WINTERS V. LEGAL SERVICES SOCIETY

S.C.C. 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

RESPONDENT (RESPONDENT)

FACTUM OF THE RESPONDENT LEGAL SERVICES SOCIETY

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Part 1

STATEMENT OF FACTS

1. The respondent LSS Legal Services Society ("LSS") accepts the facts set out in statement of facts in the appellant's factum.

2. As a result of the decision of the British Columbia Court of Appeal in *Gonzalez-Davi v. Legal Services Society* (1991), 55 B.C.L.R. (2d) 236 (C.A.), the respondent LSS faced additional costs which rose to be over $4,000,000 in each of fiscal years 1992-1993 and 1993-1994, and have been over $3,500,000 annually in each subsequent fiscal year.

Affidavit of Duncan, paragraph 8, Appellant's Record, p. 24.

Excerpts from Annual Reports (Book of Authorities of Respondent LSS, Tab 13, p. 24, Tab 14, p. 21.)

3. The number of serious prison disciplinary cases in the federal penitentiaries in British Columbia in the 12 months ended March 31, 1994 was 882, and in the 9 months of April 1, 1995 to December 31, 1995 was 708.

Affidavit of Croft, paragraph 4, Appellant's Record, p. 92

Memo (Book of Authorities of Respondent LSS, Tab 15.)

PART 2

ISSUES ON APPEAL

4. The central issue in this case of statutory interpretation is this: was the British Columbia Court of Appeal in its decision in *Landry v. Legal Services Society* (1986), 3 B.C.L.R. (2d) 98 (B.C.C.A.) correct in concluding that prison disciplinary proceedings are not criminal proceedings within the meaning of s. 3(2)(a) of *Legal Services Society Act*, R.S.B.C. 1979, c. 227 (now R.S.B.C. 1996, c. 256) and are not civil proceedings within the meaning of s. 3(2)(b) of *Legal Services Society Act*?

5. A further issue which may arise is this: can the prison disciplinary proceedings the appellant faces pursuant to *Corrections and Conditional Release Act* S.C. 1992 c. 20 and *Corrections and Conditional Release Regulations*, SOR/92-620 lead to his imprisonment?

6. In the event the court finds the respondent LSS is required pursuant to s. 3(2) of *Legal Services Society Act* to ensure legal services are available to the appellant in

respect of prison disciplinary proceedings pursuant to *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulation*s, this issue arises: should the court specify what legal services the respondent LSS is to make available and how legal services are to be made available?

PART 3 ARGUMENT

INTRODUCTION

7. As stated in paragraph 18 at page 6 of the appellant's factum, the appellant's underlying objective is to have state-funded counsel provided for him at his prison disciplinary proceeding. In these proceedings the appellant seeks to obtain a construction of *Legal Services Society Act* favourable to him, and to obtain a court order to compel the respondent LSS to provide him with legal services.

this appeal raises no Charter issues

8. The appellant has raised no constitutional question in the appellant's factum and has filed no Notice of Constitutional Question. This case does not raise issues about procedural protection under s. 7 of *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, as enacted by *Canada Act 1982* (U.K.), 1982, c.l1, for inmates affected by disciplinary measures. In *R v Shubley* McLachlin J. confirmed that the flexible guarantees of s. 7 applied to such inmates. This case does not raise issues about the nature and quality of the procedural protections to be accorded and does not call for an analysis of whether or not provision of state-funded counsel is constitutionally mandated in the context of prison disciplinary proceedings. In *R v Lyons* La Forest J. confirmed that the requirements of fundamental justice vary according to the context in which they are invoked, and that a case-by-case analysis is needed of the proceeding and its impact on the liberty of the individual.

R v Shubley, [1990] 1 S.C.R. 3 at 23 and 24 **(Book of Authorities of Respondent LSS, Tab 9)**

R v Lyons, [1987] 2 S.C.R. 309 at 360, 361, 362 and 363 **(Book of Authorities of Respondent LSS, Tab 8)**

9. This case does not raise issues about the jurisdiction of the prison disciplinary tribunal to enforce the procedural protections under s. 7 of the *Charter* should the participation of counsel in the prison disciplinary proceedings be required to give effect to those procedural protections. Nor does it raise issues of the circumstances in which a conditional stay of proceedings should be ordered pending appointment of counsel, or issues of the jurisdiction of the court to order the provision of state-funded counsel to guarantee a fair prison disciplinary proceeding. A detailed discussion of these issues is contained in the article by Mark Benton and Michael D. Smith *The Right to State-Funded Counsel at Trial*.

