon the Attorney General's Ministry, the Society is not an agent of the Crown and is governed by an independent Board.

Attorney General's Record, Tab 2, paragraphs 8 and 9

Legal Services Society Act, ss. 4(2) and 5

11. In the years 1991 - 1994, the expenditures of the Society increased from $65.5 million to an estimated $99.3 million. During the same period government funding was as follows:

1991-1992 $38 million plus a supplement of $12.7 million

1992-1993 $71.5 million plus a supplement of $15.4 million

1993-1994 $84.6 million plus a supplement of $6.8 million

Appellant's Record, pp. 22 and 23, paragraphs 2, 3, 4 and 5 (Affidavit of David S. Duncan, May 9, 1994)

12. The Society's expenditures increased significantly as a result of a British Columbia Court of Appeal decision, relied upon by the Appellant, which established that the Society is required to provide legal counsel to refugees facing possible deportation: *Gonzalez-Davi v. Legal Services Society of British Columbia* (1991), 55 B.C.L.R. (2d) 236 (C.A.) (Appellant's Book of Authorities, Tab 3 - "*Gonzalez-Davi*". Up until the time of Gonzalez-Davi those services were not provided or funded by the Society.

13. Because of the decision in *Gonzalez-Davi*, the Society established a tariff for the referral of deportation hearings to the private bar. The cost of that service between 1988 - 1994 increased dramatically as illustrated below:

Fiscal Year	**Immigration Tariff Expenditures**
1988-1989	$0
1989-1990	$53,761
1990-1991	$1,219,180
1991-1992	$3,119,076
1992-1993	$4,073,281
1993-1994	$4,505,000 (estimated)

Appellant's Record, p. 24, paragraph. 8 (Affidavit of David S. Duncan, May 9, 1994)

14. In the context of financial difficulties and limited resources, the Society established a committee to examine which services must be provided by it to the public. That Committee's report was widely distributed and considered by the Society's Board of Directors at a meeting held April 15, 1994.

Appellant's Record, p. 24, paragraph 9, Exhibit "A" (Affidavit of David S. Duncan)

Prisoners Receive Legal Assistance from the Society

15. Under the policy in place at the time of the Committee's Report, the Society provided legal services from a branch office in Abbotsford (a community in an area of British Columbia where an overwhelming number of provincial and federal jails are located) called the Prisoners' Legal Services. It provided general rights' advice on a range of prison law matters, assistance in preparing submissions and limited advocacy.

Appellant's Record, p. 63 (Affidavit of David Duncan, May 9, 1994)

16. The Appellant contacted the Prisoners' Legal Services.

Appellant's Record, p. 13 {Affidavit of the Arthur Winters, February 23, 1994, paragraph 9)

Disciplinary Hearings Are Numerous

17. The number of disciplinary hearings relating to minor charges in British Columbia under the Corrections and Conditional Release Act between April 1, 1993 and March 31, 1994 was 1525. The number of serious charges during the same time period was 882.

Appellant's Record, p. 92, paragraph. 4 (Affidavit of Judy Croft, May 27, 1994)

PART II

STATEMENT OF POINTS IN ISSUE

18. The Attorney General of British Columbia will address the following issues arising on this Appeal:

a) The Society is entitled to refrain from providing legal services to an incarcerated person facing a disciplinary proceeding pursuant to the *Corrections and Conditional Release Act*; and,

b) The Appellant is not entitled to an Order requiring the Society to provide him with services ordinarily provided by a lawyer.

PART III

MEMORANDUM OF ARGUMENT

A. THE SOCIETY IS ENTITLED TO REFRAIN FROM PROVIDING LEGAL SERVICES TO AN INCARCERATED PERSON FACING A DISCIPLINARY PROCEEDING PURSUANT TO THE CORRECTIONS AND CONDITIONAL RELEASE ACT

19. The Attorney General of British Columbia submits the scarce resource of legal aid should not be extended to administrative hearings such as internal prison disciplinary hearings. This is consistent with an interpretation of the *Act* in the context of the fiscal limitations of legal aid.

The Society is Entitled to a Degree of Deference

20. The Society was established under predecessor legislation to the *Act*. The objects of the Society are quite limited and specialized under section 3(1) of the *Act*.

21. Pursuant to section 5 of the *Act*, The Board of Directors of the Society consists of 15 people, five of whom are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, five of whom are appointed by the Benchers of the Law Society of British Columbia after consultation with the executive of the British Columbia Branch of the Canadian Bar Association, and five of whom are appointed by community law office association. At least two of the members of the Board are non-lawyers.

