Conroy & company

WINTERS V. LEGAL SERVICES SOCIETY

No. A940574

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*
R.S.B.C. 1979, c. 209

- AND -

IN THE MATTER OF THE LEGAL SERVICES SOCIETY ACT
R.S.B.C. 1979, c. 227

BETWEEN:

ARTHUR ROBERT WINTERS

PETITIONER

AND:

LEGAL SERVICES SOCIETY

RESPONDENTS

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE FRASER

Counsel for the Petitioner: John W. Conroy, Q.C.

Counsel for the Legal Services Society of British Columbia: Robert Kasting

Counsel for the Attorney General of British Columbia: Harvey Groberman

Place and Date of Hearing: Vancouver, B.C. 1st December 1994

The petitioner seeks a declaration that the Legal Services Society is required to provide him with legal representation.

The petitioner is a prisoner at the Kent Institution in British Columbia, a maximum security penitentiary in the federal prison system, serving a life sentence for a first degree murder committed in 1983. He will be entitled in 1998 to apply to have his period of parole ineligibility reduced from 25 years, pursuant to the "15 year review" provided for in s. 745 of the *Criminal Code of Canada*.

In November of 1993, the petitioner was an inmate of the Matsqui medium security institution. On 25th November 1993, he was served with an "Inmate Offence Report and Notification of Charge", alleging that he had, the previous day, assaulted another inmate.

This charge is a "disciplinary offence" under s. 40(h) of the *Corrections and Conditional Release Act*[1]. A hearing was set up, under the provisions of the *Act*.

On 1st December 1993, when the petitioner first appeared before the disciplinary court at the Matsqui Institution, he stated his position that he needed to be represented by counsel. He has a Grade 10 education. He cannot afford to retain counsel privately; and the Legal Services Society has declined to provide counsel for him. The hearing awaits disposition of these proceedings.

The concern of the petitioner is that, if he is convicted of an offence under s. 40(h) of the *Act*, this will prejudice his chances at the 15 year review. Conviction would also carry with it the prospect that he will be sentenced to some time in solitary confinement. Counsel for both respondents concede this.

The petitioner contends that s. 3(2) of the *Legal Services Society Act*[2] obliges the Society to provide him with counsel. It says that the Society shall

"ensure" that legal services are available to "a defendant in criminal proceedings that could lead to his imprisonment" or to an individual who "may be imprisoned or confined through civil proceedings".

But the Court of Appeal, in a 1986 decision, *Landry v Legal Services Society*[3], held that prison disciplinary proceedings fall within neither description and that Mr. Landry was not entitled to have legal aid provided to him by the Legal Services Society for a disciplinary hearing.

The petitioner relies on *Gonzalez-Davi v. British Columbia Legal Services Society*, a case decided by the Court of Appeal in 1991[4].

Mr. Gonzalez-Davi was facing a hearing before the Immigration Commission. The Court of Appeal observed that, in the course of the inquiry, an immigrant is subject to arrest and detention. The Canadian Bar Association, which had Intervenor status on the appeal, sought to distinguish *Landry*, "on the basis that disciplinary proceedings are domestic matters involving internal administration of the institution". Hutcheon J.A., speaking for the Court, said, "I think that is a valid distinction and that the decision [Landry] should be applied only to facts of a similar nature."

The ultimate holding in Gonzalez-Davi was this:

> The object of s. 3, pertinent to this case, is to supply legal services to any person without sufficient funds to obtain that assistance who faces confinement or imprisonment. Leaving aside the discipline cases in the jails, I would give to the section a sufficiently broad meaning to "criminal proceedings" and "civil proceedings" so that no one threatened with confinement or imprisonment and otherwise qualified is left without legal assistance.[5]

Counsel for the Legal Services Society and for the Attorney General of British Columbia conceded that they found it difficult to say that the petitioner here

is not "threatened with confinement or imprisonment and otherwise qualified". They found themselves unable to reconcile the two decisions. Their position is, simply, that I am bound by *Landry*.

By either of two routes, one may say that the petitioner is threatened with confinement or imprisonment. The first is the prospect that, if he is "found guilty" (the words are from s. 44(1) of the *Corrections and Conditional Release Act*), this will prejudice him at the s. 745 hearing. Of course, this is not a necessary result, nor a direct result, only a possible result, down the road. I conclude, however, that it meets the language of *Gonzalez-Davi*, in that it holds in it the threat of future confinement. Whether that proposition is sound may be unnecessary to the analysis, however. Given that a finding of guilt can lead to "segregation from other inmates for a maximum of thirty days"[6], that is, solitary confinement, I conclude that the petitioner is faced with imprisonment.

Of course, the sentence imposed on the petitioner is life in prison and the formal character of that sentence will not change, no matter if he spends ten more years in prison than he might otherwise do or is put in solitary confinement. This does not affect matters. On a comparison between parole and continuing in custody, or on a comparison between ordinary time in prison and solitary confinement, the latter represents imprisonment, as compared to the former.

Landry does not say otherwise. Mr. Landry did not qualify because the regulations creating the disciplinary offence he faced were "not invoked for the protection of the public or for the general good of society, but for an institutional purpose"[7]. The implication seems to be that the obligation of the Legal Services Society to a person who applies for legal representation is triggered not solely by the

potential consequences for the applicant but, rather, those consequences coupled with the source of and reason for them.

Landry was decided under the *Penitentiary Act and Penitentiary Service Regulations*, the complicated citations for which appear in the decision. They have since been repealed and the governing statute is now the *Corrections and Conditional Release Act*. Procedural norms under the former legislation were prescribed administratively by Commissioners Directive No. 213, of 1st May 1974. These had to do with ensuring that the disciplinary hearing was fair. Provisions similar to those of the Directive now form part of the new *Act*.

In *Landry*, the Court of Appeal referred to the status of the Commissioners Directive, calling its provisions "administrative rules, not rules of law". The procedural rules now are, of course, rules of law. The petitioner would like me to seize upon this as a ground for distinguishing *Landry*. I find myself unable to do so. It is certainly a distinction. It is not central to and, perhaps, even unnecessary for the analysis in *Landry*.

Referring to the passage quoted above from *Gonzalez-Davi*, the petitioner's brief asks, "Why should prison disciplinary matters be left aside?". I conclude that it is not open to a Judge of this Court to attempt to answer that question. If this application goes to the Court of Appeal, as I think it should, the answer will be found there.

I am bound by the decision of the Court of Appeal in *Landry*. *Landry* was specifically distinguished by the Court of Appeal in *Gonzalez-Davi*. In the circumstances, it is apparent that I must apply *Landry*.

The petition is dismissed.

Vancouver, B.C.

4th May 1995

1. 40-41 Elizabeth II, c. 20 (1992).

2. R.S.B.C. 1979, C. 227.

3. (1986), 28 C.C.C. (3d) 138 (B.C.C.A.).

4. (1991) 55 B.C.L.R. (2d) 236 (B.C.C.A.).

5. At 240.

6. s. 44(1)(f).

7. at 147.