Mark Benton and Michael D. Smith, "**The Right to State-Funded Counsel at Trial**", (May 1998) 56 Part 3 The Advocate 373 **(Book of Authorities of Respondent LSS, Tab 12)**

Correctional Services Canada should pay for any state-funded counsel

10. What is clear is that the courts insist on an unequivocal denial of legal aid as the first requirement before considering a conditional stay of proceedings pending appointment of counsel. Without an unequivocal finding of ineligibility for legal aid, the appellant cannot seek to define and to enforce his rights under the *Charter*. In particular he cannot apply to the courts for an order requiring that he be provided with counsel funded by Correctional Service of Canada, the state organization which initiated the prison disciplinary proceedings he faces. If the appellant is entitled to

state-funded counsel, it is Correctional Services of Canada which should pay for that counsel.

ISSUE #1: Was the British Columbia Court of Appeal in its decision in *Landry* correct in concluding that prison disciplinary proceedings are not criminal proceedings within the meaning of s. 3(2)(a) of *Legal Services Society Act*, and are not civil proceedings within the meaning of s. 3(2)(b) of *Legal Services Society Act?*

the categories criminal proceedings and civil proceedings are not necessarily exhaustive

11. S. 3(2) of *Legal Services Society Act* sets out four categories of qualifying individuals for whom the respondent LSS is to ensure legal services are available. In establishing those four categories, the legislature in s. 3(2)(a) and s. 3(2)(b) defined two of the categories according to the nature of the proceeding in which the qualifying individual is involved.

Legal Services Society Act, R.S.B.C. 1996, c. 256 **(Book of Authorities of Respondent LSS, Tab 2)**

12. If the legislature had intended all qualifying individuals subject to imprisonment or confinement to be covered by s. 3(2) of *Legal Services Society Act*, the legislature could have given effect to such an intention by using words along the lines of:

> (3)(2) The society must ensure, for the purposes of subsection (1)(a), that legal services are available for a qualifying individual who
>
> (a) is subject of proceedings that could lead to imprisonment or confinement.

13. The legislature did include in s. 3(2) the words "criminal proceedings" and "civil proceedings". The courts must give those words some meaning and content.

Legal Services Society Act, R.S.B.C. 1996, c. 256 **(Book of Authorities of Respondent LSS, Tab 2)**

14. In paragraph 21 at page 7 and in paragraph 27 at page 9 of the appellant's factum the submission is made that the words criminal proceedings and civil proceedings are to be construed as including all types of administrative, quasi-administrative and disciplinary proceedings without any exception for prison disciplinary proceedings. To accept this submission would have the effects of:

- removing any boundary between the two categories; and
- extending the joint boundaries of both to include proceedings of any kind which can result in imprisonment or confinement.

15. This is not appropriate given the presence in s. 3(2) of the words criminal proceedings and civil proceedings. The possibility that these two categories do not exhaust all possible categories of proceedings must at least be considered by the courts.

two complimentary tests: nature of proceedings and results and consequences

16. The appellant's factum at paragraphs 21 and 22 on page 7 and at paragraph 24 on page 8 identifies the two tests used by the British Columbia Court of Appeal in construing s. 3(2)(a) and s. 3(2)(b) of *Legal Services Society Act*, namely the nature of the proceedings test and the results or consequences test.

17. Nature of the proceedings and results or consequences are not competing tests. In construing s. 3(2) of *Legal Services Society Act* the court ought to consider both the nature of the proceedings and the results or consequences of them. Each factor is distinct and each has a distinct purpose. The appropriate approach is to consider separately:

- the nature of the proceedings in which the appellant is involved to determine whether those proceedings are criminal proceedings or civil proceedings or neither; and
- the results or consequences of those proceedings to determine whether or not those proceedings could lead to imprisonment, or may lead to the appellant's being imprisoned or confined.

It does not matter the order in which the court applies these two distinct tests. The tests are applied for different purposes.

two correct applications of the nature of proceedings test

18. The British Columbia Court of Appeal correctly applied the nature of the proceedings test on the two occasions on which that court turned its attention to the question of whether prison disciplinary proceedings are criminal proceedings, civil proceedings, or neither.

19. The British Columbia Court of Appeal in *Landry* applied the nature of the proceedings test, and determined that one is to look at the law underlying the proceedings to determine their nature and character. Mr. Justice Macfarlane, speaking for the court, said this at page 106:

> The nature and character of the proceedings is not determined by the result, but rather by the law upon which the proceedings are based, or out of which they arise: Re Storgoff [1945] S.C.R. 526 at 543, 594, 598, 84 C.C.C. 1 at pp. 19-20, 72, 76, [1945] 3 D.L.R. 673.

Landry v. Legal Services Society (1986), 3 B.C.L.R. (2d) 98 (B.C.C.A.) **(Book of Authorities of Appellant, Tab 5)**

20. After an extensive analysis of that law to determine if the proceedings had the character of criminal proceedings, the court concluded as follows in *Landry* at page 112:

> In my opinion, the proceedings taken in this case under the Penitentiary Service Regulations for a breach of discipline, while penal in nature, were not criminal proceedings.