22. It is apparent that the Board is designed to be a body composed of persons with broad expertise in the area of legal aid and the provision of legal services. The Board can be expected to have a solid understanding of the types of cases for which legal aid funding is being sought in the Province, as well as for the relative importance of legal aid funding for various types of cases.

23. It is imperative, given the limited funding available to the Society, that it have the ability to interpret the statute and set its priorities. Indeed, section 10 of the statute specifically provides that "the society has authority to determine the priorities and criteria for the services it or a funded agency provides under this Act."

24. The Society has substantial expertise in the allocation of legal aid funds. Further, there is a clear indication in the legislation that it is the Society which is to set priorities and criteria for services. While this does not mean that the Society is free to ignore the dictates of the statutory language in section 3(2) of the statute, it does suggest a significant degree of deference to the determinations of the Society. On a pragmatic and functional approach, it is submitted that the Society's interpretation of

subsections 3(2)(a) and (b) of the statute should not be interfered with unless they are found to be wholly unreasonable.

Pushpanathan v. Canada (Minister of Citizenship and Immigration) (June 4, 1998), S.C.C. No. 25173

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748

25. It is submitted that the Society's finding in this case that the Appellant was not subject to criminal or civil proceedings was not only reasonable, but also correct.

Disciplinary Hearings Pursuant to the Corrections and Conditional Release Act are Administrative Hearings

26. The Appellant must be able to place himself within the description of one of the subsections of section 3(2) to receive funding under the *Act*. The Attorney General of British Columbia submits the hearing the Appellant faces under the *Corrections and Conditional Release Act* is an internal disciplinary proceeding which is neither a civil nor criminal proceeding within the meaning of subsection 3(2)(a) or (5) of the *Act*. It is properly described as an administrative proceeding.

27. The Supreme Court of Canada has noted that a single "act" (in this case an alleged assault on another person) may have different consequences. Furthermore, the Court affirmed that with regard to some of the Charter's protection a "disciplinary exception" may exist. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; 45 D.L.R. (4th) 235 the Supreme Court of Canada dismissed an appeal from the Saskatchewan Court of Appeal which commented as follows (quoted in *Wigglesworth* at 549):

> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, it if constitutes a breach of the duty a person owes to society, amount to a crime, for which the *Act*or must answer to the public. At the same time, the *Act* may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the *Act*or must answer to the person he injured. And that same act may have still another aspect to it; it may also involve a breach of the duties of one's office or calling, in which event the *Act*or must account to his professional peers.

28. And at 552, Wilson J. for the majority of the Supreme Court of Canada noted:

> There have been a large number of cases decided on the issue whether the accused has been "charged with an offence" within the meaning of [s. 11 of the *Charter*]. A number of these cases have recognized a so-called "disciplinary exception" to the application of s. 11. Thus in, R. v. Mingo (1982), 2 C.C.C. (3d) 23 (B.C.S.C.), s. 11(h) was held to be inapplicable to a criminal prosecution for the same conduct which had been the subject of disciplinary proceedings against an inmate.

29. And at 560:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. **This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity:**
>
> (emphasis added)
>
> See also R. v. Shubley, [1990] 1 S.C.R. 3; 65 D.L.R. (4th) 193 at 18 per McLachlin J. for the majority

30. If it is possible that prison disciplinary hearings are not afforded the protection of section 11 of the *Charter*, it is reasonable that they do not fall within subsection 3(2)(a) or (b) of the *Act*. The Attorney General of British Columbia submits the comments from *Wigglesworth, supra* support the contention that there can be a class of proceedings that is neither criminal nor civil in nature. The Attorney General of British Columbia argues internal prison disciplinary proceedings fall into that category.

31. The structure of the *Corrections and Conditional Release Act* supports this conclusion. Specifically, section 40 (the alleged contravention of which is the impetus for the hearing the Appellant faces) is contained in Part 1 of the *Act* which is titled

"Institutional and Community Corrections". Furthermore, the content of section 40 makes it obvious that the "offence" created is pertinent only to the prison environment because it is premised on jeopardy to the "security of the penitentiary" [see for example ss. 40(a), (b), (f) and (j)]. This is consistent with the view of a section 40 disciplinary hearing as an internal, administrative matter.

Disciplinary Hearings Pursuant to the *Corrections and Conditional Release Act* are not Criminal in Nature

32. The Appellant argues he is entitled to funding under subsection 3(2)(a) of the *Act* because he is facing a criminal proceeding. He supports his argument by focusing on the standard of proof and the adjudicative nature of proceedings under section 40 of the *Corrections and Conditional Release Act*.