After a further analysis of that law to determine if the proceedings had the character of civil proceedings, the court concluded as follows in *Landry* at page 113:

> I am not persuaded that proceedings before the disciplinary court are civil proceedings. They are internal proceedings designed to foster order, and do not bear any of the usual characteristics of civil matters.

Landry v Legal Services Society, supra, **(Book of Authorities of Appellant, Tab 5)**

21. In *Gonzalez-Davi Hutcheon* J.A. speaking for the court also applied the test of "nature of

the proceedings" when considering prison disciplinary proceedings. The relevant passage is this at page 240:

> Mr. Berger, counsel for the Canadian Bar Association 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 and that the decision should be applied only to facts of a similar nature.

Gonzalez-Davi v Legal Services Society of British Columbia (1991), 55 B.C.L.R. (2d) 236 (C.A.) **(Book of Authorities of Appellant, Tab 3)**

22. In determining the nature of prison disciplinary proceedings, the court in Gonzalez-Dalai did not look at the law on which the prison disciplinary proceedings are based but looked more at the purpose of those proceedings. But the question the court asked in *Gonzalez-Davi* was the same as was asked in *Landry*: what is the nature of the prison disciplinary proceedings? In *Gonzalez-Davi*, insofar as the court considers prison disciplinary proceedings, the test of results or consequences is not applied.

wrong test but correct result in Gonzalez-Davi in respect of proceedings other than prisondisciplinary proceedings

23. In the appellant's factum at paragraph 21, page 7, it is accurately stated that in *Gonzalez-Davi* the British Columbia Court of Appeal applied the results or consequences test and not the nature of the proceeding test when the court construed s. 3(2) of *Legal Services Society Act* in an overall way and in particular when it interpreted s. 3(2)(b). Hutcheon, J.A speaking for the court, said this at page 240:

> The first impression that s. 3 of the *Legal Services Society Act* conveys is that any proceeding that could involve imprisonment or confinement, and legal services, is covered by the section.

and later on the same page says this:

> ...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.

Gonzalez-Davi v. Legal Services Society, supra, **(Book of Authorities of Appellant, Tab 3)**

24. At paragraph 26, page 9 of the appellant's factum, it is correctly noted that it is difficult to reconcile the failure of the court in *Gonzalez-Davi* to apply the nature of the proceedings test to its general consideration of criminal proceedings and civil proceedings with the court's application of the nature of the proceedings test in its particular consideration of prison disciplinary proceedings. In the submission of the respondent LSS, the British Columbia Court of Appeal applied the incorrect test in its more general consideration of s. 3 of *Legal Services Society Act*. The British Columbia Court of Appeal in *Gonzalez-Davi* did however correctly decide that the subject matter of that case, namely an inquiry under *Immigration Act* R.S.C. 1985, c. I-2, was a civil proceeding, even if the court did so by applying the incorrect test. See paragraphs 33 to 35 later in this factum.

using nature of proceedings test is consistent with decisions of this court

25. To consider the nature of prison disciplinary proceedings separately from considering the results or consequences of those proceedings is consistent with decisions of this court.

26. In *Martineau (No. 2)* Dickson J. (as he then was) considered the nature of the prison disciplinary proceedings and said this at pages 629 and 630:

> An inmate disciplinary board is not a court. It is a tribunal which has to decide rights after hearing evidence. Even though the board is not obliged, in discharging what is essentially an administrative task, to conduct a judicial proceeding, observing the procedural and evidential rules of a court of law, it is, nonetheless, subject to a duty of fairness and a person aggrieved through breach of that duty is entitled to seek relief from the Federal Court, Trial Division, on an application for certiorari.

Martineau v. Matsqui Institution Disciplinary Board (No. 2), [1980] 1 S.C.R. 602

(Book of Authorities of Respondent LSS, Tab 6)

27. In *Shubley* McLachlin J. said this of prison disciplinary proceedings at page 20:

> Was the prison disciplinary proceeding to which the appellant was subject, by its very nature, criminal? I conclude it was t. 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 prison rules.

and later on the same page says this:

> The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offend. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved. They are not, to borrow the words of Wilson J. in *Wigglesworth* at p. 560, "of a public nature, intended to promote public order and welfare within a public sphere of activity".

This court, like the British Columbia Court of Appeal in *Gonzalez-Davi*, looks to the purpose of the prison disciplinary proceeding to determine its nature.

R v Shubley, supra, **(Book of Authorities of Respondent LSS, Tab 9)**

28. When determining whether prison disciplinary proceedings are criminal proceedings, civil proceedings or neither, it would be inconsistent with decisions of this court to do as the appellant suggests and to abandon the nature of the proceedings test using only a results or consequences test in its place. The appropriate way to determine whether prison disciplinary proceedings are criminal proceeding, civil proceedings, or neither is to apply the test this court has already applied and to determine the nature of prison disciplinary proceedings from their purpose.

prison disciplinary proceedings are not criminal proceedings

29. For the reasons set out in the quotations from *Shubley* set out in paragraph 27 of this factum, prison disciplinary proceedings are not criminal proceedings. Their purpose is not the criminal law purpose of meting out punishment and promoting public order and welfare within a public sphere of activity. Their purpose is to maintain order in the prison.

the purpose of civil proceedings

30. The words civil proceedings can have different meanings in different contexts. In *Mackay v. The Queen*, when contrasting proceedings in military tribunals with proceedings in ordinary criminal courts, this court at pages 377 and 378 used the term civil courts to encompass proceedings in the ordinary criminal courts. As is pointed out in the appellant's factum at paragraph 40, page 14, in three cases referred to of disciplinary proceedings before a law society the courts characterized

the proceedings as being civil in nature. The contrast being made in those cases was with criminal or quasi-criminal proceedings, with the purpose of making the contrast being to adjudicate rights under the *Charter*. The court should be cautious in applying a description made in one context to the specific context of statutory interpretation in the case at bar. The touchstone should be the purpose of the proceedings.

Mackay v The Queen, [198O] 2 S.C.R. 370 **(Book of Authorities of Respondent LSS, Tab 7)**

31. The purpose of a civil proceeding is to adjudicate private rights or to provide redress for violation of them. In the case of *Attorney General v Radloff*, Platt, Baron said this at page 373:

> What then is a "civil proceeding" as contra distinguished from a "criminal proceeding." It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding, that is a civil proceeding; but if the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender, that I consider a criminal proceeding.

Attorney General v Radloff (1854), 10 Ex 84 at 101 **(Book of Authorities of Respondent LSS, Tab 4)**

32. This court in *United Nurses of Alberta v Alberta (Attorney General)* was called on to distinguish civil contempt from criminal contempt. McLachlin, J. said the following at page 931:

> The distinction between civil and criminal contempt rests in the concept of public defiance that accompanies criminal contempt.

and later on the same page:

> These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing

> to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However w en the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal.

On page 932 McLachlin J. goes on to say this:

> What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole" *B.C.G.E.U. v British Columbia (Attorney General)* supra, at 237, per Dickson C.J., Lamer, Wilson, La Forest, and L'Heureux-Dube JJ. concurring.

United Nurses of Alberta v Alberta (Attorney General), [1992] 1 S.C.R 901 **(Book of Authorities of Respondent LSS, Tab 10)**

33. The hallmark of what falls in the civil category is that the purpose being carried out is to deal with rights of a personal and private nature. For the purposes of construing Legal Services Society Act, the court should find that for a proceeding to be a civil proceeding, its purpose must be to adjudicate private rights or to provide redress for violation of them.

immigration inquiry proceedings and mental health proceedings are civil proceedings

34. This submission is broader than that which was made on behalf of the respondent LSS in *Gonzalez-Davi* in the British Columbia Court of Appeal, and is broad enough to include in the category of civil proceedings both the immigration inquiries which were the particular subject matter of *Gonzalez-Davi* and the *Mental Health Act* proceedings referred to by Hutcheon J.A. at page 240 where he said this:

> Mr. MacAdams, counsel for Legal Services, submitted that "civil proceedings" should be restricted in its meaning to private causes of action involving rights as between individuals. aha cannot be correct, in my view, because it would exclude proceedings under s. 20 of the *Mental Health Act*, R S.B.C. 1979, c. 256, dealing with involuntary admissions. Under s. 27 of the Act applications are contemplated to the court to prohibit the admission of a person to a

> provincial mental health facility or to discharge the patient. In my opinion, the confinement in those cases is "through civil proceedings."

Gonzalez-Davi, supra, **(Book of Authorities of Appellant, Tab 3)**

35. At trial of *Gonzalez-Davi* the court found at page 234 that the purpose of the inquiry under *Immigration Act* was to determine and declare the status of an individual. A proceeding held for the purpose of adjudicating an individual's status as a refugee has as its purpose adjudication of the individual's private right to the advantages of that status. These proceedings under *Immigration Act* are civil proceedings, as was correctly decided in Gonzalez-Davi at trial and in the British Columbia Court of Appeal.