33. The Attorney General of British Columbia submits the argument that prison disciplinary hearings can be considered criminal has been rejected by this Honourable Court in *R. v. Shubley, supra* where McLachlin J. for the majority noted (at 20):

> **Was the prison disciplinary proceeding to which the appellant was subject, by its very nature, criminal? I conclude it was not.** The appellant was not being called to account to society for a crime violating the public interest in the preliminary proceedings. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with the prison rules....
>
> The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison.
>
> (emphasis added)
>
> See also *Landry* (Appellant Book of Authorities, Tab 5) at 108 to 109 citing *R v. Mingo* (1982), 2 C.C.C. (3d) 23; 4 C.R.R. 18 (B.C.S.C.)

34. The Attorney General of British Columbia submits the rejection by this Honourable Court that internal prison disciplinary hearings are criminal in nature is compelling and should not be overturned. For that reason, the Attorney General of British Columbia submits the Appellant must fail on his argument that he is eligible for legal aid under subsection 3(2)(a) of the *Act*.

The Appellant will not be Imprisoned or Confined through a Civil Proceeding

35. The disciplinary hearing the Appellant faces relates to the terms and conditions of his incarceration. It is the Attorney General of British Columbia's position that the following passage from the Majority's decision in *Shubley, supra* is a more useful and relevant description of the potential consequences of a disciplinary proceeding than the observations of Charles Dickens from over 100 years ago (cited at paragraph 35 of the Appellant's Factum). At 21 the majority remarked:

> In this case, the internal disciplinary proceedings involved neither fines nor imprisonment. The appellant's punishment was close confinement for five days on a special diet that fulfils basic nutritional requirements. Looking more generally at the powers conferred by s. 31 of Reg. 649 on a superintendent who finds that an inmate has committed a misconduct, it may be observed that they are generally confined to matters affecting the conditions under which a prisoner lives....

36. And at 23:

> I conclude that the sanctions conferred on the superintendent for prison misconduct do not constitute "true penal consequences" within the *Wigglesworth* test. **Confined as they are to the manner in which the inmate serves his time, and involving neither punitive fines nor a sentence of imprisonment, they appear to be entirely commensurate with the goal of fostering internal prison discipline and are not of a magnitude or consequence that would be expected for redressing wrongs done to society at large.**
>
> (emphasis added)

37. The British Columbia Court of Appeal has accepted that even a broad interpretation of "civil proceedings" in subsection 3(2)(b) of the *Act* excludes prison

disciplinary hearings. In *Gonzalez-Davi* an unanimous Court stated (Appellant's Book of Authorities, Tab 3 at 240):

> [Counsel for an intervenor] distinguished the disciplinary proceedings in Landry from the present case on the basis that disciplinary proceedings are domestic matters involving internal administration of the institution. I think that is a valid distinction...

38. The Attorney General submits subsection 3(2)(b) is meant to capture those individuals facing a proceeding which although not criminal may lead to them being imprisoned or confined. But it is clear that subsection 3(2)(b) does not apply to all non-criminal proceedings which may result in imprisonment or confinement; otherwise the legislature would have no reason to include the word "civil".

39. There are practical differences between court proceedings and those of administrative tribunals that make counsel more critical to the former than to the latter. In particular, the very formal procedures and rules of evidence that apply in court proceedings make formal legal training extremely valuable. While such training may be of assistance in administrative proceedings, the less formal procedures and rules of evidence are designed to allow a lay person to present his or her case adequately without the need for counsel. Accordingly, it is quite reasonable, in allocating scarce legal aid resources, that the Legislature should have given a priority to court proceedings.

40. Even if disciplinary proceedings under the *Corrections and Conditional Release Act* are considered civil in nature, the Attorney General of British Columbia argues the Appellant would not be entitled to funding under subsection 3(2)(b) of the *Act* because he is not facing imprisonment or confinement. The Attorney General submits the intent of subsection 3(2)(b) is to provide legal services to a person who faces a public process which involves the exercise of the power to imprison or confine to

which that person is not normally subject. Because prisoners are already incarcerated, the power to imprison or confine has already been exercised.

41. The Appellant is serving a life sentence for murder and is in an entirely different situation from someone who is not currently in prison. The very purpose of imprisonment is to impair a criminal's liberty; an incarcerated person's "liberty" ought not to be regarded in the same light as someone not imprisoned. For similar reasons, the Attorney General submits people facing post-suspension, post-revocation or detention hearings are in a significantly different circumstance than the Appellant. They have been released and may face a return to prison.

42. The Appellant relies on commentary from cases describing solitary confinement as a "prison within a prison" to argue the Appellant faces imprisonment or confinement under disciplinary proceedings. Those comments were made in the context of issues dealing with the applicability of the principles of procedural fairness to prisoners. That is not an issue in this case.

43. Similarly other cases upon which the Appellant relies are not relevant to whether disciplinary hearings fall under section 3(2) of the *Act*. For example the principles that emerge from the cases are:

> (a) *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 (Appellant's Book of Authorities, Tab 1) - prisoners are entitled to procedural fairness even when placed in solitary confinement.
>
> (b) *Solosky v. Her Majesty the Queen*, [1980] 1 S.C.R. 821 (Appellant's Book of Authorities, Tab 18) - prisoners are entitled to the benefit of invoking solicitor- client privilege with regard to their correspondence.
>
> (c) *R. v. Miller*, [1985] 2 S.C.R. 613 and *Morin v. SHU Review Committee*, [1985] 2 S.C.R. 662 (Appellant's Book of Authorities Tabs 10 and 1 1) - provincial superior courts have jurisdiction to consider an application for *habeas corpus* by an inmate in a federal institution.

44. None of these cases nor the general comments describing solitary confinement detract from the reality that a prisoner is "imprisoned and confined" and further restrictions on his or her term of imprisonment do not result in the prisoner being "imprisoned or confined through a civil proceeding". To regard that it does would ignore the inescapable truth that we put people in prison in order to confine them.

45. The Attorney General also notes that the Appellant was not treated in the manner described in *McCann v. The Queen* (1975), 29 C.C.C. (2d) 337 (Fed. Ct. T.D.) and therefore little is gained by an examination of the history of the use of solitary confinement (as discussed in the Appellant's Factum at paragraphs 34 to 37).

46. The Attorney General of British Columbia also submits the professional disciplinary cases (cited at paragraphs 40 and 42 of the Appellant's Factum) are not helpful to the determination of the nature of prison disciplinary hearings. Those cases characterized certain hearings as non-criminal for purposes unrelated to the issues arising here.

> (a) *Donald v. Law Society of B.C.*, [1984] 2 W.W.R. 46 (B.C.C.A.) (Appellant's Book of Authorities, Tab 2) - a proceedings by the Law Society against a lawyer was characterized as civil in response to the argument that the hearing was criminal so as to attract the protection of s. 13 of the *Charter*. The Court concluded s. 13 applied even though it was not a criminal proceeding.
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> (b) *Re James*, [1983] 2 W.W.R. 316 (B.C.S.C.) (Appellant's Book of Authorities, Tab 14) - a proceeding under the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 49 was characterized as civil as opposed to criminal or quasi-criminal to respond to an argument that the lawyer facing the hearing was not a compellable witness.
>
> (c) *Rosenbaum v. Law Society of Manitoba*, [1983] 5 W.W.R. 753 (Man. Q.B.) - (Appellant's Book of Authorities, Tab 17) - a Law Society proceeding was not considered penal and therefore ss. 11 and 13 of the *Charter* were inapplicable.

47. These characterizations do not mean professional disciplinary hearings fall within subsection 3(2)(b) of the *Act*. If that issue did arise, the Attorney General would argue they fall instead under subsection (2)(d)(iii).

48. In response to the Appellant's argument at paragraph 51 of his Factum, the Attorney General of British Columbia submits there is little significance to the fact that at the time of the *Landry* decision the custody, treatment, training, employment and discipline of inmates was governed by Commissioner's Directives pursuant to a regulation. The Attorney General respectfully adopts the reasoning from the British Columbia Court of Appeal in this case (Appellant's Record, p. 101, Appellant's Book of Authorities, Tab 19, p. 2) as discussed above at paragraph 8.

49. The essential nature and purpose of disciplinary proceedings under the *Corrections and Conditional Release Act* are the same today as when *Landry* was decided. The Directive in force at that time has been incorporated in virtually identical wording into the *Corrections and Conditional Release Act* itself. Similarly, provisions relating to offences, duties, sanctions and the requirements of the hearing are also set out in the statute. The fact that the legislation incorporates characteristics adhering to strict procedural fairness and states goals beyond internal prison discipline is not determinative to the interpretation of section 3(2) of the *Act*. Those factors relate to the proceeding itself and not legal aid funding.

Section 3 of the *Act* Takes into Account the Nature of the Proceedings and the Potential Consequence

50. The Appellant argues that he is entitled to funding under subsection 3(2)(b) of the *Act* because he may be imprisoned through a civil proceeding. He argues that funding for legal services must be determined on a "consequence" oriented approach

to section 3 rather than a "nature of the proceeding" approach and therefore a "prisoners' exemption" is difficult to justify.

51. The Attorney General agrees that the consequences or result of a proceeding which a person faces is relevant to whether legal services are to be provided; however, other factors are also important.