Gonzalez-Davi v Legal Services Soc. (1990), 42 B.C.L.R. 232 (B.C.S.C.) **(Book of Authorities of Respondent LSS, Tab 5)**

36. *Mental Health Act* R.S.B.C. 1996, c. 288 s. 25(2) (successor to s. 20 of *Mental Health Act* R.S.B.C. 1979 c. 256) provides that the purpose of a hearing by a review panel is to determine whether the patient should continue to be detained in a provincial mental health facility. This involves an adjudication of the individual's mental health status and of the individual's private right to carry on with life Bee from restraint by mental health officials. *Mental Health Act* R S.B.C. 1996, c. 288 s. 33 (successor to s. 27 of *Mental Health Act* R.S.B.C. 1979 c. 256) also has as its purpose adjudication of an individual's mental health status and thus of the individual's private right to carry on with life. Proceedings under *Mental Health Act* are civil proceedings.

Mental Health Act, R.S.B.C. 1996, c. 288 **(Book of Authorities of Respondent LSS, Tab 3)**

parole proceedings are also civil proceedings

37. At the appellant's factum paragraph 47, page 15 the question is put as to whether post-suspension, post-revocation and detention hearings (for all of which the respondent LSS provides counsel) are seen as civil proceedings by the respondent LSS. These proceedings are seen as civil proceedings. The purpose of the post-suspension and post-revocation proceedings is set out in *Corrections and Conditional Release Act* s. 135(5), and is to adjudicate whether or not resumption of parole or statutory release would constitute an undue risk to society by reason of a further offence. At stake is the offender's private right to parole or statutory release. The purpose of detention hearings is set out in *Corrections and Conditional Release Act*, s. 130(3) and is to adjudicate whether or not the offender is likely, if released, to commit certain categories of offences. At stake is the offender's private right to statutory release. These proceedings are civil proceedings.

Corrections and Conditional Release Act, S.C. 1992, c. 20 **(Book of Authorities of Respondent LSS, Tab 1)**

prison disciplinary proceedings are not civil proceedings

38. As is set out in paragraph 27 earlier in this factum, this court in *Shubley* at page 20 said this about the purpose of prison disciplinary proceedings:

> Their purpose is not to mete out criminal punishment, but to maintain order in the prison.

R v Shubley, supra, **(Book of Authorities of Respondent LSS, Tab 9)**

39. This formulation of the purpose of prison disciplinary proceedings was anticipated by the British Columbia Court of Appeal in *Landry* where Macfarlane J.A. said at page 107:

> The aim and purpose of the regulations, in the context of this case, is to maintain discipline of inmates, to maintain order in the prison, and to ensure the good government of penitentiaries.

and in *Gonzalez-Davi* where Hutcheon J.A. said at 240:

> Mr. Berger, counsel for the Canadian Bar Association 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....

Landry v Legal Services Society, supra, **(Book of Authorities of Appellant, Tab 5)**

Gonzalez-Davi v Legal Services Society of British Columbia, supra, **(Book of Authorities of Appellant, Tab 3)**

40. At paragraph 46, page 15 of the appellant's factum, reference is made to the purpose of prison disciplinary proceedings as set out in s. 38 of *Corrections and Conditional Release Act*. The appellant submits that s. 38 includes protection of the public by contributing to the inmate's rehabilitation as a purpose of prison disciplinary proceedings. That is an overly generous reading of s. 38. Rehabilitation and successful reintegration into the community are descriptive of the means by which the inmates will be given encouragement to promote good order of the institution. Rehabilitation and successful reintegration are not in themselves goals of the disciplinary system.

Corrections and Conditional Release Act, supra, **(Book of Authorities of Respondent LSS, Tab 1)**

41. The purpose of prison disciplinary proceedings faced by the appellant is not to adjudicate his private rights or to provide redress for violation of them. There is no element of reviewing any status he may have or claim to have. The purpose of the prison disciplinary proceedings is to encourage the appellant to stop fighting and in

so doing to promote the good order of the institution. This purpose is not consistent with civil proceedings.

42. This purpose is consistent with proceedings which are neither criminal proceedings nor civil proceedings. Whether prison disciplinary proceedings are called administrative (as in *Martineau (No. 2)*) or disciplinary (as in *Landry*) does not matter in this case. If this court decides prison disciplinary proceedings are neither criminal proceedings nor civil proceedings as those words are used in s. 3 of Legal Services Society Act, there is no need for this court to go any further. In particular, there is no need for this court to define the category into which they do fall.

response to paragraphs 43 and 51 of the appellant's factum

43. At paragraph 43, page 14 of the appellant's factum the appellant points out that there is no contractual or consensual agreement between the inmate and the institution. The respondent LSS concedes this. But whether prison disciplinary proceedings are consensual or not does not change their purpose. At paragraph 48, page 16 of the appellant's factum the appellant points out that prison disciplinary proceedings are subject of judicial review, and that they are carried out by public not private bodies. These points the respondent LSS concedes, but notes that the purpose f the prison disciplinary proceedings is not affected by what body carries them out or what body hears appeals.

44. At paragraph 51 on page 16 of the appellant's factum the appellant notes that matters governing prison disciplinary proceedings are set out in *Corrections and Conditional Release Act*, and that they do not fall in the realm of the private sphere. This the respondent LSS concedes. But the statutory source of governance of prison disciplinary proceedings does not change their purpose. In that same paragraph, the appellant submits that prison disciplinary proceedings do not fall in the realm of the

domestic s here. This the respondent LSS does not concede. The purpose of prison disciplinary proceedings is domestic in the sense of being internal to the institution. The purpose of the prison disciplinary proceedings is to foster the internal good order of the institution.

concluding paragraph

45. The purpose of prison disciplinary proceedings determines how they are categorized. The results of the proceedings and their procedural characteristics are significant insofar as they indicate the purpose of prison disciplinary proceedings. The purpose of those proceedings is not to mete out punishment or to promote public order and welfare in a public sphere of activity. The purpose of those proceedings is not to adjudicate private rights or to provide redress for violation of those private rights. The purpose of prison disciplinary proceedings is to maintain order within the internal sphere of the prison. These proceedings are neither criminal proceedings nor are they civil proceedings.

ISSUE #2: Can the prison disciplinary proceedings pursuant to *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations* faced by appellant lead to his imprisonment?

respondent LSS's concession regarding confinement

46. In paragraphs 38 and 39 at page 13 of the appellant's factum, the court is urged to find that the appellant is subject to confinement for the purposes of *Legal Services Society* Act. The respondent LSS concedes that the disciplinary proceedings pursuant to *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations* faced by the appellant may lead to his confinement as that word is used in s. 3(2)(b) of *Legal Services Society Act*.

respondent LSS's earlier position regarding imprisonment

47 The respondent LSS did not dispute in *Landry* that prison disciplinary proceedings could lead to imprisonment as that word is used in s. 3(2)(a) of *Legal Services Society Act* or may lead to his being imprisoned as that word is used in s. 3(2)(b) of *Legal Services Society Act*. The trial judge found that the appellant is faced with imprisonment.

Reasons for Judgment, Appellant's Record, p. 97

appellant does not face imprisonment: Shubley

48. Since the decision of the British Columbia Court of Appeal in *Landry* pronounced on May 12, 1986, Supreme Court of Canada rendered its decisions in *Shubley*, in which the court dealt with the case of an inmate in a provincial institution who, after a disciplinary hearing arising from an assault of another inmate, was ordered placed in solitary confinement for a period of five days with a restricted diet. He was later charged for the same assault under the *Criminal Code*. The issue before the court was whether or not prosecution under the *Criminal Code* violated s. 11(h) of the *Charter*.

R v. Shubley, supra, **(Book of Authorities of Respondent LSS, Tab 9)**

49. In a dissenting judgment in *Shubley*, Cory J. said the following at page 9:

> Prisons within prisons have been known to man as long as prisons have existed. As soon as castles had dungeons there were special locations within those dungeons for torture and for solitary confinement. The grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. Prisons within prisons exist today, exemplified by solitary confinement.
> The complete isolation of an inmate from others is quite different from confinement to a penal institution where some form of contact with people both inside and outside is the norm. Close or solitary confinement is a severe form of punishment.

R v. Shubley, supra, **(Book of Authorities of Respondent LSS, Tab 9)**

50. Speaking for the majority, McLachlin J. said the following in *Shubley* at pages 20 and 21:

> Does the punishment involved in internal prison disciplinary proceedings involve the imposition of true penal consequences? One must first examine what constitutes a true penal consequence. Wilson J. provides the answer in *Wigglesworth*. After stating that persons charged with private or domestic matters may nevertheless possess s. 11 rights because the proceedings involve the imposition of "true penal consequences", she explains what she means by that term, at p. 561:
> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. [Emphasis added.]
> Wilson J. goes on to comment that a restricted power to impose fines in order to achieve a particular private purpose may not attract the application of s. ll. As for imprisonment, she questions (noting the issue was not argued) whether the imposition of imprisonment could ever be anything but a penal consequence.

and continued at page 21:

> In this case, the internal disciplinary proceeding involved neither fines nor imprisonment. The appellant's punishment was close confinement for five days on a special diet that fulfills basic nutritional requirements.

and continued on page 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. Certainly the discipline meted to the appellant in this case is not such as to attract the application of s. 11(h).

R v. Shubley, supra, **(Book of Authorities of Respondent LSS, Tab 9)**

Shubley should be applied

51. In the appellant's factum at paragraph 38 on page 13 the submission is made that this court should not follow *Shubley*, and should find that the appellant, if

subject to the punishment of solitary confinement, is subject to imprisonment. The appellant submits in the appellant's factum paragraph 29 at page 10 that this court's previous decisions in *Martineau (No. 2), Cardinal, Morin* and *Miller* support the proposition that confinement in segregation constitutes imprisonment, and goes on to note at paragraph 38 on page 13 that these cases were not referred to in *Shubley*.