52. In the end, however, the individual must meet the specific requirements set out in one of subsections 3(2)(a), (b), (c) or (d). Each subsection identifies factors which must be present in order for funding to be available. The factors set out in those subsections revolve around both the nature of the proceeding and the nature of the problem the applicant faces.

53. Subsections 3(2)(a) to (d) do not represent a class of situations that can be described by a uniform effect such as a potential deprivation of a person's liberty. While a person's physical liberty is arguably implicated in the description contained in subsections 3(2)(a), subsections. 3(2)(c) and (d) are not similar in that regard. Accordingly, an effect on one's liberty is not sufficient for determining funding under the *Act*.

54. For that reason, the Attorney General of British Columbia submits the Appellant's reliance on the quoted passages from *Re Mountain and Legal Services Society* (1984), 5 D.L.R. (4th) 170 (B.C.C.A.) (Appellant's Book of Authorities, Tab 15) and *Gonzalez-Davi* (at paragraphs 19 and 22 of the Appellant's Factum) are not determinative. Beyond commenting on the general intent of the *Act*, the passages from those cases upon which the Appellant relies do not diminish the principle that an applicant must fit within section 3(2) in order to receive legal services funded by the Society.

55. Furthermore, the Court of Appeal in *Gonzalez-Davi* did not bring into doubt the result from Landry. Contrary to the Appellant's assertion that *Landry* is difficult to reconcile with the Court of Appeal's comments in other cases (at paragraph 26 of his Factum) the Court of Appeal in *Gonzalez-Davi* specifically identified and approved of *Landry* (see above at paragraph 31).

B. THE APPELLANT IS NOT ENTITLED TO AN ORDER REQUIRING THE SOCIETY TO PROVIDE HIM WITH SERVICES ORDINARILY PROVIDED BY A LAWYER

56. It is important to recall that legal services (including advice from lawyers) are available to people in the Appellant's situation (see above at paragraphs 14 and 15).

57. The Appellant however seeks an order that the Society be required to provide "legal services of the kind ordinarily provided by a lawyer" for his disciplinary hearing. This Order would reflect the wording found in section 3(1) and not the wording found in section 3(2) which refers to the provision of legal services. The Attorney General submits the Appellant is only entitled to seek relief in relation to the wording contained in section 3(2).

58. The wording in sections 3(1) and 3(2) is different and that difference must have meaning. The Attorney General submits the difference is that "legal services" in section 3(2) may not necessarily require that a lawyer represent him at the hearing. To what extent legal services provided for those qualifying individuals who are eligible under section 3(2) resembles legal services ordinarily provided by a lawyer is a matter best left to the Society's independent discretion.

Solicitor-Client Costs are Not Warranted in this Case

59. The Attorney General of British Columbia has not and does not seek his costs in this matter.

60. The Attorney General submits none of the factors favouring an award of Solicitor-Client costs exists in this case. In prior cases, that award has been made in circumstances such as the following:

> (a) the Court was of the opinion that the case was not one that ought to have been brought to trial and for that reason the successful party ought not to bear all the costs of defending his successful judgments from the courts below.
>
> *Palachik v. Kiss*, [1983] 1 S.C.R. 623; 146 D.L.R. (3d) 385
>
> (b) third parties trying to claim under a contract of insurance which was ultimately found to be inapplicable so as to bar recovery could not have had knowledge of the negotiations regarding coverage and the successful party (the insurers) were not "innocent" parties.
>
> *Coronation Insurance Co. v. Taku Air Transport*, [1990] 3 S.C.R. 622; 85 D.L.R. (4th) 609 (per Cory J. for the Majority)

61. In this case, the Attorney General submits given the British Columbia Court of Appeal's decision in *Landry*, it is proper for him to oppose the relief sought in the petition. Moreover in the context of the significant financial impact the case raises for his Ministry it cannot be said that the Attorney General's position is unreasonable or improper.

Conclusion

62. The Attorney General of British Columbia submits disciplinary hearings under the *Corrections and Conditional Release Act* are administrative proceedings which are neither criminal nor civil under section 3(2) of the *Act*. Accordingly, the Society is not required to provide either legal services or services ordinarily provided by a lawyer to the Appellant for the disciplinary hearing he faces.

PART IV

NATURE OF ORDER REQUESTED

63. The Attorney General of British Columbia seeks an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 3, 1998

Neena Sharma

Counsel for the Attorney General of British Columbia

PART V

LIST OF AUTHORITIES

LEGISLATION

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 1-3 and 38 - 43

Legal Services Society Act, R.S.B.C. 1996, c. 256

AUTHORITIES

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