52. The respondent LSS notes that in none of , *Cardinal, Morin* or *Miller* do this court's decisions depend on a finding that confinement in segregation constituted imprisonment. As is noted in the appellant's factum in paragraph 29 at page 10, this court in *Martineau (No. 2)* at page 622 has held that confinement in segregation has the effect of depriving an individual of his liberty. But this court has not directly characterized as imprisonment deprivation of liberty by way of confinement in segregation. The reference to "prison within a prison" in *Martineau (No. 2)* by Dickson J. at page 622 is unnecessary to his finding that confinement in segregation is a deprivation of liberty. The reference to "prison within a prison" in the judgment is in quotation marks, indicating that the description is not intended to be taken literally, but is illustrative.

Martineau v Matsqui Institution Disciplinary Board (No. 2), supra, **(Book of Authorities of Respondent LSS, Tab 6)**

Cardinal v Director of Kent Institution, [1985] 2 S.C.R. 643 **(Appellant's Book of Authorities, Tab 1)**

Morin v SHU Review Committee, [1985] 2 S.C.R 662 **(Appellant's Book of Authorities, Tab 11)**

Miller v The Queen, [1985] 2 S.C.R. 613 **(Appellant's Book of Authorities, Tab 10)**

53. In paragraph 35 on pages 1 1 and 12 of the appellant's factum, reference is made to an unfavourable description of multi-year confinement in segregation as practiced in Pennsylvania some 150 years ago. Another observer of the same Pennsylvania prison gave a different description, this based on information received from prisoners themselves, as is described by Jerome Meckier at p. 103 in the chapter "The Battle of the Travel Books" in his book *Innocent Abroad - Charles Dickens' American Engagements*. In paragraphs 36 and 37 on pages 12 and 13 of the appellant's factum, reference is made to confinement in segregation in Canada in the 1970's and early 1980's. The references made in the appellant's factum do paint a picture of confinement in segregation in those time periods as being a grim experience. But these descriptions do not assist the court in determining the narrow issue of statutory interpretation as to whether or not confinement in segregation is not only confinement as that word is used in *Legal Services Society Act* s. 3(2)(b) (which the respondent LSS concedes) but is also imprisonment as that word is used in *Legal Services Society Act* s. 3(2)(a) or leads to an individual's being imprisoned as that word is used in *Legal Services Society Act* s. 3(2)(b).

Jerome Meckier, "The Battle of the Travel Books" (1990) *Innocent Abroad - Charles Dickens's American Engagements* p. 75 at p. 103 **(Book of Authorities of Respondent LSS, Tab 11)**

54. In paragraph 38 on page 13 of the appellant's factum the submission is made that the appellant's liberty is threatened by use of a conviction in prison disciplinary proceedings at the parole ineligibility hearing available to the appellant in 1998 under s. 745 of the *Criminal Code*. It is the possibility of conviction in prison disciplinary proceedings which is said to pose the threat to his liberty. Presumably the appellant is concerned that the fact of a conviction in a prison disciplinary proceeding will lead the decision maker in the s. 745 hearing to deny eligibility for

parole. What is said to be imprisonment or is said to lead to an individual's being imprisoned is ongoing incarceration:

- after a s. 745 application which has failed because of a conviction in a prison disciplinary proceedings, or
- after a successful s. 745 application and after an application for parole which has failed because of a conviction in a prison disciplinary proceedings.

55. Ongoing incarceration by reason of failure of a s. 745 application or the failure of an application for parole would not be imprisonment and cannot be said to lead to an individual's being imprisoned even if the appellant were able to demonstrate that failure was due to conviction in a prison disciplinary proceeding. Ongoing incarceration after a failed s. 745 application or after a failed parole application does not arise from the s. 745 application or from the parole application. Ongoing incarceration after such failed applications arises from the original conviction. The appellant at the outset of his s. 745 application or his parole application has no right to be released. It is not through the s. 745 application or through the parole application that he is imprisoned afterwards.

this court does not need to deal with s. 3(2)(a)

56. Even if this court were to determine that the prison disciplinary proceedings faced by the appellant are criminal proceedings within the meaning of those words as used in s. 3(2)(a) of *Legal Services Society Act*, that sub-section does not apply to the appellant's case because he does not face imprisonment. The court does not need to deal with s. 3(2)(a) of *Legal Services Society Act*.

ISSUE #3: Should the court specify what legal services the respondent LSS is to make available and how legal services are to be made available?

statutory provisions

57. No section of *Legal Services Society Act* defines in detail the "legal services" the respondent LSS has a duty to make available. S. 3(2) of *Legal Services Society Act* reads as follows:

> 3(2) The society must ensure, for the purposes of subsection 1(a), that legal services are available....

with the text of subsection 1(a) being:

> 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....

Other sections of *Legal Services Society Act* which assist in defining the scope of the obligations of the respondent LSS are these:

> 9. Despite the Legal Profession Act, the society or a funded agency may employ, with or without remuneration, an individual who is not a lawyer or an articled student to provide services that would ordinarily be provided by a lawyer so long as the individual is supervised by a lawyer, but the individual may not appear as counsel in a court except with leave of the court.
> 10. The society has authority to determine the priorities and criteria for the services it or a funded agency provides under this Act.

Section 11, which came into force on February 3, 1995, is also relevant:

> 10. 1 (1) In this section "revenue" means, for a fiscal year of the society, the revenue of the society from all sources for that year, including, without limitation, all grants made or to be made to the society for that year by the government or any other person or agency.
> (2) The aggregate of the expenditures made by the society in a fiscal year and the liabilities incurred by the society that might reasonably come due in the fiscal year shall not exceed the society's revenue for that fiscal year.
> (3) Despite subsection (2), the society may make an expenditure or incur a liability that would have the effect of placing the society in contravention of that subsection if the expenditure or liability is first approved by the Attorney General and the Minister of Finance and Corporate Relations.

Legal Services Society Act, R.S.B.C. 1996, c. 256 **(Book of Authorities of Respondent LSS, Tab 2)**

appellant has correctly identified relief

58. In paragraph 70 on page 23 of the appellant's factum, the order sought is a declaration that the respondent LSS is required to ensure that the appellant is afforded legal services of a kind ordinarily provided by a lawyer at his prison disciplinary proceeding. The respondent LSS agrees that this is the appropriate relief to grant if the court accedes to the submissions made on behalf of the appellant.

continuum of services

59. The services ordinarily provided by a lawyer to persons faced with prison disciplinary proceedings would include investigation of the facts giving rise to the disciplinary proceedings, advice to the appellant, and in appropriate cases representation at the prison disciplinary proceedings. In many circumstances legal services ordinarily provided by a lawyer might not include the full continuum of investigation, advice, and representation. A prudent person in the position of the appellant who was of ordinary means might decide, after investigation and advice had been provided, to save the expense and to do without representation at the disciplinary hearing.

60. The respondent LSS should not be required to provide more than a prudent person of ordinary means would provide for himself or herself. This court should make no order touching on the right of the respondent LSS to provide legal services (including representation at the disciplinary hearing) by means of a non-lawyer working under the supervision of a lawyer.

the respondent LSS must be free to exercise fully its discretion

61. The respondent LSS is mindful of the expense which would be imposed on it if the appellant is successful in his appeal. There were 882 serious charges in the federal penitentiaries in the 12 months ended March 31, 1994 and 780 serious

charges in the 9 months of April 1, 1995 to December 31, 1995. As a result of the decision of the British Columbia Court of Appeal in *Gonzalez-Davi*, the respondent LSS faced additional costs of service in excess of $3,500,000 annually.

Affidavit of Duncan, paragraph S, Appellant's Record, p. 24

Affidavit of Croft, paragraph 4, Appellant's Record, p. 92

Excerpts from Annual Reports, Book of Authorities of respondent LSS, tab 13, p. 24, tab 14, p. 21.

Memo, Book of Authorities of Respondent LSS, Tab 15

62. In order to carry out its mandatory duties, the respondent LSS must be free to exercise fully the discretion given to it by the legislature. If the court does conclude that the respondent LSS is required to provide legal services to the appellant, the court should refrain from using language or making orders that go further than the order sought by the appellant.

PART 4

NATURE OF ORDER SOUGHT

63. The respondent LSS seeks an order that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6TH DAY OF JULY, 1998

MacAdams Law Firm
Solicitors for the respondent Legal Services Society

Per: Douglas MacAdams, Co-Counsel

Mark Benton, Co-Counsel

PART V

TABLE OF AUTHORITIES

Statutory Authorities

Case Authorities

United Nurses of Alberta v Alberta (Attorney General), [1992] 1 S.C.R. 901

Miscellaneous

Jerome Meckier, "The Battle of the Travel Books", (1990), *Innocent Abroad - Charles Dickens's American Engagements* 75

Mark Benton and Michael D. Smith, "The Right to State-Funded Counsel at Trial", (May 1998), 56 Part 3 *The Advocate* 373

Excerpt from Annual Report, Legal Services Society, 1995- 1996

Excerpt from Annual Report, Legal Services Society, 1996-1997

Memo January 24, 1997 re disciplinary proceedings in B. C. institutions